



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS**  
**Civil Suit 219 of 2007 (OS)**  
**ONGATA RONGAI TOTAL FILLING STATION LTD.....PLAINTIFF**

**VERSUS**

**INDUSTRIAL AND COMMERCIAL  
DEVELOPMENT CORPORATION.....DEFENDANT**

**JUDGMENT**

The plaintiff filed suit by way of originating motion seeking orders of permanent injunction to restrain the defendant from selling, alienating, disposing off or dealing in any other way with the plaintiff's properties known as LR Nos. Ngong/Ngong 27547, 23793, 23794, 23795, 23796 and 23797. The plaintiff further sought an order of the court to compel the defendant to unconditionally discharge the titles in respect of the suit properties and thereafter release the said titles to the plaintiff. The plaintiff prayed for the court to order the defendant to pay the costs of the suit. The motion is supported by the annexed affidavit of Ruth Wanjiru Wakapa, a director of the plaintiff company. As is usual with such cases, the defendant filed a defence to the originating summons by filing a replying affidavit. Grace M. Magunga, the corporation secretary of the defendant swore a replying affidavit in opposition to the originating summons.

The parties agreed to dispose off the originating summons by oral submissions. I heard the rival submissions made by Mr. Chege for the plaintiff and by Mr. Mulwa for the defendant. I have carefully read the pleadings filed by the parties in support of their respective opposing positions. I have also considered the rival arguments presented to the court by counsel for the parties to this suit. The issue for determination by this court is whether the plaintiff made a case to entitle this court grant the reliefs sought in its originating summons. Certain facts are not in dispute in this suit. In 1995, the defendant advanced to the plaintiff a loan of the sum of KShs.5 million to enable the plaintiff secure working capital and to purchase machinery and equipment for its business. The loan was secured with a charge over LR No. Ngong/Ngong/7505. The plaintiff made effort to repay the loan, but at some point, fell in arrears.

During this period, the plaintiff requested the defendant to temporarily discharge the property to enable the plaintiff sub-divide the same. The defendant agreed to discharge the property on professional undertaking by the plaintiff's then advocate that upon the sub-division of the property, the plaintiff would repay in full the then outstanding sum. It appears that the plaintiff failed to honour its part of the bargain. The property was sub-divided into six (6) parcels of land, namely LR Nos. Ngong/Ngong 27547, 23793, 23794, 23795, 23796 and 23797 (*hereinafter referred to as the suit property*). The defendant sought to

realize the security charged to it by exercising its statutory power of sale.

It was common ground that when the defendant informed the plaintiff of its desire to dispose of the suit properties, the plaintiff and the defendant entered into out of court negotiations with a view to amicably resolving the matter. The plaintiff pleaded with the defendant to consider waiving part of the interest that had accrued at the time. It is not disputed that after protracted out of court negotiations, the defendant agreed to the plaintiff's proposal to pay the sum of KShs.3 million in full and final settlement of the then outstanding amount. At the time the defendant accepted the plaintiff's proposal, the outstanding amount due was KShs.6,792,130.50 as at 31<sup>st</sup> December 2005.

The defendant communicated its acceptance of the plaintiff's proposal vide its letter dated 28<sup>th</sup> February 2006. The said letter was written on "*without prejudice*" basis. This was despite the fact that the initial correspondence exchanged between the plaintiff and the defendant were not on "*without prejudice*" basis. In the said letter, the defendant informed the plaintiff that it should pay the agreed sum of KShs.3 million within six (6) months of the said date, or in default thereof the defendant would consider the offer to have lapsed and would institute recovery measures of the entire sum that would then be outstanding. It was common ground that pursuant to the said communication by the defendant, the plaintiff paid the said sum of KShs.3 million by installments by 31<sup>st</sup> July 2006 which was within the period of six (6) months from the date the defendant notified the plaintiff of its decision.

If I understood the defendant's case correctly, the thrust of its case is that the plaintiff could not rely on a "*without prejudice*" communication in support of its case that the claim had been compromised in the present suit. The defendant argued that the rule against admission of "*without prejudice*" communication precluded this court from admitting the said letter as evidence in support of the plaintiff's case in these proceedings. On the other hand, the plaintiff contends that the court must admit the said two letters written by the defendant to the plaintiff signifying its acceptance of the plaintiff's proposal for waiver of accrued interest and the final settlement of the claim. The plaintiff argued that since it changed its position pursuant to the said communication by the defendant, the defendant was estopped from denying the existence of the said correspondence. It was further the plaintiff's case that the "*without prejudice*" rule did not apply in this case because negotiations between the plaintiff and the defendant led to the out of court settlement of the dispute.

The issue for determination by this court is whether indeed the defendant can rely on the "*without prejudice*" rule to preclude admission of the two letters written by the defendant dated 28<sup>th</sup> February 2006 and 30<sup>th</sup> March 2006 which notified the plaintiff of the defendant's acceptance of the plaintiff's proposal which sought waiver of the then accrued interest. In **Unilever vs. Procter & Gamble [2001] 1 All ER 783**, Robert Walker L. J. set out the justification for the "*without prejudice rule*". At page 789 he stated as follows:

***"Without prejudice communications: general***

In **Rush & Tompkins Ltd vs. Greater London Council [1988] 2 All ER 737** at 739 – 740, [1989] AC 1280 at 1299, Lord Griffiths said:

*"The "**without prejudice rule**" is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver L.J. in **Cutts vs. Head ([1984] 1 All ER 597** at 607 – 606, [1984] Ch 290 at 306): "That the rule rests, at least in part, on public policy as is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in **Scott Paper Co. vs. Drayton Paper Works Ltd (1927) 44 RPC 151** at 156, be encouraged freely and frankly to put their cards on the table ... the public policy justification, in truth,*

*essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.” The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.’*

*This well-known passage recognizes the rule as being based at least in part of public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensues.”*

It is therefore clear that as a general rule, communication between parties to a suit, made on “*without prejudice*” basis will not be admissible in evidence. However, there are exceptions to this general rule. Under **Section 23 (2)** of the **Evidence Act**, an advocate is not exempted from giving evidence in regard to any matter that he may be compelled to give evidence under **Section 34** of the **Act**. Other exceptions were set out in the **Unilever vs. Procter & Gamble** case (*supra*) and in **Cutts vs. Head [1984] 1 All ER 597**. They include, *inter alia*, where the issue is whether the “*without prejudice*” communication had resulted in a compromise settlement; where it was admissible to show that an agreement apparently concluded between the parties during negotiations should be set aside on the ground of misrepresentation, fraud or undue influence; where a statement might be admissible as giving rise to an estoppel; where the exclusion of the evidence would act as a cloak for perjury, blackmail, threat or other unambiguous impropriety; where the evidence is admissible in order to explain delay or apparent acquiescence, for instance, in application to strike out proceedings for want of prosecution; and where in an action for negligence, the evidence was admissible to show that the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a third party.

In the present case, the defendant wishes the court to exclude the two letters which communicated to the plaintiff its acceptance of the plaintiff’s request for waiver of the then accrued interest on the basis that the said letters were written under the “*without prejudice*” rule. Having carefully considered the applicable law on “*without prejudice*” communications, I am unable, with respect to the defendant, to agree with the defendant’s position. As stated earlier in this judgment, the initial correspondence between the plaintiff and the defendant in relation to the request made for waiver of interest were not made on “*without prejudice*” basis. I hold that although the defendant’s acceptance of the plaintiff’s request for waiver of interest was communicated in writing on “*without prejudice*” basis, it was evident to this court that once the plaintiff took action on the basis of the said communication, the law allowed it to rely on the said letters in support of its case that the defendant had accepted to be paid the said sum of KShs.3 million within a specified period, which period the plaintiff abided by, in full and final settlement of the amount then owing to the defendant. I am of the view that since the said letters communicated to the plaintiff the defendant’s acceptance of the plaintiff’s request to be granted waiver of interest by the defendant, the said letters fell in the category of “*without prejudice*” communication that was admissible in evidence as an exception to the general rule that prohibits admissibility of “*without prejudice*” communications in evidence. I further hold that the defendant is estopped from denying that it wrote the said letters to the plaintiff, and further the fact that the communication resulted in the plaintiff paying the said sum of KShs.3 million in the belief that it was settling the outstanding debt, fully and finally.

The defendant further argued that since the waiver of interest was not approved by the management of the defendant, the plaintiff could not rely on the said letters in support of its case that the defendant had compromised its claim. I have considered the said submission. It is trite law that a corporate body cannot use the excuse of failure to comply with its internal procedures to defeat a legitimate claim of a third party unless it is established that the claimant was aware of the existence of such internal rule or regulation. As was held in **Morjaria vs. Kenya Batteries [1981] Ltd and Others [2002] 2EA 475**, whether a company has or has not complied with its internal procedures as regard to borrowing or execution of contracts is an internal management issue and cannot constitute a defence to a third party’s legitimate claim that arose during its contact with the company. The third party is entitled to assume that the company complied with its internal rules and regulations, unless it is established that he has or has had actual knowledge of the rules and regulations or there are suspicious circumstances putting such a party on inquiry.

From the foregoing, it is evident that the plaintiff has established its claim to the required standard of proof on a balance of probabilities. The plaintiff established that it paid the sum of KShs. 3 million which was required of it to be paid to the defendant within six (6) months of 28<sup>th</sup> February 2006, for the plaintiff's then outstanding debt with the defendant to be considered as fully settled. The plaintiff paid the final balance of the said sum of KShs.3 million on 31<sup>st</sup> July 2006. This court therefore declares that pursuant to the agreement between the plaintiff and the defendant, upon the payment of the said sum of Kshs.3 million, the plaintiff had fully repaid the loan advanced to it by the defendant.

The defendant is therefore restrained by permanent injunction from selling, alienating, disposing off or in any manner whatsoever dealing with the plaintiff's properties, being LR Nos. Ngong/Ngong 27547, 23793, 23794, 23795, 23796 and 23797. Since the said properties were offered as security for the sum which was advanced by the defendant to the plaintiff, and since the said loan has already been repaid in full, I hereby direct the defendant to forthwith unconditionally discharge the titles in respect of the said suit properties and release the title documents in respect of the said suit properties being LR Nos. Ngong/Ngong 27547, 23793, 23794, 23795, 23796 and 23797 to the plaintiff.

The plaintiff shall be paid the costs of the suit.

**DATED at NAIROBI this 29<sup>TH</sup> day of APRIL, 2009.**

**L. KIMARU**

**JUDGE**