REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Civil Suit 448 of 1996

IN THE MATTER OF THAT PROPERTY KNOWN AS MOMBASA/BLOCK XX/44

BETWEEN

MARGARET WANJIRU NJUGUNA ..... PLAINTIFF

- Versus -

1. MURIUKI MBURU t/a HEKO BAR AND RESTAURANT

2. CROWN HILL TRADERS..... DEFENDANTS

RULING

By a Notice of Motion dated 9.2.98, the plaintiff in the mainsuit seeks two orders under Order 24 Rule 6 Civil Procedure Rulesas follows.

"(a) The plaintiff's suit against the 1st defendantbe marked as adjusted fully in terms of thecompromise contained in letters dated 7.5.97and 12.5.97.(b) The 1st defendant do vacate the suit premiseson or before 30.11.98"

The Rule under which the orders are sought states:

"where it is proved to the satisfaction of thecourt, and the court after hearing the partiesdirects, that a suit has been adjusted whollyor in part by any lawful agreement orcompromise, or where the defendant satisfiesthe plaintiff in respect of the whole or anypart of the subject matter of the suit, thecourt shall, on the application of any party,order that such agreement, compromise orsatisfaction be recorded and enter judgment inaccordance therewith"

It would also be appropriate to set out the contents of the two letters cited above which are said to constitute the compromise of the suit: Firstly the letter dated 7.5.97;

"Kinyua Kamundi & Co.Advocates, Mombasa

"WITHOUT PREJUDICE"

Dear Sirs,

RE: HCCC NO. 448 OF 1996 (OS)MARGARET NJUGUNA -Vs- MURIUKI MBURU & ANOTHERWe thank you for your letter dated 2.5.97.We have taken our clients instructions on your clients offer as contained in your letter under reference. Our instructions are as follows:-

That your client lets our client stay in thesuit premises for one and half years (18months) from 1.6.97 and thereafter he vacatesthe premises for good without any intention ofcoming back after your client hasreconstructed. Your client will however haveto rebuild the toilets which were demolished.Our client will not ask for any good will inthat case.

We are of the view that this a most reasonableoffer in the circumstances because if thedefendants application for injunction succeeds(as it may considering the recent High Courtand Court of Appeal decisions) then the matterwill take a considerable time before it isdisposed of in the High Court and perhaps yourclient may have to take it to the Business

Premises Rent Tribunal.

Kindly therefore let us have your clientsviews soon.

In the meantime, Mr. Kasmani who is doing thismatter with us has written to us to say that21.5.97 is not convenient to him as he ishaving another High Court matter which isstrenuously contested.

We therefore suggest that we take another dateas we finalise the negotiations. In thatregard, let us know what dates are convenientto you and confirm that we do a consent letterto take out this matter out of the hearinglist of 21.5.97. Alternatively, if yourclient will agree to our client's proposal, wecan record a consent on 21.5.97.Yours faithfully,Musinga & Co."

On 12.5.97 M/S Kinyua Kamundi wrote back to Musinga & Co.

"We thank you for your letter dated May 7,

1997.

Your clients proposal is accepted. We shall record a consent on 21.5.97. The writer will contact you before then to agree on the wording of the consent". The letter was not written "without prejudice". Counsel for the parties appeared before me on 21.5.97 and stated thus:

"Musinga

Application for today is dated 16.12.96 - Wehave agreed to settle the matter out of court.We are working out the wording. We need about 7 days. We request that it be taken out. Weshall prepare the consent and file it in theRegistry. Meanwhile the status quo bemaintained."Kinyua

The wording of the consent has been agreedupon. What remains is another aspect on whichwe need to take instructions. This can bedone in one week".An adjournment was then granted to enable the parties to exploreand reach a settlement.

No consent was ever filed. Instead the Advocates took aconsent date for the hearing of the Application which had beenadjourned. They appeared before me again on 22.9.97 when a furtheradjournment was applied for and I stated in my Ruling:

"The Advocates in this matter led me tobelieve that they had reached a consent andwere only working out the final wording. Onthat basis the application dated 16.12.96 wasadjourned on 21.5.97. Four months down theline no consent has been filed and the partiesnow seek a further adjournment. I do not takethe application kindly. The parties do not appear to be ready to finalise this matter. I order that it shall be set down for hearing within the next seven days."

And so it was and I determined the Application dated 16.12.96 on 28.1.98. Nine days after the Ruling, the plaintiff returned to court to say that the suit had already been compromised in May 1997. Viewed in light of the history of the matter the applicationsmacks of an afterthought, and in view of the fact that it wasfiled soon after the plaintiff lost the application dated 16.12.97,it appears to be an effort to circumvent

that Ruling. On thatscore it would be an abuse of the process of the court. I willnevertheless examine the application on its merits.

It was submitted by Mr. Kinyua that the letter dated 7.5.97from M/S Musinga & Co. amounted to a counter-offer to an earlieroffer from his client. Although the counter offer was made on"without prejudice" basis, he did subsequently accept it in an openletter dated 12.5.97 and therefore a binding contract wasprecipitated. The subsequent letters which were exchanged betweenthe parties were also open although they introduced other matterswhich were not agreed upon. He cited various authorities definingcommunication between counsel on "without prejudice" basis andsubmitted that evidence of such communication is only inadmissiblewhere there is no agreement reached. Once an agreement is reachedit is binding and the letters can be relied on. That is STROUDSJUDICIAL DICTIONARY, He also relied heavily on TOMLIN -Vs-STANDARD TELEPHONES & CABLES LTD. [19691 3 All ER 201 an EnglishCourt of Appeal decision relating, to negotiations by Solicitors on liability for injuries suffered by a workman. Liability was agreed at 50/50 and there were at least four other letters referring tothat agreement. The matter of damages was not agreed upon. Theissue arose as to whether the letters which were exchanged "without prejudice" were admissible in evidence. It was held (Ormrod J.dissenting)

"i) the letters were admissible as it was notpossible to determine without looking into thecorrespondence whether there was a bindingagreement.

ii) on the proper construction of the letterswritten by the defendants representativesthere was a definite and binding agreement ona 50/50 basis even though the question ofdamages was left for further negotiations"

Relying on these authorities Mr. Kinyua submitted that his letter of 12.5.97 was enough to constitute a binding agreement and the subsequent letters which contained other terms were extraneous. In response to these submissions Mr. Musinga referred to the wording of the Rule under which the application is grounded and submitted that the court has to be satisfied upon proof that there was a compromise which would then be reduced into a consent and a judgment thereon would follow. He referred to the two letters cited and submitted that there was no agreement as to how the consent would be worded as such wording was part and parcel of a consent. There cannot be one unless the wording is agreed upon.

As is evident from the court record, such wording was never conclusively settled since a consent could have been recorded on 21.5.97 when the parties appeared in court but was not. The fact that there was no settled consent would show a pending agreement on the issues which were not severable and the parties Advocates stated so. All matters pertaining to the consent related to the tenancy of the premises and were covered in the chain of letters exchanged by the parties during negotiations. One letter cannot be taken as the basis of a definite agreement. The court cannot therefore impose a consent on an unwilling party.

Referring to the authorities Mr. Musinga conceded that the court can, in an appropriate case look at letters marked "without prejudice" to see if there was a definite agreement or where one has been reached. There are limitations however based on public policy that parties should be given a free reign to negotiate settlements in matters without the fear that they will be held accountable to what they state "without prejudice" in their correspondence. That view was supported by another English Court of Appeal decision SOUTH SHRUPSHIRE DISTRICT COUNCIL -Vs- AMOS [1981] I All ER 340 where it was held:

"All documents which form part of negotiations between the parties are prima facie privilegedfrom admission in evidence if they are marked"without prejudice", even if the document inquestion merely initiates the negotiations andeven if the document does not itself containan offer. Finally Mr, Musinga submitted that the fact that there was no definite agreement was acknowledged by the plaintiffs/applicants who agreed to take a hearing date for the application dated 16.12.96.

There is a weighty issue of law pending decision in the main suit, that is to say the position of a sitting tenant when the rented property is purchased by another person. This is not equivalent to an issue of liability in a running-down matter as was the case in the TOMLIN CASE cited. In a running-down matter

issues of liability and quantum can be agreed on or decided on separately. Not so in a tenancy matter as is the one before us. As there never was a mutual concession or definite consent or agreement reached and recorded, the application is for dismissal, he submitted.

I have considered all the matters on record including the submissions of counsel. That a court is at liberty in an appropriate case to look at correspondence exchanged "without prejudice" is well exemplified in the authorities cited. I may perhaps add a local decision which reviewed other persuasive English authorities in M. GHEEWALA -Vs- A. GHEEWALA CA 144/1986 (Nyaranqi/Platt/Apaloo JJA) (UR) where in a unanimous decision on the aspect of correspondence exchanged "without prejudice" Nyarangi JA stated

"To sum up, the law on the "without prejudice"rubric may be summarised thus:

(1) A document headed "without prejudice" is notconclusively privileged.

(2) Whatever privilege is claimed by a party butChallenged by the other a court may peruse thedocument so as to decide what it is all about.

(3) A document headed "without prejudice" iscapable of being privileged even if it is anopening shot."

The court there blocked the reference to correspondence marked "without prejudice" which was supposed to disclose compromise proposals saying in the process

"It is one. thing for a party to state to acourt that there were "without prejudice"negotiations. It is quite another for a partyto want to refer to the particulars of offersor proposals which are made by parties. Myanswer to counsel is that the "withoutprejudice" rule is very useful it cannot betoo strongly emphasized that the rule shouldbe safeguarded".

There is an allegation in the matter before me that there was a binding agreement reached between the parties which amounted to a compromise of the suit in terms of Order 24 Rule 6 Civil Procedure Rules. Only two letters are relied on and are reproduced above.

There are however other letters introduced in the application which disclose that there was no conclusive agreement reached which could be recorded and wholly dispose of the suit. These the applicants counsel contends, are extraneous. With respect I do not agree.

If an agreement on negotiations is alleged to have been reached it is proper, in the interests of balanced assessment, that the court should examine the whole correspondence. It did so in the Tomlin Case and found out that in no less than four letters there was a reference to an agreement on liability. SIR GORDON WILLTER, who agreed with DANCKWERTS L.J. in the majority judgment put it this way:

"The question which I think must finally beresolved in favour of the plaintiff iswhether the plaintiffs counter-offer ascontained in that letter of 20.12.1966, can besaid to have been accepted by the repeatedrecital in the numerous letters subsequentlywritten on behalf of the defendants referringto the existence of an "agreement". On thewhole I think that those repeated recitals ofthe existence of an agreement can be, andshould be, construed as an acceptance of theplaintiffs counter-offer. In thosecircumstances I think that the properconclusion is that which was arrived at by thelearned Judge, namely that there was aconcluded agreement on the issue of liabilityleaving for further negotiation the separateand severable question of quantum of damages".

I am far from satisfied that the solitary letter written on 12.5.97 constituted such binding agreement. In the first place it refers to the recording of a subsequent consent whose wording was yet to be formalised, which signified that the matter was still inchoate and would be finalised when such consent is recorded. It never was. In the second place there is no evidence that the matters intended to be recorded and those that are said to have been agreed upon through the letter dated 12.5.97 are in the words of Sir Willmer, "Separate and Severable" question. In the nature of the issues in the main suit, I find that the matters raised in the wording of the final consent are not separate and severable and a definite agreement could

not have been arrived at unless they werefinally agreed upon, which it is evident, they have not.

As the proof envisaged under Order 24 Rule 6 Civil Procedure

Rules has not been discharged, I decline to grant the orders sought and dismiss the application with costs.

Dated at Mombasa this 22nd day of July 1998.

P.N. Waki

JUDGE