



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 143 OF 2011**

**HON. BISHOP MARGARET WANJIRU**

**KARIUKI.....PLAINTIFF/APPLICANT**

**VERSUS**

**CAROLINE MUTOKO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**FELIX ODUOR alias**

**MZEE JALANG'O.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RADIO AFRICA LIMITED**

**t/a KISS FM.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The ruling herein relates to an objection that was raised by counsel for the defendants on the 12<sup>th</sup> day of July, 2019 when the matter came up for hearing. The objection was on production of the following;

- a. The certificate dated 8<sup>th</sup> day of April, 2019.
- b. The video tape.
- c. The letter dated the 27<sup>th</sup> October, 2010.
- d. An objection was also made to the amendment of the plaintiff's witness statement dated 15<sup>th</sup> day of April, 2011.

Counsel for the defendants argued that the certificate dated 8/04/2019 does not comply with Section 106(B) of the Evidence Act and that the same cannot be relied on as prove of existence the impugned broad cast. He submitted that the certificate has not indentified the electronic record and the manner in which it was produced and that it does not disclose the date, time and place of production. He further argued that under Section 106(B) the certificate should state the particulars of the device. In support of his submissions on these points he relied on the case of *M. N. N. vs. E. N. K. (2017) eKLR* and that of *Jack & Jill Supermarkets vs. Victor Maina Ngunjiri (2016) eKLR* . All in all, he contended that the said certificate is defective, ambiguous and that it lacks the necessary details in the circumstances of this case. He urged the court to expunge it from the record.

On the CD, he averred that the same was not served upon the defendant which is contrary to the Civil Procedure Act and that the lack of its service upon them would cause prejudice to their client in that they have not had time to pay it.

Regarding the letter dated 27<sup>th</sup> October, 2010, counsel for the defendant submitted that the letter was done on a “*without prejudice*” basis and therefore it cannot be relied on, in evidence. He cited the case of *Kawamambanjo Limited vs. Chase Bank (Kenya Limited) & another 2014 eKLR* wherein the court rendered itself on what “*without prejudice*” is.

He also cited the case of *Millicent Wambui Vs. National Botanica Gardening Limited (2013) eKLR* in which the court examined the purpose of a without prejudice communication.

He also relied on the case of *Bishop Wanjiru Kariuki Vs. Caroline Mutoko & Another Civil Case No. 142/2011* in which opposition was

raised and the court rendered the letter as inadmissible and the same was expunged from the record.

On the objection to the amendment of the plaintiff's witness statement, he argued that pleadings have closed and the plaintiff had to seek leave of the court to amend the same. He also contended that it is too late to apply to amend the statement at this time.

In her response to the objections, counsel for the plaintiff submitted that the certificate as filed satisfied the conditions with regard to the details the same should contain as required under Section 106 (B) of the Evidence Act. She sought to distinguish the case of MNN V. ENK(2017) eKLR from the case herein and averred that, the case of MNN vs. ENK was dealing with interpretation of recording from one language to another and that, what was before the court was a certificate of translation and not a certificate under Section 106(B).

On the contention by the defendant's counsel that the CD was not served upon him, she stated that all the pleadings, documents and the CD were served upon the defendant as a bundle. She argued that a perusal of paragraphs 4 and 5 of the defence confirms that the defendants were served with the CD as the defence and defendants' witness statements are in respect to the matters raised in the CD. She further submitted that when the matter came up in court for pre-trial directions, counsel for the defendants did not tell the court that they had not received the said CD.

On the letter dated the 27<sup>th</sup> October, 2010, she submitted that there are several exceptions to the production of documents on a "without prejudice" She cited the case of Charles Kipnetich Arap Kirui Vs. Nation Media Group Hcc. 493/2003 on the test as to whether a document was made in furtherance to settle the claim without which, the mere marking of the document on "without prejudice" will not afford it the protection that is envisaged by the law. She submitted that the letter being objected to, by the defendants, is a denial of liability and not done in furtherance to settling the matter. That the letter was done to justify what the defendants had done and it even goes further to cast aspersions on the character of the plaintiff. She contended that it fails the test of protection under the "without Prejudice" rule and in any event, it was a response to the demand letter and it should therefore be admitted in evidence.

On the objection to the amendment of the witness statement, she submitted that a witness statement is not a pleading and therefore not subject to the rules relating to the amendment of the pleadings. She relied on Section 2 of the CPA on the definition of a pleading and on the case of Surgipharm Limited V Kenya Invalid & Pharmacy Supplies Ltd & 2 Others[2013]eKLR to the effect that a witness statement remains a guide to the witness statement testimony and a party can deviate from it with the leave of the court. She further submitted that what she was seeking to include in the witness statement is pleaded in the plaint. She cited the case of Martin Kabanga Gathawa Vs. Associated Battery Manufactures Ltd where the court stated that a witness statement is not a pleading. She urged the court to dismiss the objection.

The court has considered the four limbs of the objection raised by counsel for the defendants and the oral submissions made by the parties herein.

On the certificate dated 8<sup>th</sup> day of April, 2019, the objection was based on Section 106(B) (2) of the Evidence Act. Under the said Section, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer printout) shall be deemed to be also a document if the conditions mentioned in Section 106B(1) are satisfied in relation to the information and the computer in question and shall be admissible in any proceedings, without further proof or production of the original as evidence of any contents of the original or any fact stated therein where direct evidence would be admissible.

The conditions mentioned hereinabove in respect of a computer output, are the following;

- i. The computer output containing the information was produced by the computer during the period over which the computer was used to store or process the information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.***
- ii. During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in ordinary course of the said activities.***
- iii. Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly was out of the operation during that part of the period, was not such as to affect the electronic record for the accuracy of its contents; and***
- iv. The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.***

Further, it is clear that for electronic evidence to be admissible it must be accompanied by certificate in terms of section 106B (4) which provide;

"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following;

- a) Identifying the electronic record containing the statement and describing the manner in which it was produced.***
- b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;***

c) *Dealing with any matters to which conditions mentioned in subsection (2) relate; and*

***d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of a relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it"***

The court has looked at the contents of the certificate in issue. It may not contain all the requirements set out under Section 106(B) but in my considered view, it contains sufficient information as required under the aforesaid section. The court, however, notes that the particulars of the device used in the production of the electronic record was not given and the manner in which it was produced. This can be remedied by filing of a further certificate to include the same. This court would not be serving justice if it disallows the certificate dated 8/04/2019.

On the service of the video tape, the evidence available to the court is not clear on whether the same was served upon the defendants' counsel or not. While the court appreciates that it is good practice to serve documents on the other party in good time, the defendants herein will not suffer any prejudice if the CD is served on them at this point. The plaintiff has not yet closed her case and the defendant still has an opportunity to cross examine the plaintiff on the contents of the CD.

On the letter dated 27<sup>th</sup> October 2010, the objection is premised on Section 23 of the Evidence Act which states;

***i. 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.***

***ii. Nothing in subsection (1) shall be taken to exempt any advocate from giving evidence of any matter which he may be compelled to give evidence under Section 134.***

The rationale behind the use of the term "***without prejudice***" was discussed by ***Justice Nzioka wa Makau*** in the case of ***Millicent Wambui Vs. Nairobi Botanica Gardening Limited (2013) eKLR*** where he expressed himself thus;

***The application revolves around "Without Prejudice" communication. The use of the term "Without Prejudice" issued by the 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 lawsuit. The words "Without Prejudice" impose upon the communication an exclusion of 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".***

This issue has also been discussed in ***Halsbury's law of England Vol 17*** where it has been stated that:

***"The contents of a communication made on a "Without Prejudice" are admissible when there has been a binding agreement (emphases court) 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....."***

The letter dated 27<sup>th</sup> day of October, 2010 was a reply to a demand letter which had called upon the defendant to admit liability in order to pave way for negotiations. In the letter, the defendants did not admit liability to pave way for negotiations and therefore the letter is in the class of communication to which the principles of a "***without prejudice***" applies. It is the finding of this court that the letter dated 27<sup>th</sup> October, 2010 is not admissible.

On the objection to the amendment of the plaintiff's statement, Section 2 of the Civil Procedure Act defines a pleading to include a petition or summon and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant

On the other hand, witness statement is a written statement signed by that person which contains the evidence which that person would be allowed to give orally. According to ***Halsbury's law of England Vol. 11, 5<sup>th</sup> edition***, where a witness is called to give oral evidence under this provision, his witness statement will stand as his evidence in chief unless the court orders otherwise. A witness giving oral evidence at the trial may with permission of the court amplify his witness statement and give evidence in relation to the new matters which have arisen since the witness statement was served on the other parties.

The court has considered the amendment sought to be incorporated in the witness statement. As rightly submitted by counsel for the plaintiff, the amendments are captured in the plaint. In my considered view, there is no prejudice to be suffered by the defendants if this court were to allow the amendment sought. I do allow the same.

In the end, the objection partly succeeds to the extent discussed hereinabove. The other limbs of the objection are dismissed.

It is so ordered.

**Dated, signed and delivered at NAIROBI this 7<sup>TH</sup> day of NOVEMBER, 2019.**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendants/Respondents