



**Kenya Institute of Management v Wakhanu (Appeal E066 of 2024)
[2025] KEELRC 133 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 133 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E066 OF 2024
JK GAKERI, J
JANUARY 29, 2025**

BETWEEN

KENYA INSTITUTE OF MANAGEMENT CLAIMANT

AND

GERALD WERE WAKHANU RESPONDENT

JUDGMENT

1. This is an appeal against the ruling of Maureen Nyigei, Principal Magistrate delivered on 5th November, 2024.
2. Briefly, the respondent filed a Notice of Motion dated 13th September, 2024 seeking Orders that the Court be pleased to expunge the letter dated 5th September, 2023 from the Claimant’s list of documents dated 24th May, 2024 on account that it was written on a “without prejudice” basis and no liability was admitted and was thus inadmissible as privileged communication.
3. The Notice of Motion was supported by the Affidavit of Sandra Cherotich who rehashed the grounds set out on the face of the Notice of Motion.
4. In his Replying Affidavit sworn on 20th September, 2024, the claimant deposed that he attended several meetings at the applicant’s instigation and the issue of outstanding salary arrears was discussed extensively and by letter dated 5th September 2023 the applicant committed to settle the salary arrears through monthly instalments of Kshs.50,000.00 until the amount consented to was fully settled and the claimant accepted the offer on 26th September, 2024 and undertook not to make any further claim against the respondent.
5. The claimant deposes that there are exceptions to Section 23(1) of the *Evidence Act* on inadmissibility of documents written “without prejudice”.



6. The affiant further deposes that the applicant made an offer which he accepted and expunging the letter would be tantamount to striking out of the claim for payment of salary arrears.
7. In its submissions, the applicant relied on the provisions of Section 23(1) of the *Evidence Act* and the sentiments of Tuiyot J in *Al-Sabah V East African Fitness Ltd* [2021] KEHC 269 (KLR) citing Bosire J in *Randu Nzau V Mbuni Transport Co. Ltd* [1989] eKLR on the inadmissibility of the pre-trial admissions otherwise with consent of the other party.
8. The claimant cited the sentiments of Kasango J in *High Chem East Africa Ltd V David Njau Wambugu & 4 Others* [2020] eKLR on the justification of the “without prejudice rule”, application and exceptions such as, where the words are not used in a genuine attempt to negotiate a settlement to urge that the without prejudice rule has exceptions as held in *Lochab Transport Ltd V Kenya Arab Orient Insurance Ltd* [1986] eKLR to submit that the applicant’s letter dated 5th September, 2023 was an offer which the Claimant accepted and was binding.
9. Reliance was also made on *Mumias Sugar Co. Ltd & Another V Beatrice Akinyi Omondi* [2016] eKLR.
10. In her ruling, the learned trial Magistrate held that the applicant’s letter dated 5th September, 2023 was admissible as evidence and dismissed the application with costs.
This is the ruling appealed against.
11. The appellant argues that the trial Magistrate erred in law and fact by failing to find that its letter dated 5th September, 2023 ought to be expunged from the claimants list of documents as it was written on a “without prejudice” basis and was inadmissible for being privileged communication.

Appellant’s submissions

12. The appellant relied on Section 23(1) of the Evidence Act and the sentiments of Tuiyot J in *Al-Sabah V East African Fitness Ltd* (Supra) relied on before the trial Court to urge that the trial court erred as the communication was privileged.

Respondent’s submissions

13. The respondent cited Section 23(3) of the *Limitation of Actions Act* and the decision in *Patrick S. K. Kimiti V John Ngugi Gachau & Another* [2015] eKLR on acknowledgement and part payment of a debt if statute barred.
14. Concerning admissibility of a letter written on a “without prejudice” basis, reliance was made on the sentiments of Mary Kasango J in *High Chem East Africa Ltd V David Njau Wambugu & 4 Others* (Supra) cited before the trial court as well as those of Majanja J in *Cordisons International Kenya Ltd V Innovation & Growth Academic BV* [2022] KEHC 16417(KLR) as well as those of NJoki Mwangi J in *Mumias Sugar & Another V Beatrice Akinyi Omondi* (Supra) to urge the Court to find that the appellant’s letter dated 5th September, 2023 is admissible as it was an offer by the appellant which the claimant accepted vide signature on 26th September, 2024.

Analysis and determination

15. The singular issue for determination is whether the appellants letter to the respondent dated 5th September, 2023 is admissible as evidence in the matter before the trial Court as held by the Court on 5th November, 2024.



16. While the appellant urges that the letter is inadmissible as it was privileged communication, the respondent submits that it is admissible as it transitioned into a binding contract between the parties.
17. It is common ground that Section 23(1) of the *Evidence Act* render such letters generally inadmissible as follows:
 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.
18. In *Geology Investments Ltd V Behal t/a Krishan Behal & Sons* [2002] 2KLR 447 Mwera J. captured the rationale of the rule as follows

The rubric “without prejudice” has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements 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 of the parties. 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 an 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 courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements”.

19. See *Oceanbulk Shipping and Trading SA V TMT Asia Ltd and 3 Others* [2010] UKSC 44. In *Unilever PLC V the Protector & Gamble* [2000] IWLRL 2436 at 2448 – 2449, the Court stated as follows:

...the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties in the words of Lord Griffiths in *Rush & Tompkins* [at p 1300] ‘to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts’. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders.”

20. In *Walker V Wilsher* [1889] 23 QBD 335 at 337 Lindley L J defined the words “without prejudice” as follows:

I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one”

21. The foregoing position was fortified by the decision in *Lochab Transport Ltd V Kenya Arab Orient Insurance Ltd* [1986] eKLR, where the Court observed that:

... if an offer is made “without prejudice” evidence cannot be given on this offer.



If this offer is accepted is accepted a contract is concluded and one can give evidence of the contract and give evidence of that ‘without prejudice’ letter”.

22. The foregoing decisions lay it bare that the “without prejudice” rule is grounded on public policy to promote free negotiations in the settlement of disputes as opposed to litigation and should litigation be resorted to the rule excludes all correspondence exchanged in the course of seeking a settlement.
23. However, the foregoing sentiments also acknowledge that the “without prejudice” rule is not without qualification.
24. In *Rush and Tomkins Ltd V Greater London Council* [1989] AC 1280 Lord Griffiths captured the rule as follows:

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence ‘without prejudice’ to make clear beyond doubt that in the event of negotiations being unsuccessful they are not to be referred to in at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase “without prejudice’ and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission...

I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. However, these cases show that the rule is not absolute and resort may be had to the ‘without prejudice’ material for a variety of reasons when the justice of the case requires it....

25. Finally, the issue of admissibility of ‘without prejudice’ communication was also considered by the Court of Appeal in *Heineken East Africa Imports Co. Ltd & Another V Maxim Ltd* [2024] KECA 625 (KLR) where the Court expressed itself as follows: -

...It is notable that the contents of a communication made “without prejudice” are only admissible in certain exceptional circumstances, including 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 to the fact that such communication have been made is also admissible to show that negotiations have taken place, but not is contents, which are otherwise not admissible. With due respect to counsel, the circumstances they rely on to admit the letter dated 26th January 2016 are events that took place before the said letter was written and do not fall within these exceptions.

Any doubts, conflicts, differing interpretations with regard to the “without prejudice” notice of termination must in the circumstances therefore be construed against the originator of the notice”.

26. Electronic evidence availed by the appellant reveals that the appellant and the respondent were in constant communication since 2023 and the respondent met various officials of the appellant on the issue of salary arrears and to all intents and purposes the interactions appear to have been genuinely intended to yield a settlement.



27. The appellant's letter dated 5th September, 2023 was nothing but an expression of the appellant's commitment to settle the respondent's salary arrears and it proposed a sustainable plan of Kshs.50,000.00 per month until the amount agreed upon by the parties was fully settled provided the respondent forfeited entirely his claim for alleged project supervision arrears and had to execute a certificate of no further liability against the appellant.
28. The document was signed by three persons, namely; the appellant's Head of Finance, Head of Branches and Head of Shared Services.
29. In the circumstances of this case the Court is persuaded that the appellant's letter dated 5th September, 2023 was an unambiguous intimation by the appellant to pay the respondent's salary arrears and was thus an offer for the respondent to accept or decline.
30. The respondent's execution of the certificate of no further liability against the appellant on 6th September, 2023 was, in the court's view, his acknowledgment of acceptance of the terms of the letter.
31. Thus the letter dated 5th September, 2023 was no longer a negotiation document but a binding contractual arrangement between the appellant and the respondent on the payment of the respondent's salary arrears by the appellant.

The trial Court expressed itself as follows:

The upshot of all the above is that the claimant has every right to have the letter dated 5/9/2023 admitted into evidence for the reason that it has metamorphosed into a contract that is enforceable in law..."

32. The Court was guided by the sentiments of the Court in *Lochab Transport Ltd V Kenya Arab Orient Insurance Ltd* (Supra) and *Mumias Sugar Co. Ltd & Another v Beatrice Akinyi Omondi* (Supra). Both decisions reinforce the position that once an offer by a party made on "without prejudice" basis is unequivocally accepted by the other, a contract comes into existence and evidence of the contract and terms of the "without prejudice letter" are admissible as recently affirmed by the Court of Appeal in *Heineken East Africa Import Ltd & Another V Maxims Ltd* (Supra).
33. Flowing from the foregoing, it is discernible that the instant appeal is for dismissal and it is accordingly dismissed.

In the circumstances, parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF JANUARY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

