Al-Sabah v East African Fitness Limited (Civil Case E484 of 2020)
[2021] KEHC 269 (KLR) (Commercial and Tax) (17 November 2021) (Ruling)

Neutral citation: [2021] KEHC 269 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E484 OF 2020

F TUIYOTT, J

NOVEMBER 17, 2021

BETWEEN

MOHAMMED JABER AL-SABAH ..... APPLICANT

AND

EAST AFRICAN FITNESS LIMITED ..... RESPONDENT

RULING

1. Mohammed Jaber Al-Sabah (Mohammed or the plaintiff) seeks to bring these proceedings to a quick end through judgment on admission for USD 510,000/= and certain interest thereon. Hence the Notice of Motion of 18th November, 2020.

2. East African Fitness Limited (EAF or the defendant) sought to establish a fitness business in Kenya and in the year 2019 approached Mohammed for finance. The approach was fruitful and through a convertible loan agreement dated 7th March, 2019 (The March Agreement), Muhammed advanced EAF a sum of USD 350,000.00. Seven (7) months later, on 1st October 2019, Mohammed and EAF entered another Bridging Loan Agreement (The October Agreement) pursuant to which the plaintiff advanced to the defendant a sum of USD 160,000.00.

3. Mohammed alleges default of both facilities and asserts that by a letter of 4th May, 2020, EAF admitted the debt.

4. EAF resists the application on four fronts. The first is that the letter dated 4th May, 2020 is not admissible as it offends the provisions of section 23 (1) of the *Evidence Act*. Supplemental to that objection is that, even if admissible, the statement contained in the letter does not constitute an admission.

5. The auxiliary matter is elaborated in the replying affidavit of James Holden sworn on 11th February, 2021. Holden is a Director of EAF. He states that as EAF was unable to pay the Bridging loan, Mohammed had an option of re-grant of the loan as a mezzanine loan facility in the event of default but did not do so. EAF contends that notwithstanding non-election, the EAF requested Luann Chamyne Partners (LCP), another lender, consent to obtain a personal guarantee as well as to execute a debenture in implementation of the re-grant clause. LCP another financier to EAF has an agreement dated 25th May, 2019 that prohibited any borrowing of a senior debt on better terms than the loan it advanced.

6. The Court is asked to view the letter of 1st May, 2020 against this background. That the letter merely proposed for the enhancement of the security for all senior debt holders in conversion of debt into equity or contribution of additional capital.

7. It is also the argument of EAF that its inability to repay the loan was due to financial difficulties caused by disruption of its business in the wake of the Covid-19 pandemic and that the obligations under the contracts were suspended under clause 14.4 of the March Agreement.

8. Last, the jurisdiction of this Court is challenged. EAF cites the Arbitration Clause under both agreements.

9. There is consensus that the Mohammed advanced an aggregate sum of USD 510,000/= to EAF. It is also not disputed that sum remains wholly unpaid. A critical question posed by the application before Court is whether the debt had fallen due for repayment at the time the suit was filed and whether the obligation to pay has been admitted by EAF.

10. As I turn to examine each of the issues raised, I leave the question of jurisdiction to the last because if the Court was to find that the debt is truly due then there can be no dispute for reference to arbitration and this Court would have jurisdiction to hear and determine this suit. The converse would also be true.

11. The first is the admissibility of the letter of 4th May, 2020 and its contents. The respondent urges the letter was made on an occasion that is privileged as it was in the course of out of court negotiations that were not intended to be relied on by parties in any subsequent court proceedings. Section 23(1) of the *Evidence Act* was cited and reads:

> " Admissions made without prejudice in civil cases
>
> 1. 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."

12. The efficacy of the without prejudice doctrine in facilitating amiable dispute resolution has been constantly upheld by the Courts. Take for example the observation by Bosire, J (as he then was) in *Randu Nzau v Mbuni Transport Company Ltd* [1989] eKLR where the Judge stated;

> " The section makes inadmissible a certain crop of admissions which the parties by either an express condition or by implication did not intend that evidence thereof be adduced in subsequent proceedings. The marginal note describes those as without prejudice admissions. By the rules of construction the marginal note must be read with the body of the section. It then follows that the section accords protection to any pre-trial admissions made without prejudice unless the consent of the other party or parties to it be first obtained.

> The effect of the provisions above is that a party who enters into pre-trial negotiations which culminate in a settlement is at liberty to resile before judgment is entered. Once a judgment is entered then he would be estopped from challenging it later unless on grounds which would vitiate a contract. I say so because in general terms a judgment entered into on the basis of pre-trial negotiations and settlement is a consent judgment. Such judgment is so to speak in the nature of an agreement and binds both sides."

13. The point to be emphasized is that where "without prejudice" negotiations are apparent, the Court should lean towards excluding them in evidence so as not to discourage of parties from pursuing such negotiations.

14. Admittedly, the letter dated 4th May, 2020 is not marked by its own author to be a "without prejudice" correspondence. But as submitted correctly by counsel for EAF, a court can still treat correspondence as done on "without prejudice" even though it is not expressly marked to be so. On this, Gikonyo, J, in *Guardian Bank Ltd v Jambo Biscuits Kenya Ltd* [2014] eKLR that held:

> " There is ample judicial authorities on this subject of ''without prejudice''. The string of those judicial authorities confirm that, the practice of ''without prejudice'' is a matter of public policy aimed at encouraging parties to resolve civil disputes amicably and to engage into such negotiations, compromises and admissions without the fear of the admissions being used against them in formal court proceedings should they fail to fasten a settlement. However, for communication to receive the privilege and the protection of the practice of without prejudice, it must be one which is made during an amicable negotiation of a dispute with the intention of yielding a settlement or compromise of the dispute. The communication may be expressly signed to be on without prejudice basis or it may be inferred from the circumstances in which it was made that the parties agreed or intended it should not be given in evidence. The communication may be oral or in writing. Such communication or letter is inadmissible in evidence. See *Halsbury's Laws of England, 4th Edition Vol. 17*."

15. So in what context, was the letter of 4th May, 2020 authored? I think I am able to find it in the first three paragraphs of the letter which reads:-

> 1. We have been appointed by East Africa Fitness Limited (EAFL) as its legal adviser in light of the financial difficulties the business is facing and the potential refinancing required to allow the business to continue to operate as a going concern.
>
> 2. As you are aware, EAFL is in a difficult financial situation that has been exacerbated by the impact of COVID and the lockdown in Kenya which has caused the suspension of its business activities and as such a halt in revenues.
>
> 3. In this letter we have been instructed to outline a proposed way forward to be agreed by the debt providers of the business to prevent EAFL from going into liquidation.

16. In the three opening paragraphs, the EAF states that it is faced with financial difficulties and so potential refinancing is required to prevent it from going into liquidation. Later, the letter outlines a three stepped proposal for refinancing and closes by seeking consent of Mohammed for each of the three (3) steps.

17. In paragraph 5 of section 1 of that letter EAF captures the two loans granted by Mohammed as being part of its debt position as at 31st March, 2020. Nowhere in that letter does EAF suggest that it admits the debt merely for purposes of making the proposed refinancing a reality.

18. EAF faces a particular difficulty in persuading this Court that the correspondence should be treated as a without prejudice communication because it was authored by a barrister, a lawyer. A lawyer is expected to be well aware of the importance of expressly marking a communication "without prejudice" where it is intended to be such. This is because it is that mark that ordinarily bestows privilege to the correspondence. A lawyer can only be excused for failing to make such a mark if is shown that it was truly an omission and that looking at the overall circumstances surrounding the correspondence its omission could only be a mistake.

19. In this matter, the author of the all-important letter, Arvin Halkhoree, has not sworn as affidavit saying, for a start, that the letter was on a without prejudice occasion and secondly that he, by inadvertence, omitted to mark it as such. I therefore reach the conclusion that the communication is not privileged.

20. What the letter does is to unequivocally admit the debt of USD 350,000/= and USD 160,000/= as due and in the table in paragraph 5 of section 1 tabulates the interest due on interest. For example, the table shows that as at the 31st March, 2020, the interest days were 162 days. This would be consistent with the number of days set on in the plaint as the interest period between 21st October, 2019 to 23rd March, 2020. EAF did not raise the proposition that payment of the debt is not yet due or is otherwise suspended. The admission is as plain as can be.

21. Having come to the conclusion that the debt is admitted, then there can be no dispute for which the arbitration agreement can be properly invoked.

22. The Notice of Motion dated 1st November, 2020 is allowed as prayed. Costs of the suit, as well, to the plaintiff.

DATED AND SIGNED THIS 11TH DAY OF NOVEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT