



County Government of Busia v Trident Insurance Company Limited (Commercial Case 333 of 2018) [2025] KEHC 949 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 333 OF 2018
MN MWANGI, J
JANUARY 17, 2025**

BETWEEN

COUNTY GOVERNMENT OF BUSIA PLAINTIFF

AND

TRIDENT INSURANCE COMPANY LIMITED DEFENDANT

RULING

1. The defendant/applicant filed a Notice of Motion application dated 11th October 2022 pursuant to the provisions of Order 25 Rule 5 of the Civil Procedure Rules, and Sections 1A, 1B & 3A of the [Civil Procedure Act](#). The defendant seeks an order that a consent be recorded in terms of the negotiated settlement between the parties herein, and thereafter judgment be entered in favour of the defendant in the sum of Kshs.45,000,000/=, all inclusive.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Maurice Otieno Omuga, an Advocate of the High Court of Kenya and learned Counsel for the defendant. He averred that the defendant instructed his law firm to file a defence and counter-claim to the plaintiff's suit, on the ground that the plaintiff had paid the defendant Kshs.169,165,172.00 out of a contract sum of Kshs.209,165,172.00, thereby leaving a balance of Kshs.40,000,000/=, but the plaintiff failed to respond to the counter-claim or take steps to prosecute the case, leading to a default judgment being entered in favour of the defendant.
3. Mr. Omuga averred that the plaintiff applied to set aside the default judgment and sought leave to file a defence to the defendant's counter-claim albeit out of time. He stated that the defendant consented to the plaintiff's request by a letter dated 13th January 2020, which was adopted as an order of the Court on 25th February 2020.



4. Counsel stated that while the contract was being adopted, out-of-court settlement negotiations had commenced, and they were concluded on 19th November 2020 with the plaintiff making an offer of Kshs.45,000,000/= all inclusive, which was communicated to the defendant vide a letter dated 16th November 2020, and that the offer was accepted by the defendant. The defendant contended that the plaintiff failed to fulfill the payment during the agreed 2020/2021 financial year. Mr. Omuga averred that the "Without Prejudice" negotiation letters lost their privileged status once the settlement was finalized, and they can be considered by the Court. He asserted that this Court has the mandate to consider their true intent and meaning. He contended that the plaintiff lacked a valid defence and was using delaying tactics to avoid payment of the outstanding amount.
5. In opposition to the application, the plaintiff filed a replying affidavit sworn on 14th November 2023 by Marren Adunga, an Advocate of the High Court of Kenya, and the learned Counsel for the plaintiff. She stated that they have no instructions to proceed with the negotiated terms, which should not be seen as an admission of fault. She averred that this Court lacks jurisdiction to record a compromise based on out-of-court negotiations, in the absence of a consent that has been duly filed or signed by the parties herein. Ms. Adunga asserted that out-of-court negotiations are done at the discretion of the parties and are non-binding until a formal consent is duly signed and filed.
6. Further, she averred that the Court cannot enforce a unilateral consent or substitute itself in place of the plaintiff. Counsel stated that the documents marked "Without Prejudice" are privileged and inadmissible unless a binding agreement has been reached. She emphasized that the "Without Prejudice" rule exists to encourage settlements without fear of prejudicing litigation.

Ms. Adunga contended that in the absence of a duly executed consent between the parties herein, the main suit should proceed to full hearing.
7. The instant application was canvassed by way of written submissions. The defendant's submissions were filed by the law firm of Omuga Advocates LLP on 23rd February 2024, whereas the plaintiff's submissions were filed on 2nd April 2024 by the law firm of Rachier & Amollo LLP.
8. Mr. Omuga, learned Counsel for the defendant cited the provisions of Order 25 Rule 5(1) of the Civil Procedure Rules, 2010 and submitted that the plaintiff, vide a letter dated 28th September 2020, offered to settle this suit for Kshs.45,000,000/= all inclusive, and he then inquired about payment timelines vide a letter dated 15th October 2020, and the plaintiff's Advocates responded in a letter dated 16th November 2020, indicating willingness to settle the amount during the 2020/2021 financial year. He submitted that the defendant then prepared and signed a letter of consent dated 19th November 2020, and forwarded it to the plaintiff's Advocates for their signature.
9. Counsel argued that by accepting the counter-offer, the negotiations despite the "Without Prejudice" letters were concluded, creating a new binding contract distinct from the original cause of action. Mr. Omuga cited the case of HCCC No. 191 of 2001 Kiambu Service Store Limited v Joseph Muchina Muriuki & Vera Properties Limited, and stated that while "Without Prejudice" communication are typically privileged, this protection ends once the proposal is accepted by the opposing party. He asserted that in this case, the acceptance of the proposal created a new contract which supersedes the original cause of action.
10. Ms. Adunga, learned Counsel for the plaintiff relied on the case of International Air Transport Association & another v Connect Travel Limited & 2 others [2016] eKLR, and submitted that the applicant seeks to rely on correspondence marked "Without Prejudice" as the basis for seeking this Court to enter judgment in favour of the defendant against the plaintiff. He stated that the said



exchanges were privileged communication aimed at arriving at an amicable resolution of the dispute, hence they should be excluded from the case record.

11. She further submitted that the defendant had selectively presented facts regarding the alleged consent, which was conditional and rendered obsolete by subsequent events, hence it did not form a legally enforceable agreement. As such, it cannot serve as a basis for judgment. Counsel argued that even if the negotiations were deemed enforceable, Clause 4 of the consent specified that failure to pay by 30th June 2021, would revert the parties to their original positions. She urged for the matter to proceed to hearing and be decided on its merits.

Analysis and Determination.

12. Upon consideration of the instant application, the affidavit filed in support thereof, the replying affidavit by the plaintiff, and the written submissions by Counsel for the parties, the issue that arises for determination is whether the communication between the parties culminated in a legally binding contract.
13. The application herein has been brought pursuant to the provisions of Order 25 Rule 5(1) of the Civil Procedure Rules, 2010 which states as hereunder –

Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

14. The defendant's case is that the parties herein engaged in out-of-court negotiations with a view of amicably settling the dispute in the main suit out of Court. The defendant however claimed that although the aforesaid negotiations were conducted on "Without Prejudice" letters, the said letters lost their privileged status once the defendant accepted the plaintiff's offer and the settlement was finalized. He stated that the Court can examine the contents of these letters to assess their accuracy and reflect the true intent of the parties. The plaintiff on the hand agreed that out-of-court negotiations took place but contended that since no consent was signed, as the settlement was not finalized, the "Without Prejudice" letters should not be admitted as evidence or used against the plaintiff.
15. It is trite law that a "Without Prejudice" letter protects the contents of the communication from being used as evidence in Court. The said term indicates that statements made in an effort to settle a dispute are not meant to impact the legal rights of the person making them. The Court in the case of *Geology Investments Ltd v Behal t/a Krishan Behal and Sons* [2002] 2 KLR 447, addressed itself on the effect of a "Without Prejudice" letter as follows -

The rubric "without prejudice" has been used over the ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlement of dispute. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any party. The rubric simply means "I will make you an offer, if you do not accept it, this letter should not be used against me. Or I make the 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 jealously guarded by the court otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlement.



16. In *Oceanbulk Shipping and Trading SA v TMT Asia Limited and 3 others* [2010] UKSC 44 quoted by the Court in *KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others (Civil Case 446 of 2015)* [2023] KEHC 24298 (KLR), the Court in addressing the legal principles of the "Without Prejudice" rule, in a majority decision of the Supreme Court of the United Kingdom in the Oceanbulk case stated as follows -

The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute.

17. Further, in *KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others* (supra), the Court in dismissing an application similar to the instant one held that -

In addressing this issue, Halsbury's Laws of England vol 17 at paragraph 213 states-

The contents of a 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 and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible.

From the foregoing, it is clear that without prejudice communication is protected. However, it can be relied on where there is compromise. This includes where there is acceptance of the proposal made on a without prejudice. The acceptance must be unequivocal and without conditions. Where it is accepted with conditions, the same amounts to a counter-offer and the rules relating counter-offers apply. (Emphasis added).

18. It is not in contest that the negotiations between the parties herein with a view of amicably settling the dispute between them were conducted through "Without Prejudice" letters. Therefore, in order for this Court to determine whether or not the contents of the said letters are privileged and cannot be admitted into evidence, the defendant has to demonstrate that it unconditionally accepted the plaintiff's offer.

19. The plaintiff vide a "Without Prejudice" letter dated 28th September 2020, offered to settle this suit for Kshs.45,000,000/= all inclusive. Thereafter, the defendant inquired about payment timelines vide a letter dated 15th October 2020, and the plaintiff's Advocates responded in a letter dated 16th November 2020, indicating that the plaintiff was willing to settle the amount during the 2020/2021 financial year. As a result, the defendant prepared and signed a letter of consent dated 19th November 2020, and forwarded it to the plaintiff's Advocates for their signature. Upon perusal of the letter dated 19th November 2020 forwarding the aforesaid consent, in paragraph 1, the defendant's Advocates indicated that the defendant had accepted the plaintiff's counter-offer of Kshs.45,000,000/=, all inclusive, on condition that the entire amount would be paid in the course of the financial year 2020/2021, and should there be default, the parties would revert to their initial position in which the defendant would be liable to pay the principal sum of Kshs.40,000,000/= plus costs and interest.



20. The above in my view, was a counter-offer, which was open to acceptance and/or rejection by the plaintiff, thus it cannot be said that the plaintiff's offer was unconditionally accepted by the defendant. It does not therefore amount to an enforceable contract in order for this Court to conclude that the "Without Prejudice" letters written to the defendant by the plaintiff during negotiations lost their privileged status.
21. This Court as such finds that there was no compromise of the suit as the communication between the parties herein did not give rise to a contract that is capable of being enforced by this Court.
22. Accordingly, the defendant's application dated 11th October 2022 is unmeritorious. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Omuga for the defendant/applicant

No appearance for the plaintiff/respondent

Ms B. Wokabi - Court Assistant.

