Guardian Bank Limited v Jambo Biscuits Kenya Limited (Civil Case 301 of 2013) [2014] KEHC 1796 (KLR) (Commercial & Admiralty) (11 November 2014) (Ruling)

Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] eKLR

Neutral citation: [2014] KEHC 1796 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

CIVIL CASE 301 OF 2013

F GIKONYO, J

NOVEMBER 11, 2014

BETWEEN

GUARDIAN BANK LIMITED ..... PLAINTIFF

AND

JAMBO BISCUITS KENYA LIMITED ..... DEFENDANT

RULING

Judgment on admission

(1) This is an application by the Plaintiff seeking for judgment on admission. The application is dated 30th June, 2014 and is expressed to be brought under Order 13 Rule 2 of the Civil Procedure Rules. Order 13 Rule 2 of the Civil Procedure Rules provides as follows:

> Any party may at any stage of a suit where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

The application

(2) The application is seeking for judgment on admission in favour of the Plaintiff against the Defendant for the sum of Kshs. 10,000,000. The application is supported by the Affidavit of Mary Omullo the legal Manager of the Plaintiff Bank. The basis of the application is the admission purportedly made

by the Defendant in the letter to the Plaintiff dated 14th May, 2013 which was signed by the Managing Director (MD) of the Defendant Company. The relevant part stated that:-

> ...In order to move ahead we propose the full settlement figure to be Kshs.90 million net. As confirmed you are already having a professional undertaking of Kshs.90 million from I & M Bank Ltd. The balance of Kshs.10 million will be fully crystalized once our transaction is complete and in the meanwhile, we can discuss with HHM advocates, to advise on the type of comfort letter which can be availed and the rest the issue"

(3) The Plaintiff states that the letter constitutes a clear and unequivocal admission for which judgment on admission will be entered. They denied the letter was written on a without prejudice basis but it was an admission. The other correspondence annexed in the replying affidavit by the MD of the Defendant Company has nothing to do with the letter dated 14th May 2013 and it relates to a later period of June and July 2013. It simply informs of the status of things and the settlement of the debt. For those reasons, the Plaintiff beseeches the court to enter judgment on admission in the sum of Kshs. 10 million.

The Defendant denied admitting any debt

(4) The Defendant opposed the application for judgment on admission. It filed a replying affidavit dated 22nd July 2014 and sworn by Nitin Purshottam Dawda the Managing Director of the Defendant. The Defendant submitted that, the parties in a bid to settle the present suit out of court entered into negotiations on how to settle the dispute. In the course of the negotiations both parties exchanged correspondences. The parties' representatives also on more than one occasion held face to face meetings. Indeed the Applicant's annexure MO3 refers to a past meeting between the parties. One of the letter's written by the Defendant's Managing Director has now become the subject of the present application this being despite the fact that the same was written in the course of negotiations on a without prejudice basis. To show this honourable court that indeed the parties were trying to negotiate the Respondent has attached e-mails from the Plaintiff's managing director to the defendant's managing director. The said letter of admission is, therefore, in admissible in evidence as it is privileged document.

(5) The Defendant went on to submit; that the purported admission was made in the letter dated 2nd July 2013 which was made amidst of negotiation. The writer refers to numerous meetings between the parties before the letter was written. The practice of without prejudice was designed to enable parties to find means of settling their disputes out of court by laying all their cards on the table without the fear of being held on the bargain in a court of law. Without prejudice correspondence may be express or implied. And a party should not be penalized for any admissions made as such. The admission should be disregarded by the court and dismiss the application. The courts have clearly held the view that the without prejudice rule applies to both oral and written admissions. It is clear that the letter dated from the Respondent's managing director was written in the course of negotiations between the two parties indeed he refers to meetings. The letter was written by a party who was clearly led to believe that the plaintiff was ready to settle the matter. The applicant being the party holding most cards abused its power by filing the present application. Indeed the Plaintiff has approached this court with unclean hands. The fact that the plaintiff/applicant purposely withheld the other correspondences exchanged between the parties in particular their responses clearly show that they intended to mislead this Honourable Court. The Defendant was of the view that the letter in question is a privileged document and as such inadmissible. They referred to the English case of Rush & Tompkins Ltd v Greater London Council and Another [1988] 3 All ER 737. It was a case in which discovery of correspondence forming part of out of court negotiations was prayed for by a stranger to

the negotiations. The House of Lords held that without prejudice correspondence exchanged with the object of a compromise in the action was privileged. Accordingly none of the parties to it or any other person would adduce them in evidence in subsequent proceedings without the consent of the parties to it. They urged the court to dismiss the Notice of Motion dated 30th June 2014 with costs.

The Determination

(6) The major issue here is whether the letter of 14th May 2013 amounts to admission in law? Here, I will also determine the queries that the said letter was written on without prejudice basis, and therefore, is privileged and inadmissible in evidence, for it is inextricable to the main issue. But let me settle one issue which I think is of preliminary importance- the issue of service of summons. The allegation that the Defendant was never served with summons and plant are neither here nor there. See the contradiction in the affidavits by Nitin Purshottam Dawda dated 19th July, 2013 at paragraph 2 "that contemporaneous with a plaint dated 1st July, 2013, the plaintiff herein filed an application of even date seeking injunctive orders against the defendant herein." Also I see an affidavit of service dated 20th July, 2013 sworn by Onesmum Muoki Kilonzo which show service was done. I rest the issue there.

(7) Back to the main course of things. The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: Choitram v Nazari(1984) KLE 327 that;-

> ...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."
>
> Chesoni Ag. JA went on to add that:-
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> "...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was''.
>
> Cassam v Sachania(1982) KLR 191 –
>
> The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment''.

(8) The Defendant in paragraph 6 and 7 of the replying affidavit avers that it owed the Plaintiff Ksh.90million which was settled and the balance of 10 million being claimed is usurious. It also contends that the admission of Kshs. 10 million in the letter dated 14th May 2013 was made on without prejudice basis and cannot found a judgment on admission. This claim throws me to a brief discussion on the practice of ''without prejudice'' communication in order to determine whether the letter dated 14th May 2013 is admissible in evidence as an admission for purposes of Order 13 Rule 2 of the Civil Procedure Rules.

(9) The practice of without prejudice in civil process and specifically admissions made thereto has received statutory protection in the *Evidence Act*, Cap.80 of the Laws of Kenya which provides:-

> 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".

(10) Counsels for the parties cited relevant cases which I will reproduce below. In the case of Geoloy Investments Ltd v Behal T/A KrishanBehal& Sons [2002] 2 KLR 447, Mwera, J stated thus:

> 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...The rule, however is strictly confined to cases where there is a dispute or negotiation, and suggestions are made for settlement thereof.

[11] Similarly in the case of Ongata Rongai Total Filing Station Ltd vs. Industrial and Commercial Development Corporation Nairobi (Milimani) HCCS No. 219 of 2007 (OS) Kimaru, J relying on Unilever vs. Proctor & Gamble [2001] 1 All ER 783; Rush &Tompkins Ltd v Greater London Council [1988] 2 All ER 737 at 739-40; [1989] AC 1280 At 1299; Cutts vs. Head [1984] 1 All ER 597 At 605-606; Scott Paper Co. vs. Drayton Paper Works Ltd [1927] 44 RPC 151 at 156 had this to say:

> The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. The rule rests on public policy and the convenient starting point of the inquiry is the nature of the underlying policy which is that parties should be encouraged so far possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should be encouraged freely and frankly to put their cards on the table and the public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. This rule is recognized as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensures... It is therefore clear that as a general rule, communication between parties to a suit, made on "without prejudice" basis will not be admissible in evidence. (emphasis own)

(12) 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.

(13) Is the letter dated 14th May 2013 a communication made on without prejudice basis? On the face of it, the said letter is not marked ''without Prejudice''. Express marking such communication as being on without prejudice makes our work easier. But where express marking is lacking, the court falls back to the other requirement; consider the communication and the entire circumstances in which it was made to determine whether it can infer that the parties agreed or intended the communication should not be given in evidence. Care should be taken, however, in this exercise to avoid parties who make clear and unequivocal admissions from denying such admissions under the pretext of cover of without prejudice. But let me examine the entire circumstances of the case. The suit is for a sum of Kshs. 18,639,153.90 with further interest at 18.25% p.a. and other prayers for in junction or deposit of security for the sum claimed. The letter dated 14/05/2013 does not refer to any usurious or disputed interest. The letter is making a proposition that the sum of Kshs. 100 million shall be the full settlement figure of the transaction. The letter also made reference to a professional undertaking having been given for the sum of Kshs. 90 million and the balance of Kshs. 10,000,000 was to be fully crystalized once their transaction is complete, but in the meantime, the defendant sought to know from HHM advocates on the type of comfort letter it can avail on the balance. The said letter does not contain any denial whatsoever of the plaintiff's claim. There is no ambiguity in the letter as the letter not only admitted the balance is Kshs. 10,000,000 but also made express intention to provide a letter of comfort to cover the balance; a clear intention to admit the debt. Although the letter refers to some meeting of the same day in the office of the CEO, Guardian Bank, there is nothing which shows the correspondence was intended to be privileged as it encapsulates the entire claim as admitted by the defendant to be due to the Plaintiff. The letter did not involve disputations on usury or disputed interest or compromises as alleged by the defendant. Therefore, no agreement can be inferred in the circumstances that the correspondence was not intended to be tendered in evidence. The letter is an admission that the defendant owes a balance of Kshs. 10,000,000 and is not the type which is protected under the cover and practice of ''without prejudice'' as it laid down the admitted sum and paid part of it. See Halsbury's Laws of England, 4th Edition Vol. 17. Accordingly, in such clear admission, it will be imprudent to allow the suit to go for trial on the issue; nothing useful will be gained in taking such course. The Defendant bore the onus, but did not prove that the letter dated 14th May 2013 was written on without prejudice basis as not to be tendered in evidence.

(14) The upshot is that I enter judgment on admission for the plaintiff against the defendant in the sum of Kshs. 10,000,000. Costs shall be determined in the cause upon the determination of the remainder of the debt claimed. It is so ordered.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2014

F. GIKONYO

JUDGE