



**KSC International Limited (Under Receivership) & 4 others v
Bank of Africa (Kenya) Limited & 7 others (Civil Case 446 of 2015)
[2023] KEHC 24298 (KLR) (Commercial & Admiralty) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE 446 OF 2015
A MABEYA, J
OCTOBER 24, 2023**

BETWEEN

**KSC INTERNATIONAL LIMITED (UNDER RECEIVERSHIP) ... 1ST PLAINTIFF
KUNDAN SINGH UBHI 2ND PLAINTIFF
OPKAR SINGH UBHI 3RD PLAINTIFF
RIPTHUMA SINGH UBHI 4TH PLAINTIFF
VISTA WINDOWS LIMITED 5TH PLAINTIFF**

AND

**BANK OF AFRICA (KENYA) LIMITED 1ST DEFENDANT
KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT
I & M BANK LIMITED 3RD DEFENDANT
KOLLURI VENKATA SUBBARAYA KAMASASTRY 4TH DEFENDANT
DELOITTE CONSULTING LIMITED 5TH DEFENDANT
SAMUEL OKETCH ONYANGO 6TH DEFENDANT
HARVEEN GADHOKE 7TH DEFENDANT
KEYSIAN AUCTIONEERS 8TH DEFENDANT**



RULING

1. This is a ruling on three (3) applications all dated 6/3/2023. They were by the 1st, 2nd and 3rd defendant, respectively. They all sought orders to the effect that the suit had been compromised in various ways. I propose to deal with the applications sequentially, beginning with that of the 1st defendant (1st application), that of the 2nd defendant (2nd application) and conclude with that of the 3rd defendant (3rd application).

1st Application

2. This was by the 1st defendant and was brought under order 25 rule 5 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#). It sought that the suit be compromised in the terms that the 1st, 2nd, 3rd and 4th plaintiffs shall pay the 1st defendant a sum of ksh 50, million and each party bear own costs.
3. The application was supported by the grounds on the face thereof and the supporting affidavit of BEN MWAURA sworn on 6/3/2023. It was contended that vide a letter dated 19/12/2022, the 3rd and 4th plaintiff offered to pay the 1st defendant ksh 50,000,000/- in full and final settlement of the suit.
4. That the 1st defendAnt accepted the offer vide a letter dated 3/3/2023 and as a result, the matter had been compromised and therefore there was no need of having a further hearing in the matter.
5. The plaintiffs opposed the Application vide a replying affidavit of Okpar Singh Ubhi sworn on 10/3/2023. He stated that the letter dated 19/12/2022 that was being relied upon by the 1st defendant was inadmissible since it was written on a without prejudice basis. The plaintiffs denied the existence of any agreement that settled or compromised the suit.
6. They contended that the letter was a proposal which was only in relation to the amounts claimed by the defendants in respect of their banking facilities. That the counter offer was rejected by the plaintiffs' in a letter dated 3rd and 6th March 2023 and requested the defendants to sign the letter and they failed to do so. The plaintiffs maintained the position that there was no agreement between the parties settling the suit and the application was meant to scuttle the hearing.

2nd Application

7. The application by the 2nd defendant was brought under order 25 rule 5 of the [Civil Procedure Rules](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#). It sought judgment against the 1st plaintiff in favour of the 2nd defendant for ksh 750,000,000/- and the suit be compromised as such.
8. Phinias Isundu swore an affidavit in support thereof. It was the 2nd defendant case that the 1st plaintiff was a customer of the bank and was advanced various facilities. That vide a letter dated 19/12/2022, the 1st plaintiff agreed to settle the amount owed to the 2nd defendant by offering to pay ksh 750,000,000/-.
9. That the 2nd defendant accepted the offer on condition that the plaintiffs gave an undertaking to satisfy any judgment that would be issued against the 2nd defendant in Mombasa HCCC 8 OF 2006 (*Tanroads v KSC and KCB*). The second condition was that the plaintiff would settle the current outstanding exposures by the 5th and 6th plaintiff by paying ksh30 million in a separate agreement.



10. The plaintiffs opposed the application vied the affidavit of Okpar Sing Ubhi sworn on 10/3/2023. It was the plaintiffs' position that the letter relied on was written without prejudice. That it was therefore inadmissible.
11. That the letter related to the debts owed and did not make any reference to any suit. Further, that the plaintiffs had intended to pursue damages and the letter in question did not provide for the same. They contended that there was no binding or enforceable agreement between the plaintiffs and the 2nd defendant for the settlement of the suit.

Third Application

12. The application by the 3rd defendant was brought under Order 25 rule 5, Order 51 rule 5 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act cap 21. It sought that the plaintiffs' suit against the 3rd defendant be marked as adjusted and compromised on the terms that the 1st, 2nd, 3rd and 4th plaintiff do pay the 3rd defendant sums of ksh 40,000,000/- and ksh 40,645,434.40 of which, 10% thereof be paid within 28 days and the balance be payable within 90 days.
13. The application was premised on the grounds set out on the face of it and supported by the affidavit of Andrew Muchina, the Senior Legal Manager of I&M Bank Limited on 6/3/2023. The 3rd defendant's case was that by a letter dated 19/12/2022, the directors of the 1st plaintiff wrote to the 1st, 2nd and 3rd defendant offering a full and final settlement of the debt. That the 3rd defendant accepted the offer vide a letter dated 20/2/2023 and there was therefore no live dispute between the parties for the Court's determination.
14. The 3rd plaintiff, Okpar Singh Ubhi, filed a replying affidavit sworn on 10//3/2023 in opposition to the application. His contention was that the letter dated 19/12/2022 could not be relied on as it was written under no prejudice. Further, that there had never been any agreement between the plaintiffs and the defendants which had the effect of settling the suit.
15. Further, that the proposal contained in the said letter lacked a provision for damages and that there was no enforceable agreement between the plaintiffs and the 3rd defendant for settlement of the suit.
16. The application was canvassed by way of written submissions which I have considered. The 1st, 4th, 5th and 7th defendant submitted that once an offer was made on a without prejudice basis and the same was accepted, a contract was concluded between the said parties. That in view of the acceptance by the 1st defendant of the 1st plaintiff's offer, a contract was formed between the 1st, 2nd and 3rd and 4th plaintiff with the said defendants.
17. On its part the 2nd defendant submitted that the directors of the 1st plaintiff offered to pay to it, ksh 750,000,000/- in full settlement of the suit and the 2nd defendant accepted the offer thereby establishing a binding and enforceable contract. That the suit had been partly compromised and what was left was the parties to discuss and agree the terms of the contract.
18. On their part, the plaintiffs submitted that the 1st plaintiff's letter of 19/12/2022 was not admissible since it constituted communication made without prejudice. That the same did not constitute an offer by all the plaintiffs to compromise the suit. That it was only in relation to the banking facilities with the three banks. That there was no valid or enforceable agreement between the parties to settle or compromise the suit.
19. I have considered the pleadings, the rival submissions and the authorities relied on by Counsel. The core issue that runs across the three applications is whether the letter dated 19/12/2022 compromised the suit as against the 1st, 2nd and 3rd defendant.



20. Order 25 rule 5 of the *Civil Procedure Rules* provides as follows: -

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit be adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfied 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.”

21. Vide the letter dated 19/12/2022 by the directors of the 1st plaintiff, on a without prejudice basis, the plaintiffs proposed a payment plan to the effect that they would settle the debts between themselves and the 1st, 2nd and 3rd defendant. While the 1st to 3rd defendant contend that they accepted the offer contained therein, the plaintiffs contend that the letter was not binding as it was written on a without prejudice.

22. Order 25 rule 5 spells out that any agreement that has been entered by the parties on the subject matter of the suit is capable of compromising the suit. The question therefore is whether the letter dated 19/12/2022 and the acceptance by the 1st, 2nd and 3rd defendants amounted to a contract which is capable of being enforced by this Court.

23. It is common knowledge that a contract consists of three fundamental elements that is offer, acceptance and consideration. In *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR, the Court of Appeal held: -

“It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”

24. In *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G.* {2010} UKSC 14, the Supreme Court of the United Kingdom held that: -

“The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”

25. In *Oceanbulk Shipping and Trading SA v. TMT Asia Limited and 3 others* [2010] UKSC 44, on the legal principles of the "without prejudice" rule, in a majority decision of the Supreme Court of the United Kingdom, the Judges stated-

“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”.

26. Further, in *Millicent Wambui v Nairobi Botanica Gardening Ltd* cause no 2512 of 2012, the Court stated that:-

“...the application revolves around “without prejudice” communication. The use of the term “without prejudice” is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing law suit. The words “without prejudice” impose upon the communication an exclusion of the use against the party making the statement in subsequent court proceedings. It is a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in litigation. A party making a “without prejudice” offer does so on the basis that they reserve the right to assert their original position, if the offer is rejected and litigation ensues. For correspondence between parties to be protected it must be made in a genuine attempt to settle a dispute between the parties.”

27. 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.”

28. 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.

29. In the words of *Steyn LJ in G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyds Rep 25 quoted with approval in the case of *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* [2017] eKLR, Lord Steyn stated: -

“... It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden v Metropolitan Railway* [1877] 2 AC 666; *New Zealand Shipping Co Ltd v AM Satterthwaite*



Co. Ltd. [1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; *Gibson v Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd. v Novinex* [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalized in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd. v Atomic Power Constructions Ltd.* [1963] 1 WLR 333.”

30. In the formation stage of a contract it is essential to have positive evidence that a contractual obligation exists. In this case, the obligation was that the letter in question herein was subject to some conditions for it to be termed as a contract. On the second aspect of acceptance, it is trite that acceptance must be unequivocal and must not be qualified.
31. In the letters of acceptance by the defendants, it was agreed that the proposed sums would be accepted in full settlement but upon satisfaction of several conditions. The moment conditions were attached to the acceptance, they amounted to a counter-offer which the plaintiffs should have accepted for an enforceable contract to arise. The intention of the 3 defendants was to first have the conditions settled or accepted by the plaintiffs before they could be bound.
32. In view of the foregoing, this Court finds that there was no compromise of the suit capable of being recorded. The communication did not amount to an enforceable contract that is capable of being enforced by this Court.
33. Accordingly, all the applications dated 6/3/2023 are found to be frivolous and unmerited. They were only meant to scuttle the hearing of the suit. They are hereby dismissed with costs.

It is hereby ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2023.

A. MABEYA, FCI Arb

JUDGE

