REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 39 OF 2015

MUMIAS SUGAR CO. LTD.

SAMWEL ONYANGO DHOGA.....APPELLANTS

VERSUS

GLADYS K. OMARI.....1ST RESPONDENT

FELIX MBOYA AYAKO.....2ND RESPONDENT

R U L I N G

Background

1. The 1st respondent's husband, David Omari Yako died when the motor vehicle he was travelling in was involved in a head on collision with a vehicle belonging to the 1st appellant, that was being driven by the 2nd appellant. After hearing the case, the learned magistrate entered judgment against the appellants for a total sum of Ksh. 2,997,535.00, plus costs and interest. The appellants being dissatisfied with the said judgment, filed a memorandum of appeal on 20th May, 2015. Thereafter, the parties agreed on 19th June, 2015 that the decretal sum of Ksh. 2,997,535.00 be deposited in a joint interest earning bank account at credit bank, Kisumu branch, in the names of both the counsel for the appellants and respondents.

2. On 6th June, 2015, the law firm of L.G Menezes & Company Advocates for the appellants wrote to M/s. Omundi Bw'onchiri & Company Advocates for the respondents seeking an out of court settlement. On the face of it, the letter bore the words **"without prejudice**". The appellants offered to settle the claim the subject matter of the appeal at the sum of Ksh. 2,304,800/=. The reasons for making an offer that was lower than that awarded by the court were well explained in the said letter.

3. After consulting his clients, the law firm of Omundi Bw'onchiri Advocates wrote to L.G Menezes & Company Advocates on 18th August, 2015 informing them that they had no objection to the offer of Ksh.2,304,800/=. The law firm representing the respondents requested for a consent on the said terms. Omundi Bwonchiri Advocate sent reminders to L.G. Menezes & Company Advocates on 24th August, 2015 and 11th September, 2015. No response was forthcoming from L.G Menezes & Company Advocates. The silence on the part of the appellants' Advocates is what has triggered the respondents to file the instant application dated 16th September, 2015 seeking the following orders:-

a. Spent;

b. That Ksh.2,304,800/= out of Ksh.2,997,535/= deposited in joint account (sic) of both counsel at Credit Bank Kisumu Branch be paid to the respondents in satisfaction of the decree in Mumias SRMCC (sic) No. 355 of 2012;

c. That the appeal be marked as settled upon satisfaction of limb (b) of this application with no order as to costs.

4. The application is premised on the following grounds:-

i. That on 24/4/2015 judgment was delivered in favour of the respondents to the tune of Ksh. 2,997,535/= in Mumias SRMCC (sic) No. 355 of 2012;

ii. That on the 20/5/2015 the appellants filed this appeal;

iii. That on the 19/6/2015 parties recorded consent for deposit of the decretal sum in joint interest earning account of both counsel;

iv. That vide their letter dated 6/6/2015 the appellants did concede to have this appeal settled at Ksh.2,304,800/=;

v. That vide the letter dated 18/8/2015 the respondents accepted to have the appeal settled at Ksh.2,304,800/= as per the appellants' proposal;

vi. That the respondents who are legal representatives of the deceased require the said sums for maintenance and upkeep of the young family left behind by the deceased ;

vii. That efforts by the respondents to the appellants to have the amount released and have the appeal marked settled have been futile hence this application.

The application is supported by the affidavits of the 1st respondent Gladys Kerubo Omari and her advocate Joseph Omundi Bw'onchiri.

Respondents' submissions

5. When the application came up for hearing, Mr. Bw'onchiri, learned counsel for the respondents submitted thus:-

i. The application is brought under sections 1A, 3A and 63 (e) of the Civil Procedure Act and order 51 rules 1, 2, 3 and 4 of the Civil Procedure Rules. The respondents prayers are for an order for Ksh.2,304,800/= out of Ksh.2,997,535.00 deposited in a joint bank account of both counsel at credit bank Kisumu branch A/C No. 0036001000480 in satisfaction of the decree in Mumias SPM's Court Civil suit No. 355 of 2012 to be paid to the respondents.

ii. Mr. Bw'onchiri submitted that in the event that the court allows prayer (i) above the respondents will not seek for costs from the appellants. He submitted that the application is supported by the affidavits sworn on 16th September, 2015, by the 1st respondent, Gladys Kerubo and by himself.

iii. Mr. Bw'onchiri then delved into brief facts preceding the application which I will not replicate as the same are contained in the background I have given in this matter. He submitted that through a letter dated 6th June, 2014, the respondent made a proposal for settlement as per the annexture marked GKOII attached to the 1st respondent's affidavit. Through a letter to the appellants' advocates dated 8th August, 2015, the respondents agreed to settle for Ksh.2,304,800/= . Subsequent letters dated 24th August, 2015 and 1st September, 2015 were sent by the law firm of Omundi Bw'onchiri Advocates to L.G Menezes & Company Advocates. The said letters elicited no response. The respondents have therefore filed the application before the court seeking settlement.

iv. Mr. Bw'onchiri also submitted that the appellants did not file replying affidavits. Instead, they filed grounds of opposition stating that the letter addressed to the respondents from their office for settlement was written on a **"without prejudice"** basis.

v. He referred the court to two (2) decisions to support his arguments to show that the court can go ahead and grant the orders sought. The first decision he relied on was that of **D. Light design Incorporated Vs PowerPoint Systems East Africa Limited [2013] eKLR**. Mr. Bw'onchiri briefly explained that the plaintiff in that case had made an application to rely on privileged communication. The other party was opposed to the reliance on such information. The court at paragraph 24 of the said decision held that the annextures that were attached to a joint affidavit were admissible. The preliminary objection in that case was dismissed.

vi. He submitted that in the instant case, no replying affidavit has been filed to say that the correspondence between the appellants' and respondents' Advocates was privileged.

vii. Mr. Bw'onchiri, cited the case of **Guardian Bank Ltd vs. Jambo Biscuits Kenya Ltd [2014] eKLR**. He highlighted brief facts of the said case being that *the plaintiff communicated to the defendant that they were ready to settle for Ksh.10,000,000/=. The defendant objected to the use of the communication between it and the plaintiff. In paragraph 19 of the said judgment, summary judgment was arrived at through the use of privileged communication. Although the letter in issue in the said case was written on a "**without prejudice**" basis, the court entered judgment on admission.*

viii. It was submitted for the respondents that in her affidavit, Ms. Kerubo deposes that on receipt of the offer from the appellants, she instructed her counsel to write to the appellants' counsel accepting the offer of Ksh.2,304,800.00. Mr. Bw'onchiri in his affidavit also deposes to the same matter as Ms. Kerubo.

Mr. Bwonchiri prayed that the respondents' application be allowed.

The appellants' response to the application

6. In response to the application by the respondents, the appellants filed grounds of opposition on 16th October, 2015 to the effect that:-

i. The application offends the provision (sic) of section 23 (1) of the Evidence Act;

ii. The letters sought to be relied on are "without prejudice" correspondence (sic) and are therefore privileged;

*iii. The letters sought to be relied on are inadmissible in line with the holding and principles elucidated in **Rush & Tompkins Ltd. Vs Greater London Council [1988] 3 ALL ER 737** and previous other decided cases;*

iv. The application is grounded on documents that are inadmissible in law and as such should be dismissed with costs.

The appellants' submissions

7. Mr. Maganga, learned counsel for the appellants submitted that:-

i. The respondents' application is premised on inadmissible documents which offend the provisions of section 23 (1) of the Evidence Act. The section provides that once an express provision has been given that certain documents cannot be used against a party, the same are not admissible. The court has the discretion of making an inference on deciding which documents are admissible and which ones are not;

ii. The letter dated 6th June, 2014 annexed to the 1st respondent's affidavit is clearly marked **"without prejudice"**. This was therefore privileged communication;

iii. Mr. Maganga cited the decision of **Ronnie Rogers Malumbe vs. Prof. Erasto Muga, [2005] eKLR,** on the determination on page 4, where the judge held that letters bearing negotiations were subject to confirmation;

iv. It was submitted for the appellants that in the instant case, the respondents did not give a confirmation to the proposal in the letter dated 6th June, 2014;

v. It is a matter of public policy that disputes are subject to communication and that documents referred to herein should not be used against the appellants;

vi. Mr. Maganga also relied on the case of **Nzau vs. Mbuni Transport Co. Ltd, Mombasa Civil Suit No. 496 of 1988,** in the determination of Justice Bosire, as he then was, on page 175, in paragraph 15, where he held that *"it is the policy of the law that disputes should be amicably settled, where possible, and parties should be at liberty to freely admit certain facts to facilitate a settlement without the fear of them being used against them in subsequent proceedings in the event that the attempt to settle not being successful. The without prejudice doctrine being a rule of evidence must not, to my mind be confined to discovery alone".*

vii. Mr. Maganga submitted that the application is unmerited and prayed for the application to be dismissed with costs since no prejudice had been caused to the respondents as the decretal sum is in an interest earning joint bank account.

The respondents' response

8. Mr. Bwonchiri in his response stated that no prejudice will be suffered by the appellants as they are not interested in costs. He submitted that with regard to Section 23 (1) of the Evidence Act, the decisions of Justices Gikonyo and Kamau which he cited, looked at those provisions. In holding No. 19, Justice Gikonyo addressed the said issue and held that there are exceptions to the "without prejudice" rule. Mr. Bwonchiri submitted that there is no replying affidavit filed by the appellants showing that the letter dated 6th June, 2015 was plainly for communication.

Determination of the application

9. I have considered the application before me, the submissions tendered by both counsel as well as the authorities they have relied on in support of their arguments. The issues I have identified for determination are -

i. If the letter written by the appellants' Advocates on a "without prejudice" basis is admissible; and.

ii. If any agreement ensuing from the negotiations is enforceable in law.

Admissibility of the letter written on a "without prejudice" basis

10. To cite from the case of **Oceanbulk Shipping and Trading SA V TMT Asia Limited and 3 others [2010] UKSC 44,** on the legal principles of the **"without prejudice"** rule, in a majority decision of the Supreme Court of the United Kingdom, the Judges stated-

"The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed

and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute".

11. **In the case of Walker V Wilsher (1889) 23 QBD 335 at 337 Lindley LJ** asked what the meaning of the words "**without prejudice**" was in a letter written "**without prejudice**" and answered the question this way -

"I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

12. The appellants in their grounds of opposition filed on 16th October, 2015, referred to the case of **Rush and Tompkins Ltd V Greater London Council [1989] AC 1280**, a copy of the said authority was not availed by the appellants' counsel. This court has read the said decision that was determined a century after the **Walker V Wilsher case (supra).** In the case of **Rush and Tompkins** (supra), Robert Walker LJ at page 1299 held as follows:-

"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts V Head [1984] Ch 290 at 306;

'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course failure to respond to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Co V Drayton Paper Works Ltd (1927) 44 RPC 151 at 156 be encouraged fully and frankly to put their cards on the table ....The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."

13. However, in the case of **Rush & Tompkins Ltd V Greater London Council and another (supra)** at page 1300, Lord Griffiths said:-

"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of negotiations being unsuccessful they are not to be referred to in at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. However, these cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it....(emphasis mine).

14. In the present case, the appellants made a very clear offer to the respondents for the sum of Ksh.2,304,800/- in settlement of the decretal sum. To quote in verbatim, the letter dated 6th June, 2015, which was written on a "**without prejudice"** basis reads,*"....we have instructions to file appeals in both matters. That notwithstanding, we also have instructions to attempt settlement of the matters in order to expeditiously conclude the file. In view of the aforesaid, please consider our proposals set out below and revert.....as per the principle in the KEMFRO case (Court of Appeal) the award on loss of expectation of life should have been deducted from the final award hence please take instructions and revert. In addition the multiplier of 24 years for a 36 year old is rather high. Would your client accede to reducing it to 20 years hence 2/3 x 14, 404x12x20 =2,304,800. Kindly take instructions and revert."*

15. The respondents' advocate reverted on 18th August, 2015, in the following terms quoted in verbatim *"your letter dated 6/6/2015 refers. This is to inform you that our clients have no objection to settling the two matters as follows (a) Mumias SPMCC No.355 of 2012 - Kshs.2,304,800. Kindly thus let us a (sic) consent in the above terms."*

16. This court construes the response by the respondents to be an acceptance of the offer by the appellants, thus a legally binding contract ensued as the respondents did not make a counter-offer of the proposed terms of settlement. It is no wonder that the respondents' Advocates sent two reminders of their letter dated 18th August, 2015, as a follow up. It is my considered opinion and I so hold that the intention of both parties was clearly brought out in the said communication as there was no ambiguity in the terms offered by the appellants and the acceptance by the respondents. I therefore find that the justice of this case requires admission of the letter dated 6th June, 2015, from the appellants' Advocates.

17. In the case of **Lochab Transport Ltd Vs Kenya Arab Orient Insurance Ltd [1986] eKLR**, it was held thus-

> ***"..if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that 'without prejudice' letter".***

18. The cases cited in this ruling have shown that the rule of "**without prejudice**" is not absolute, it has exceptions. I find that since the respondents accepted the appellants' offer, the letter from the appellants written on a "**without prejudice"** basis was excluded from the operation of the provisions of section 23 (1) of the Evidence Act, thus rendering it admissible in evidence.

19. **The treatise Halsbury's Laws of England Vol. 17 at paragraph 213 states-**

> ***"The contents of a communication made "without prejudice" are admissible when there has been a <u>binding agreement</u> (emphasis mine) between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible."***

The above commentary solidifies the decision taken by this court that the letter in issue in this case, is admissible.

If any agreement ensuing from the negotiations is enforceable in law

20. The negotiations in this case mutated and assumed the form of a contract from the date of posting of the respondents' Advocates email to the appellants' Advocates on 18th of August, 2015. The general principles of contract then came into play. Chitty on Contracts, 24th edition, volume 1 at page 21, paragraph 41 states that -

> ***"In order to decide whether the parties have reached an agreement it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test: if the parties have to all outward***

appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree."

23. I do not need to be-labour the point of whether the agreement ensuing from the negotiations is enforceable in law. The answer is in the affirmative. The appellants were legally bound to execute the contract by effecting payment of the negotiated sum of Kshs. 2,304,800/- to the respondents. They have failed to do so which has precipitated this application before me.

22. I therefore find that the respondents' application has merit and I hereby grant the following orders –

i. That Ksh.2,304,800/= out of the Ksh.2,997,535/= deposited in a joint interest bearing bank account of counsel for the appellants and the respondents at Credit Bank Kisumu Branch be paid to the respondents within thirty (30) days from today's date in satisfaction of the decree in Mumias SPMCC No. 355 of 2012; and

ii. That Kakamega High Court Civil Appeal No. 39 of 2015 be marked as settled upon satisfaction of order (i) above;

iii. No order as to costs.

DELIVERED, DATED and **SIGNED** in open court at **KAKAMEGA** on this **19TH** day of **MAY**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... for the Appellants

..... for the Respondents

..... Court Assistant