



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 1844 OF 2001**

**GEOLOY INVESTMENTS LTD.....APPLICANT**

**VERSUS**

**BEHAL T/A KRISHAN BEHAL & SONS.....RESPONDENT**

**RULING**

By his application dated 18.4.2002 the defendant has invoked Order 9B rule 8 Civil Procedure Rules and section 3A Civil Procedure Act so that this court exercises its discretion to set aside an *ex parte* judgment it entered against him on 17.4.2002.

Mr Kariuki went over the course of proceedings in this file so far, including the fact that on the said 17.4.2002 this court heard the plaintiff's application dated 4.3.2002 which sought the striking out of the defence on record and entering judgment. Therein it had been pleaded that that defence raised no triable issues but that it was meant to delay the trial of this suit and was an abuse of the process of court. It was not in dispute that the plaintiff's application dated 4.3.2002 was served on the defendant's lawyers on 14.3.2002. It bore the hearing date of 17.4.2002. It is also not in dispute that for over a month – before the hearing on 17.4.2002 the defendant did not file a replying affidavit or a statement of grounds of opposition to that application at all. Again it was admitted that the defendant's lawyer did not attend court on 17.4.2002.

Mr Kariuki told the court that on that day 17.4.2002 he had two other matters in the downtown registry – HC MISC APPL 402/2002 coming at 2.30 pm, and HCCC 2157/99 which was coming earlier – at 9 am. That he was able to adjourn the latter matter but could not attend the court at Milimani on time for the plaintiff's application aforesaid. That his assistant was on leave and attempts to find the Milimani court staff to convey the dilemma he was in, were unsuccessful.

Mr Kariuki went on to tell the court that, he did not delay in bringing this application and that the provisions of law he cites are still in his client's favour even if he had not filed a replying affidavit and/or grounds of opposition to the application of 4.3.2002 and he was not present on 17.4.2002.

That the *ex parte* judgment was obtained/given because the plaintiff relied on a "WITHOUT PREJUDICE" letter as evidence of admission of debt, which letter was not admissible in law as evidence. That indeed the plaintiff had not by 17.4.2002 exhibited two "RD" cheques from the defendant, which it was now introducing at this stage of hearing a setting aside application. That the order point that is triable is to the effect that while it had been deposed to firmly in the affidavit supporting the application dated 4.3.2002, that the defendant himself signed invoices and delivery notes, forming the basis of the claim of sh 1,871,475/55 for goods sold and allegedly delivered, in this application, the plaintiff was now saying that the defendant's employee may have signed the said documents. All this and more appears in Mr Kariuki's own affidavit in support of the present application. He also laid before the court several cases

which the court perused during arguments and later.

Mr Iseme on his part could not agree with Mr Kariuki on the point that the *ex parte* judgement of 17.4.2002 be set aside. While noting that Mr Kariuki may have been in a situation where he had several matters listed in different registries on the same day, but still the application dated 4.3.2002 was not opposed in accordance with Order 50 rule 16 Civil Procedure Rules. He added that section 23 Evidence Act (Cap 80) contained what should or should not be seen as proper evidence when “without prejudice” aspects came into play. He too cited cases, some agreeing with the defendant’s view that once sufficient material or reasonable cause is shown why a party did not appear at a given hearing, then whatever orders followed that hearing, may be set aside.

Other cases were however to the contrary and Mr Iseme was not able to discern sufficient material on which to set aside the judgment of 17.4.2002 or that there were triable issues to go to trial in the light of the admission of the debt.

This court heard both sides. It is correct to say that under Order 9B rule 8 Civil Procedure Rules any judgment or order entered at a hearing where the other party did not appear, the same may be set aside upon such terms are just. It is also not in doubt that as the court considers the application to set aside that order or judgment, it must be satisfied with material placed before it by the applicant that the order to set aside ought to issue in its favour. That the reasons, grounds, causes or explanations advanced by the applicant are such that the orders sought are deserved and warranted and that it is just to give such orders. That the applicant is not seeking such orders while in his mind or by acts he wants to deliberately delay the final determination of the cause or in any way prejudice the respondent. All these are laid out in the cases the parties cited.

Here Mr Kariuki told the court what one would say, though more on the side that he ought to have made suitable arrangements for a lawyer to hold his brief when the judgment of 17.4.2002 was passed, while he had other matters elsewhere, that state of things can be considered reasonable and so deserving of the orders to set aside. But then we have to look at what the state of the proceedings were.

It has already been set out above that the defendant for over a month from the time he was served with the application dated 4.3.2002 up to the hearing of the same on 17.4.97, had not replied to oppose it. What difference does it make that Mr Kariuki did not appear before the court which was about to hear the application to strike out the defendant’s defence and enter judgment in favour of the plaintiff? Let us look at Order 50 rule 16 Civil Procedure Rules:

“16 (1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a reply affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of the hearing.  
(2) Any application upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with leave of the court, file a supplementary affidavit.  
(3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard *ex parte*”.

In this matter the applicant did not file a replying affidavit or grounds of opposition to the plaintiff’s application dated 4.3.2002 three clear days before its hearing on 17.4.2002. So in the terms of Order 50 rule 16 (1) Civil Procedure Rules he did not wish to oppose that application. So with or without Mr Kariuki’s presence on 17.4.2002 the court could have gone on and heard the plaintiff’s application *ex parte* i.e it was unopposed, followed with due orders. That is what took place on 17.4.2002 Mr Kariuki only told the court that he had sufficient reasons not to attend the court and that it was not a deliberate action to obstruct, or delay the cause of justice at all. But he does not argue further to say that at that sitting he would have urged the court on good reasons that he had not replied to oppose the application and that he would have sought time to do the needful under Order 45 rule 5 Civil Procedure Rules (to enlarge time within which to file a replying affidavit and/or grounds of opposition to the plaintiff’s application dated 4.3.2002). So even if the *ex parte* judgment of 17.4.2002 is set aside under Order 9B rule 8 Civil Procedure Rules as the defendant prays, what would it mean in substance? Nothing. Because

even had Mr Kariuki attended the court yet he had not opposed the application, it could have still been heard *ex parte* and judgment delivered. Because the defendant does not even now say that on attending court on 17.4.2002 he could have sought the court's indulgence to allow him to oppose the application in enlarged time. Thus all the time the defendant was never of the intention to oppose the plaintiff's application dated 4.3.2002.

The court now addresses S 23 of the Evidence Act. It says in its relevant part:

"23. (1) In civil cases no admission may be proved 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.

(2) ....."

The marginal notes to this provision read:

"Admission made without prejudice in civil cases."

Mr Kariuki argued and quite forcefully that this provision in our law does not lay down the process/guidelines by which a "without prejudice" document can or cannot be taken into evidence. He reiterated the position that on 17.4.2002 the plaintiff had asked the court to give the judgment under attack on the grounds among others that by his letter of 25.1.2002 the defendant had admitted the debt of sh 1,871,475/55 – the basis of the suit herein. That that letter which bore the remarks 'WITHOUT PREJUDICE' ought not have been relied on by the plaintiff to seek and get the judgment as it did. The reason is that such kind of communication between parties does not attach liability or basis to sue at all. That the said section 23 (Cap 80), having no process by which to go as said earlier, did permit of this court to fall back on common law cases which have held that "without prejudice" communication should not find its way in evidence against a party to a suit.

The case of:

*Oliver v Nautilus Steam Shipping Co Ltd* [1903] 2 KR 639

*Walker v Wilsher* [1889] 23 QBD 335

*Kurtz & Co v Spence & Sons* [1888] 57 LR 238 *Rabin v Mendoza & Co* [1954] 1 All ER 247

*La Roche v Armstrong* [1922] 1 KB 485

Very good cases these were but they seemed to fall aside of our present case. They all invariably referred to negotiations or conversations undertaken on "without prejudice" basis. Was the defendant's letter of 25.1.2002 of such a nature? Not quite. This is so as the letter itself says in the relevant parts

: "Reference is made to the above and in reply we would like to clarify the following issues which we discussed and agreed at our meeting on 21st January 2002, at your office.

The outstanding amount of Ksh 1,871,475/55 will be paid by four consecutive monthly instalments with effect from 31st January 2002 i.e. Ksh 467,868.90 on 31st February 2002, Ksh 467,868.90 on 28th February 2002, Ksh 467,868.90 on 31st March 2002 and the final instalment of Ksh 467,868.90 on 30th April 2002. .... (underlining supplied)

signed."

This is not a letter during negotiations or of such a nature that one party taking to rely on it as the plaintiff did here, amounts to bursting the protection or reservation of that letter at the disadvantage of the defendant. It could be acted on without further ado. It is not uncertain, unambiguous or in any way

detracting from what the defendant owed. In the case of *Cooperative Bank of Kenya Ltd v Shiraz Sayani* MBA HCCC 23/99 the learned Waki J was considering an argument that any document with remarks “without prejudice” automatically excludes from even being looked at to evidence one thing or another in dispute. Remarkd the learned judge:

“The issue raised by Mr Gikandi on communication made “without prejudice” is not a novel one. The rubric “without prejudice” has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of dispute. Until such time as there is definite (sic) agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. As I understand it, the rubric simply means “I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which you may accept or not, as you like, but if you do not accept it, my having made it, is to have no effect at all.” It is a privilege that is jealousy guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements.”

With that reasoning Waki J rejected the argument that “without prejudice” communication shuts out all and gives protection to the author(s).

The present letter preceded the defence which denies liability. It was nonetheless an admission of the debt in which again like in the *Cooperative Bank* case (above), interest and charges were said never to have been discussed and agreed.

The court may add an extract from HCCC (MIL) No 213/99

*National Industrial Credit Bank Ltd v Yandal Enterprises Ltd & 2 others*

where again “without prejudice” documents were being regarded by Ransley C.A. He quoted from *Sakar: On Evidence*, 14th Edn page 359 under the scope “Exceptions”:

“The rule, however, is strictly confined to cases where there is a dispute or negotiation, and suggestions are made for settlement thereof. Where this is not the case .... the sender of a letter cannot impose on the recipient any condition as to the mode in which it may be used by marking it “without prejudice.”

From the foregoing this court is satisfied that the defendant’s letter in issue was properly admitted on 17.4.2002 as forming the basis of the claim that was granted by the court. The court however adds that introducing the two “RD” cheques, also commented on above, is not regular at this stage and they add nothing to the case anyway.

Similarly the court did not find merit in the arguments that Mr Iseme’s affidavit in support fell to be struck out in some parts of its deposition.

In sum the application is dismissed with costs.

Orders accordingly.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of June, 2002**

**J.W MWERA**

**JUDGE**