REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 483 OF 2015

ATHI RIVER STEEL PLANT LIMITED.....PLAINTIFF

VERSUS

CHINA CONSTRUCTION ENGINEERING (K) LTD.....DEFENDANT

RULING NO.2

1. The plaintiff's application is for judgement on admission. It is the plaintiff's case that the defendant had admitted owing it the sum of Kshs. 16,923,710/-.

2. The plaintiff has provided copies of invoices and delivery notes, to demonstrate that it performed its obligations in terms of the contract between the parties. However, that is not the basis of this application.

3. The application is premised on a letter written by the defendant, dated 27th July 2015. According to the plaintiff, the said letter constitutes an unequivocal admission of liability for the sum of Kshs. 16,923,710/-.

4. However, the respondent denies the contention that there was any unequivocal admission of liability.

5. In a Replying Affidavit sworn by Zhao Rong Hai, the defendant states that it contests the sums claimed because the same is not the contractual amount, and also because the defendant had been making some payments.

6. The defendant also said that it was contesting some of the Delivery Notes, although it did not either identify the alleged disputed Delivery Notes, nor give any reasons for contesting them.

7. Once again, it bears repetition, that the application before me is for judgement on admission. It is not an application for summary judgement, which could have required the court to ascertain whether or not the Defence raised any triable issues.

8. The matter which the court is required to delve into regards the efficacy of the alleged admission by the defendant. If the court was satisfied that the admission was made by the defendant, and that the said admission was clear, unambiguous and unequivocal, the court would proceed to grant judgement based on the admission.

9. It is noteworthy that the defendant does not deny having written the letter which is said to embody the admission.

10. The letter is in the following terms;

"THE MANAGING DIRECTOR

ATHI RIVER STEEL PLANT LTD

P.O Box 45074-00100

NAIROBI

27/7/15

Dear Sir/Madam

RE: OUTSTANDING AMOUNT OF KSHS. 16,923,710

We confirm to be indebted to your company of the above amount as at today. Due to some cash flow problem we have been facing we couldn't settle them on time; kindly we request to reschedule our payment and settle them as follows:

ON OR BEFORE	AMOUNT
20th/08/2015	4,000,000
20th/09/2015	4,000,000
20th/10/2015	4,000,000
20th/11/2015	4,923,710
	TOTAL 16,923,710

Thank you for your continued support.

Yours Faithfully

(Signed)

Zhao Ronghai"

11. The terms of the letter are clear in every respect. The letter has no ambiguity whatsoever.

12. It confirms that the respondent is indebted to the plaintiff in the sum of Kshs. 16,923,710/-.

13. The said confirmation of the respondent's indebtedness was not suggested to be conditional upon any factor, issue or consideration.

14. The admission was plain and unmistakable.

15. The admission was free from any uncertainty. It was therefore, unequivocal.

16. Nonetheless, the respondent submitted that because the admission was made during negotiations, it was intended to enjoy protection under section 23 of the Evidence Act.

17. The law has designed rules which enable parties to engage in meaningful negotiations, with a view to

amicably resolving disputes. The said rules protect the communication exchanged during the *"Without Prejudice"* negotiations from disclosure in court.

18. When a letter was written on a without prejudice basis, it is privileged, and is therefore inadmissible in evidence.

19. In **GEOLOY INVESTMENTS LTD Vs BEHAL T/A KRISHANBEHAL & SONS [2002] 2 KLR 447,** Mwera J., *(as he then was),* said that the privilege accorded to *"Without Prejudice"* negotiations are jealously guarded by the courts, because;

> **"…otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out-of-court settlement".**

20. But the learned Judge also noted thus;

> **"The rule, however, is strictly confined to cases where there is a dispute or negotiations, and suggestions are made for settlement thereof".**

21. Ordinarily, when parties are engaged in without prejudice correspondence, they do mark their respective communications, *"Without Prejudice"*. When that is done, the position is clear.

22. However, there might be cases, such as this one, in which the correspondence was not marked *"Without Prejudice"*.

23. In the case of **GUARDIAN BANK LIMITED, Vs JAMBO BISCUITS KENYA LIMITED, Hccc No. 301 of 2013,** Gikonyo J. said;

> **"Express marking such communication as being on without prejudice, makes our work easier. But where express marking is lacking, the court falls back to the other requirement; consider the communication and the entire circumstances in which it was made, to determine whether it can infer that the parties agreed or intended the communication should not be given in evidence. Care should be taken, however, in the exercise to avoid parties who make clear and unequivocal admissions, from denying such admissions under the pretext or cover of without prejudice".**

24. In this case, I have already found that the defendant's admission was unequivocal.

25. I have now given consideration to all the other material which is before the court, and I found no communication from which it can be inferred that the parties agreed or intended that the letter containing the defendant's admission should not be admissible in evidence.

26. Indeed, there is no correspondence indicating the presence of negotiations between the parties.

27. There had been a demand made by the plaintiff, and in response to it, the defendant expressly and unconditionally admitted liability. I therefore find that the letter containing the admission is admissible in evidence.

28. As regards the contention that the defendant was unaware of the claim against it because it had allegedly not been served with the Plaint and Summons, I find no merit in it.

29. The very fact that the defendant had responded to this application, by making reference to and by answering the claims embodied in the plaint, means that the defendant was well aware of the claim.

30. If a default judgement had been entered against the defendant, the issue of the alleged non-service of the Plaint and Summons may have been relevant. But in a situation wherein the defendant has not just had the opportunity to answer to the claim, and has proceeded to utilize the said opportunity

appropriately, the alleged non-service is a non-issue.

31. In the result, I grant judgement in favour of the plaintiff as prayed in the plaint. This judgement is founded upon the unequivocal admission made by the defendant.

32. The plaintiff is also awarded the costs of the application dated 14th February 2017.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **31st day** of **July** 2017.

FRED A. OCHIENG

JUDGE

A Jelle for Gathu for the Plaintiff

Wamae for the Defendant

Collins Odhiambo – Court clerk.