



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 528 OF 2017

(Formerly Nairobi Milimani ELC Case No. 773 of 2016)

PARIKIEN OLE NAIKUNI OSEUR.....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

NKOSERA KILELU SIRERE.....2ND DEFENDANT

RULING

What is before Court for determination is an Objection raised by the Plaintiff’s Counsel in respect to the 2nd Defendant’s production of a Letter dated the 27th May, 2003 which the 2nd Defendant intended to produce as an exhibit as it was marked ‘without prejudice’. The 2nd Defendant’s Counsel submitted that this letter is crucial as it forms the crux of the case. Further, that it is a letter authored by the Plaintiff addressed to the 2nd Defendant during the time parties were not in any form of negotiation. She submitted that in the said letter the Plaintiff admitted there was a transaction between them and captures the history of this matter. Further, it confirms there was a Sale Agreement, Purchase Price paid and the description of Land being sold. She reiterated that the Plaintiff should not be allowed to hide behind the ‘without prejudice’ rule.

The Plaintiff’s Counsel submitted that this is a Court of procedure. Further, Letter marked ‘without prejudice’ cannot be produced as evidence unless the receiving party acknowledges it and accepts the terms thereon. He insists at no time did the Plaintiff admit he wrote such a letter. Further, there was no negotiation between Plaintiff and 2nd Defendant. The maker of the Letter has to be called.

Analysis and Determination

Upon consideration of the submissions by the Counsels for the Plaintiff and 2nd Defendant, the only issue for determination is whether the Letter dated the 27th May, 2003 marked ‘without prejudice’ should be produced as an exhibit herein. It is not in dispute that the 2nd Defendant had filed the said letter as part of his list and bundle of documents on the 23rd November, 2016. I note on 5th June, 2017 when the respective Counsels appeared before the Deputy Registrar, they intimated that all parties had complied with pre trial directions and sought for a hearing date. At no point was there an objection raised in respect of production of the letter dated the 27th May, 2003. Be that as it may, the Plaintiff’s Counsel has objected to the production of the said letter. On perusal of the letter dated the 27th May, 2003 which was marked ‘without prejudice,’ I note it is from messrs Naikuni Ngaah & Company Advocates who had been retained by the Plaintiff to send a demand note to the 2nd Defendant in respect to the dispute herein. In the said letter, it indicates there was a Sale Agreement, Purchase Price paid for Kshs. 462,000 in respect to 60 acres of land situated at Enkaroni in Kajiado. The said law firm was warning the 2nd Defendant from intimidating the Plaintiff and intimated they would proceed to lodge a complaint with the Land Disputes Tribunal. The Plaintiff insists since the communication was marked ‘without prejudice’ the same cannot be produced.

In the case of Rush and Tompkins Ltd V Greater London Council [1989] AC 1280 at page 1300, Lord Griffiths on dealing with the ‘without prejudice’ rule said:-

"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of negotiations being unsuccessful they are not to be referred to in at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore

agree with the Court of Appeal that the problem in the present case should be resolved by linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. 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 when the justice of the case requires it....(emphasis mine)

Further, in the case of **Ocean Bulk Shipping and Trading SA V TMT Asia Limited and others (2010) UK SC 44** in the main judgement by Lord Clarke, he provided exceptions to the 'without prejudice' principle and indicated that an agreement made during WP negotiations may be set aside on the ground of misrepresentation, fraud, or undue influence.

See the case of **Ongata Rongai Total Filing Station Ltd V Industrial & Commercial Development Corporation (2009) eKLR**.

I note the letter dated the 27th May, 2003 was written before this suit was filed on 8th July 2016. Further, on perusal of the Plaintiff dated the 3rd July, 2016 and filed in court on 8th July, 2016, the Plaintiff has made allegations of fraud against the 2nd Defendant at its paragraph 15 where he denies existence of a Sale Agreement and that the 2nd Defendant effected a transfer of the suit land without the consent of the Plaintiff and his family.

Based on my analysis above while relying on the decisions I have cited, I beg to differ with the Plaintiff that the letter dated 27th May, 2003 marked without prejudice is inadmissible as the same was made as a demand notice before this suit was filed while the parties were not involved in any form of negotiations to resolve the matter. Further, the Plaintiff had made allegations of fraud within his Plaintiff while *balancing the public interest in promoting settlements and the public interest in full discovery between parties to litigation, I opine that it is pertinent if the said letter was produced as evidence.*

It is against the foregoing that I proceed to dismiss the objection and allow the 2nd defendant to produce the letter dated 27th May, 2003 as an exhibit.

Costs will be in the cause.

DATED SIGNED AND DELIVERED IN OPEN COURT AT KAJIADO THIS 12TH DAY OF APRIL, 2021.

CHRISTINE OCHIENG

JUDGE