



Unilever Tea Kenya Limited v Max Global Group Limited (Commercial Case E049 of 2021) [2025] KEHC 3272 (KLR) (Commercial and Tax) (7 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E049 OF 2021**

MN MWANGI, J

MARCH 7, 2025

BETWEEN

UNILEVER TEA KENYA LIMITED PLAINTIFF

AND

MAX GLOBAL GROUP LIMITED DEFENDANT

RULING

1. This ruling is in respect to two applications. The first application is the plaintiff's Notice of Motion dated 25th January 2021 filed pursuant to the provisions of Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Order 13 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The plaintiff's prayer is for an order that judgment be entered in favour of the plaintiff against the defendant based on the defendant's admission of indebtedness as pleaded in the plaint.
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 Mr. Edwin Komen, the plaintiff's Procurement Manager. He averred that the plaintiff contracted the defendant in December 2018 to supply 808 tons of fertilizer for USD 510,270.00. He deposed that the Agreement required an advance payment of USD 306,162.00, which the plaintiff paid on 17th January 2019. He further deposed that despite repeated demands, the defendant failed to deliver 664.72 tons of fertilizer as agreed or to refund the advance payment. He stated that the plaintiff sourced for fertilizer from another supplier at an extra cost of USD 116,876.20. Mr. Komen asserted that the defendant admitted its breach in a meeting held on 19th March 2020 and later expressed willingness to compensate the plaintiff, but no resolution was reached. He deposed that given the defendant's clear admission, the plaintiff seeks judgment without trial to avoid unnecessary costs and delays.



3. In opposition to the application, the defendant filed Grounds of Opposition dated 8th October 2021 raising the following grounds –
 - i. That the application as drawn is ex facie bad in law, misconceived, incompetent, oppressive, mischievous, contra-statute and an abuse of the Court process. The defendant will therefore urge the Honourable Court to dismiss the same in limine at the earliest opportunity;
 - ii. That the application was filed contemporaneously with the plaint of the same date and the grounds on the face of the application and in the affidavit in support thereof are a replica of the contents of the plaint;
 - iii. That there is no admission of the claim either by the defendant in the statement of the defence filed in Court or the documents attached to the affidavit of Mr. Edwin Komen, as such the application is misguided and ought to be dismissed;
 - iv. That the application does not meet the threshold in *Choitram v Nazari* [1984] KLE 327 as the alleged admissions are neither obvious nor as plain as a pikestaff. The grounds are not clearly readable and require more than a magnifying glass to ascertain their meaning;
 - v. That the plaintiff has attached a letter dated 29/04/2020 (page 34(a) which was written on a “without prejudice” basis. In addition, the same was not an admission as the plaintiff refused to comply with the precondition set by the defendant;
 - vi. That at paragraph (d) of the grounds on the face of the application the plaintiff has alleged loss of USD 116,876.20 which has neither been admitted nor proved. In addition, the claim for interest sought in the plaint was neither contractual nor admitted and will be subjected to proof at the trial; and
 - vii. That the defendant will seek leave of the Court to rely on the principles established in *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [2014] eKLR; *Choitram v Nazari* [1984] KLE 327 and *Cassam v Sachania* [1982] KLR 191 to the extent that the application is unmerited, unfounded and a mere attempt by the plaintiff to use the Court as a conduit to harass and intimidate the defendant.
4. The 2nd application is the defendant’s Chamber Summons dated 17th September 2021 filed pursuant to the provisions of Sections 1A & 3A of the *Civil Procedure Act* and Order 26 Rules 1, 5(1) & 6 of the Civil Procedure Rules, 2010 seeking orders that the plaintiff provides security for costs amounting to Kshs.5,000,000.00 within a specified period to be fixed by this Court, the security be in the form of a cash deposit in Court or a joint account held by both parties’ Advocates and if the plaintiff fails to comply, the suit be struck out with costs to the defendant.
5. The application is anchored on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Mr. Cornelius Kiplagat, the defendant’s Managing Director. He averred that the plaintiff’s claim of USD 332,360.00 which is equivalent to Kshs.36,559,600.00 exposes the defendant to significant legal costs in defending the suit. He denied that the defendant owes the claimed amount and asserted that its defence is bona fide with a high chance of success. He deposed that the defendant is concerned about recovering legal costs, estimated at Kshs.5,000,000.00, if the plaintiff loses. He urged this Court to order the plaintiff to deposit security for costs to safeguard the defendant against potential losses.
6. In opposition to the said application, the plaintiff filed Grounds of Opposition dated 24th January 2022 raising the following grounds –



- i. The application is frivolous, vexatious and an abuse of the process of the Court and is otherwise intended to delay the matter;
 - ii. The defendant's application is an effort to prevent this matter from being determined on its merits;
 - iii. The defendant has not shown that it would be unable to enforce an order of costs should one be made;
 - iv. Requiring the plaintiff to provide security for costs would amount to a denial of justice to the plaintiff, in particular having regard to the law and the merits of its claim against the defendant;
 - v. The application is an afterthought and an abuse of this Court's process;
 - vi. The application is misplaced, and ought to be dismissed with costs to the claimant;
 - vii. The said application has been filed after undue delay being over 6 months after the filing and service of the plaint and application dated 25th January 2021 together with all the supporting documents. Further, the present application is designed to frustrate the plaintiff and prevent it from pursuing its merited claim against the defendant; and
 - viii. The application is without merit and should be dismissed with costs.
7. The applications herein were canvassed by way of written submissions. The plaintiff's submissions were filed on 25th January 2023 by the law firm of Kaplan & Stratton Advocates, while the defendant's submissions were filed on 17th March 2022 by the law firm of Abidha & Company Advocates.
 8. Mrs. Opiyo, learned Counsel for the plaintiff cited the provisions of Order 13 Rule 2 of the Civil Procedure Rules, and relied on the case of *Choitram v Nazari* (supra). She submitted that the defendant has made clear admissions of the debt owed, has acknowledged the Agreement, purchase orders, and receipt of USD 306,162.00. She argued that the Agreement between the parties herein allowed the plaintiff to reject non-compliant products and seek reimbursement for alternative procurement. Mrs. Opiyo contended that the defendant admitted that its imported fertilizer was rejected due to quality issues and that it sought liability admission from its supplier. She stated that the said admission confirms the defendant's failure to deliver as per the contract, making it liable for the refund of USD 306,162.00 and an additional USD 116,876.20 incurred in sourcing for alternative fertilizer.
 9. She argued that the defendant's attempt to justify its breach still constitutes an admission, reinforcing its obligation to pay the outstanding amounts. She relied on the case of *Scanad Kenya Limited v Independent Electoral & Boundaries Commission* [2021] eKLR, and submitted that the defendant's averments constitute a clear implied admission through justification of default of the terms of the Agreement. Mrs. Opiyo referred to the case of *Kawamambanjo Limited v Chase Bank (Kenya) Limited & another* [2014] eKLR, and further submitted that "without prejudice" communication is admissible in evidence, where an Agreement between parties is reached.
 10. Counsel relied on the Court of Appeal case of *Messina & another v Stallion Insurance Co. Ltd* [2001] eKLR, and argued that the defendant has not made out a case to warrant being granted an order for security for costs.
 11. Mrs. Opiyo cited the case of *Keystone Bank Limited & 4 others v 1&M Holdings Limited & another* [2017] eKLR, and submitted that the defendant has not demonstrated the plaintiff's inability to pay its costs in the event that it is unsuccessful in its suit against the defendant.



12. She asserted that the plaintiff has established that it has a bona fide claim against the defendant and that the defendant's defence contains mere denials save for an implied admission of the plaintiff's claim. She stated that the plaintiff is able to pay costs for the defendant should its suit be dismissed, especially because it is a reputable company registered and carrying out business in Kenya, it is solvent, financially stable and has known assets in the jurisdiction of this Court. She contended that the defendant was unlikely to suffer any injustice whatsoever, should the Court dismiss its application for security for costs.
13. Mr. Abidha, learned Counsel for the defendant relied on the case of *Choitram v Nazari* (supra) and submitted that there is no admission of liability in the plaint or any correspondence. He further submitted that the plaintiff had failed to present any documents or correspondence proving any admission on the part of the defendant. He asserted that while the plaintiff referred to a meeting between both parties' agents, no minutes had been provided to verify any alleged admissions. He stated that the plaintiff had not made out a case for entry of judgment on admission.
14. On the issue of security for costs, Mr. Abidha cited the case of *Abel Moranga Ongwacho v James Philip Maina Ndegwa & 3 others* [2012] eKLR, and stated that the plaintiff herein only filed Grounds of Opposition and failed to counter the claim that the defendant may face challenges recovering costs if its suit is struck out. In addition, he stated that the plaintiff's own pleadings and documents indicate financial difficulties, justifying the request for security for costs.

Analysis and Determination

15. Upon consideration of the instant applications, the affidavits filed in support thereof, the Grounds of Opposition by the plaintiff and the defendant, and the written submissions by Counsel for parties, the issues that arise for determination are –
 - i. Whether this Court should enter judgment on admission against the defendant; and
 - ii. Whether an order for deposit of security for costs should issue against the plaintiff.

Whether this Court should enter judgment on admission against the defendant.

16. I note that both the parties herein filed Grounds of Opposition to oppose each other's applications. Needless to say, Grounds of Opposition cannot be relied upon to respond to factual issues as they are regarded as mere averments. In the case of *Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited* [2010] eKLR, the Court held as follows when addressing the issue of reliance on Grounds of Opposition:

The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant".

17. Judgment on admissions is provided for under Order 13 Rule 2 of the Civil Procedure Rules, 2010 which states that –

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such



admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.

18. The jurisprudence relating to applications of this nature is set out in the case of *Choitram v Nazari* (supra) where Madan, JA stated that -

For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. (Emphasis added).

19. In the same judgment, Chesoni Ag. JA., made the following observation -

Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions..... It is settled that a judgment on admission is in the discretion of the court and not a matter of right, that discretion must be exercised judicially.

20. It is trite that before the Court can grant a judgment on admission, the admission has to be unequivocal. This was the position taken by the Court in *Cassam v Sachania* [1982] KLR 19, where it held that -

Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal..

21. The plaintiff’s case is that it contracted the defendant in December 2018 to supply 808 tons of fertilizer for USD 510,270.00. The Agreement required an advance payment of USD 306,162.00, which the plaintiff paid on 17th January 2019. The defendant however failed to deliver 664.72 tons of fertilizer as agreed or to refund the advance payment. As a result, the plaintiff sourced for fertilizer from another supplier at an extra cost of USD 116,876.20. The plaintiff contended that the defendant admitted its breach in a meeting held on 19th March 2020 and later expressed willingness to compensate the plaintiff, but no resolution was reached. The defendant on the other hand submitted that the plaintiff has not adduced evidence to demonstrate the defendant’s admission of the alleged debt.

22. On perusal of the annexures attached to the plaintiff’s affidavit in support of its application for entry of judgment on admission, I note that the plaintiff has not produced minutes of the meeting held on 19th March 2020 for the me to ascertain whether indeed the defendant admitted to being in breach of its Agreement with the plaintiff. I further note that in support of its application, the plaintiff produced correspondence between the parties’ Advocates to assert that in the said letters, the defendant admitted to having failed to deliver the total quantity of fertilizer it was contracted to deliver, and that it expressed its intention to compensate the plaintiff for the undelivered fertilizer.

23. It is not in contest that the correspondence relied on by the plaintiff was clearly indicated on the face of it that it was written on a “without prejudice” basis. It is now well settled that letters written on “without prejudice” basis protect the contents of the communication from being used as evidence in Court. The term “without prejudice” depicts 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 letter written “without prejudice” 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.

24. 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 quoted the decision made in *Shipping and Trading SA v TMT Asia Limited and 3 others* [2010] UKSC 44, where in addressing the legal principles of the “without prejudice” rule, the Supreme Court of the United Kingdom in a majority decision 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.

25. 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 present 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 to 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.

26. It is evident at paragraph 11 of the plaintiff's supporting affidavit that in as much as the parties herein engaged in negotiations on “without prejudice” letters with a view of amicably settling the dispute



between the parties herein, no resolution was ever reached. The plaintiff avers that it offered the defendant a counter proposal but it did not receive a response from the defendant on the same. That in itself is evidence of lack of a meeting of minds and/or an Agreement between the parties herein. In the premise, it is my finding that the “without prejudice” letters written by the parties’ Advocates during negotiations did not lose their privileged status, hence they cannot be used as evidence in Court against the defendant.

27. It is trite law that before a Court can grant a judgment on admission, the admission has to be plain, obvious and unequivocal. In view of the foregoing, this Court finds that the plaintiff has not made out a case for entry of judgment on admission against the defendant.

Whether an order for deposit of security for costs should issue against the plaintiff

28. Security for costs is provided for under Order 26 Rule 1 of the Civil Procedure Rules, 2010 which states that -

In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

29. The Court in the case of Anitha Karuturi & another v CFC Stanbic Bank Limited & 4 others [2020] eKLR, addressed itself on this issue as hereunder-

Whether or not the provisions for security for costs are justified under *the Constitution* was considered by the Court of Appeal in Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others (Supra) where it was argued that an order for security for costs would impede the right of access to justice. The court stated as follows:

“The rationale for security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same due to poverty; secondly, it ensures that a litigant who by reason of his financial ability is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. In Noor Mohamed Abdulla v Ranchhodbhal J. Patel & Another [1962] E.A. 448, it was held: -

The order for security for costs in such a case is not directed towards enforcing payment of the costs as such, but is designed to ensure that a litigant who by reason of near insolvency is unable to pay the costs of the litigation when he loses, is disabled from carrying on the litigation indefinitely except upon terms and conditions which afford some measure of protection to the other parties.

It is therefore imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs. Article 24 (1) (d) of *the Constitution*, provides: -

24

- (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable



in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

.....

- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;
- (Emphasis added).

30. The Court in the case of Barrack Ofulo Otieno v Instarect Limited [2015] KEHC 3855 (KLR), in dismissing an application for security for costs held as follows -

The discretion to order for security for costs is to be exercised reasonably and judicially by taking into consideration to the circumstances of each case. Such matters as; absence of known assets within the jurisdiction of court; absence of an office within the jurisdiction of court; inability to pay costs; the general financial standing or wellness of a party; the bona fides of the party's claim; or any other relevant circumstance or conduct of the party. Such conduct will include activities which may hinder recovery of costs, for instance recent closer (sic) or transfer of bank accounts, and disposal of assets. The conduct of the adverse party or rather the applicant includes, filing of application for security for costs as a way of oppressing or obstructing the other parties claim.

31. The defendant herein alleges that the plaintiff's claim exposes it to significant legal costs in defending the suit, especially because the claim is denied. The defendant contended that it is concerned about recovering legal costs, estimated at Kshs.5,000,000.00, if the plaintiff loses, thus it is only prudent that the Court orders the plaintiff to deposit security for costs to safeguard it against potential losses.
32. It is evident that other than expressing concern in recovering legal costs in the event that the plaintiff's suit does not succeed, the defendant has neither alleged nor demonstrated the plaintiff's inability to pay the resultant costs in the event its suit is dismissed. The defendant has not demonstrated that the plaintiff has no known assets and/or an office within the jurisdiction of this Court and that the plaintiff has in the recent past engaged in activities that may hinder recovery of costs. On the issue of the bonafides of the plaintiff's claim, the plaintiff submitted that the defendant's defence contains mere denials save for an implied admission of the plaintiff's claim. The defendant on the other hand averred that it has a bonafide and arguable defence that has high chances of success.
33. The plaintiff's claim against the defendant is for breach of contract, refund of the advance payment for alleged undelivered fertilizer, and costs allegedly incurred in sourcing for fertilizer from another supplier. On perusal of the defendant's defence, I note that the defendant denies breaching its Agreement with the plaintiff and contends that the plaintiff's demands were mere attempts to enable them demonstrate to their supplier the urgency of the matter in light of the quality issues raised. The defendant asserts that the parties agreed to alter the terms of the initial Agreement which led to variation of the contract of 18th December 2019. In the circumstances, it is my finding view that the defendant's defence raises triable issues. I also note that the defendant's application for security for



costs was filed contemporaneously with the defendant's Memorandum of Appearance. I am as such not persuaded that the present application is an afterthought as contended by the plaintiff, since the said application was filed timeously.

34. However, after considering all factors, I am not satisfied that the defendant has made out a case to warrant this Court to order the plaintiff to deposit security for costs.
35. In the end, I find both the plaintiff's application dated January 21, 2021 and the defendant's application dated September 17, 2021 are not merited. They are both dismissed. Each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF MARCH, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Bett h/b for Mrs. Opiyo for the plaintiff

Ms Mutua h/b for Mr. Abidha for the defendant

Ms B. Wokabi – Court Assistant.

