

REPUBLIC OF KENYA
COMPETITION TRIBUNAL

AT NAIROBI

TRIBUNAL CASE NO CT/11 OF 2021

BETWEEN

THE MAKINI SCHOOL LIMITED..... APPELLANT

VERSUS

COMPETITION AUTHORITY OF KENYA..... RESPONDENT

*(Being an appeal from the decision of the Competition Authority of Kenya given at Nairobi on
13th day of October, 2021 by the Competition Authority of Kenya.)*

RULING

BACKGROUND

1. Before the Tribunal is a Notice of Motion dated 4th April 2022 brought pursuant to Rule 14 of the Competition Tribunal Procedure Rules, 2017. Order 19 Rules 3 & 6 of the Civil Procedure Rules 2010, Section 1A & 1B of the Civil Procedure Act Section 23 of the Evidence Act Cap 80 Laws of Kenya and all other enabling provisions of the Law seeking the following Orders
 - a. That the Honorable Tribunal do strike out or expunge from the Tribunal record the Respondents Replying Affidavit sworn on 10th January 2022 and filed on 11th January 2022.
 - b. That in the alternative to prayer 1 above, the Honorable Tribunal do strike out or expunge from the Tribunal record paragraph 44, 45, 46 and 47 of the Respondents Replying Affidavit Sworn on 10th January 2022 and all the annexures exhibited thereto.

2. The Application was supported by the sworn Affidavit of AWA MUHINDI, an advocate of the High Court practicing as such with the firm of Messer O&M Law LLP who had the matter on behalf of the Appellant.

3. The said Advocate stated that he was aware that the Appellant was engaged in "Without Prejudice" discussions with the Respondent concerning its decision and the financial penalty it then proposed to levy as a consequence thereof.

4. The Advocate deponed that the Appellant had filed a Memorandum of Appeal dated 12th November 2021 and the Affidavit filed therewith and the Appellant has filed a Replying Affidavit Sworn on 10th January 2022.

5. The Affidavit filed by the Respondent in response, refers to and exhibits correspondence that was issued in the course of such negotiations and was clearly marked "Without Prejudice" and which was consequently undoubtedly well calculated to prejudice and embarrass the Respondents.

6. That said advocate further deponed that paragraphs 44, 45, 46 and 47 of the Respondents Replying Affidavit Sworn on 10th January 2022 and the documents annexed to the said Affidavit and marked "WK 9 (a)" and "WK 9 (b)" are irregular and unlawfully before the Tribunal in so far as they comprise of correspondence exchanged on a "without prejudice" basis.

7. That the decision of the Respondent and the financial penalty levied as a consequence thereof the very subject of the said correspondence are disputed and are the subject of the instant Appeal. Reference to and production of the said documents is malafides, scandalous, oppressive bad in Law and otherwise an abuse of court process and ought to be struck out or expunged from the record of this Honorable Tribunal and sought the Tribunal to grant the prayers granted in the Notice of Motion.

8. The Respondent filed its Replying Affidavit in opposition to the Notice of Motion Application on the following grounds

a. That the rule on exclusions of “without prejudice” correspondence is not absolute as it has exceptions among them being that such correspondence is admissible for the purpose of illustrating the fact that such communication has been made and to show that negotiations have taken place.

b. That further to the above, a clear statement by one party to the negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel.

c. That the offending paragraphs 44 to 47 in the Replying Affidavit and the annexures in support of these paragraphs were meant to bring out a crucial fact in the matter in dispute thus their inclusion in the Respondent Replying Affidavit.

d. That it was in the interest of justice that paragraph 44 to 47 of the Replying Affidavit are maintained in the record and relied upon to ensure that the Tribunal is appraised of all the essential facts in this matter and the two annexures in paragraphs 44 “WK-9 (a) and WK 9 (b) and only annexure WK-9 (a) is marked without prejudice and thus annexure “WK-9 (b)” should not be expunged.

e. That paragraphs 44 to 47 contain matters of fact that require a response from the Appellant and should not be expunged from the Replying Affidavit as prayed by the Appellant.

APPLICANTS CASE

9. The Applicant filed its submissions dated 28th September 2021.

It was submitted that the Notice of Motion Application was filed as a consequence of an attempt by the Respondents to subvert a well-established rule of evidence and the Respondents Replying Affidavit refers and contains exhibits correspondence that was

clearly marked “without prejudice” with and undoubtedly were well calculated intention to prejudice and embarrass the Applicant appears on its merit.

10. The Appellant relied on Section 23 of the Evidence Act (Cap 80 of laws of Kenya) Secondly it was argued that there was no clear agreement pursuant to a negotiation that was reached between the Applicant and Respondent and especially now that would establish estoppel and further that there was nothing placed by the Respondent that the Appellant had conceded that it breached Section 42 (2) of the Competition Act in admitting liability for any financial penalty.

The Applicant further argued that in consideration of the policy underlying exclusion of consideration of “without prejudice” correspondence and the limited grounds of admissibility. The Applicant quoted the case of **Unispan Limited vs Africa Gas & Oil Limited 2014 eKLR**.

11. The Applicant also relied on the cases of **Khunaif Trading Company Limited vs Equity Bank & Another (2015) eKLR** and **Janet Osebe Gechuki vs Commission of Enquiry & Another (2007) eKLR** and **Iata vs Corinet Travel Limited (2019) eKLR** in which the High Court held that “thus where parties attempt negotiations which eventually fail then any “without prejudice” communication associated with such negotiations will not be admissible even where the negotiations fail and the matter proceeds to trial.’

12. The Appellant urged this Tribunal to grant the prayers in the Notices of Motion be granted as prayed.

RESPONDENTS CASE

13. It was the Respondents Submission in a nutshell (*whilst not admitting or denying*) that it had annexed “without prejudice” communication in its Replying Affidavit and its annexures

a. The Respondents main ground of opposition was that rule on “without prejudice” correspondence not absolute and has exceptions.

It relied on the Case of **Rush & Tompkins Ltd vs Greater London Council (1989) AC1280** quoted in the case of **Mumias Sugar and Another Vs Beatrice Akinyi Omondi (2016) eKLR at page 1300, Lord Griffiths** while discussing on admissibility of “without prejudice” communication stated 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 where the justice of the case requires it.

14. The Respondent also relied on the case of **Kawamambanjo Limited Vs Chase Bank (Kenya) Limited (2014) eKLR which quoted Halsbury’s. Laws of England Vol 17 at paragraph 213** “The contents of a communication made “without prejudice” are admissible 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 in fact that such has been made (though not their contents) is admissible to show negotiations have taken place”.

a. The Respondents argued that in the course of investigations done by the Respondents the Applicant and the Respondents were in negotiations regarding the financial penalty that would be payable by the Applicant as a result of engaging in a conduct prohibited under the Competition Act No.12 of 2010.

b. The Respondent also argued that “without prejudice” correspondence will be admissible to perpetuate the public interest requirement of full discovery between parties to litigation

It relied on the case of **Rush & Tompkins vs Greater London Council above where Lord Griffiths** while assessing on the question of admissibility of “without prejudice” correspondence stated that “I believe that question has to be looked at more broadly and

...by balancing two different public interests namely the public interest in prompting settlements and the public interest in full discovery between parties to litigation”.

- c. The Respondent further argued it was in the interest of justice that the impugned paragraphs were intended to ensure that this Tribunal was all aware of the facts surrounding the case and that the paragraphs contain matters of fact that the Appellant needs to disapprove the facts contained therein and the paragraph should not be expunged from the record.

ISSUES FOR DETERMINATION

15. The Tribunal has considered the Application. The Replying affidavit and the rival written Submission of the parties and frames the following two issues for determination.

1. Whether this Tribunal should strike out or expunge from its record the Appellants Replying Affidavit sworn on 10th January 2022?
2. Whether the Tribunal should strike out or expunge from its record paragraphs 44, 45, 46 and 47 of the Respondents Replying Affidavit sworn on 10th January 2022 and all annexures exhibited thereto?

ANALYSIS

16. The Appellant herein relied on **Section 23 of the Evidence Act Cap 80** 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”*.

17. The Applicants complaint is that against paragraphs 44, 45, 46 and 47 and the annexures thereto are offensive. The Applicant in its own case or pleadings, has not demonstrated before the Tribunal how the other paragraphs, other than the above three paragraphs in the Replying Affidavit are offensive, to it.

18. The Tribunal takes judicial notice that striking out is a very drastic remedy that should only be granted in exceptional cases.

A pleading should only be struck out in clear cases. See the case of **Trivedi and Trivendi vs Njeri Ngiru (Civil Appeal Number 129 of 1984) (Nyarangi Gachuhi and Apallo JAA on 11th November 1988)**

The Appellant has not made a case for a special case why the entire Replying Affidavit it seeks to be struck out should be expunged from the record.

19. It is the Tribunal's finding that the Appellant has not made a case or demonstrated how and why the parts of the Affidavit which are not offensive to it should be expunged from the record. For this reason Prayer 1 prayed in the Notice of Motion fails.

20. The second Prayer in the Notice of Motion the Appellant seeks the Tribunal to strike out paragraphs 44, 45, 46 and 47 of the Respondents Replying Affidavit.

The offensive paragraphs states as follow:

Paragraph 44 *“That the Appellant did not deny the Respondents findings on existence of the merger and instead submitted a counter proposal to the proposed penalty amount after which the Respondent responded with another proposal “Annexed hereto marked “WK 9(a)” and “WK 9(b)” are copies of the letter dated 17th August 2021 sent to the Respondent by the Appellant and the response from the Respondent dated 26th august 2021.*

21. The Tribunal has considered this paragraph and the annexures thereto and notes that Annexure “**WK 9(a)**” is clearly marked “**without prejudice**” Annexures WK 9(b) is not marked “**without prejudice**”.

22. The Respondent in its Submissions in paragraph 20 states

“Additionally and again dispute the foregoing Submission only the annexure marked “WK 9 (b) is not marked “Without prejudice” and over and above this is the Respondents own letter and should therefore be maintained in the Tribunal records”.

23. This Tribunal makes a finding that Exhibit “**WK 9 (a)**” is clearly marked “without prejudice”, while exhibit “**WK 9 (b)**” “is not so marked and is not apprehensive or offensive in any way.

24. In case of **Robin Vs Mendoza (1954) 1 ALL ER 247** it was held that “without prejudice” documents are inadmissible.

Similarly in **Fatuma Sood vs Total Oil Products, Kisumu High Court Civil Case Number 8 of 1996 (Wambilyangah on 16th June 1988)** held that documents on a without prejudice basis are inadmissible.

In **Geology investment Limited vs Behal T/A Krishna and Sons (2002) 2 KLR 447 (Mwera J on 25th June 2002)** held inter-alia and observed that the “*rubic without prejudice*” has been used over the ages particularly in correspondence between counsel for litigating parties to facilitate free and unhibited negotiations to explore settlement of disputes. *Until such time as there is a definite agreement on the issue at hand, such correspondence cannot be used as evidence against any parties”.*

25. The Respondent contends that there was an exception to this rule.

This Tribunal distinguishes the authorities cited by the Respondents from those quoted above, as the Appellant has contended on paragraph 11 and 12 of its Submissions that there was no agreement reached pursuant to a negotiation between the Appellant and the Respondent that the Appellant had accepted the adverse decision of the Respondent or thereafter accepted its liability to pay the financial penalty.

26. In the absence of a definite agreement between the parties the Tribunal finds that Exhibit “WK 9(a)” is inadmissible in evidence and is hereby expunged from the record.

27. In view of the above, this Tribunal makes a finding that prayer 2 of the Notice of Motion dated 4th April 2022 partly succeeds in so far as it relates to the inclusion of Exhibit “WK 9 (a)” clearly marked “without prejudice”.

28. The upshot of this is that prayer 1 of the notice of motion fails, prayer 2 partly succeeds in so far as exhibit “WK 9 (a)” is concerned, and WK 9 (a) be and is hereby expunged from the record.

FINDINGS AND DETERMINATION

29. This Tribunal makes the following findings and determinations

- i. This Tribunal finds that the Applicant has not satisfied the Tribunal that the Respondents Replying Affidavit sworn on 10th January 2022 and filed on 11th January 2022 should be expunged from the record, accordingly prayer 1 of the Notice of Motion is dismissed.
- ii. The Tribunal finds that paragraph 44 of the Respondents Replying Affidavit contains an exhibit “WK 9(a)” which is clearly marked “without prejudice”. This exhibit is expunged from the record. Since the said paragraph also refers to exhibit WK 9(b) which the Tribunal does not find offensive, paragraph 44 and exhibit WK 9(b) shall remain part of the record.
- iii. The Appeal filed by the Applicant be listed for hearing expeditiously

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29TH DAY OF
MARCH 2023.



HON. DANIEL OGOLA
CHAIRMAN
COMPETITION TRIUNAL

In the presence of

Awa Muhindi, for the Appellant

Miss Maina, for the Respondent

Marion, Court Assistant