



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 344 OF 2013

KAWAMAMBANJO LIMITED..... PLAINTIFF

VERSUS

CHASE BANK (KENYA) LIMITED.....1ST DEFENDANT

REDHILL FISHERIES LIMITED2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Chamber Summons application dated on 23rd September 2013 and filed on 25th September 2013 was brought under the provisions of Order 19 Rule 6 of the Civil Procedure Rules 2010, Section 1 A, 1B 3 and 3A of Civil Procedure Act, Section 23 of the Evidence Act Cap 80 and all other enabling provisions of law. It sought the following orders:-

(1) THAT the Honourable court do strike out or expunge from the court record the 1st Defendants Replying Affidavit sworn on 6th September 2013 and filed on the same day.

(2) THAT in the alternative to prayer (1) above, the Honourable court do strike out the paragraphs and all annexures exhibited thereto relating to without prejudice correspondence.

(3) THAT the costs of this application be born by the 1st Defendant.

2. The same was generally premised on grounds:-

(a) THAT in response to its Notice of Motion application dated and filed on 5th August 2013, the 1st Defendant filed a Replying Affidavit sworn by Alex Thande on 6th September 2013.

(b) THAT the said affidavit contained correspondence that was marked "without prejudice" which were undoubtedly well calculated to prejudice and embarrass the Plaintiff.

(c) THAT the said Replying Affidavit ought to be struck out for being scandalous,

oppressive, bad in law and otherwise an abuse of the court process.

AFFIDAVIT EVIDENCE

3. The said application was supported by the affidavit Alex Ndegwa which was sworn on 23rd September 2013. He reiterated, *extenso*, the grounds contained in the face of the application.
4. In response thereto, on 9th October 2013, the 1st Defendant filed Grounds of Opposition dated the same date. The grounds can be summarised as follows:-

(a) THAT the rule on the exclusion of correspondence under the cover of without prejudice basis had limitations.

(b) THAT privilege only attached to correspondence for the purposes of the proceedings in which the correspondence was written.

(c) THAT without prejudice documents have always been admitted to prove matters secondary to the dispute.

(d) THAT only documents found not to be admissible in evidence or averments found by the court to be offensive should be struck out of an affidavit and not the entire affidavit.

(e) THAT the question of admissibility of evidence was one that was to be decided at the hearing wherein the court would decide whether to exclude the evidence or not.

(f) THAT the Plaintiff's application was brought to delay the expeditious disposal of the matter and was an abuse of the court process.

LEGAL SUBMISSIONS BY THE PLAINTIFF

5. In its written submissions dated 14th November 2013 and filed on 27th November 2013, the Plaintiff repeated averments set out in its Supporting Affidavit *in extenso*.
6. It added that paragraphs 10-15 of the 1st Defendant's Replying Affidavit made reference to privileged communication that had passed between them in respect of this matter. It was its submission that the said communications referred to negotiations that had been entered into with a view of settling the matter herein and that because no agreement was ever arrived at, then they were privileged and could not be adduced in evidence in subsequent proceedings.
7. The Plaintiff referred to the case of **Walker vs Wilsher (1889) 23 QBD 335** in which the holdings can be summarised as following, that:-

(a) Nothing which was written or said on a without prejudice basis should be looked at without the consent of both parties;

(b) The terms proposed should not have been accepted;

(c) The door should not be shut against compromises by admitting "without prejudice" letters.

8. It also relied on the definitions of "without prejudice" in **Jowitt's Dictionary of English Law, Vol 2 at page 1909** and **Halsbury's Laws of England, 4th Edition Vol 17** which stated that letters written or oral communications made during a dispute with a view to negotiating a compromise and which were expressed or otherwise proved to have been made "without prejudice" could not be admissible in evidence.
9. It also referred this court to Section 23 (1) of the Evidence Act Cap 80 (laws of Kenya) and the cases of **Nzau vs Mboni (sic) Transport Co Ltd [1990] KLR 174** to buttress its argument and

urged the court to expunge the aforementioned paragraphs or strike out the 1st Defendant's Replying Affidavit.

LEGAL SUBMISSIONS BY 1ST DEFENDANT

10. On its part, the 1st Defendant filed its written submissions dated 29th October 2013 on 30th October 2013. It argued that the Plaintiff was not only disputing its right to exercise its statutory power of sale but that it was also disputing the debt.
11. Further, the 1st Defendant submitted that the correspondence referred to was between itself, the Plaintiff and the 2nd Defendant and that the subject matter was not a dispute over the security but rather the restructuring of the loan which resulted in a legally binding agreement between the three (3) parties.
12. It was its submission that the paragraphs the Plaintiff wanted expunged did not offend the Civil Procedure Rules or the exclusion rules of evidence and explained the same as follows:-
 - (a) **Paragraph 10 of the Replying Affidavit showed that all steps were taken to register the security against the title;**
 - (b) **Paragraph 11 of the Replying Affidavit attested to the fact that the Plaintiff was fully aware that the 1st Defendant had complied with all banking practices;**
 - (c) **Paragraph 12 of the Replying Affidavit alluded to the fact that the Plaintiff and the 2nd Defendant instructed the firm of M/S Gachie Mwanza & Co Advocates to act for them to re-negotiate the loan;**
 - (d) **Paragraph 13 of the Replying Affidavit referred to the binding agreement; and**
 - (e) **Paragraphs 14 and 15 of the Replying Affidavit showed letters that were written after the agreement to propose liquidation of the agreed debt and forwarding of cheque.**
13. It was therefore the 1st Defendant's case that the Plaintiff could not on one hand claim that it had entered into negotiations to compromise the debt which were privileged and on the other hand disclaim the same debt that it was seeking to compromise.
14. It relied on the case of **Milicent (sic) Wambui vs Nairobi Botanica Gardening Limited [2013] eKLR** and **Charles Kipngetich Arap Kirui vs Wangethi Mwangi & Another [2007] eKLR** in support of its case.
15. The Plaintiff distinguished the case of **Charles Davy Kipngetich Arap Kirui vs Wangethi Mwangi & Another** (Supra) where the main issue was whether a demand letter marked "without prejudice" was admissible in evidence and which the court held, it was admissible and the case of **Milicent Wambui vs Nairobi Botanica Gardening Limited** (Supra) where the main question was whether a valid agreement was entered into from the various correspondence exchanged between the parties.

LEGAL ANALYSIS

16. This court has found it necessary to look at paragraphs 10-15 of the 1st Defendant's Replying Affidavit to establish whether or not the same can be struck off or expunged from the court record.
17. It is clear that paragraphs 10 and 11 are mere averments and contain no annexures and make no reference to privileged communication as has been alleged by the Plaintiff or at all.
18. On the other hand, paragraphs 12, 14 and 15 contained annexures which are "without prejudice" communications between M/S Gachie Mwanza & Co Advocates for the 1st and 2nd Defendants and the Plaintiff's advocates indicating proposals that had been made by the 2nd Defendant with a view to liquidating the outstanding monies.
19. Exhibit marked "AK 8" annexed to support the 1st Defendant's contention in paragraph 13 that

- there was an agreement, is a Memorandum of Acceptance which was duly executed by the 2nd Defendant's directors.
20. It is important to point out that the 2nd Defendant never filed its papers in this matter. On 23rd September 2013, counsel for the 1st Defendant informed the court that they did not serve the 2nd Defendant with the 1st Defendant's Replying Affidavit and maintained that both the Plaintiff and 2nd Defendant were alter egos of Timothy Benson Kamande. The Plaintiff did not address the court on the issue of non-participation of the 2nd Defendant by virtue of it (the Plaintiff) not serving the 2nd Defendant with the pleadings herein or notices of the various dates when the matter came up in court. The matter therefore proceeded between the Plaintiff and the 1st Defendant.
21. It is evident that both the Plaintiff and the 2nd Defendant are distinct and separate corporate entities. Either of them had the *locus standi* to bring the present application to court as the firm of M/S Gachie Mwanza & Co Advocate was acting for Redhill Fisheries Limited and Kawambanjo Limited, the 2nd Defendant and the Plaintiff respectively.
22. The court has noted the 1st Defendant's position that by annexing the said "**without prejudice**" letters, it merely intended to demonstrate that the Plaintiff was aware of the loan and that it had a nexus with the Plaintiff.
23. Having attached a copy of the Charge to its Replying Affidavit marked as "AK 5", it was not necessary for the 1st Defendant to attach the said correspondence exchanged on a "**without prejudice basis**" to prove that the monies were advanced or to demonstrate the nexus between the Plaintiff and the 1st Defendant as the said Charge was clear that the Chargor was the Plaintiff while the Borrower was the 2nd Defendant.
24. The above notwithstanding, the court noted that in **Halsbury's Laws of England Vol 17** paragraph 213, it had been stated that:-

"the contents of a communication made "without prejudice" are admissible when there has been a binding agreement (emphasis court) between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible..."

25. Similarly as was held in the case of **Lochab Transport Ltd vs Kenya Arab Orient Insurance Ltd [1986] eKLR:-**

"... if an offer is made "without prejudice", evidence cannot be given on this 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".

26. As has therefore been seen hereinabove, contents of a communication made "**without prejudice**" are admissible when there has been a binding agreement between the parties and that once a contract is concluded, one can give evidence of the terms of that "**without prejudice**" letter.
27. The making of the said Memorandum of Acceptance contained in the 1st Defendant's letter dated 12th August 2010 Exhibit "AK 8" does not appear to have resulted from some of the "**without prejudice**" letters. It appeared to be an independent document.
28. Consequently, in the absence of any evidence placed before this court to show that the Memorandum of Acceptance marked as "AK 8" was made on a "**without prejudice basis**" and that the parties intended the same to be treated as such, this court is not persuaded that the said Exhibit "AK 8" ought to be expunged or struck out from the court record.
29. For the reason that the said Memorandum of Acceptance did not flow from some of the "**without prejudice**" letters, this court agrees with the submissions by the Plaintiff that letters that were forwarded to the 1st Defendant's advocates by the Plaintiff and the 2nd Defendant prior to the execution of the Memorandum of Acceptance were privileged and could not be adduced as evidence without the consent of the Plaintiff and the 2nd Defendant. It would not be correct as the

- 1st Defendant submitted that it had waived its privilege thus giving the court the green light to rely on the letters.
30. In that regard, the court hereby expunges or strikes out copies of letters from the Plaintiff and 2nd Defendants advocates to the 1st Defendant's advocates written prior to 12th August 2010 as the same appear to have been in relation to certain negotiations which were quite distinct and independent from those where the Memorandum of Acceptance was arrived at.
31. Indeed, the letter that would have been admissible even if the same was on a **"without prejudice"** basis would have been the letter of 27th July 2010 alluded to in the said letter of 12th August 2010 as it would have been admissible to give evidence of the terms of that letter.
32. Accordingly, whilst this court will strike out Exhibits "AK 6", part of Exhibit "AK 7" and "AK 10", it will not expunge or strike out paragraphs 10 – 15 of the 1st Defendant's Replying Affidavit as the same contain matters of fact. The burden is on the 1st Defendant to prove the same without the said annexures and for the Plaintiff to disprove the said facts contained therein.

DISPOSITION

33. The upshot of this ruling therefore is that annexures "AK 6", some letters in "AK 7" and "AK 10", are hereby expunged from the court record. For the avoidance of doubt, in "AK 7", all letters are to be expunged except letters dated 8th September 2010, 30th September 2010 and 18th November 2010 on pp 66 – 68, still annexed in "AK 7", as these were all written after the Memorandum of Acceptance was executed and could not have been intended to have been on a **"without prejudice basis"**.
34. As the Plaintiff did not fully succeed in its Notice of Motion application dated 23rd September 2013 and filed on 25th September 2013, each party will bear its own costs.
35. The court hereby directs that parties fix a mutually convenient date at the registry for the hearing of the Plaintiff's Notice of Motion application dated 5th August 2013. The interim orders will stay in place until that date.
36. For the avoidance of doubt, if the Plaintiff does not invite the Defendants to fix the said date within ten (10) days from the date of this ruling, the interim orders herein will automatically lapse.
37. It is so ordered.

DATED SIGNED and DELIVERED at NAIROBI this 31st day of March 2014

J. KAMAU

JUDGE