

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 27 OF 2019

JOSEPHINE NDERUPLAINTIFF

VERSUS

BANK OF BARODA.....1ST DEFENDANT

SKYHEIGHT DEVELOPMENT LTD.....2ND DEFENDANT

PAPEAS LEWIS NDERU KINYANJUL.....3RD DEFENDANT

LAND REGISTRAR, UASIN GISHU.....4TH DEFENDANT

ATTORNEY GENERAL5TH DEFENDANT

RULING

Mr. Mwetich learned counsel for the 1st and 2nd defendants makes an oral application that the whole of the replying affidavit of the 3rd defendant sworn on 13th March, 2019 be expunged from record for annexing documents with privileged information. Mr. Wahinya, learned counsel for the 3rd defendant on the other hand applies that the replying affidavit of Divyesh Kotecha be struck out for annexing privileged information. He quips that what is good for the goose is good for the gander.

I have perused the 3rd respondent's replying affidavit sworn on 13th March, 2019 and do find that the deponent has annexed **PLNK V**, a letter written on a without prejudice basis whereas the 1st and 2nd defendants have in the affidavit of Divyesh Kotecha annexed **DK 5** that was written on a without prejudice basis. It is not clear whether the other annexures were written on a without prejudice basis as some are not legible.

In law, statements made in a document marked on a without prejudice or made verbally on a without prejudice basis, in a genuine attempt to settle a dispute, will generally not be admissible in court against the person making the statement. The treatise Halsbury's Laws of England vol 17 at paragraph 213 states-

“The contents of a communication made on a without prejudice basis are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communication have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise inadmissible.”

In the case of **Lochab Transport Ltd V Kenya Arab Orient Insurance Ltd (1986) eKLR**, it was held thus –

“if an offer is made on a without prejudice basis evidence cannot be given on this offer. If this offer is accepted, a contract is concluded, one can give evidence of the contract and give evidence of that ‘without prejudice’ letter”

The upshot of the above is that all annexures marked “without prejudice” including annexure PLNK V in the affidavit of the 3rd defendant and annexure DK 5 in the affidavit of Divyesh Kotecha are expunged. I decline to strike out the respective affidavits. Costs in the cause.

Dated and Delivered at Eldoret this 21st March, 2019.

ANTONY OMBWAYO

JUDGE