



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 1195 OF 2013**

**KOINARI LEIKARI KANAMO.....PLAINTIFF**

**VERSUS**

**ATHI RIVER MINING LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOYCE NANKAYA WARURU.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff filed an application dated **13<sup>th</sup> June 2014** seeking an order that Judgment on admission be entered for the Plaintiff against the 2<sup>nd</sup> Defendant for Kshs. 5,680,000/- together with costs and interests from the date of filing suit. The application is premised on grounds that the Plaintiff was the registered owner of land title **Kajiado/Kaputiei South 1215** until the 2<sup>nd</sup> Defendant procured the sub-division and transfer of 40 acres known as **Kajiado/Kaputiei South/3130** thereof to the 1<sup>st</sup> Defendant at a sum of **Kshs. 6,680,000/-** on account of the Plaintiff. The Plaintiff avers that the 2<sup>nd</sup> Defendant paid into his account a total of **Kshs. 1,000,000** but is yet to settle the remaining **Kshs. 5,680,000/-** despite her admission that the contract of the sale of the Plaintiff's land measuring 40 acres was fully performed by the 1<sup>st</sup> Defendant and payment made to and received by the 2<sup>nd</sup> Defendant on his behalf.

The application is supported by an affidavit sworn by **Adeline Moraa Rogito**, Advocate in conduct for the Plaintiff. The deponent referred to the 2<sup>nd</sup> Defendant's Replying Affidavit sworn on 27<sup>th</sup> November 2013, wherein she admitted to have received **Kshs. 6,680,000/-** from the 1<sup>st</sup> Defendant but paid the Plaintiff only **Kshs. 1,000,000/-** in two instalments of **Kshs. 500,000/-** on **5<sup>th</sup> July 2012** and **27<sup>th</sup> July 2012**. The deponent also referred to correspondences and deposed that the 2<sup>nd</sup> Defendant's advocate made proposals in a bid to enter in to an out of court settlement to the effect that the 2<sup>nd</sup> Defendant would pay **Kshs. 4,500,000/-** in full and final settlement instead of **Kshs. 5,680,000/-**. The deponent urged the court to allow the application deposing that it would be in the interest of justice that the matter be disposed off without further delay.

The 2<sup>nd</sup> Defendant filed a Notice of Preliminary Objection dated 17/6/2014 on grounds that the documents annexed to the affidavit of Adeline Moraa Rogito are irregularly and unlawfully before the court because it comprises of communication exchanged between the parties. Secondly, that the inclusion of the said documents is mala fides and intended to delay or obstruct the course of justice. The 2<sup>nd</sup> Defendant further averred that the affidavit should be expunged from the court record and the Plaintiff be condemned to meet the costs of the application.

The 2<sup>nd</sup> Defendant also swore a Replying Affidavit on **7<sup>th</sup> July 2014**, wherein she reiterated the contents of the Preliminary Objection and refuted the claim that she admitted receiving Kshs. 6,680,000/-. The Plaintiff deposes that she pursued an out of court settlement on a without prejudice basis with a view of finding an amicable solution. Further that the initial and subsequent proposals of Kshs. 3.8 Million and 4.5 Million, respectively on a without prejudice basis was based on the belief of being a civil debt and not the purports of the suit.

The application was canvassed by way of written submissions. Counsel for the 2<sup>nd</sup> Defendant filed submissions dated 22<sup>nd</sup> July 2014 wherein it was submitted the Plaintiff's annexures are without prejudice communication which are negotiations and compromises that were made with the aim of reaching a settlement. However, that the agreement never crystalized and therefore the protection afforded by the "without prejudice" tag is still in force. In support of the submission, counsel relied on the authorities of **Millicent Wambui v Nairobi Botanica Gardening Ltd (2013) eKLR, Kwamambanjo Ltd v Chase Bank Ltd & Another (2014) eKLR, and Janet Osebe Gichuki v Commissioner of Customs and Excise & Another (2007)** where the courts did find that the without prejudice letters were not admissible as the parties did not come to an agreement.

On behalf of the Plaintiff, counsel filed submissions dated 25<sup>th</sup> July 2014 wherein counsel distinguished the authorities relied on by the 2<sup>nd</sup> Defendant's counsel. It was submitted that the correspondence subject matter of the application were exchanged between the parties after the suit was instituted and therefore the 2<sup>nd</sup> Defendant was already aware of the claim against her. Further, pursuant to the said correspondence, the 2<sup>nd</sup> Defendant's offer of Ksh. 4.5 Million in full and final settlement was agreed by the Plaintiff. Consequently, that the correspondence is lawful, regular and admissible.

The application herein is brought under Order 13 Rule 2 of the Civil Procedure Rules which gives this court discretion to enter Judgment as it deems fit upon an application by any party. The provision reads:

**"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just."**

The Plaintiff avers that the 2<sup>nd</sup> Defendant in a Replying Affidavit sworn on **27<sup>th</sup> November, 2013** made an admission to receiving **Kshs. 6,680,000/-** but only remitted to the Plaintiff **Kshs. 1,000,000/-** hence remaining with a balance of **Kshs. 5,680,000/-**. The Plaintiff relied on correspondence exchanged between counsels in support of the claim. This claim has been refuted by the 2<sup>nd</sup> Defendant who maintains that without prejudice correspondence is not admissible in the circumstances. The 2<sup>nd</sup> Defendant also denies making an admission as alleged by the Plaintiff.

The jurisprudence relating to applications made for judgment on admission is set out in the following cases:

***Choitram -V- Nazari (1984) KLR 327- .... admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as 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. Cassam -V- Sachania [1982] KLR 191- The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment.***

I have carefully read through the pleadings on the court record. The Plaintiff in the amended Plaint makes allegations of fraud and misrepresentation on the part of the 2<sup>nd</sup> Defendant by, inter-alia, making a power of attorney, sub-dividing and subsequently transferring 40 acres of the Plaintiff's property. These

allegations were mirrored in the supporting affidavit of the Plaintiff's application dated 3<sup>rd</sup> October 2013 to which the 2<sup>nd</sup> Defendant swore the Replying Affidavit on 27<sup>th</sup> November 2013 in response thereto. The 2<sup>nd</sup> Defendant denies the allegations of fraud made by the Plaintiff maintaining that the Plaintiff willfully and without coercion agreed to the preparation of the power of attorney, sub-division and transfer.

Courts have established that it is rare and quite unusual to enter summary judgment when serious allegations of fraud and other wrong-doings are made. This principle was re-stated by the Court of Appeal in the case of **Harit Sheth T/A Harit Sheth Advocates v Shamas Charania Civil Appeal No. 252 OF 2008 [2014] eKLR** when they were faced with an appeal emanating from a judgment entered on admission.

The Plaintiff has placed reliance on the correspondence exchanged between the advocates and deposed that albeit on without prejudice basis, the correspondence were admissible because the offer made by the 2<sup>nd</sup> Defendant was accepted and therefore a contract was entered into. On perusal of the said correspondence, the last letter was written by the Plaintiff's advocates accepting the 2<sup>nd</sup> Defendant's proposal but with conditions. A response to the said letter, if any, was not availed and therefore this court cannot ascertain that the Plaintiff's counter-offer was accepted and acted upon. In that regard, it is my considered opinion that the negotiation between the parties did not result to an agreement and thus the correspondence remains without prejudice.

Having now considered the Plaintiffs Notice of Motion dated 13<sup>th</sup> June 2014, the Court finds it not merited. The upshot is that the Plaintiff's application is dismissed. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered this **20<sup>th</sup>** day of March **2015**

**L. GACHERU**

**JUDGE**

In the Presence of:-

None attendance for the Plaintiff/Applicant though served.

Mr Kirwa for the 2<sup>nd</sup> Defendant/Respondent

Hilda: Court Clerk

**L.GACHERU**

**JUDGE**

**Court:**

Ruling Read in pen Court in the presence of the above counsels.

**L. GACHERU**

**JUDGE**