



Beckwith v Mara Wildlife Ballon Services Limited (Cause E219 of 2025) [2025] KEELRC 2713 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2713 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E219 OF 2025
SC RUTTO, J
OCTOBER 3, 2025**

BETWEEN

JOYCE WAIRIMU BECKWITH CLAIMANT

AND

MARA WILDLIFE BALLON SERVICES LIMITED RESPONDENT

RULING

1. The Respondent, by a Notice of Objection dated 28th May 2025, challenges the admission of an audio recording marked JW-21 contained in the Claimant’s list and bundle of documents. It is the Respondent’s contention that the recording, relating to a meeting of 19th December 2024, breaches the principles of privileged communication and confidentiality and further offends Article 50(4) as read with Article 25(c) of the *Constitution* and public policy.
2. The Claimant countered the Respondent’s Objection through her Response dated 9th June 2025, in which she contends that while the Respondent objects to the recording of the meeting held on 19th December 2024, no objection has been raised against the recording of the meeting of 6th October 2024. She avers that both meetings were between the parties, save that the meeting of 19th December 2024 was also attended by their respective Advocates.
3. The Claimant further avers that both meetings of 6th October and 19th December 2024 were convened at the instance of the Respondent, and all participants were at liberty to take notes in any form, including audio recording. That being an invited participant, she recorded both meetings in audio, which recordings are legally verifiable. According to the Claimant, the Respondent’s claim of lack of consent to the recording is without legal basis, as such consent was neither necessary nor legally required.
4. The Claimant further contends that the Respondent has neither demonstrated any illegality in the manner of recording nor shown how the production of the audios offends Articles 31 or 50 of the



Constitution . That consequently, their production is not prohibited by Article 50(4) on admissibility of evidence.

5. The Claimant further avers that the Respondent does not dispute the accuracy of the recordings, but merely fears that they will expose perjury, misrepresentation, and concealment of material facts relating to the ‘new entity.’ She further argues that the Respondent’s Legal Officer, Angela Muhu, voluntarily disclosed the information in issue and repeated the same in her witness statement dated 6th May 2025.
6. According to the Claimant, no prejudice would be suffered by the Respondent if the recordings of 6th October, 2024 and 19th December, 2024 are admitted.

Submissions

7. The Objection was canvassed through written submissions. In support thereof, the Respondent argued that, as a matter of law and judicial policy, proceedings conducted in the context of Alternative Dispute Resolution (ADR) are strictly without prejudice, whether expressly stated or not, and do not bind the parties unless and until a formal agreement is reached. It was the Respondent’s position that such proceedings are privileged and inadmissible against any party. On this score, reliance was placed on the decision in Kenya Institute of Management v Wakbanu (2025) KEERLC 133 (KLR) and on the commentary in Words and Phrases Legally Defined, 4th Edition, at page 1353.
8. The Respondent further submitted that the ADR engagement was undertaken in good faith as an effort to resolve the Claimant’s grievances and was accordingly privileged, unless and/or until a binding agreement was reached which was not the case. It was further urged by the Respondent that any attempt to introduce the audio recording into evidence offends the proper administration of justice and amounts to an improper practice which should be robustly frowned upon.
9. The Respondent further contended that admitting the said recording would contravene Section 23(1) of the Evidence Act, as well as Articles 25(c) and 50(4) of the Constitution . In the Respondent’s view, such admission of the impugned document would render the trial unfair, contrary to Article 25(c).
10. In conclusion, the Respondent prayed that the objection be upheld and that the audio recording marked JW-21, together with its transcript, be expunged from the record. It was further urged that any pleadings or statements by the Claimant making reference to the contents of the said meeting be similarly struck out.
11. Submitting against the Objection, the Claimant argued that the Respondent has not placed before the Court any evidence to demonstrate that the audio recordings were unlawfully obtained, or that their production infringes its constitutional rights, or offends the principle of advocate/client confidentiality. To fortify this position, reliance was placed on Jennifer Nyambura Kamau v Humphrey Mbaka Nandi, NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR, and Trust Bank Limited v Paramount Universal Bank Limited & 2 Others, Nairobi (Milimani) HCCS No. 1243 of 2001.
12. Referencing the decision in Hon. Justice Said Juma Chitembwe, Judge of the High Court (Petition E001 of 2023) [2023] KESC 114 (KLR) (Judgment of 28 December 2023), the Claimant submitted that she personally made the audio recordings of the meetings with the Respondent held on 19th December 2024, at which Advocates for both parties were present. She further posited that there were certificates of electronic evidence on record, which confirm that no third party was involved in the making of the recordings, a fact not disputed by the Respondent. In the Claimant’s view, the recordings are therefore of high probative value and that their making, presentation, and admission cannot amount to a violation of the right to a fair hearing under Articles 50 and 25(c) of the Constitution .



13. The Claimant further submitted that the audio recording of 19th December 2024 demonstrates the Respondent's fraudulent misrepresentation, concealment, and non-disclosure of material information, which induced her to enter into a contract under the honest belief that she had been dealing with the same employer since 2019. She added that the allegation of entrapment is unfounded, as she was incapable of committing such an offence.
14. Placing reliance on the decision in *Jackline Chepkemoi Kimeto v Shafi Grewal Kaka & 3 Others* [2019] KEELRC 2392 (KLR), the Claimant submitted that she neither improperly, unlawfully, nor illegally obtained any communication between Angela Muhu and Mara Wildlife Balloon Services Limited, and that she has not sought, nor does she seek, to rely on any such privileged communication. In her view, the information in issue does not qualify as privileged. She further contended that the audio recording is central in corroborating the Respondent's witness statement and ought therefore to be admitted in evidence.
15. The Claimant further argued that the audio recordings would aid the Court in evaluating the facts presented by both parties so as to arrive at a just and fair determination of the issues in dispute. She further contended that no prejudice would be occasioned to the Respondent by their admission into evidence.
16. The Claimant further contended that the Respondent was invoking the 'without prejudice' principle mala fides, as a cloak to conceal its perjury and impropriety.
17. She further submitted that neither 'alternative dispute resolution' nor 'without prejudice' communication is expressly provided for under Sections 128 or 143 of the *Evidence Act*, or under any other written law. In her view, such privilege is subject to consent, waiver, exemption, the conduct of the parties, and judicial interpretation in the interest of fair administration of justice.

Analysis and Determination

18. To my mind, the question for determination at this juncture is whether the audio recording of the meeting held on 19th December 2024 between the Claimant and the Respondent amounts to privileged communication, and if not, whether it is admissible in evidence before this Court.
19. The Respondent contends that the meeting was an ADR session and, by law and judicial policy, the proceedings therein are without prejudice and privileged unless and until a binding agreement is reached. In the Respondent's view, the proceedings of the meeting held on 19th December 2024 are privileged and thus inadmissible against any party.
20. The Claimant takes a contrary position, asserting that at no point during the discussions did the Respondent invoke the 'without prejudice' rule or ADR, nor make any statements capable of being construed as having been made on a 'without prejudice' basis. She has further argued that neither ADR nor without prejudice communication is expressly recognised under the *Evidence Act* as privileged, and further, that any such privilege is subject to waiver and judicial interpretation.
21. In light of the rival positions advanced by the parties, the Court is called upon to determine whether privilege attaches to the deliberations of 19th December 2024, and if so, whether such privilege was waived or otherwise lost through voluntary disclosure.
22. The Court has considered the audio recording and transcript of the meeting held on 19th December 2024. It is discernible that the meeting was held after the Claimant's termination from employment, with discussions revolving around the reasons for her termination, the lawfulness of the procedure



followed by the Respondent, and the computation of terminal dues. Evidently, no consensus was reached on the contested issues hence the present suit.

23. Viewed holistically, and in light of the Claimant’s opening remarks, the deliberations point to the fact that the parties were engaged in settlement negotiations. For instance, the Claimant in her opening remarks stated as follows: “..so that when I bring up something and you see it is not correct we can back check with the company policies check with the Employment Act and where we are at in a legal term of view, and then once we finished we sign what we need to sign I am happy with my days you happy with what you have written...”
24. Indeed, the Court observes that the Claimant’s opening statement indicates that the deliberations were conducted with a view to resolving the contentious issues. The record further demonstrates that the parties engaged openly and without inhibition, consistent with negotiations aimed at settling the matter.
25. Article 159(2)(c) of the [Constitution](#) requires courts, in the exercise of judicial authority, to promote alternative dispute resolution, including mechanisms such as reconciliation, mediation, arbitration, and traditional dispute resolution methods.
26. To give effect to this constitutional imperative, it follows that parties must be allowed to negotiate candidly without fear that statements made in such forums would later be used against them in court. Indeed, the use of such communication would defeat the very object of out of court settlement negotiations.
27. Although the parties herein did not expressly label their deliberations of 19th December 2024 as ‘without prejudice,’ such a characterization was implied, given that the discussions were undertaken with a view to resolving the matter outside the court process.
28. As I understand, the principle of ‘without prejudice’ is intended to encourage frank and honest negotiations between parties, without fear that concessions, admissions, or proposals made during the discussions will subsequently be relied upon in court. It also enables parties to explore settlement options freely and openly, thereby promoting the constitutional and policy objectives of ADR.
29. In considering the legal principles underpinning the ‘without prejudice’ rule, the Court of Appeal in [Heineken East Africa Imports Co. Ltd & Another v Maxim Ltd](#) [2024] KECA 625 (KLR) cited with approval the decision of the Supreme Court of the United Kingdom in [Oceanbulk Shipping and Trading SA v TMT Asia Limited & 3 Others](#) [2010] UKSC 44, where it was held as follows:
 - “19. The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is usually called, the without prejudice rule, initially focused on the case where the negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying rationale of the rule was that the parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute.”
30. Further to the foregoing, Section 23 of the [Evidence Act](#) provides that no admission is admissible in civil proceedings if it was made on an express condition that evidence of it should not be given, or in



circumstances from which the Court could infer that the parties agreed that such evidence should not be adduced. As observed in *Heineken East Africa Imports Co. Ltd & Another v Maxim Ltd* [supra], this rule is founded on the express or implied agreement between the parties that communications made in the course of their negotiations should remain inadmissible, in evidence if, despite their negotiations, a contested hearing ensued.

31. The protection afforded under Section 23 of the *Evidence Act* is consistent with the constitutional mandate in Article 159(2)(c), which obliges courts to promote alternative dispute resolution. As stated earlier, this ensures that parties engage in out of court negotiations candidly, without apprehension that statements made in the course of settlement discussions will be used against them in subsequent judicial proceedings.
32. As to exceptions to the ‘without prejudice’ rule, the Court in *Heineken East Africa Imports Co. Ltd & Another v Maxim Ltd* [supra] held that communications made ‘without prejudice’ are admissible only in exceptional circumstances, such as to establish the existence of a binding agreement arising from the negotiations, or to determine whether such an agreement had been reached and to the fact that such communications had been made was also admissible to show that negotiations have taken place, but not its contents, which were otherwise not admissible.
33. As earlier adverted, the deliberations between the parties did not culminate in any form of agreement, as there was no consensus. Consequently, the exceptions to the ‘without prejudice’ rule are not applicable.
34. For the reasons stated above, the Court finds that it would be manifestly unfair to admit statements made during bona fide settlement discussions against the Respondent during the deliberations by the parties on 19th December 2024.
35. Accordingly, the Respondent’s objection is upheld and the audio recording of the meeting of 19th December 2024 and the attendant transcript are hereby expunged from the record.
36. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Nganga

For the Respondent Mr. Mungla

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

