**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2512 OF 2012**

**MILLICENT WAMBUI**
**……..……..……CLAIMANT/RESPONDENT**

**VERSUS**

**NAIROBI BOTANICA GARDENING**
**LIMITED…….....……RESPONDENT/APPLICANT**

**RULING**

1. The Respondent herein filed a Notice of Motion Application under Rules 16(1),(2) and (5) of the Industrial Court (Procedure) Rules 2010 on 31st May 2013 seeking the following orders:-
    1. That this suit be marked as wholly settled in terms of the agreement reached and evidenced by the correspondences exchanged between the parties between 7th November 2011 and 21st August 2012.
    2. That in terms of the said agreement, this suit be marked as settled with costs to the Respondent.

    The Application was supported by the Affidavit of Jean Wangui Kariuki sworn on 31st May 2013 together with annexures thereto.

2. The Application was opposed by the Claimant/Respondent who filed on 6th June 2013 a Replying Affidavit sworn on 5th June 2013 together with annexures.

3. Mr. Namachanja urged the Application before me on 2nd July 2013. He submitted that the application before Court sought to have the suit marked as compromised. He stated that a series of correspondence were exchanged and the end result was an agreement but there was no response to the final letter which sought confirmation of acceptance of the sums payable. He relied on the case of **Lochab Transport Ltd v. Kenya Arab Orient Insurance Ltd [1986]eKLR** where the Court, Shields J. held that *if an offer is made "without prejudice", evidence cannot be given of this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of the terms of the "without prejudice" letter offer.* On that premise, he urged the Court to find that the suit herein was compromised. The Court reserved the Ruling to today, 5th July 2013 at 11.00 a.m.

4. After he departed from Court, Mrs. Olotch appeared in Court at 9.10 a.m. and indicated that she had filed the Replying Affidavit in opposition and the same was sworn on 5th June 2013 and filed

on 6th June 2013. The Court advised counsel that the Court had reserved the Ruling for Friday 5th July 2013.

5. 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 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.

6. For correspondence between parties to be protected it must be made in a genuine attempt to settle a dispute between the parties. In the case **Re Daintrey ex Holt [1893] 2 QB 116**, it was held that the Court will not permit the phrase 'without prejudice' to be used to exclude an act of bankruptcy. The protection afforded by that phrase being limited to negotiations for compromise. The Court per Vaughan Williams J stated at page 119:

   *'In our opinion the rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation, and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiations and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms. Moreover we think that the rule has no application to a document which, in its nature, may prejudice the person to whom it is addressed. It may be that the words "without prejudice" are intended to mean without prejudice to the writer if the offer is rejected; but, in our opinion, the writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer, and for this reason also we think the judge is entitled to look at the document to determine its character.'*

7. In the case of **Walker v Wilsher (1889) 23 QBD 335** which was cited by the Hon. Justice Shields in the case of **Lochab Transport Ltd v. Kenya Arab Orient Insurance Ltd [1986]eKLR** It was held that the "without prejudice" material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement. This is the point that Lindley LJ made in the case cited by the judge. I would agree that I would be permitted to look into the letters exchanged to ascertain the character of the negotiations and whether there was indeed an agreement which would take the matter out of the purview of the protection afforded by the "without prejudice" tag.
8. I have read each of the letters annexed to the Affidavit of Jean Wangui Kariuki sworn on 31st May 2013 and the Replying Affidavit of Milicent Wambui sworn on 5th June 2013. The letters were in the class of communication to which the principles on 'without prejudice' apply. These were letters seeking to settle the dispute amicably. It was one which resulted in an offer on 20th February 2012 headed "Without Prejudice" which was responded to by letter which was not marked "without prejudice" on 14th March 2012. After a letter of 3rd April 2012, from the Respondent's Advocates which was not marked, the Claimant's advocate wrote a letter on 21st May 2012 marked "without prejudice" wherein the advocate for the Claimant Pamela Olotch-Ochieng wrote that her client was agreeable to proposed settlement on a without prejudice basis. The Respondent's Counsel C. Namachanja wrote on the same date stating that he had called for the settlement and that a cheque would be forwarded. This was followed by a letter marked "without prejudice" in which a sum of 40,892/- was offered in full and final settlement. It provided the breakdown and the letter required the Claimant to confirm that once payment was

made there would be no further claims. This letter precipitated the suit.

9. The Claimant deposes that she did not agree to the sums therein. Her depositions and communication were that the computations were wrong. It seems to my mind that the parties were not *ad idem.* In the proposed agreement, parties did not agree to the same thing. In other words, they had agreed in principle but there was no agreement which I would be able to enforce by way of admitted compromise because the Claimant demanded and expected a certain sum based on her salary at 60,000/- net while the Respondent offered a settlement at 50,000/- net. The case cited by Mr. Namachanja namely, **Lochab Transport Ltd v. Kenya Arab Orient Insurance Ltd [1986]eKLR** is distinguishable. The Claim herein is not one where a proper agreement has been reached. Parties attempted settlement and disagreed on figures. The final letter from Counsel for the Claimant says it all. The proposed payment was to be taken by the Claimant without prejudice.

10. I would therefore order that the purported compromise did not crystalise. The Application dated 31st May 2013 is dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this **5th** day of **July** 2013

**Hon. Mr. Justice Nzioki wa Makau**

**Judge**