

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO.351 OF 2015

IATA.....PLAINTIFF

VERSUS

CONNECT TRAVEL LIMITED.....DEFENDANT

RULING

These directions are made pursuant to an oral application made by **Ms Wachira Counsel** for the 1st and 2nd Defendants seeking that the “**without prejudice**” communication contained in Pages 106-151 of the Plaintiff’s Bundle of Documents filed on **16th July 2015** be expunged from the record.

Mr Kigata for the Plaintiff opposed the application arguing that the same was premature. I have carefully considered the oral submissions made by both counsel in this matter.

Section 23(1) of the Evidence Act Cap 81 laws of Kenya, provides when admission may be proved. As a general rule “**without prejudice**” communication between parties is excluded in order to allow for free negotiations between parties attempting to resolve a dispute amicably out of Court. Such communication may be expressly indicated as having been made “**without prejudice**” or it can be inferred from the circumstances in which it was made that the parties intended that said communication not to be adduced as evidence in the trial of the suit.

With respect to the present suit the question of the admissibility of the “**without prejudice**” communication was settled by **Hon Lady Justice Olga Sewe**, in her ruling delivered on **16th September 2016**. The Hon Judge found such communication to be inadmissible for the purposes of entry of judgment on Admission.

In **RUSH & TOMPKINS LTD –VS- GREATER LONDON COUNCIL [1982]2 ALLER 737** it was held:-

“The “without prejudice rule” is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish.....The rule applies to exclude all negotiations generally aimed at settlement whether oral or in writing from being given in evidence. This well known passage recognizes the rule as being based at least in part on public policy. Its other basis of foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if despite the negotiations, a contested hearing ensues.”[emphasis added]

Thus where parties attempt negotiations which eventually fail then any “**without prejudice**” communication associated with such negotiations will not be admissible, even where the negotiations fail and the matter proceeds to trial.

This would cover all communication specifically marked being made a “**without prejudice**” basis but also includes and covers any associated communication.

In her ruling delivered on **16th September 2016 Justice Sewe** stated that all e-mail correspondence relating to proposals on how to settle the matter between the parties amicably, though not bearing the “**without prejudice**” tag were clearly made in furtherance of the “**without prejudice**” letter dated **17th April 2014** and were therefore equally inadmissible. I am of the same mind.

Accordingly I do find that the “**without prejudice**” communication entered into by the parties to this suit in furtherance of the attempt to settle the suit as well as all related and associated communication would be inadmissible for use during the trial of the suit.

Dated in Nairobi this 24th day of September 2019.

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Justice Maureen A. Odera