REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
Civil Appeal 660 of 2002

RONNIE ROGERS MALUMBE ……...……. APPELLANT

VERSUS

PROF. ERASTO MUGA …….…….. RESPONDENT

(An Appeal from the Ruling/Order of G. N. Ngari, SRM in Milimani Commercial Courts Civil Suit No. 8898 of 1999

delivered on 3rd October, 2002).

JUDGMENT

By a Plaint dated 21st September, 1999, and filed in the lower court on 22nd September, 1999, the Appellant (Plaintiff in the lower court) sought to claim "general damages" from the Respondent for personal injuries arising out of a motor vehicle accident in September 1999. In his defence, filed on 4th October, 1999, the Respondent denied all the allegations of negligence, including the occurrence of the accident.

The parties, through their Counsels, subsequently commenced negotiations for the purposes of an out of court settlement, and to this extent exchanged correspondence written on "without prejudice" basis.

On 24th June, 20002, the Appellant filed an application, by way of Notice of Motion, asking that Judgment be entered for the Plaintiff (Appellant) for special damages of Kshs.173, 792.75. That application was made under Order 24 Rule 6 of the Civil Procedure Rules, and annexed to the affidavit in support of the same, were a bunch of letters exchanged between Counsels on a "without prejudice" basis.

At the hearing of that application, the Respondent applied, by way of a Preliminary Objection, that the said affidavit in support be struck out on the grounds that it contained material relating to without prejudice negotiations. The learned trial Magistrate upheld the Preliminary Objection and expunged all the "without prejudice correspondence" annexed to the affidavit.

It is against that Ruling that the Appellant has preferred this appeal, based on the following seven grounds of appeal:

> ***"1. THAT the learned trial Magistrate erred in law and in fact by failing to look at the letter dated 30th January, 2001 by the Respondents Advocate herein to the Appellant and appreciating the fact that the Respondent had agreed with the Appellants claim for Kshs.173,792/= towards special damages.***

2. THAT the learned trial Magistrate erred in law and in fact in failing to appreciate that on 6th February, 2001 a Consent Judgment was entered on liability and subsequently on 19th March, 2001 the Appellants Plaint was by Consent amended to include the claim for the sum of Kshs.173,792/= towards special damages which had been mutually agreed to between the parties.

3. THAT the learned trial Magistrate erred in law and in fact in holding that the Consent to amend the Plaint to reflect special damages was not sufficient to reflect an agreement.

4. THAT the learned trial Magistrate erred in law and in fact in failing to appreciate that the Respondents Advocates letter dated 30th January, 2001 reflected a validity (sic) concluded and enforceable compromise of the Plaintiffs claim for special damages in the sum of Kshs.173,792 and did actually finalize the special damages negotiations. 5. THAT the learned trial Magistrate erred in law and in fact in failing to appreciate that contents of a communication made on a "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it or for the purposes of deciding whether such an agreement has been reached.

6. THAT the learned trial Magistrate erred in law and in fact by wholly failing to appreciate the Appellants Advocates submissions supported by authorities.

7. THAT if the learned trial Magistrate had considered the entire weight of submissions advanced by the Appellants Advocates she should have come to the conclusion that the Appellant had proved the ingredients for the claim for the enforcement of compromise and that the Preliminary Objection did not have any merits."

In his submissions before this Court, Mr Tiego, Counsel for the Appellant, conceded that "without prejudice documents" are generally inadmissible in evidence, but argued that there are exceptions to that rule. The main exception is where there has been a binding agreement between the parties arising out of those communications, or for the purpose of deciding whether such an agreement had been reached. **(See Halbury's Laws of England, 4th edition**, paragraph 213, page 152. He argued that the documents reflected a conclusive agreement on special damages, following which the parties agreed to amend the pleadings. He relied on the cases of **Tomlin vs Standard Telephones and Cables Ltd, Rush & Tompkins Ltd vs Greater London Council and another, Mbugua vs Mbugua** Nairobi Civil Case No. 323 of 1997 and **Stephen Wagacha Gichura vs Mohammed Hassan Said Nairobi Civil Case No. 772 of 1986.**

Ms Kitonyo, Counsel for the Respondent, submitted that the Respondent had not agreed to any special damages, that he had simply agreed to the Plaint being amended to plead specials; that the only agreement the parties had reached related to general damages; and that all communications entered into "without prejudice" was inadmissible. Having looked at the record of proceedings, and having considered the submissions, I am satisfied that the parties had not entered into any conclusive or binding agreement on special damages. On 6th February, 2001, the parties entered into consent on liability. At that time, the specials had not been pleaded. On 19th March, 2001 the parties agreed to amend the pleadings whereby the Plaintiff pleaded the sum of Kshs.173,792.75/= for specials, and the Defendant denied the same. That was the extent of the agreement – to amend the pleadings only. Even the letter of 30th January, 2001 from the Respondent's advocates to the Appellant's advocate cannot be said to be conclusive and binding. It is clearly marked "without prejudice" and is an attempt to negotiate the figures. The only line that the Appellant relies upon as constituting a binding agreement states: ***"We confirm that in principle our client is satisfied on the issue of the specials."***

However, the last line of that letter states:

"Please respond to enable us seek our client's confirmation".

Clearly, the negotiations were subject to confirmation. And in any event, a single line in that letter could

not be taken out of context. The conduct of the parties, and evidence generally indicates that there was no agreement on specials. It was subject to proof. That is indeed why the case was set down for hearing on 9th May, 2002. When it came up for hearing, Mr Mwangi, Counsel representing the Defendant, clearly indicated to the Court that only liability had been agreed, and that he was ready to proceed to hearing on damages. The hearing did not proceed because Mr Tiego was not ready to proceed.

Accordingly, I am of the view that the learned Magistrate was correct in her decision that no binding agreement had been reached on the question of special damages and, therefore, that exception to the admissibility of without prejudice communications did not apply.

If I may, let me add my voice to those of several other Judges, and say that the "without prejudice" rule should not be taken lightly. Any attempt to tamper with it would infringe on the confidentiality of the information, and would violate an important public policy to promote negotiations for out of court settlements in an environment of free and frank disclosures. How else would advocates negotiate freely if they have to constantly watch their backs, and be punished for their candidness? That certainly would not promote mediations and negotiations, when in this new era of Alternative Dispute Resolution, the Courts should be encouraging and moving parties towards dispute resolution. The "without prejudice" rule, I believe, is critical towards that objective.

Accordingly, I will uphold the lower court's decision and dismiss this appeal with costs to the Respondent.

Dated and delivered at Nairobi this 19th day of September, 2005.

ALNASHIR VISRAM

JUDGE