



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 93 OF 2013

D. LIGHT DESIGN INCORPORATED.....PLAINTIFF

VERSUS

POWERPOINT SYSTEMS EAST AFRICA LIMITED..... DEFENDANT

RULING

INTRODUCTION

1. A brief background of this matter is that Plaintiff filed a Notice of Motion application dated 12th March 2013 on 13th March 2013. It sought injunctive orders to restrain the Defendant from passing of its goods as its own. The said application was supported by the Affidavit of Tim Rump which was sworn on 12th March 2013. Learned Havelock J granted the Plaintiff interim injunctive orders pending the hearing and determination of the said application.
2. In response thereto, on 22nd March 2013, the Defendant filed Grounds of Opposition dated the same date and a Replying Affidavit sworn by Cosmas Musyoki on the same date.
3. On 12th August 2013, the Plaintiff filed another Notice of Motion application dated 7th August 2013 seeking orders to commit the Defendant to civil jail for disobeying the orders that had been issued by the learned Judge.
4. On 26nd August 2013, the Defendant filed a Joint Replying Affidavit sworn which had been sworn by Cosmas Musyoki and Stanley Ngatia in response to the said application.
5. On 2nd September 2013, the Plaintiff filed a Notice of Preliminary Objection. Its written submissions were also dated the same date. The grounds of the objections were generally as follows:-
 - i. **The documents annexed to the said Joint Affidavit were irregularly and unlawfully before the court because the same comprised communication exchanged between it and the Defendant.**
 - ii. **The inclusion of the said documents was mala fides and intended to delay and/or obstruct the course of justice.**
 - iii. **The said documentation related to settlement talks in a criminal anti-counterfeiting complaint Ref No ACA/HQ/ENF/IPRC035 and not the Trademark Infringement suit which was an attempt by the Defendant to cloud the real issue in question.**
 - iv. **The said documentation should be expunged from the court record and the Contemnors be condemned to meet the costs attendant to this application.**

6. The Defendant's written submissions were filed and dated 9th September 2013.

ISSUES

7. In its submissions, the Plaintiff identified the following as the issues for determination:-
- Does the law exclude "without prejudice" documents and information from being admitted into court? If so, under what criteria/prerequisites?**
 - Is the nature of annexures filed by the Respondents, such that they fall within the rubric of information that ought to be excluded from tabling in court?**
 - Consequently does the nature of these annexures and reference to them in the Respondent's response warrant their expungement from the record of the court?**
8. On its part, the Respondent was of the view that the only issue for determination was:-

Whether the relevant correspondence is admissible by way of affidavit evidence and if so their relevance, if at all in these proceedings?

9. From the understanding of this court, the question before it is basically:-

Whether or not correspondence marked "without prejudice" is admissible as evidence?

PLAINTIFF'S SUBMISSIONS

10. It was the Plaintiff's submission that Article 50 (1) of the Constitution of Kenya, 2010 expressly provides that every person has a right to a fair hearing. It was its argument that the dispute between it and the Defendant must therefore be decided in a manner that was free from prejudice. It argued that this could only be achieved by expunging the correspondence that was exchanged between the parties and marked "**without prejudice**".
11. The Plaintiff argued that the marginal notes under Section 23(1) of the Evidence Act Cap 80 (laws of Kenya) were clear that they envisaged a situation where admissions could be made without prejudice in civil cases. The said section stipulates as follows:-
- "In civil cases, no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."**
12. It relied on the case of **Civil Appeal No 206 of 2000 Reli Co-operative Savings Limited and Credit Society Ltd vs DO Songa** where the Court of Appeal held that a letter written by a party and marked "**without prejudice**" is privileged and if tendered by the recipient in court it ought to be expunged from the court record. It also referred the court to the case of **Rabin vs Mendoza (1954) 1 All ER 247** where the court established that without prejudice documents were inadmissible.
13. It was its further argument that the exclusion of "**without prejudice**" documents was not obsolete as it was only confined to those documents in which there was a dispute, negotiations or suggestions made for settlement. This was to give parties freedom to negotiate freely. The cases the Plaintiff relied on were **HCCC No 23 of 1999 Mombasa Co-operative Bank of Kenya Limited vs Shiraz Sayani, HCCC No 213 of 1999 National Industrial Credit Bank Kenya Ltd vs Yandal Enterprises Ltd & 2 others cited with approval in HCCC No 1844 of 2001 Geeloy Investments Ltd vs Behal t/a Krishnan Behal & Sons.**
14. The Plaintiff further submitted that the correspondence cited by the Respondents related to criminal anti-counterfeiting complaint Ref No ACA/HQ/ENF/IPRC035 and was therefore irrelevant in the suit herein.
15. According to the Plaintiff, the correspondence would not add any probative value towards the court determining whether or not the Defendant had disobeyed the court orders.
16. Both the Plaintiff and the Defendant were agreed that the principle of "**without prejudice**" is not absolute. The Defendant, however, added that the correspondence was excluded in circumstances from which the court could infer that the parties had agreed that the evidence could not be given

otherwise the rule was inapplicable. The Defendant also relied on the cases of **Co-operative Bank of Kenya vs Shiraz Shabudin Sayani (Supra) and Unilever Plc vs Proctor & Gamble Co [2001] 1 All ER 783** which expanded the circumstances under which the principle of “without prejudice” could be excluded.

17. The Defendant argued that it was faced with very serious allegations and had to do all that was within its right to demonstrate that it had not disobeyed the court orders. It submitted that the correspondence was admissible for the reason that it was intended by the parties to be admissible; it was relevant as it showed that the parties actually struck a settlement and that the intended prosecution was halted; the court could therefore expand exemptions of the “**without prejudice**” rule.

LEGAL ANALYSIS

18. This court has carefully considered the oral and written submissions by the Plaintiff and the Defendant and found that it was necessary for this court to look at the correspondence that had been exchanged between them to establish whether or not the same was admissible as a response to the Plaintiff’s Notice of Motion application dated 7th August 2013 seeking to cite the Defendant for contempt.
19. This application is basically premised on an advertisement by the Defendant that the Plaintiff said was contained on page 5 of the Energy Digest Magazine of Kenya Renewable Association (KERA), Issue # 1 June-July 2013. This was marked as Exhibit TM-4 attached to the Plaintiff’s Affidavit of Tim Rump which was sworn on 7th August 2013. The said extract is incomplete but for all purposes and intent, this court finds that it was an extract of the said Digest as the fact was admitted by the Defendant. Exhibit TM- 5 is a demand letter dated 11th July 2013 from the Plaintiff’s advocates to the Defendant’s advocates pointing out the carrying of the said advertisement.
20. Annexures in the aforesaid Joint Affidavit by Cosmas Musyoki and Stanley Ngatia sworn on 26th August 2013 show the Defendant’s advocates dated 18th July 2013 explaining how the said advertisement was carried in the said Digest and letters exchanged between the Defendant and KERA explaining the circumstances leading to the said advertisement being run in its Digest. It also annexed proof of payment of the said advertisement that was made on 14th December 2012.
21. This court has noted that there were other letters that were exchanged between the Plaintiff’s and the Defendant’s advocates in which certain terms for settlement of the dispute between them were discussed, the Defendant’s letters and Credit notes to its clients advising the new name for its Solar Lantern. These latter documents refer to “**Powerpoint Solar Lantern.**” The attached receipts were illegible and the court is unable to make out what the same were.
22. It is instructive to note that all the letters exchanged between the Plaintiff’s and the Defendant’s advocates were copied to Anti-Counterfeit Agency and to their respective clients. Save for the consent letter dated 28th May 2013 by advocates for both the Plaintiff and the Defendant, none of the other letters bore the words “**without prejudice.**” The said consent letter was essentially advising the Anti-Counterfeit Agency that the matter had unequivocally been settled on mutually agreed terms as had been indicated therein.
23. Whereas the Plaintiff argued that the said annexures were not relevant because they related to a criminal anti-counterfeiting complaint Ref No ACA/HQ/ENF/IPRC035, that is a matter to be determined by the court at the time of hearing its application on merit. Indeed, the court wishes to point out that relevance, admissibility and weight of evidence are very distinct principles. A document may be admissible in a particular circumstance but it may very well be irrelevant. In such a case, the court will attach very little weight to the same in the determination of that dispute.
24. As was correctly submitted by the Plaintiff’s counsel, negotiations that are done out of court must be guarded jealously to allow parties to be free to explore all possibilities of an out of court settlement with a view to compromising a suit. However, there was nothing to jealously guard in this matter as regards the correspondence that was attached in the Joint Affidavit. The Plaintiff does not even tell this court how the letters and credit notes by the Defendant to its clients were privileged.

25. This is because as was also correctly stated out by counsel for the Defendant, the documents in the said Joint Affidavit were not privileged for the reason that the Plaintiff and the Defendant did not intend them to be confidential. This was illustrated by the fact the letter marked “**without prejudice**” basis was to be acted upon and it was copied to other persons other than to the advocates of both the Plaintiff and the Defendant. Indeed, from the contents therein, the terms therein were acted upon. It is evident that the said documents were not intended to compromise the suit herein and they were acted upon before the suit herein was contemplated.
26. From the facts of this case, what the court is really being asked to establish at this point is really whether the annexures in the said Joint Affidavit were admissible as none of them were privileged.
27. In an adversarial system like the one in this jurisdiction, each party puts its best foot forward. It must be given a fair and reasonable opportunity to present its case in the best way it knows how. The right to fair trial is indeed envisaged in Article 50 of the Constitution of Kenya, 2010. It would be a travesty and miscarriage of justice if a party to a suit could dictate the evidence that its opponent would seek to be relying on. The inadmissibility of the evidence can only be as provided for under Section 23 (1) of the Evidence Act Cap 80 (laws of Kenya).
28. After a careful consideration of the aforesaid, the court is more persuaded by the Defendant’s submissions that the annexures to the said Joint Affidavit were intended to demonstrate that it was not in contempt of the court orders.
29. It is the finding of this court therefore that the annexures to the said Defendant’s Joint affidavit were admissible and will not therefore be expunged from the court record. As has been seen above, their relevance in this matter is quite another matter and parties will be at liberty to ventilate the relevance of the same before the court at the appropriate time.
30. The upshot of this court’s ruling therefore is that the Plaintiff’s Preliminary Objection raised in the Notice of Preliminary Objection dated and filed on 2nd September 2013 is not merited. In the circumstances foregoing, the same is hereby dismissed with costs to the Defendant.
31. It is so ordered.

DATED and DELIVERED at NAIROBI this 17th day of December 2013

J. KAMAU

JUDGE