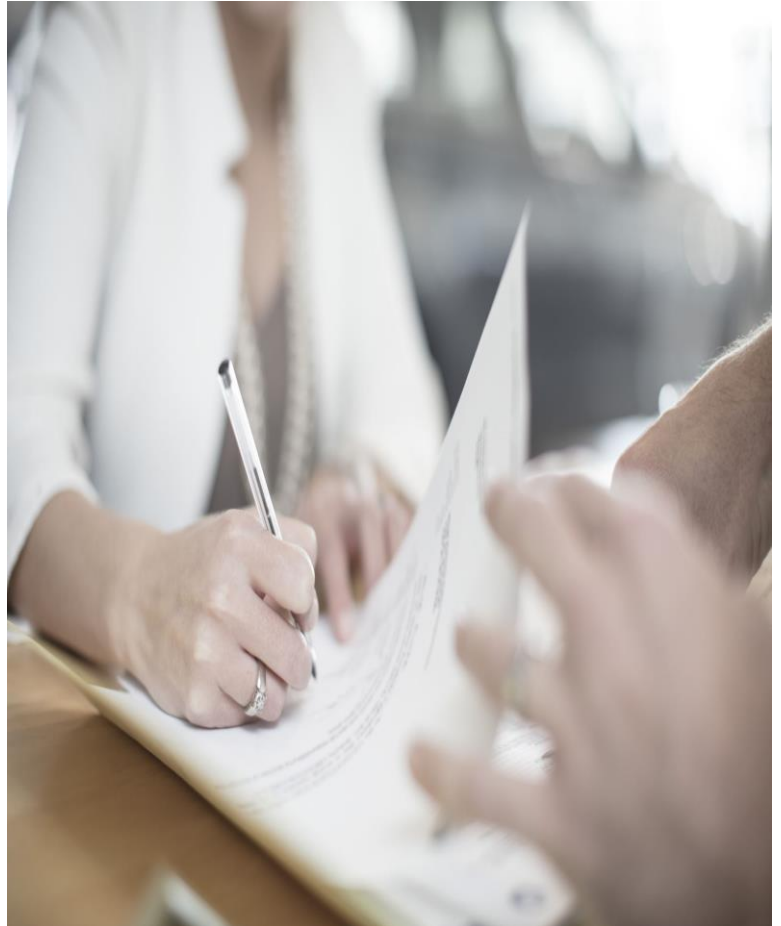


A LEGAL  
POSITION ON  
ADMISSIBILITY  
OF DOCUMENTS  
MARKED  
'WITHOUT  
PREJUDICE'  
UNDER  
NIGERIAN LAW



## INTRODUCTION

Without Prejudice” (WP) lexically speaking is generally a common law concept and a form of legal privilege with the aim of enabling parties attempting to settle to negotiate freely. When there is an existing dispute between parties, Without Prejudice discussions (sometimes referred to as “off the record” discussions) or correspondence can be used to reach a resolution. Ordinarily, the “Without Prejudice” rule prevents statements made in a genuine attempt to settle an existing dispute from being put before the court or tribunal as evidence of admissions made.

While engaging in commercial activities, disputes may arise wherein the disputing parties may elect to settle the dispute amicably or through litigation. To amicably resolve commercial disputes, parties may admit liabilities or divulge information in business letters or other communications captioned “without prejudice”. When a letter is marked “without prejudice”, usually any fact admitted, or information divulged in such letter is merely for the purpose of settlement. Hence, admission or information contained in such letters/documents must be accorded privilege and protected from being used to the disadvantage of parties in the event that the matter proceeds to court.

## THE GENERAL POSITION OF LAW

By the provisions of Section 196 of the Evidence Act, 2011 of Nigeria:

“A statement in any document marked “without prejudice” made in the course of negotiation for settlement of a dispute out of Court shall not be given in evidence in any civil proceedings in proof of the matters stated in it.”

In **Ashibuogwu v. A.G., Bendel State & Anor** (1988) LPELR- (SC), the Court at per Nnaemeka-Agu, JSC laid down this principle of law thus:

"A statement made in the course of the negotiation of the compensation or the offer of such a compensation would, in my view, be analogous to a statement made "without prejudice" during a negotiation. The law has always taken the view that parties should speak freely in attempting a settlement of their disputes. That freedom of discussion will be seriously prejudiced if any offer or admission made in the process of the negotiation could be given in evidence and be used to support a party's case in Court afterwards, should negotiation break down. Where such negotiations are made by written communication, they are usually recognized that in some circumstances it is not essential that the words "without prejudice" should have been used; it may be implied that negotiations were conducted on this understanding...."

Similarly, the much-cited case of **Unilever Plc v. The Procter & Gamble Company** [2000] 1 WLR 2436, affirms the modern standard to the admission or exclusion of “without prejudice” communication in evidence in Nigeria. In this case, the Court struck out the suit for being an abuse of court process on the ground of

inadmissible statement as the statements being relied on by the Claimant were ruled to be statements made by the Defendant during negotiation and were hence privileged.

### THE IMPLICATION OF THE USAGE OF “WITHOUT PREJUDICE” IN BUSINESS LETTERS AND SETTLEMENT OF DISPUTES

By virtue of the “Without prejudice” rule, whenever the expression is used in a letter/document or during settlement of disputes or negotiations between two parties to a commercial agreement, it precludes such letter/document, information divulged, and liabilities admitted in such statement/letter/document from being admissible in evidence against the maker.

This doctrine seeks to encourage parties in scenarios of disputes and negotiations to peacefully resolve ongoing disputes between them by placing all their cards on the table, in order to aid easy resolution of trade and business disputes without the fear of being held by the jugular to a disadvantaged point should the dispute or subject matter of it eventually be adjudicated upon.

In Nigeria, the importance of the doctrine was given judicial flavour by the Supreme Court in **Jadesimi v. Egbe** (2003) 10 NWLR (Pt 827) 1 where the Court held that the doctrine or principle will apply even when such document/letter is not so marked, as what is important is that it was made in the course of negotiation in an attempt to settle dispute between parties. – See

also **Joe Iga & Ors. v. Ezekiel Amakiri & Ors.** {1976} 11 SC. 1

### CONDITIONS FOR UPHOLDING THE WITHOUT PREJUDICE RULE

It should be noted that the mere fact that any document/letter has been marked “without prejudice”, does not automatically disqualify such document from being admissible in evidence. The crucial test and conditions which the Court will look at and critically consider when presented with letters/documents marked “without prejudice” is stated in the case of **Jadesimi v Egbe** {Supra} as follows:

- a. The marked letter/document must have been made in the course of negotiation or settlement of dispute or negotiation between parties. – Section 196, Evidence Act, 2011.
- b. The document must contain an admission that can be detrimental/disadvantageous to the maker.
- c. The document must be in such circumstances from which the Court can infer that parties intended that evidence of it should not be given, this is to say that it was meant to be privileged.
- d. The mark of “without prejudice” must have been made on the document with previous conditions fully present, without which the addition of the expression is merely cosmetic.

## EXCEPTIONS

It should be noted that any document captioned “without prejudice” where there is no dispute/settlement ongoing is admissible in evidence as the Court will disregard the caption for an attempt to subvert justice –**Jadesimi v Egbe** {Supra}.

In the English case of **Unilever Plc v. The Procter & Gamble Company** [2000] 1 WLR 2436, CA, the Court also established several exceptions to the inadmissibility of Documents/letters marked “without prejudice” and several of them have been equally adopted and applied by the Nigerian Courts over the years.

Documents/Letters marked “without prejudice” may still be admitted in evidence notwithstanding the fact that they so mark for the following reasons:

- Where it is clear that the document does not contain an admission, neither was it made in an attempt to settle a dispute or contemplation of a proceeding {litigation or ADR} – Section 196 of the Evidence Act, 2011.
- Where the party relying on the without prejudice rule is not a party to the document marked “without prejudice”. This exception is comparable to the principle of privity of contract, as only parties to a contract and sue and enforce it.
- Where it is tendered to prove that the document was made

## CASE APPLICATION TO THE EXCEPTIONS

and not to prove the matter stated in it or prove the admission of the maker – In **Jadesimi vs. Egbe** [Supra}, the Court held that “a statement made without prejudice is admissible to prove that it was made and not to prove an admission by its maker”

- In the case of **Underwood v Cox** {1912} 4 DLR 66, the Court held that: “Documents/letters marked without prejudice are admissible in evidence when the purpose is to show that settlement or agreement concluded was reached by misrepresentation or fraud or undue influence”. However, the Nigerian Evidence Rule has not been extended to cover this.
- Where the without prejudice communication, whether concluded or not, on which a party intends to act and does act are admissible as giving rise to estoppel.
- Without prejudice communications are admissible in evidence where the communication would serve as a cover for perjury or other criminal offences.
- Without prejudice communications are also admissible in evidence in order to explain delay, acquiescence in suits where the other party has a preliminary objection that the suit is statute-barred.

In **Pacers Multi Dynamics Limited & Anor v. Eco Bank Plc** (2020)

LPELR - 45008 (CA) IKYEGH, JCA held; “The letter written 'without prejudice' became cosmetic or decorative and/or impotent and did not drain the agreed indebtedness of potency and efficacy... However, there is a concluded agreement the fact that the correspondence is 'without prejudice' would not affect its admissibility in evidence.”

In the same vein, in the case of **Greyspot Enterprises Ltd v. The Hon. Minister of Agriculture & Ors.** (2002) 9 NWLR (Pt.771) 1, it was held inter alia that if, however, there is a concluded agreement the fact that the correspondence is marked 'without prejudice' would not affect its admissibility in evidence.

Likewise in the recent case of **AMCON & Anor v. Israel Aerospace Industries Ltd & Anor** (2019) LPELR-47324(CA), The Court, laying down the exception succinctly submitted inter alia.

“... The policy of the law is to encourage settlements; it is thought to be "unfair" that advantage should be taken of the willingness of one party's admission and then hold that without prejudice communications should not be disclosed. I must be quick to add that the inscription of the words "without prejudice" cannot be applied to truncate a concluded agreement.

### **THE LEGAL DISTINCTION BETWEEN “WITHOUT PREJUDICE” AND “ADMISSION”**

Basically, an admission refers to owning up to a fact under the law.

Section 20 of the Evidence Act, 2011, defines an admission as “a statement, oral or documentary, or conduct which suggests any inference as to any fact in issue or relevant fact in issue”. It should be noted that the “Without prejudice” rule operates by its very nature as an exception to the principle of admission.

Generally, by the provision of Section 123 of the Evidence Act, 2011 facts that are already admitted require no further proof, save for facts which need to be proven other manner different from admission. However, though facts have been admitted by a person and ought to be held out against him, the “Without Prejudice” rule as contained in Section 196 Evidence Act, 2011 operates as a shield and protection for the maker of the statement from being held liable to any admission made in a document while still at the negotiation stage.

### **THE RELATIONSHIP BETWEEN “WITHOUT PREJUDICE” AND “RELEVANCY”**

It is an established legal principle that relevancy governs admission of documents in evidence in Court. Section 1 of the Evidence Act 2011 provides that only facts which are relevant to the facts in issue are admissible in evidence. However, where there is an existence in law which will render that fact inadmissible by its nature, such fact, though relevant, becomes inadmissible. See **Kubor v. Dickson**, {2013} 4 NWLR {Pt. 1345} 534 at 577-587.

Likewise, facts though relevant and admissible may still become excluded by virtue of the “without prejudice” rule as contained in the provision of Section 196 of the Evidence Act, 2011. Another similarly interesting provision is Section 26 of the Evidence Act, 2011, which provides that:

“In civil cases, no admission is relevant if it is made either upon an express condition that evidence of it is not to be given or in circumstance from which *the Court can infer that the parties agreed together that evidence of it should not be given.*”

Clearly, from the foregoing, where the court can infer that parties agree or intend that such evidence of any nature should not be given, the court will deem such evidence privileged, as affirmed by the without prejudice rule. It should be noted that this is however subject to the test of legality, repugnancy or where the court compels such evidence.

### **CORRESPONDENCE THAT SHOULD NOT BE MARKED WITHOUT PREJUDICE**

- Letters of demand.
- Petition to law-enforcement agencies, disciplinary bodies and tribunals.
- General commercial letters which are not in any way related to the settling of disputes. For example, letters of offer granting a loan facility should not be tagged “without prejudice”.

- Deeds of Assignment, title documents, legal mortgages, or transfer of title.
- Prenuptial agreements. (In countries where legal)
- Documents already privileged, e.g., communication between Attorney and Client.
- General commercial contracts.

### **RECOMMENDATIONS**

- In settlement of disputes, it is advisable that parties when making an offer which may or may not be accepted by the other party to title such letters “without prejudice” so that such letters will not be held out against the offeror.
- When engaged in a “without prejudice” communication, parties must be careful not to inadvertently waive the privilege that attaches to “without prejudice” communication by subsequent conduct or communications.
- In the event the “without prejudice” might be admissible, parties can go further to execute a Non-Disclosure Agreement (NDA) to protect their rights. A Non-Disclosure Agreement restricts parties to the agreement from disclosing vital information protected under the NDA.
- The best way to apply the rule is by clearly noting and agreeing with the other party that such communication is privileged. While the court can infer this, it is better for parties to clearly

state this in their  
correspondence.

## **CONCLUSION**

This Article is a potent reminder that the protection afforded by the Without Prejudice rule is not absolute and parties should take care not to overlook this when participating in Without Prejudice discussions and correspondence.

The need to ensure seamless business relationships between disputing parties spurs parties in dispute to seek out-of-Court settlements, in order to achieve parity of demands. Hence, “Without prejudice”, though a legal provision, is also backed by a public policy expectation and burden on parties which is that- parties to a dispute or negotiation process should feel free to communicate for purpose of settlement.

That said, it should be restated succinctly, that as effective as this general principle of law is and the court will generally affirm it, the exceptions must be understood and circumvented where desired, so that the general rule can be duly applied within the full tenor of law.



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