



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 415 of 204**

**SPINNERS & SPINNERS CO. LTD.....APPELLANT**

**VERSUS**

**TOBIAS OJWANG.....RESPONDENT**

**J U D G M E N T**

In his ruling delivered on 18<sup>th</sup> May, 2004 the Principal Magistrate, Thika dismissed an application brought by the appellant Spinners & Spinners Co. Ltd under Order VI Rule 13(1)(b) & (c) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to strike out the plaintiff's suit. The appellant had contended that there was an out of court settlement entered into by the parties pursuant to which the respondent signed a discharge voucher having been paid a sum of Kshs.1,000/= and therefore the respondent was estopped from pursuing his cause of action.

On his part the respondent Tobias Ojwang had opposed the application contending *inter alia*, that the discharge voucher and the agreement entered into by the parties violates the mandatory provisions of the Workman's Compensation Act Cap 326 of the Laws of Kenya. The respondent maintained that the agreement was repugnant to the rules of natural justice.

The trial magistrate held that the respondent's suit as filed disclosed a proper cause of action against the appellant and that the fact that some negotiations may have been entered into does not bar the respondent from pursuing his claim more so where he alleges that he was misled and the compensation was inadequate. The trial magistrate further held that under Order XXIV Rule 6 of the Civil Procedure Rules a party can sue in a suit where there has been a compromise and any application regarding the compromise can be canvassed under that Section.

Being aggrieved by that ruling, the appellant has filed a memorandum of appeal raising the following grounds: -

- (1) That the honourable magistrate erred in law and in fact in dismissing the appellant's application when he himself in his ruling reached the following conclusions.
  - (a) That the respondent signed a discharge voucher, which was witnessed by the representative of the Tailors and Textile Union of which the respondent is a member.
  - (b) That the said discharge voucher has explicit and clear terms of settlement.
  - (c) That the respondent did not refer the settlement to court within three months after execution if aggrieved by the manner of settlement in pursuant to Section 16(3) of Cap 236.

- (d) That the respondent has not pleaded the particulars of misrepresentation and/or undue influence while signing the discharge voucher in pursuant to Order VI Rule 8(a).
- (2) That the honourable magistrate erred in law and in fact in holding that the suit cannot be terminated at the interlocutory stage even when there is no triable issue to warrant full trial.
- (3) That the honourable magistrate erred in law and fact in failing to uphold the principle of estoppel in as far as the settlement between the appellant and the respondent is concerned.
- (4) That the honourable magistrate erred in law and fact in erroneously relying on Order XXIV Rule 6 to dismiss the appellant's application herein.

In support of the appeal, Mr. Morara who appeared for the appellant submitted that the respondent's claim was not covered under the Workman's Compensation Act as his injuries were minor and did not fall within the provisions of Section 5(1) of the Workman's Compensation Act which specifies the injuries for compensation. Mr. Morara therefore submitted that the trial magistrate erred in applying the Workman's Compensation Act. Mr. Morara also submitted that the trial magistrate failed to take into account that the respondent did not plead the particulars of the alleged misrepresentation as required under Order VI Rule 8(a) of the Civil Procedure Rules. Further, Mr. Morara contended that Order XXIV Rule 6 of the Civil Procedure Rules only deals with recording of consent and did not therefore apply to this case. He faulted the trial magistrate for failing to uphold the principle of Estoppel when it was clear that the respondent had already been compensated. He therefore urged the court to allow the appeal.

For the respondent it was submitted that the alleged compensation of Kshs.1,000/= for the injuries suffered by the respondent was repugnant to the rules of natural justice. It was maintained that although the respondent signed the discharge voucher, the facts were grossly misrepresented to him as he believed that the money was for his treatment. It was maintained that in any case, payment under the Workman's Compensation Act does not preclude the workman from pursuing a claim for general damages as any payments under the Workman's Compensation Act can be taken into account under Section 25 of the Act.

I have carefully reconsidered and evaluated the arguments which were canvassed before the trial magistrate. I find that the respondent's claim as set out in the plaint which was filed on 11<sup>th</sup> July, 2003 was a claim for general and special damages arising from injuries suffered by the respondent as a result of the appellant's alleged negligence and or breach of statutory duty. In its defence filed on the 8<sup>th</sup> July, 2003 the appellant denied the respondent's claim contending *inter alia* that the claim had been compromised and therefore the respondent is estopped from instituting the proceedings. The respondent apparently did not deny having signed the alleged discharge voucher but maintained that the same was misrepresented to him and that the alleged compromise is inadequate and repugnant to natural justice. Although the appellant did not plead the issue of misrepresentation in his plaint or reply to the defence, it is evident that the issue of misrepresentation is a crucial issue which ought to be considered at the trial. Pleadings have been closed but amendment of pleadings can be done at any stage. So the issue can still be canvassed. Moreover, as it has always been stated, striking out a suit is a drastic remedy which should only be undertaken in very clear circumstances. In this case, the remedy was not appropriate as it was necessary for the trial court to have the benefit of evidence. Indeed, it is only after considering such evidence that the trial court could determine issues such as whether the parties were *ad idem*, whether there was a compromise, and whether the Workman's Compensation Act was applicable. For these reasons, I find no substance in this appeal and do therefore dismiss it with costs.

**Dated and delivered this 2<sup>nd</sup> day of December, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Morara for the appellant

Onindo for the respondent