

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 493 of 2003

CHARLES DAVY KIPNGETICH ARAP KIRUI.....PLAINTIFF

VERSUS

WANGETHI MWANGI

THE NATION GROUP LTD.....DEFENDANTS

RULING

The matter herein is part heard. The Plaintiff is in the process of giving evidence in chief. He had reached a stage where he was giving evidence introducing the defendant's response to the Plaintiffs Counsels demand letter. It is dated 19th December 2002. It is marked "*without prejudice*" when the Plaintiffs Counsel moved to have the letter produced as an exhibit, the defence objected because it is a "without prejudice" letter. In response, the Plaintiff's Counsel has argued that despite it being titled "without prejudice" it does not fall into the category of without prejudice" correspondences which can be withheld from production as it was not written in pursuance to negotiations with a view to settling the matter. To this, the defence still maintains that the letter is immune from production in terms of the provisions of Section 23(1) of the evidence Act.

To resolve this the Court has had occasion to revisit Section 23(1) of the evidence Act Cap.80 Laws of Kenya

ase law on the subject. Section 23(1) of the Evidence Act reads "*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*". The central theme in that section is that "*there must be an express condition that evidence of it is not to be given or that parties themselves have agreed that evidence of it should not be given or alternatively by way of inference by the court. that the same was not to be given in evidence*". Herein there is no express condition or agreement of the parties explicitly on the record that the same should not be given in evidence. If anything, the court may infer from the appending of the words "*without prejudice*" on the same.

In order for it to be excluded it has to satisfy certain pre-requisites as shown by case law. This court had occasion to rule on a similar objection in the case of JANET OSEBE GACHUKI VERSUS THE COMMISSIONER OF CUSTOMS AND EXCISE AND RAJEN H. MAIDE NAIROBI, HCCC NO.210 OF 2005 delivered on 13th day of July 2007. At page 17-18 of the ruling this court quoted with approval the decision of Onyango Otieno J. as he then was (now J.A.) in the case of **D.O. SANGA AND ANOTHER VERSUS RELI COOPERATIVE SAVIAGNS AND CREDIT SOCIEITY LTD MILIMANI COMMERCIAL COURT HCCC NO.109/00** at line 7 from the bottom it is stated. '*The test is whether the Communication was part of a genuine attempt to settle a dispute. If so the whole course of the negotiation is protected. It is immaterial that it can be said from individual documents that they contain no offer*'. At line 3 from the bottom it is observed "*the mere fact of the heading of a document "without prejudice is not in the least decisive*". At page 18 of the ruling line 5 from the top it is stated "*Thus the real test is whether the communication was part of a genuine attempt to settle a dispute*" on the same page 18 line 9 from the bottom this court quoted with approval Visram J. in the case

of **AMINGA VERSUS UNITED INSURANCE CO. LTD NAIROBI HCCC NO. 1186/00** where the learned judge ruled that *“the mere marking of correspondence as “without prejudice” does not automatically render them in admissible. Such statements are not excluded unless if they are made in the course of negotiation for the settlement of a dispute.”*

Applying the above principles to the facts herein, it is clear that the test to be applied is whether the said document was made in furtherance of negotiations to settle the dispute. In the absence of that, mere making of the document “without prejudice” will not afford it protection that it is envisaged by the law. This has been considered in the light of the document objected to and finds that the said letter was in response to a demand letter from the plaintiffs advocate. It has nothing to do with negotiations with a view to settling the matter herein. In fact it is a denial of liability. This being the case the mere branding of the letter “without prejudice” does not afford it the protection accorded by law. It is ruled not to fall within the class envisaged by law. It is ordered admissible in evidence.

The objection is overruled with costs to the plaintiff.

DATED, READ AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2007.

R.N. NAMBUYE

JUDGE