REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT NO 496 OF 1988

RANDU NZAU ……..…….….. APPLICANT

VERSUS

MBUNI TRANSPORT CO LTD…....……. RESPONDENT

RULING

By a motion on notice dated 15th March, 1989, the plaintiff applied for judgment for Kshs 135,230/- under order XXIV rule 6 Civil Procedure Rules. The figure was allegedly arrived at after out of court negotiations with a view to settling the suit without a trial. The defendant's counsel allegedly later resiled from the settlement. The above application was thereby provoked.

The motion first came for a hearing on 25th April, 1989. Mr Mburu appeared for the applicant, while Mr Paul Kiambo appeared for the respondent, the defendant in the action. Mr Kiambo did not think the application was competent. He raised a preliminary point that it was grounded on inadmissible without prejudice correspondence. He did not readily have authority to buttress his objection. So he requested for time to conduct a research on the matter. He was allowed time up to 4th May, 1989, when the application next came for a hearing. He came up with a very recent English case of *Rush & Tompkins Ltd v Greater London Council and Another* [1988] 3 All ER 737. It was a case in which discovery of correspondence forming part of out of court negotiations was prayed for by a stranger to the negotiations. The House of Lords held that without prejudice correspondence exchanged with the object of effecting a compromise in the action was privileged. Accordingly none of the parties to it or any other person would adduce them in evidence in subsequent proceedings without the consent of the parties to it.

Mr Mburu was of the view that the case was distinguishable on its own facts. It was his submission that the principal question in the case was whether the without prejudice correspondence were discoverable in a civil suit. Mr Mburu appears to have overlooked the fact that privilege is a rule of evidence. It stems from public policy. It is the policy of the law that disputes should be amicably settled, where possible, and parties 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 of the attempt to settle not being successful. The without prejudice doctrine being a rule of evidence must not, to my mind, be taken to be confined to discovery alone. Nor can it be treated to apply only in cases where an attempted settlement is unsuccessful. The rationale of the doctrine is to encourage parties to a dispute to engage in pre-trial and out of court settlements without the fear that admissions by them of certain facts would be used against them to their prejudice.

Mr Mburu's second argument was that the doctrine has no legal sanction particularly in the Evidence Act, Cap 80 Laws of Kenya. Mr Mburu's attention must have escaped the provisions of S 23 of the Act. The marginal note to the section reads:

"Admissions made without prejudice in civil case".

The section makes inadmissible a certain crop of admissions which the parties by either an express condition or by implication did not intend that evidence thereof be adduced in subsequent proceedings. The marginal note describes those as without prejudice admissions. By the rules of construction the marginal note must be read with the body of the section. It then follows that the section accords protection

to any pre-trial admissions made without prejudice unless the consent of the other party or parties to it be first obtained.

The effect of the provisions above is that a party who enters into pre-trial negotiations which culminate in a settlement is at liberty to resile before judgment is entered. Once a judgment is entered then he would be estopped from challenging it later unless on grounds which would vitiate a contract. I say so because in general terms a judgment entered into on the basis of pre-trial negotiations and settlement is a consent judgment. Such judgment is so to speak in the nature of an agreement and binds both sides. Such stage had not been reached in this matter. The result of the foregoing is that the without prejudice correspondence which the applicant annexed to his supporting affidavit is inadmissible.

Accordingly the preliminary objection succeeds. The correspondence must be and are hereby expunged.

Order accordingly.

Dated and Delivered at Mombasa this 18th Day of May, 1989

S.E.O. BOSIRE

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JUDGE