**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 23 OF 1999**

**CO-OPERATIVE BANK OF KENYA LTD.....PLAINTIFF**

**Versus**

**SHIRAZ SHABUDIN SAYANI t/a**

**MAKUPA AGIP SERVICE STATION.....DEFENDANT**

**RULING**

The short point that arose for consideration before the Chamber Summons dated 16.3.99 was prosecuted, was whether a letter addressed to Counsel for the Plaintiffs/Respondents by Counsel for the Defendant/Applicant on 2.6.98 which was marked "WITHOUT PREJUDICE" ought to be accepted on record and to be referred to as intended by Counsel for the Plaintiffs/Respondents.

Learned Counsel for the Applicant Mr. Gikandi protested that the letter should neither be looked at nor accepted on record, since the mere fact of writing it "without prejudice" disqualified it as evidence. It would prejudice his client since it did not amount to an agreement. Mr. Mburu, Learned Counsel for the Respondent on the other hand saw nothing wrong with the introduction of the letter in evidence as it contained a clear admission of the debt claimed in the plaint. That the letter was marked "without prejudice" did not detract from such admission. "Without Prejudice" meant without admission of liability but here there was express admission of liability and a proposal for payment. There was no prohibition against looking at the letter to determine its contents and to see whether there was any ambiguity which should at all events be construed against the writer.

The issue raised by Mr. Gikandi on communication "Without Prejudice" is not a novel one. 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 settlements of disputes. Until such time as there is definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. As I understand it, the rubric simply means "I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you and offer which you may accept or not, as you like, but, if you do not accept it, my having made it, is to make no effect at all". It is a privilege that is jealously guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in their disputes or to reach out-of- court settlements.

There is no question that the courts are at liberty to examine a document presented as evidence although marked "Without Prejudice" and I do not agree with Mr. Gikandi that the court cannot begin to do so, when the document is so marked.

Where a document contains an admission there is provision under Section 23 of the Evidence Act Cap 80 which states:

> *"In all civil cases no admission may be approved 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"*

The side note relates to "Admissions made without prejudice in civil case". Admissions are of course not conclusive proof of the matters admitted, but they may operate as estoppels in appropriate circumstances. That is the essence of Section 24 of the Act.

In this case there was only one letter written by the Defendant's/Applicant's Counsel. It preceded the defence which makes total denial of liability. There is however an express admission of the debt in the letter save for interest charged and there is a proposal for payment by specified instalments. There is even an admission that there was demand which is denied in the Defence filed. It sought the plaintiff's views which were not given but a suit was filed instead.

I cannot say in the circumstances of the case that there was protection under Section 23 of the Evidence Act. The letter was written in response to a demand notice before action for a specified amount money. There was an express admission that the money was owing. Marking the letter "Without Prejudice" or seeking views on side issues which did not detract from the admission was, in my view, superfluous.

The letter dated 2.6.98 may be admitted in evidence and I so find. The main application may be relisted for hearing at an early date as there is a Certificate of Urgency.

**Dated this 19th day of April, 1999.**

**P. N. Waki**

**JUDGE**