



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 457 of 2004**

**BENJAMIN NGUA KIMUYU.....1<sup>ST</sup> PLAINTIFF**

**ANASTACIA NDUKU MULI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENLINE AGENCIE LIMITED.....DEFENDANT**

**AND**

**BARCLAYS BANK OF KENYA LTD.....3<sup>RD</sup> PARTY**

**RULING**

The defendant *KENLINE AGENCIES LTD* had secured a loan from *BARCLAYS BANK LTD* and offered as security the following securities namely: *L.R. NO.NAIROBI/BLOCK 82/267*, which was charged on 2<sup>nd</sup> March 1989.

A further charge of the same property on 28<sup>th</sup> June 1991. A second further charge on 21<sup>st</sup> April 1992. *L.R. NO.NAIROBI/BLOCK 126/639* on 26<sup>th</sup> July 1995. A third further charge over *NAIROBI/BLOCK 82/267* on 5<sup>th</sup> May 1998. *L.R. NO. 1160/740* on 19<sup>th</sup> September 2001 and *L.R. NO. NAIROBI/BLOCK 126/640*.

Kenline defaulted in servicing the loan. By 22<sup>nd</sup> May 2003 the accumulated loan plus interest had reached Shs.41,677,228.12. Kenline was completely unable to service the loan. The bank issued Kenline a Statutory Notice to realize the security. Kenline moved to court on 7<sup>th</sup> October 2003. The parties recorded a consent order in the following terms among others.

In paragraph 4 of the consent order the Bank allowed the Kenline to subdivide the suit property *L.R. NO.1160/740* into 11 subdivisions and sell the subdivisions. Provided that there shall be no discharge registered in respect of any subdivisions unless the full purchase price in respect of such sub-division has been paid in full to the bank. Provided further that the plaintiffs will be all costs of the subdivisions and will obtain the necessary consents for the subdivisions.

**“7” That the sale of the subdivisions by the plaintiffs be completed within 90 days from the 1<sup>st</sup> day of September 2003 time being of essence.”**

On the 4<sup>th</sup> December 2003 the plaintiffs entered into a Sale Agreement to purchase *L.R. NO. 2260/775* which was one of the subdivisions of *L.R. NO.1160/740* at Shs.4,500,000/=. The plaintiffs

paid a deposit of Shs.2,500,000/=. The balance of Shs.2,000,000/= was to be paid on or before the completion date.

The plaintiffs after learning of the consent order recorded between the defendant and the Bank in *HCCC NO. 198 OF 2003* felt cheated as the defendant had breached the consent order entered into between itself and the bank as stated above.

The filed this suit against the defendants seeking:-

- (a) Damages for breach of contract.
- (b) Return of the deposit to the plaintiffs.
- (c) Further special damages as pleaded in paragraph L 13 ( c ) (d) (e) and (f) of the plaint.
- (d) Interest on the damages for breach of contract.
- (e) Other relief as the court deems fit.
- (f) Costs.

On 12<sup>th</sup> August 2004 the plaintiffs filed this application by way

of Notice of Motion seeking judgment on admission and in the affidavit in support of the application the plaintiffs annexed a bundle of documents which included the following letters which were marked “without prejudice” namely: Letters dated 16<sup>th</sup> January 2004, 26<sup>th</sup> January, 2004, 5<sup>th</sup> February 2004, 19<sup>th</sup> March 2004, and 15<sup>th</sup> December 2004.

Mr. Wandaka counsel for the defendants raised Preliminary Objection to the application on the ground that admissions made “without prejudice” are not admissible in evidence.

Miss Luvuna counsel for the plaintiffs submitted that there was a Sale Agreement between the plaintiffs and the defendants. A deposit of Shs.2,500,000/= was paid to the defendants but the defendants have failed to deliver the suit property. The defendants have admitted through correspondences that they received the payment but were unable to complete the sale because the property was mortgaged to the bank.

All the plaintiffs want is the refund of the deposit. The defendants are not covered by the phrase “without prejudice” privilege,

Letters written or oral communication made during a dispute or negotiation between the parties and expressed or otherwise proved to have been made “without prejudice” cannot generally be admitted in evidence.

The privilege has been authoritatively stated to be founded on the public policy of encouraging litigants to settle their differences rather than litigate them to finish. The literal use of the phrase “without prejudice” is no more than indicative that evidence prefaced by it may be intended to lead to the settlement of a dispute and so to be protected.

The rule however is confined to cases where there is a dispute or negotiation and suggestions are made for the settlement thereof. Where this is not the case apart from some special relation existing between the sender and the recipient, the sender of a letter cannot impose on the recipient any condition as to the mode in which it may be used by marking it “without prejudice” or “private” or “confidential”.

Thus the rule has no application to a document which in its nature may prejudice the person to whom it

is addressed.

In the incident case suit property was not available as the defendants had breached the terms of the consent order recorded between it and the bank to which he had mortgaged the same. When the Sale Agreement between the plaintiffs and the defendants was entered into the time within which to sell the subdivisions had expired so that the statement was not made as part of a genuine attempt to negotiate a settlement.

An unequivocal admission of impropriety may override any exclusion, even though made under the rubric in the context of negotiation. In the incident suit the attempts to settle by the defendants were not genuine since the suit property was no longer available for the sale.

The preliminary objection to the plaintiffs' application dated 12<sup>th</sup> August 2004 is disallowed. Costs to the plaintiff.

Delivered and dated at Nairobi this 11<sup>th</sup> day of October 2005.

**J.L.A. OSIEMO**

**JUDGE**