REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 1010 OF 2000

FRANCIS KANUNGU …………………………………….. PLAINTIFF

VERSUS

JAMES MURIITHI & ANOTHER …………………. DEFENDANT

RULING

I must apologize to both parties at the delay in delivering this ruling. This was necessitated by absence from Nairobi to attend the International Women's Judges Association Conference held in Entebbe, Uganda and also by the very important points of law raised by the parties that required diligend consideration. A) THE PROBLEM By an application of motion dated the 3rd of March 2002 and filed on the 9th of May 2003, the plaintiff sought prayers that this High Court do enter judgment in favour of the plaintiff against the defendant based on the compromise that the parties had reached.

The agreement had been as a result of a compromise conducted through correspondence, between the parties. The defendants are now said to be regardanting on the said compromise. The said application was supported by an affidavit of the plaintiff advocate together with the annextures marked "without prejudice." The basic issue before me being whether:- ". . . the letters or communications made between advocates marked on "without prejudice" admissible in proceeding taken out to determine whether a binding agreement was reached by the parties?" B) BACKGROUND OF THE CASE

The original suit is a running down matter. It is alleged that Samuel Kinyati Kahunga, now deceased, was on the fateful day of the 26th of March 1999 lawfully walking on the side of the road along Landhies road at Muoroto state, when the motor vehicle bus belonging to the Kenya Bus Services Ltd (The 2nd defendant herein) and driven by James Muriithi (the 1st defendant herein) lost control and ran down the said Samuel Kinyati Kahungu, occasioning him fatal injuries. On the 30.6.00, Francis Kahungu Wanderi, the father to the deceased and also the administrator to his estate filed suit against the two defendants in negligence and claimed damages for the wrongful death of his late son. The defendants entered appearance and filed a joint defence dated the 14.8.00 and denied liability. When the parties came for hearing on the 8.10.02, before Ransley CA (as he then was) who at the time was dealing with the running down matters, the parties recorded a consent judgment, Namely, "By consent; i) Judgment be conceeded on part of plaintiff against defendant at 45% liability of plaintiff and 55% liability of defendant ii) ________________" This consent was reached on liability as a result of negotiations between the parties. What was left was the issue of quantum. The parties were still negotiating this and prayed for time. They reported to court (Ransely CA) on 30.10.02 and 21.11.02 that a settlement had not been reached.

By a notice of motion dated 3.3.02 (the subject of this ruling) the plaintiff prayed that the out of court settlement be enforced by the court. When the application came before Mbito J on the 14.7.03, he stood

the matter over to 29.7.03 and again to 3.10.03. The reasons why the application was put before Mbito J was that the cases having application in the civil seciton of the High Court of Kenya at Nairobi are heard by Judges in the civil seciton. Mbito J is no longer available to hear this application. He took down no proceeding and as such the application had not been heard. The parties took hearing dates for 30th and 31st March 2004 – what I believed was the hearing of the assessment of damages. The issue of the out of court settlement arose and the said pending application of the 3.3.02. It is trite law that a suit should not be set down for hearing until all the applications are heard and determined.

The parties raised and argued before me the application dated notice of motion 3rd March 2002 which contained the issue of the "out of court settlement as a basis of disposing the points of law raised." I did permit parties time to look up their law and authorities. C) ARGUMENT. Clearly the advocate for the respondent/defendant stated that where a document is endorsed with the remarks "without prejudice" then such documents cannot be used in evidence before court. He relied on seciton 23 and 134 of the Evidence Act. He also relied on the case law of:- W.F. Marshalls Ltd B Barnes ALL England Law Reports 1953 He also brought to me various statues and law on the definition of "without prejudice" and compromise. Blacks Law dictionary and the code of civil procedure. Thus according to the text book where a matter is compromised that word compromise is: "A mutual promise of two or more parities that are at controverse." "A settlement of a disputed claim by mutual concession to a void a law suit. An agreement to compromise a suit must be established by general principles which govern the formation of contracts though there are special rules governing its enforcement which arises out of its esentric nature.

In civil cases no admission may be proved if it is made either upon express condition that evidence of it is not to be given on a circumstances from which the court law refer that the parties agreed together." In the ruling delivered by the plaintiff/applicant in support of this contention. In the ruling delivered by Onyango Otieno J, as he then was, in the case of":- D.O. Songa & Another v Reli Co-operatives and Credit Society Ltd Unreported Hccc 109/00

A preliminary objection was taken up that the annexture to an application contained a letter that was marked "without prejudice." The court expunged this letter together with corresponding paragraph to the affidavit from the record (a second letter was returned but it was unclear if indeed it was marked without prejudice) In the case law of:- Walker v M Wilsher (1889) 23 QBN 355 A suit was compromised and finalized. The only issue left for the court to determine was the issue of costs to the plaintiff. The defendant produced letters written "without prejudice" whereby it disclosed the plaintiff misconduct in the case. The judge declined to give costs on the basis of the said letter. The plaintiff appealed. It was held on appeal by Lord Esher Mr that the judge should:-

"Not have taken these matters (the without prejudice letter) into consideration in determining whether there was good cause …" "A good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties otherwise the whole object of the limitation would be destroyed." Bower L.J stated "It would be a bad thing and leads to serious consequences if the courts allowed the action of litigation or letters written to them without prejudice to be given in evidence against them to be used as material for depressing their costs." Lindley I J stated

"That the issues to decide is whether a judge is entitled to look at letters written without prejudice in order to determine a question of the existence of good cause for depriving a successful litigant to costs." To his mind, the authorities did not appear to be uniform on this point and he specifically touched on the case by Kindersley V.C in which the correspondence "without prejudice" were looked at. Nonetheless even that case did not convince him that a judge is:- "Entitled to look at letters written without prejudice unless he has the consent of the parties to so doing." The three judges ruled that the judge should not have looked at the "without prejudice" letter. They allowed the appeal and set the decision aside, that denied costs. It is therefore clear that in effect where affidavits contain annextures of "without prejudice" letters, that such is not permitted to be looked at. Indeed, in the case of:- Jones v Foxall 1853 15 Beav Street Pg 396 (quoted in the Tomklin Standard Telephone Cables case below) Sir John Romalley M.R. stated:-

"But in addition to this I find that the offer were in fact made without prejudice to the rights of the parties, and I shall as far as I am able in all cases endeavour to repress a practice which, when I was first

acquainted with the profession was never ventured upon but which according to my experience in this place has become common of late – namely, that of attempting to convert offers of compromise into admission of acts prejudicial to the persons making them. If this were permitted, the effect would be that no attempt to compromise a dispute could even be made.” This contention was supported by Ormrod J in he case of:- Tomlin v Standard Telephones and Cables (1969) 3ALL ER There were varying opinions from this. Lindel JG had given a dictum in the case of:- Walker v Wilsher 889 QBD 335 (Supra) Stated:- “What is the meaning of the words “without prejudice? “ I think they mean without prejudice to the position of the writer of the letter if the terms he purposes are not accepted. If the terms proposed in the letter, although written without prejudice, operates to alter the old state of thing and to establish a new one. A contract is constituted in respect of each relief by way of damages or specific performance would be given”

On this basis the facts under the Tomlin case (supra) was that a 33 year old male adult sustained personal injuries. The parties negotiated on liability. The defendant regardanted. The courts held that a contract was indeed formed. In the proceeding before me, I am required to peruse the annexture in order to confirm whether a contract was indeed made. I find that the contract was established by the offer given by the plaintiff to the defendant and by the defendant accepting the offer on liability. On quantum, the defendant by its letter of 21.11.02 actually stated that:- “We can now record the consent on quantum along the following basis.”

They gave the full figure and requested the plaintiff to accept the settlement. This letter CNK 2 amounts to an offer to the plaintiff by the defendants which was duly accepted. I hereby find that the without prejudice “umbrella” will be lifted and can not protect the parties negotiating after the agreement had been reached. I hereby rule that the terms of the letter of 21.11.02 on quantum be and is hereby allowed with costs to the applicant/plaintiff.

Dated this 19th day of May, 2004 at Nairobi.

M.A. ANG’AWA

JUDGE

C.N. Kihara & Co. Advocates for the plaintiff

Simba & Simba Advocates for the 1 st and 2 nd defendants