REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. PETITION NO. 137 OF 2018

DAVID GITAU THAIRU.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

THE GOVERNOR, MACHAKOS COUNTY GOVT....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. In the Application dated 15th December, 2017, the Petitioner is seeking for the following orders:

> ***a. That Judgment on admissions be entered in favour of the Petitioner against the 1st and 2nd Respondents, the County Government of Machakos and the Governor, Machakos County Government based on the admissions contained in their advocate's letter dated 12th October, 2015.***
>
> ***b. That Judgment on admissions be entered for the Petitioner against the 1st and 2nd Respondents, the County Government of Machakos and the Governor, Machakos County Government by an order that the 1st and 2nd Respondents do pay compensatory and exemplary damages to the Petitioner for the illegal entry, trespass and waste dumped onto his property Land Reference Number 23423, Machakos.***

2. The Application is supported by the Affidavit of the Petitioner who has deponed that the Petition was filed after the 1st and 2nd Respondents trespassed on Land Reference Number 23423, Machakos; that the Respondents also dumped or caused to be dumped and left on the land deposits of cotton soil and other waste and that the Petition was filed to prohibit the Respondents from trespassing on the suit land and for compensatory and exemplary damages.

3. The Petitioner has deponed that by way of a letter dated 12th October, 2015, the 1st and 2nd Respondents' advocate agreed that the 1st Defendant was willing to settle the matter out of court by compensating the Petitioner for the 10 meters that was utilized by the road and for one (1) hectare along the main road. The Petitioner deponed that the letter of 12th October, 2015 is clear and unambiguous and that Judgment on admission should be entered in his favour.

4. In his Replying Affidavit, the 1st Respondent's Chief Legal Officer deponed that the parties have been negotiating the matter with a view of settling the same out of court; that all the correspondences between the Petitioner and the Respondents have been on a without prejudice basis and that as a matter of public policy, if the negotiations fail, neither party should be able to rely upon admissions made by the other in the course of the negotiations.

5. The Petitioner's advocate submitted that Order 13 Rule 2 of the Civil Procedure Rules empowers the court to enter Judgment on admission of facts, either in their pleadings or otherwise; that the letter dated 12th October, 2015 by the Respondents' advocates amounts to admission by the Respondents and that the letter was not marked *"without prejudice."*

6. The Petitioner's advocate submitted that the Respondent's advocate's letter dated 12th October, 2015 is not privileged because all the other letters marked *"without prejudice"* came after the said letter and the value of the land of Kshs. 20,000,000 was stated by the Respondents' advocate in his letter dated 17th June,2 016.

7. The Respondents' advocate submitted that the parties in this matter have been negotiating on a without prejudice basis in an attempt to settle the matter amicably and that communication between parties that relates to a series of correspondences considered to be on a *"without prejudice"*, cannot be adduced as evidence in court.

8. Counsel submitted that *"without prejudice"* may be applied by the courts when examining the nature of the evidence before them; that in any event, the Petitioner has not presented before the court a response to the impugned letter to show whether or not the content of the letter was accepted or refuted and that the letter dated 12th October, 2015 does not amount to an admission. According to counsel, the letter was only an offer which was to be considered by the Petitioner.

9. Counsel submitted that the letter of 12th October, 2015 does not in any way amount to an admission but only offers a proposal which was to be considered by the Petitioner and that the correspondences between the Petitioner and the 1st Respondent was done on a without prejudice basis.

10. This matter was commenced in Nairobi by way of a Petition dated 20th December, 2013. In the Petition, the Petitioner pleaded that he is the registered proprietor of L.R. No. 22423 situated in Machakos Town *(the suit land)*; that the 1st Respondent trespassed on the suit land and commenced constructing roads, storm water drainage and sewer lines and that he should be compensated for the said trespass.

11. From the correspondences produced, the parties commenced negotiations to settle the matter out of court. In the letter dated 12th October, 2015, the 1st and 2nd Respondents' advocate informed the Petitioner's advocate as follows:

> ***"RE: MACHAKOS JR. NO. 1 OF 2014"***
>
> ***We refer to the above matter and the application in the matter.***
>
> ***We confirm that our client is willing to settle the matter out of court. Accordingly, our client proposes as follows:***
>
> ***a. The Government compensates your client for the 10 metres that has been utilized by the road.***
>
> ***b. The Government compensates your client's 1 hectare along the main road that is not too far from his land.***
>
> ***We, therefore, seek your indulgence in withholding the Application for injunction as we expeditiously resolve this matter.***
>
> ***We suggest that hold a meeting in our Nairobi offices on 19th or 20th October, 2015 at 2.00p.m to resolve this matter."***

12. On the basis of that letter done, the Petitioner is seeking for Judgment on admission to be entered. The law relating to the circumstances under which Judgment on admission may be entered has been settled.

13. In ***Choitram vs. Nazari (1984) KLR, 327***, Madan JA held as follows:

> ***"For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain as a pikestaff and clearly readable because they may result in Judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."***

14. Indeed, admissions of fact under Order 13 Rule 2 of the Civil Procedure Rules need not be in the pleadings alone. An admission can be in the form of correspondences or duly drawn cheques. In the case of ***Peeraj General Trading and Contracting Company Limited, Kenya & Another vs. Mumias Sugar Company Limited (2016) eKLR***, the court quoted with approval the case of ***Choitram*** *(supra)* as follows:

> ***"Admissions of fact under Order XII Rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission mode through letters, affidavits and other admitted documents and proval oral admissions… It is settled that a Judgment on admission is in the discretion of the court and not a matter of right. That discretion must be exercised judicially."***

15. The 1st Respondent's Chief Legal Officer has deponed that the letter dated 12th October, 2015 that the Petitioner is relying on was just one of the many letters that the parties exchanged while negotiating this dispute out of court. Indeed, other than the said letters, all the other letters were marked *"without prejudice."* Being a letter amongst other letters that were marked *"without prejudice"*, it was argued that the letter of 12th October, 2015 was also done on a without prejudice basis.

16. Indeed, the documents annexed on the 1st Respondent's Chief Legal Officer shows that the letter of 12th October, 2015 was the first letter amongst a series of many other letters. Although the letter of 12th October, 2015 by the 1st Respondent's letter was done without being marked *"without prejudice"*, the response by the Petitioner's advocate in his letter of 14th October, 2015 was marked *"without prejudice."* All the subsequent letters by the Petitioner and the 1st Respondent's advocates were marked *"without prejudice."*

17. It is trite that communication between parties that relates to a series of correspondence considered to be *"without prejudice"* cannot and should not be adduced as evidence in court, or as an admission of the claim. This is an accepted principle in litigation to allow parties to

negotiate a dispute without the fear of one party using the promises made by the other party as an admission.

18. Indeed, as was held by Ochieng J. in ***Athi River Steel Plant Limited vs. China Construction Engineering (K) Ltd (2017) eKLR,*** there are instances when, due to human error, a party may omit to include the term *"without prejudice"* in his letter(s). When that happens, the court has the obligation to ascertain if indeed, in the scheme of things, the correspondence should be treated as having been done on a without prejudice basis.

19. The above position was addressed by Gikonjo J. in the case of ***Guardian Bank Limited vs. Jambo Biscuits Kenya Ltd, Nairobi HCCC No. 301 of 2013*** in which he held as follows:

> ***"Express marking such communication as being on without prejudice, makes our work easier. But where express marking is lacking, the court falls back to the other requirement; consider the communication and the entire circumstances in which it was made, to determine whether it can infer that the parties agreed or intended the communication should not be given in evidence. Care should be taken, however, in the exercise, to avoid parties who make clear and unequivocal admissions, from denying such admissions under the pretext or cover of without prejudice."***

20. I am in Agreement with the above pronouncement. The applicable test is whether the communication was part of a genuine attempt to settle a dispute. If so, those attempts should be protected by the court by not allowing promises made by one party to form part of the evidence, or to amount to admission. That is what happened in this matter when the 1st Respondent, through its advocate, made an offer to the Petitioner, with a view of settling the dispute out of court.

21. In fact, the offer that was made by the 1st Respondent's advocate in its letter of 12th October, 2015 cannot amount to an admission that is as plain as a pikestaff and which is obvious on the face of it. The said offer was subject to firstly, the Petitioner accepting it, and secondly to assessment of the payable amount. There is no evidence that the Petitioner accepted this offer.

22. That being the case, and considering that the letter of 12th October, 2015 was just one of the letters that was in a series of many other letters that were authored by both parties to attempt in settling the dispute out of court, that letter, despite having not been marked *"without prejudice"* is a privileged document. The letter does not amount to an unequivocal admission of the Petitioner's claim.

23. For those reasons, I dismiss the Application dated 15th December, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 27TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE