



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 210 OF 2005**

**JANET OSEBE GECHUKI .....**  
**.....PLAINTIFF**

**VERSUS**

**THE COMMISSIONER OF CUSTOMS & EXCISE.....1<sup>ST</sup>**  
**DEFENDANT**

**RAJEN H. MALDE .....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

The Notice of Motion dated 6<sup>th</sup> May, 2011 is filed by the 2<sup>nd</sup> Defendant herein which is premised under Order 25 Rule 5 of Civil Procedure Rules 2010 and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act.

It seeks the following prayers:-

- (1) That this suit as concerns the second Defendant be marked as compromised and judgment be entered for the second Defendant against the first Defendant accordingly in the terms that:-**
  - (a) The Toyota RAV4 Chassis NO. ACA21-0084330 and now bearing Registration Number KBE 493H be returned to the first Defendant within the next 7 days and delivered to a person designated to it;**
  - (b) The first Defendant do refund to an pay to the second Defendant the sum of Kenya Shillings 2,000,000.00 together with interest thereon at court rates from the date of payment by the second Defendant to the first Defendant until such time as the said sum shall be refunded; and**
  - (c) The costs of this suit be paid by the first Defendant to the second Defendant as agreed or taxed.**
- (2) That the costs of this application be provided for.**

The application is based on the grounds set forth on its face and on affidavit sworn by the 2<sup>nd</sup> Defendant on 6<sup>th</sup> May, 2011.

The application is supported by the Plaintiff and she has filed a supporting affidavit sworn on 2<sup>nd</sup> June, 2011. The 1<sup>st</sup> Defendant in opposition to the application has filed an affidavit sworn by one Seraphin Anamanjia on 8<sup>th</sup> May, 2011.

The short background of this matter is that the 2<sup>nd</sup> Defendant bought the motor vehicle in issue in an auction advertised by the 1<sup>st</sup> Defendant but the Plaintiff filed this suit challenging the said sale and had

obtained the injunction against the 2<sup>nd</sup> Defendant restraining him to deal with the motor vehicle. I shall not dwell on the issue raised by the Plaintiff i.e. whether the Interim Injunction has been discharged in view of the earlier order made vide Ruling of Hon. Nambuye J. delivered on 7<sup>th</sup> March, 2008. It is averred by the 2<sup>nd</sup> Defendant that he is still holding the motor vehicle awaiting the order of the court.

The only issue before the court is whether there is a binding contract between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant so as to rule that the suit as between the two Defendants has been compromised. It is not in dispute that the 1<sup>st</sup> Defendant addressed a letter dated 26<sup>th</sup> August, 2010 to the counsel both for the Plaintiff and the 2<sup>nd</sup> Defendant.

It was written without prejudice.

The letter proposed as under:-

**“We have instructions to negotiate on an out of court settlement as follows:**

- 1. The 2<sup>nd</sup> Defendant be refunded the sum of Kshs.2,200,000.00 paid as the purchase price of the motor vehicle with interest at court rates.**
- 2. The Plaintiff then to clear the vehicle as per the provisions of East African Customs Management Act, 2004.”**

The 2<sup>nd</sup> Defendant/applicant by his advocates' letter dated 2<sup>nd</sup> September, 2010 accepted the said proposal. This letter was an open letter. His lawyers also wrote a second letter of 8<sup>th</sup> March, 2011 reiterating that so far as the 2<sup>nd</sup> Defendant is concerned, the matter stands compromised on his accepting the proposal made by the 1<sup>st</sup> Defendant. It sought confirmation of such compromise from the 1<sup>st</sup> Defendant.

In failure of any response from the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant thus filed the present application.

The Plaintiff in support of the application submitted that the 1<sup>st</sup> Defendant is now estopped in law from contending that there is no binding contract between the two Defendants. So far as the Plaintiff is concerned, the 1<sup>st</sup> Defendant has to compensate her in damages for loss of user of the vehicle. The loss occurred due to the sale of the motor vehicle despite the reassurance made by the 1<sup>st</sup> Defendant vide the letters of 12<sup>th</sup> January, 2005, 24<sup>th</sup> January, 2005 and 25<sup>th</sup> January, 2005.

The 1<sup>st</sup> Defendant's contentions are twofold. The letter was written 'without prejudice' to both the parties in anticipation that both parties shall accept the proposals made in its letter dated 26<sup>th</sup> August, 2010. I may observe at this stage that the averments made in paragraph 6 of the replying affidavit are that the money to be refunded was Kshs.2,100,000/= and not Kshs.2,200,000/= as written in the said letter. Apart from the fact that the party cannot renegotiate the proposal by way of an affidavit without any sustainable document, I do note that the 2<sup>nd</sup> Defendant/applicant has prayed for refund of only Kshs.2,000,000/=. This issue thus does not avail to the 1<sup>st</sup> Defendant.

It was further submitted that because of the refusal by the Plaintiff to accept the proposals made by the 1<sup>st</sup> Defendant, there is no contract validly entered and that the letter addressed 'without prejudice' is not admissible in evidence and because of that, the 2<sup>nd</sup> Defendant cannot be heard to submit that a valid contract is entered. Moreover, there is no contract executed by both parties by way of consent order/letter.

Ms. Jonmohamed appearing for the 2<sup>nd</sup> Defendant submitted that the general rule of inadmissibility of correspondence exchanged 'without prejudice' is not absolute. It is by now trite that the communication made 'without prejudice' are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached (see Halsbury's Laws of England (4<sup>th</sup> Edition 17<sup>th</sup> Vol. paragraph 213).

The case of *Lochab Transport Ltd. –vs- Kenya Arab Orient Insurance Ltd. (1986) e KLR* was relied upon.

Similar issue of compromise on without prejudice was raised and Hon. Shield J. observed thus:-

**“I do not understand this plea. It could only be made by a lawyer who did not understand the significance of the words ‘without prejudice’. You cannot have an agreement made without prejudice. If an offer is made ‘without prejudice’, evidence cannot be given of this offer. However, if this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of the terms of the ‘without prejudice’ letter offer.”**

Mr. Twahir, the learned counsel appearing for the 1<sup>st</sup> Defendant responded by relying on Halsbury’s Laws of England (4<sup>th</sup> Edition, Vol. 37 paragraph 593), wherein it is stated that **“When there is agreement between the parties not to disclose the document or information that can be a ground for refusing the disclosure to the court and that where communications are expressed to be ‘without prejudice’ and are made as a part of negotiations in an attempt to compromise the proceedings they are subject to privilege from the disclosure to the court by either party.”**

I shall have no difficulty in accepting the above propositions of law which is time tested as well as fair and judicious.

Are the facts of this application covered under the above principles?

The first letter of proposals from the 1<sup>st</sup> Defendant was addressed to both the parties i.e. the 2<sup>nd</sup> Defendant and the Plaintiff. The two proposals, in my considered view, were distinct and could be accepted by two parties separately. The facts of this case are not complex and I further note that unless the 2<sup>nd</sup> Defendant does not release the motor vehicle, the claim of the Plaintiff cannot be properly heard and determined.

The 1<sup>st</sup> Defendant entered into two separate contracts first with the Plaintiff for release of car from the bonded warehouse and then with the 2<sup>nd</sup> Defendant for the sale of the vehicle by the public auction. There is no direct relationship between the Plaintiff and the 2<sup>nd</sup> Defendant. In response to the proposal offered to him, the 2<sup>nd</sup> Defendant accepted the same, and has reiterated the same in the second letter of 8<sup>th</sup> March, 2011 stressing that there is a concluded agreement when the 2<sup>nd</sup> Defendant accepted the proposal made by the 1<sup>st</sup> Defendant. The offer and acceptance thereof thus makes a concluded agreement. There was furthermore no condition that the two proposals made in 1<sup>st</sup> Defendant’s letter of 26<sup>th</sup> August, 2010 have to be accepted by both the parties to be effective.

The 1<sup>st</sup> Defendant did not respond to the acceptance by the 2<sup>nd</sup> Defendant and acceptance has been in effect since then. The internal correspondence between the 1<sup>st</sup> Defendant and its advocate has no value which can be added to the concluded agreement.

Without much ado, in view of the premises aforesaid, I allow the application and order that the Toyota RAV4 Chassis No. ACA21-0084330 and bearing Registration No. KBE 493H be returned to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant and be delivered to the officer designate within 10 days from date hereof and that the 1<sup>st</sup> Defendant refund to the 2<sup>nd</sup> Defendant a sum of KShs.2,000,000/= with interest at court rates from the date the 2<sup>nd</sup> Defendant paid the said sum to the 1<sup>st</sup> Defendant till the said sum is refunded by the 2<sup>nd</sup> Defendant.

I shall not make any order on the costs hereon.

**Dated, signed and delivered** at Nairobi this 21<sup>st</sup> day of **September, 2011**

**K. H. RAWAL**  
**JUDGE**  
**21.9.2011**