

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA
AT KAMPALA
(COMMERCIAL DIVISION)
HCCS NO 198 OF 2009**

SAROPE PETROLEUM LTD}.....PLAINTIFF

VS

- 1. ORIENT BANK LTD}**
- 2. BARCLAYS BANK (U) LTD}**
- 3. FRED MUWEMA (RECEIVER)}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a procedural issue that arose in the course of cross examination of PW1 when a document written by the lawyers of the Plaintiff which included the caption “without prejudice” was presented to the witness in his cross examination. There is no need to refer to quote the letter specifically at this point. Suffice it to say that the Plaintiff’s lawyers objected to some letters being put to the witness on the ground that they were addressed to the opposite side with the words "without prejudice" written on top of the subject caption reference.

The Plaintiff is represented by Counsels Semuyaba Justin and Brian Othieno. On the other hand Counsel Mulema Mukasa appears for the third Defendant and was cross examining PW1 when the matter arose. On the Defendant's side the first Defendant is represented by Counsel Andrew Kibaya. The second Defendant is represented by Counsel Alan Waniale while the third Defendant is represented by Counsel Mulema Mukasa. Due to constraints of time the court and failure to produce authorities cited, the court was subsequently addressed in written submissions to enable the Counsel’s produce the appropriate authorities dealing with the issue of whether a

witness can be presented with his or her document written with the words “without prejudice” included in its caption to the opposite side on proposals therein.

The Plaintiff's Counsel in their written objections to presentation of certain documents written ‘without prejudice’ to PW1 submitted that the letters can be challenged because they were written "without prejudice. They submitted that the legal implications of such letters written without prejudice was considered in **HCCS 02 of 24 of 2011 Mohanlal Kakubhai Radia vs. WARID TELECOM Uganda Ltd** being a decision of honourable Mr justice Bashaija K Andrew. In that case the Defendant's Counsel sought to exclude exhibit P7 on the ground that it was written "without prejudice" and that it ought not to be admitted in evidence because the author is not precluded from relying on other defences available to him and the contents of the letter should be regarded without prejudice and not necessarily taken as the truth. The honourable judge referred to the Supreme Court authority of **Katumba Ronald versus Kenya Airways S.C.C.A. No 9 of 2008** on the legal position on letters written "without prejudice" and whether they can be admitted in certain circumstances. In the case of **East African Underwriters versus Civil Aviation Authority C.A.C.A No 8 of 2002** it was held that letters written ‘without prejudice’ can be admitted to show whether or not there is a binding agreement between the parties. The Plaintiff's Counsel submitted that correspondences written "without prejudice" mean without prejudice to the position of the writer if the terms proposed therein are not accepted. If the terms proposed in the letter are accepted, a contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given according to the case of **Walker versus Walker (1889) 23 QBD 335 at 337, C.A.** per Lindley L.J.

He submitted that the purpose of correspondence written "without prejudice" is to safeguard the position of the author who in that case would not necessarily be compromised by the contents of the letter. ‘Without prejudice’ correspondence is privileged and the general rule is that it is inadmissible in any subsequent litigation as it is not necessarily the whole truth. The author of the letter reserves the right to invoke other defences available to him or her. The Plaintiff's Counsels relied on the case of **Katumba Ronald versus Kenya Airways** (supra). Were

negotiations are successful, without prejudice correspondence constitutes a binding contract and the correspondence may for that reason alone be produced in evidence to prove that such a contract had been entered into according to the case of **East African Underwriters versus Civil Aviation Authority** (supra). Because the letters were written and no formal agreement was entered into by the parties, the Defendants cannot seek to exhibit the document on the court record because notice was given to them by Justin Semuyaba on 5 December 2014 that a challenge would be raised because they were written without prejudice.

Counsels further relied on the case of **Katumba Ronald versus Kenya Airways S.C.C.A. No 9 of 2008** where honourable Bart Katureebe considered the holding of the Court of Appeal in which a letter written "without prejudice" was excluded as inadmissible in evidence. In that letter the Respondent stated that the appellant's luggage had been mishandled in a letter addressed to the Appellants Counsel and it had been admitted into evidence by consent of both parties. It was wrong for the court to hold that there was no consent for admission. Because the letter was one of the agreed documents on record, it had become evidence on record and had to be evaluated with the rest of the evidence before judgment could be delivered. The respondent's Counsel supported the Court of Appeal decision and argued that although Counsel for the respondent had agreed to the document being exhibited in court, he did not thereby agree to the truth of its contents which had been written on a "without prejudice" basis. The document could not be an admission of guilt. It was held that a letter written "without prejudice" implies that the letter is reserving whatever other cause of action or defence that may be available to him. When a letter is admitted among the documents admitted at the trial, it is admitted together with the words "without prejudice". It cannot preclude the writer from relying on any other defences available to him or her. The contents of the letter must be regarded without prejudice and the court would not necessarily take its contents as the truth.

In conclusion the Plaintiff's Counsel submitted that cross examination of the Plaintiffs witness about the letters should be rejected as they were written without prejudice and no settlement was arrived at on the matter which is still pending in court for litigation. Since the letters had been admitted into evidence by consent of both parties, it is wrong to assume that admission would never be challenged at the hearing. More so, the Defendants Counsel was notified in advance

about the challenge on their probative value of whatever was been put on the court record since they were "without prejudice".

In reply the third Defendant's Counsel in their written submissions contended that on 19 April 2016 while Counsel for the third Defendant was cross examining PW1 Mr Robert Ssasagi, he sought to rely on exhibit DT7, DT8 and DT9 to facilitate his cross-examination. The Plaintiff's Counsel objected to the use of this exhibit on the ground that the documents were written "without prejudice" and were not admissible in evidence. The Defendant's contended that the documents in issue had already been admitted in evidence on 5 December 2014 before the previous trial judge Honourable Lady Justice Helen Obura and could be used as such and their relevance, usefulness probative value would be determined by the court after the examination process and submissions of Counsel.

Primarily the only two documents/letters they have the inscription "without prejudice" and these are exhibits DT7 and DT8 both of which were written by the Plaintiffs advocates Messieurs Lex Uganda Advocates. The other document DT9 is written by Messieurs Sebalu and Lule advocates and does not have the writing: "without prejudice" and cannot be challenged as envisaged in the ruling of honourable justice Helen Obura delivered on 5 December 2014.

The third Defendant's contention is that the said documents are admitted documents which admission was made at the scheduling conference on 5 December 2014. At this stage of leading evidence by examination they cannot be rejected or objected to. The decision in **Mohanlal Kakubhai Radia vs. WARID Telecom Uganda limited HCCS 224 of 2014** (supra) is instructive notwithstanding that such a document has the words "without prejudice". Secondly DT9 does not have the words "without prejudice" and is not subject to any challenge to prove its probative value and therefore it is an admitted fact under section 57 of the Evidence Act Cap 6. Counsel relied on the authority of **Uganda Breweries Ltd versus Uganda Railways Ltd SCCA No. 6 of 2001** at pages 32 and 33 thereof.

As submitted earlier the issue before the court was substantially determined and disposed off by the court on 5 December 2014 and there is a ruling and orders of the court. By trying this issue

again, the matter is res judicata under section 7 of the Civil Procedure Act Cap 71 laws of Uganda.

The documents were admitted which caveats to their relevancy, usefulness and probative value and it remained to the parties to show or prove their relevancy, usefulness or probative value. This can be done by asking questions of the witness namely PW1 or any other witness yet to be called. And this would be through cross examination or re-examination. The examination process on the documents has not started and any determination on their probative value can only be done in the judgment of court after this process and the party's submissions on points of law and fact.

In the premises Counsel submitted that it was premature at this stage to reject the documents as evidence. All the parties are to be afforded opportunity to ask questions on the documents in turn and there is no prejudice or injustice occasioned in anyway.

In the two decisions relied upon, the third Defendant's Counsel submitted that the exceptions were given to the general rule on the usage of communications with the inscription "without prejudice". He contended that it is trite law that each case has to be decided on their peculiar facts and in this case certain facts are in issue. Firstly there is a claim of good financial standing including well-to-do cash flows at the Plaintiff's business. Secondly there was no agreement reached during the pendency of the suit between the Plaintiff and the second Defendant banks. Thirdly claim of loss of monies at the third petrol stations/businesses, personnel or otherwise to the third Defendant. Fourthly the failure to report the alleged conversion of monies by the third Defendant to the Plaintiff's lawyers and non inclusion of the monies converted in offers to settle the suit.

The third Defendant's Counsel submitted that documents in issue can be used to prove or disprove the aforesaid facts in issue in line with the law touching on examination of witnesses by adverse parties to the suit. Furthermore already on court record through the testimony of PW1 who is under cross examination by the Defendants Counsel there is direct circumstantial evidence that the alleged loss of money and the three businesses/petrol stations of varying amounts was not raised in any written communication whether inscribed with the words "without

prejudice" or not. Indeed there was no report or criminal complaint of this ever made to the police authorities.

Proof of the existence of an agreement based on letters written "without prejudice" requires looking at the very letters in contention and similarly, proof of non-existence of an agreement based on the same letters requires looking at the very letters according to the case of **Mohanlal Kakubhai Radia versus Warid Telecom Uganda limited** (supra) and the case of **East African Underwriters** (supra).

Furthermore the third Defendant's Counsel submitted that even in the case of **Katumba Ronald versus Kenya Airways Ltd SCCA 9 of 2008**, Katureebe JSC (as he then was) offers some exceptions on the admission and usage of letters written "without prejudice". The author of such letter is not denied of other causes of action, rights or defences and secondly the court does not take such "without prejudice" documents necessary as the truth. The admission of such documents is not strictly barred as submitted by the Plaintiff's Counsel. In the premises the third Defendant's Counsel prayed that the two documents be allowed in evidence to aid and facilitate the third Defendant's case further.

Ruling

I have carefully considered the objection to presentation of two exhibits written by the Plaintiffs lawyers "without prejudice" to PW1 who is the Managing Director of the Plaintiff. Counsel Mulema Mukasa had sought to introduce one of the documents during his cross-examination of PW1.

The crux of the objection is that the documents ought not to be presented to the witness because they were written "without prejudice". DT7 is a letter dated 3rd of September 2009 written by Lex Uganda Advocates & Solicitors and addressed to Sebalu & Lule Advocates. Lex Uganda Advocates & Solicitors were the lawyers of the Plaintiff. They wrote on the subject of HCCS 178 of 2009 between the Plaintiff and the Defendants namely the current suit. Immediately after the names and the address of the addressee Messrs Sebalu and Lule Advocates is written the words "without prejudice". The letter contains proposals in an effort to settle the case. Upon

making the proposals the letter ends with the words: "the proposal is made entirely without prejudice to our client's case. Please let us get a response to the proposal as soon as possible."

Exhibit DT8 is another letter of Lex Uganda Advocates and Solicitors dated 3 September 2009 also written with the caption "without prejudice" immediately after addressing the letter to Messieurs Shonubi Musoke & Company Advocates. The letter contains some proposals for possible settlement of the suit and ends with the words: "the proposal is made entirely without prejudice to our client's case. Please let us get a response to the proposal as soon as possible."

Additionally Counsel Mulema Mukasa, Counsel for the third Defendant intends to put to PW1 exhibit DT9 which is a response of Messieurs Sebalu & Lule Advocates and Legal Consultants dated 14th of September 2009 in respect of several matters inclusive of HCCS 178 of 2009, some miscellaneous applications there under and HCCS 31 of 2009. It refers to the proposals made in an effort to settle the case. There was a counter proposal which ends with the words:

"Please assist answer this query to allow our client arrive at a good consideration of your client's proposal."

The objection of the Plaintiff's Counsel as I understand it is that the Plaintiff acting through his lawyers by including in the letters containing the proposals the words "without prejudice" did not intend or expect the letter is to be used to his prejudice. It is a submission that cross examination on a document written without "prejudice" may be to the prejudice of PW1 who is the Plaintiff's Managing Director. To counter this submission the Defendant's answer is that the documents in issue had been admitted by consent of the parties and there is an order of the court to this effect and the matter is res judicata. Secondly admission of documents is not about the weight to be given to the document and the Plaintiff may be cross examined on the document reserving the right of the parties and the court to weigh the document accordingly.

I have duly considered **Supreme Court Civil Appeal Number 9 of 2008** and the judgment of Katureebe JSC in **Katumba Ronald versus Kenya Airways Ltd.** The ruling arises from ground 6 of the appeal in which the Court of Appeal is reported as being criticised for holding that exhibit P3 which was a letter written "without prejudice" by the Respondents was inadmissible in evidence. The judgment indicates that the respondent had a written that the Appellants luggage

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

had been "mishandled" and addressed the letter to the Appellant's Counsel. It was submitted that the letter had been admitted into evidence by consent of the parties and it was wrong for the court to hold that there was no consent for the admission and reference was made to the judgment of Tsekooko JSC in **Administrator General versus Bwanika SCCA 07 of 2003**. The submission was that because the letter was one of the agreed documents, it became part of the evidence on record and had to be evaluated with the rest of the evidence before judgment could be given. Statements contained in documents are taken as the truth. On the other hand the respondent had supported the Court of Appeal decision that the document being exhibited in court which contained the word "without prejudice" meant that the author did not agree to the truth of its contents. It could therefore not be used as an admission of guilt. The ruling of Honourable Justice Bart Katureebe is that use of the words "without prejudice" implies that the letter reserves whatever other course of action or defence is available to the writer. When the letter is admitted, it goes together with the words "without prejudice". It could not preclude the writer from relying on any defence available to him and the contents thereof must be regarded without prejudice and the court would not necessarily take its contents as the truth. The letter did not admit wilful misconduct and the Court of Appeal was correct to reject it.

The ruling is explicit and binding on this court on the question of admission of a letter "without prejudice" as being done with the reservation as to any other course of action or defence. The Supreme Court did not go as far expressly ruling on the issue of whether the document is inadmissible or not. The document had been admitted in evidence and it went with the words "without prejudice". It could not be treated as an admission of wilful misconduct. I understand the Supreme Court judgment to hold that the Court of Appeal was right in rejecting or not taking into account the contents of the letter. The fact that the letter was in evidence is not material. The Supreme Court was dealing with the weight to be attached to the letter written "without prejudice". However the issue of whether a letter written "without prejudice" can be put to the author or a person on whose behalf it is written in cross examination was not considered.

Both Counsels quoted the case of **Mohanlal Kakubhai Radia vs. Warid Telecom Uganda limited HCCS 0224 of 2011**. In that suit the honourable judge noted that the Defendant's Counsel strenuously sought to exclude exhibit P7 on the ground that it was written "without

prejudice" and that it ought not to be admitted in evidence. On the other hand the Plaintiff's Counsel submitted that a document marked "without prejudice" can be admitted under certain circumstances. It can be admitted to show whether or not there is a binding agreement between the parties. Secondly in that case the letter could be admitted to show that there was no agreement between the company and the Defendant to build on a particular plot. Honourable Justice Bashaijja Andrew held that correspondence "without prejudice" means without prejudice to the position of the writer if the terms proposed therein 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 previous state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance may be given. The honourable judge cited the case of **Walker versus Walker (1889) 23 QBD 335** at 337 per Lindley LJ for this proposition. He further noted that the purpose of any correspondence "without prejudice" is to safeguard the position of the author who in that case would not be necessarily compromised by the contents of the letter. A "without prejudice" correspondence is privileged and the general rule is that it is inadmissible in any subsequent litigation. He went on to note that exhibit P7 in that case could be treated as an exception to the general rule for a number of reasons. The first reason was that it was admitted in court proceedings as in the consent of both parties at the scheduling conference. Secondly the doctrine of estoppels would operate to bar the Defendant from turning around to argue that the letter should not be looked at. Thirdly exhibit P7 was admitted in addition to other material evidence proving the facts in issue. Therefore correspondence "without prejudice" which forms part of a series of circumstantial proof of that fact in issue could be relied upon in litigation.

I have carefully considered the submissions, the evidence and the authorities. The matter before the court was not litigated upon in the authorities relied upon and deals with the question of whether an admitted document specifically containing the words "without prejudice" being a letter by the author can be put to the author or a person on whose behalf the letter is written during cross examination.

Generally in criminal proceedings incriminating remarks can be excluded at the discretion of the judge for various reasons. Secondly in this case there was admission of certain documents in

evidence through a scheduling conference. However admission of evidence should not be mixed with the weight of evidence. This is clear in criminal procedure. The common law allows a judge to exclude evidence obtained by improper or unfair means. A judge has a discretion to exclude otherwise admissible prosecution evidence if, in his opinion, its prejudicial effect on the minds of the jury outweighs its true probative value. In **Noor Mohamed v The King [1949] AC 182** at page 192 Lord du Parc held that:

“ ... the judge ought to consider whether the evidence which it is proposed to be adduced is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible.”

Whereas the decision makes it clear that admission in evidence should not be confused with the weight of the evidence, if it is in evidence which has already been obtained from the Defendant, it can be excluded on just grounds. This is consistent with section 57 of the Evidence Act Cap 6. The section provides as follows:

“57. Facts admitted need not be proved.

No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; *except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.* (Emphasis added)

The court may at its discretion require that facts admitted by the parties be proved through some other means than through such admission. As noted in earlier, in criminal proceedings, there is power at common law to exclude evidence that is self incriminatory such as admissions,

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+: maXimum728securityx 2016 style*

confessions or evidence obtained from the accused after commission of the offence according to the case of **R v Sang [1980] AC 402** at page 437. What is the position when Counsel for the Plaintiff agrees to have put in evidence letters with the words "without prejudice"?

The question before the court is not whether the documents should be admitted in evidence. They have already been admitted in evidence and the issue is whether they can be put to the Plaintiffs witness in cross examination.

One important principle that emerges from the above authorities is that the trial judge has discretionary power to exclude some evidence which has been admitted. Secondly the discretionary power includes power to admit the evidence to the prejudice of the person against whom it is introduced. The discretionary power should be exercised judicially with the aim of achieving justice and fair trial.

Such evidence has been admitted and can be used in the evaluation of evidence as it is. However the question is whether it should be used in cross examination of the Plaintiff's witness. Cross examination intends to put to the witness questions and elicit more evidence. The Plaintiffs witness PW1 is the principal player in the Plaintiff Company. Letters were written presumably on his instruction proposing settlement of the suit. There is no evidence anywhere that the proposals were accepted in order to constitute a binding contract between the parties according to the case of **Mohanlal Kakubhai Radia vs. Warid Telecom Uganda limited** (supra). Secondly what the court is dealing with is not admission of the documents in evidence because that is already done. If PW1 is cross examined as to the grounds or any other reasons for writing a letter "without prejudice" proposing settlement, that evidence may be prejudicial to the Plaintiff's side and the effect of the prejudice would arise from the contents of the letter written "without prejudice". While the letter can be used by the defence for whatever purpose it was admitted for, it cannot be used prejudicially in cross examination of PW1. It is my further holding that cross examination is usually intended to elicit facts which may be to the prejudice of the person being cross examined or the party for whom he or she appears. Rarely would the intention of cross examination be for the benefit of the opposite side. It can be used to impeach the credibility of the witness or to introduce some adverse material to the Plaintiff's prejudice. I find support for

this holding in the Oxford Dictionary of Law, 5th Edition edited by ELIZABETH A. MARTIN that:

‘cross-examination’ is the questioning of a witness by a party other than the one who called him to testify. It may be to the issue, i.e. designed to elicit information favourable to the party on whose behalf it is conducted and to cast doubt on the accuracy of evidence given against that party; or to credit, i.e. designed to cast doubt upon the credibility of the witness. Leading questions may be asked during cross-examination.”

Having considered all the facts and authorities it is my considered holding that while the evidence has not been excluded and the parties have a right to consider the weight to be attached to exhibits DT7, DT8 and DT9, those documents cannot be put to the prejudice of PW1 as clearly intended by use of the words "without prejudice" in the letter sending proposals to the opposite side. In other words the holding of the Supreme Court in the case of **Katumba Ronald versus Kenya Airways Ltd** (supra) is that even though the letter is admitted at the trial, it is admitted together with the words "without prejudice". While the decision is binding on this court, I had noted that it did not deal with the question of cross examination. Applying the words "without prejudice" to the purpose of cross examination, the primary intention of cross examination is to introduce any evidence of PW1 to the prejudice of the Plaintiff and to the advantage of the Defendants. In the premises a reply to letters written without prejudice in so far as they do not agree with the contents of the letters sending proposals without prejudice to the opposite Counsel cannot be put to the witness because they contain counterproposals. For that reason exhibits DT7, DT8 and DT9 cannot be put to the witness and the objections of the Plaintiff’s Counsel to putting the said documents to PW1 are sustained.

Ruling delivered in open court on the 2nd of May 2016

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+: maXimum728securityx 2016 style*

Brian Othieno Counsel for the Plaintiff/Counter Defendants

First Defendant/Counterclaimant is represented by Andrew Kibaya

Second Defendant/Counterclaimant is represented by Alan Wania

3rd defendant is represented by Mulema Mukasa.

Directors of the Plaintiff who are counter Defendants are in court namely Robert Ssasagi and Peace Sasagi

Christine Nshemereirwe the Recoveries Manager for the second Defendant

First Defendant's Legal Officer Conrad Atuhirwe in court

Charles Okuni: Court clerk,

Christopher Madrama Izama

Judge

2nd May 2016