



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC. COMM. 78 OF 2012

EQUATORIAL COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

DANSON BUYA MUNGATANA.....DEFENDANT

RULING

1. The plaintiff/applicant has sought entry of judgment against the defendant in the sum of kshs.6,031,597 in terms of admission made pursuant to a letter to the plaintiff by the defendant dated 28.4.2015 read together with the subsequent letter dated 14.5.2015 and which offer was accepted by the plaintiff old letter dated 5/5/2015.

2. The application is premised on the provisions of order 25 Rule 5 as well as Order 51 Rule 1 Civil Procedure Rules. It is supported by an affidavit sworn by one Kennedy Waititu, a legal officer of the plaintiff. The grounds upon which the application is made and which are reiterated in the said affidavit in support are to the effect that after filing the suit, the defendant requested the plaintiff by letter of 14.5.2015 if the matter could be settled amicably which request culminated into a settlement. That letter read at material sections:

“We have instructions to negotiate an out of court settlement in the matter. Kindly prevail upon your client to accept a converted figure as per the debt amount less any punitive penalties payable in kshs.100,000 installments until payment in full”

3. That letter was indeed responded to when on the 15.5.2015 the plaintiff wrote back and said:

“We write to confirm acceptance by our client your clients' offer to settle the claimed account by payment of monthly installments of kshs.100,000/=.

Please find attached a consent to the same effect for your execution and return to us for filing.”

4. On the 20/5/2015, the defendant then wrote;

“We refer to the above matter and your letter dated 15/5/2015. Kindly let us have your modest tabulation on costs for our clients consideration as we look forward to signing the consent letter.”

5. It is not in dispute that the letters by the defendant were expressed to be on a 'without prejudice' basis. The question this court has to ask and answer is what effect is the act of accepting the terms of a

correspondence made on without prejudice basis.

6. The defendant has cited to court in their submissions, decisions to the effect that communication made on without prejudice are privileged and not admissible. On the contrary the plaintiff has cited decisions to the effect that a communication made without prejudice is admissible if the same has resulted in an agreement.

7. The court takes the view that the expression '*without prejudice*' is a tool used in negotiations to allow a party negotiate the best bargain while guarding against being held against statements made in the course of such negotiations. However once the terms of negotiations are settled upon and the parties come to an *ad idem* there is a contract and such communication is then admissible to prove the subsequent or consequent agreement.

8. In the case of **LOCHAB TRANSPORT CO. LTD. -VS- KENYA ARAB ORIENT INSURANCE LTD.** The court said:

“If an offer is made without prejudice, evidence cannot be given on the offer. If this offer is accepted a contract is concluded and one can give evidence of the contract and give evidence of the terms of that without prejudice letter.”

9. This to me is what transpired in the matter before me The defendant initiated the negotiation, when its offer was not responded in time, it did a reminder and the plaintiff then accepted the offer. At that time, the parties agreed and the terms of the agreement were that the matter would be settled on payment of the claimed amount by payments of monthly installments of kshs.100,000/=

10. I find that to have been the logical conclusion of the negotiations. One would ask for what reason was the defendant requesting for '*modest tabulation of costs for clients consideration*' in the absence of a settlement. I find that the only agreement not disclosed is the amount of costs payable which would ordinarily follow the event and can be ascertained at taxation. Otherwise the principal sum was agreed on as claimed in the plaint.

11. The upshot of this is that the plaintiffs application dated 11.9.2015 is allowed as prayed in that judgment is entered for the plaintiff against the defendant in the sum of kshs.6,031,597/= together with interest from 15/5/2015 till payment in full.

12. The plaintiff also gets the costs of this suit to be taxed by the taxing master if not agreed by the parties.

Dated this 18th day of April 2015 in the present of Ms.Kaguri in the Defendant/Respondent and Mr.Wafula from the plaintiff/applicant.

P.J.O.OTIENO

JUDGE