



EVALUATING THE UTILITIES OF SECTIONS 26 AND 196 OF THE EVIDENCE ACT 2011: ARE DOCUMENTS MARKED “WITHOUT PREJUDICE” A SHIELD OR A SWORD?

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ABSTRACT

It is a rule of public policy based on the proposition that it is better to settle than to fight, confidential overture made in course of negotiation are excluded from evidence. This legal rule is of common law origin and it emphasizes two purposes, firstly, the rule is to facilitate a free discussion by protecting the proposals and discussion from disclosure in the proceedings ultimately to achieve a compromise. Secondly, whilst the ordinary meaning of “without prejudice” is without prejudice to the position of the offeror if his offer is refused, it is not competent for one party to impose such terms on the other in respect of a document which, by its nature is capable of being used to the disadvantage of that other. Before the advent of the Evidence Act 2011 and the eventual codification of this principle of law in section 196, this rule was applied in our court through the aid of section 25 of the Evidence Act Cap 112 LFN 1990. However, it appears that every document marked without prejudice tend to acquire protection under this rule in a manner that suggest that this time-honoured legal rule is a sword rather than a shield. This paper seeks to demystify through the judicial application of this rule before and after its codification by the Evidence Act 2011 whether it is a shield or a sword.

INTRODUCTION

The law has always taken the view that parties should speak freely in attempting a settlement of their dispute. Freedom of discussion will be seriously prejudiced if any offer of admission made in the process of the negotiation could be given in evidence and be used to support a party’s case in court afterwards , should the negotiation breakdown.¹ Therefore, letters marked “without prejudice” which consist confidential overtures by the defendants to the plaintiff with a view to

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¹ S. F. Tamunowari, *Annotation of the Nigerian Evidence Act* (2nd edn. God’s Grace Chambers 2014)88.



settle their dispute are excluded from evidence in the court on the ground of public policy.² Most documents marked without prejudice are so marked to protect the writers who would have made some offers, concession or compromises with all good

intentions, possibly to forestall litigations.³

A document marked “without prejudice” is generally not admissible in evidence to protect the maker who made them with genuine intention to settle their dispute and avoid litigation.⁴ Even when such documents amount to an admission against interest.⁵ Documents marked “without prejudice” protects subsequent and even previous correspondence and admissions made during a bona fide attempt to settle a dispute even if not expressly marked so is also inadmissible in evidence.⁶

The main purpose for excluding from evidence admissions made “without prejudice” in the course of negotiation to settle a dispute is to enable parties negotiate fully and sincerely without being hindered by the fear that any admission made by them in the course of such negotiation might be used against them later in the court.⁷ It is to remove inhibition from frank, free and full negotiation for the settlement of dispute. Without prejudice means without loss of any rights, in a way that does not harm or cancel the legal rights or privileges of a party. Where an offer is made without prejudice, it is meant as a declaration that no right or privilege of a party concerned are

²*Ashakacem Plc v A.M Investment Ltd.* (2019) 5 NWLR (pt. 1666) 444.

³³ S.T. Hon, *Law of Evidence in Nigeria* (3rd edn. Pearl Publishers International Ltd 2019) 744.

⁴*Ibiyeye v Gold* (1013) All FWLR (PT. 659) 1074 at 1090.

⁵*Spring Capital Market Plc. v Ikara* (2016) 9 NWLR (Pt. 1516) 173.

⁶*Fawehinmi v Nigerian Bar Association* (No.2) (1989) 2 NWLR (Pt. 105) 358 at 622.

⁷*UBA I.A.S. Company Ltd* (2001) FWLR (PT. 75) 587.



to be considered as thereby waived or lost. Such document has no place in legal proof of an assertion.⁸

The application of this legal policy which was intended to operate as a shield to protect a party who in a bona fide attempt to settle dispute made a compromise, now appears in many instances to have been deployed as a sword to avoid liability. The court for the efficient application of this legal rule had formulated several exceptions to the general rule.

RELEVANCY AND ADMISSIBILITY

Relevancy and admissibility, although closely related, are different, because, while relevancy is based on common sense and logic, admissibility is regulated by the Evidence Act. Relevancy and admissibility have an inseparable relationship under the law of evidence. The principle is that facts which are irrelevant are inadmissible. However, not every relevant fact is admissible. As a general, rule it is only facts which are relevant to the fact in issue that can serve as a basis for the admissibility of a piece of evidence.⁹ A piece of evidence is relevant if it is logically probative of some matter which require proof.¹⁰

The relevance of any fact is determined by the fact that evidence of it will prove the existence or non-existence of any fact in issue or it is declared relevant by a provision of the Act.¹¹ It is logically connected and tending to prove or disprove a matter in issue; having appreciable

⁸*Ashibuogwu v. A.G Bendel State* (1888) 1 NWLR (Pt. 69) 138.

⁹ T.A. Aguda, *The Law of Evidence* (4th edn. Spectrum law series 2007)26.

¹⁰*R. v. Kilbourne* (1973) AC 729 at 746.

¹¹*Okonji v.Njokanma* (1990) 14 NWLR (PT.638) 250.



probative value. That is. Rationally tending to persuade people of the probability or possibility of some alleged fact.¹²

According to J.F. Stephen;

The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.¹³

Aguda¹⁴ holds the view that the entire law of evidence is reliant on, chiefly, on the rules regulating admissibility and inadmissibility of evidence, and whether a piece of evidence is admissible or not is determined by whether the fact to be established by the evidence is relevant to the fact in issue. The Evidence Act does not provide any precise meaning but relevance means connected with the matter at hand, pertinent and relevant evidence is that which is applicable to the issue, and which ought to be received.¹⁵ For any piece of evidence in a civil litigation to be considered as being cogent, it must possess the twin qualities of relevance and admissibility.

The evidence must be relevant to a fact in issue, or to any fact which though not in issue, is so connected with fact in issue; or relevant to a fact which is inconsistent to any fact in issue, or to a fact which by itself or in connection with any other fact makes the existence or non-existence of any fact in issue probable or improbable.¹⁶ Generally, admissibility is based on relevance, once evidence is probative of the fact in issue, it is considered to be relevant and therefore admissible.

¹² B.A. Garner, Black's Law Dictionary (10 edn West) 1404.

¹³ J.F. Stephen, *A Digest of the Law of Evidence*. Cited in S.T. Hon (n3) 82.

¹⁴ T. A. Aguda (n9).

¹⁵ *Ifaramoye v. State* (2017) 8 NWLR (Pt. 1568) 457 at 491 S.C.

¹⁶ *Emegokwe v. Okadigbo* (1973) 4 SC113 .



Therefore, once (a piece of) evidence is relevant for the proper determination of any fact in issue, the Court is bound to admit it.¹⁷

THE RULE UNDER THE COMMON LAW

The application of this rule was aptly demonstrated in the English case of *South Shropshire Council v Amos*¹⁸ the facts of the case were that the Respondent, South Shropshire District Council initiated a summons dated 10th June 1985 for an order that two documents prepared by solicitors for the appellant, Lionel Amos , namely a claim for compensation made in October 1981 in respect of a discontinuance order made by the respondent under s. 51 of the Town and Country Planning Act 1971 and an amended claim for compensation made in May 1982, both of which were marked “without prejudice” should be admitted in evidence in proceedings before the Lands Tribunal to determine the amount of the compensation. The trial Judge Gatehouse J., in his judgment ordered that the document be admitted in evidence. Mr. Amos however appealed the judgment of the trial Court.

Parker LJ. Took a thorough consideration of the two documents sought to be tendered on 13th December 1977 Mr Amos made a written claim for compensation. that claim was contained in a single page document specifying the heads under which the compensation was claimed. It stated inter alia, “the claimant wishes the amount of compensation to be negotiated with his agent...” Although correspondence ensued, it is common ground that no figure or particulars were submitted on behalf of Mr. Amos until 1981. On 14th October 1981 Messrs David Allberry

¹⁷*Haruna v. Attorney General of the Federation*(2012) 9 NWLR (PT. 1306) 419 at 437.

¹⁸ (1987) 1 ALL ER.



and Co, chartered surveyors who had then been appointed by Mr Amos agents, wrote to the respondents' district valuer advising him of their appointment. their letter included the following paragraph:

A meeting with the district council has been arranged, as you know, for Tuesday next, 20th October at which will shall be present. it is our intention at that meeting to submit a detailed claim on our client's behalf, the intention being that such a claim will be full and final under all heads and which will be included in the reference to the Land Tribunal, the papers for which are currently in course of preparation.

This letter was not headed 'without prejudice'

Despite what was said in that letter, however, what the agent in fact produced at the meeting was a 20 -page document headed 'without prejudice'. It contains full particulars of the claim then being advanced together with submissions in support of the claim. It did not result in the acceptance of the claim as put, t an agreed compromise figure or to a reference to the Lands Tribunal to which disputed questions of compensation are by s179 of the 1971 Act to be referred. Was after some correspondence, later surpassed by an amended document in similar form and similar length also marked 'without prejudice'. This was sent by Davis Allberry & Co to the district valuer under cover of a letter dated 21 May 1982 that later was itself marked without prejudice and it was in the following terms:

Further to our later on 2nd February we now enclosed our client's claim in the above matter together with the supporting documents, we will be glad to have the opportunity of a meeting in order to discuss this claim with a view with a view to negotiating a settlement and once you have studied



the documents, we will be grateful if you could suggest a date for such a meeting.

Negotiation ensued but were unsuccessful, and on 20th October 1983 the matter was referred to the Lands Tribunal under s. 179 of the 1971 Act. In the course of correspondence relating to the reference between solicitors, the respondent's solicitors wrote to Mr. Amos's solicitors on 17th February 1984.

I refer to previous correspondence and to your client's "without prejudice" claims of 20th October 1981 and 21st May 1982. The Council does not accept that a claim for statutory compensation can be made on a "without prejudice basis" particularly in view of the provisions of s. 4 of the Land compensation Act 1961 relating to cost, would you please confirm that the claims are to be treated as "open" claims; if not will you please submit an open claim, including full details of professional fees and earlier items previously omitted. if you adopt the latter course of the council will contend that its liability for cost (if any) should only run from the date of delivery of an open, particularized claim.

Mr. Amos 's solicitors were not prepared to agree to the two documents, being treated as 'open' claims and the question whether they should be admitted in evidence came before a member of Lands Tribunal for determination on a pre-trial review on 15th March 1985. It was held that the two documents should not be admitted in evidence.

However, the respondents applied in the Queen's Bench Division of the High Court for an order that the two documents be admitted in evidence. on 21st January 1986, the matter was heard before Gatehouse J. the application was granted. Hence this appeal. The Court of appeal after thorough review of the facts observed that there was dispute in existence, that it was common practice for such claims to be the subject of negotiation before the parties' resort to a reference to



the Lands Tribunal and that the documents were clearly marked “without prejudice” the Court further observed that those words should be given their ordinary effect. They allowed the appeal and held that the both documents are inadmissible.

Also, in the case of *Re Daintrey, exp Holt*¹⁹ a letter headed ‘without prejudice’ which contained an offer to settle pending litigation but which was also a clear act of bankruptcy was admitted on grounds that it was one which, from its character might prejudicially affect the recipient whether or not he accepted the terms offered thereby. In the course of giving the judgment of the Court, Vaughan Williams J. who read the lead judgment opined thus;

In our opinion the rule which excludes documents marked ‘without prejudice’ has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist. The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purpose of arriving at terms of peace, and unless there is a dispute or negotiation and an offer the rule has no application. It seems to us that the judge must be entitled to look at the document to determine whether the document does contain an offer of terms.

In *Walker v. Wilsher*²⁰ it was observed that it is important that the door should not be shut against compromises. As to public policy, it is obviously desirable to facilitate compromise rather than forcing the parties to litigate to the end. But to achieve a compromise one of them has to make an offer. He might be apprehensive that his offer might be used against him if the negotiation failed. So, he would make his offer without prejudice to his position if the offer was refused. But that

¹⁹ (1893) 2QB 116.

²⁰ (1889) 23 QBD 335 at 339.



was unfair to the other party. It was one-sided. so, it was necessary to extend the without prejudice umbrella to cover both parties.

It is deciphered from the positions of the courts in the stated English cases that the rule depends partly on public policy. The need to facilitate compromise, and partly on implied agreement. it also shows that the rule covers not only documents which form part of discussions on offers.

APPLICATION OF THE RULE BEFORE THE ENACTMENT OF THE EVIDENCE ACT 2011

The Court of Appeal applied section 25 of the Evidence Act Cap 112 LFN 1990. In *Jadesimi v. Egbe*²¹ in this case, the 1st appellant wrote a letter dated 15th January, 1995 to the 1st respondent while her appeal (*Jedesimi v. Okotie Eboh (1996) 2 NWLR (Pt. 429) 128.*) was pending before the Supreme court, which read as follows:

Dear Mr. Egbe,

I would like you to please initiate moves to settle the dispute between myself and my brothers and sisters subject to the proposal they had earlier made that my mother will be entitled to a third of the estate and the remaining to be shared in equal proportions. This is made without prejudice. Many thanks.

Yours sincerely.

Acting on the instruction of the 1st appellant, the 1st respondent wrote a later to the 2nd to 14th respondents and the parties had meetings on how to settle the dispute which had arisen between

²¹ (2003) 10 NWLR (PT. 827) at 1.



the children of the deceased on how to distribute his estate amongst them. At the end of the meeting, it was agreed that the estate of the deceased, particularly the sum of 909,424.99 British pounds sterling standing to the credit of the estate in England be distributed in accordance with an agreed formula to all the beneficiaries of the estate.

However, before the execution of the agreement arising from the out of Court settlement, the Supreme Court delivered the judgment in *Jedesimi v. Okotie Eboh (1996) 2 NWLR (Pt. 429) 128*. In favour of the 1st appellant. Consequently, the 1st appellant wrote another letter to the 1st respondent seeking to enforce the judgment of the supreme Court and to jettison the agreement reached during the out of court settlement. The 1st respondent declined this request.

The appellants commenced this suit because of the 1st respondent's insistence not to abide by the supreme Court judgment. During the trial, the respondents tendered the 1st respondent's letter dated 15th January 1995, reproduced above in prove of their case. Same was admitted in evidence, hence this appeal. In dismissing the appeal, the Court of Appeal used section 25 of the Evidence Act Cap 112 LFN 1990 to demonstrate the applicability of the rule guiding documents marked "without prejudice".

Section 25 of the Evidence Act Cap 112 LFN 1990 provides as follows:

In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or in a circumstance from which the court can infer that the parties agreed together that the evidence of it should not be given; provided that nothing in this section shall be taken to exempt any legal practitioner from giving evidence under section 170 of this Act.



The court relied on the above provision to arrive at the decision that a statement made “without prejudice” is admissible in evidence where it is tendered to prove that it was made and not to prove an admission by its maker.

In *Nwadike v. Ibekwe*²² part of the case of the appellants at the Supreme Court, was that, the lower court erred in law when it held that Exhibit ‘D’ a letter written “without prejudice” by persons acting for the respondents to a third party was wrongly admitted in evidence. The Supreme Court in unanimously dismissing the appeal, held that in a trial, letters marked “without prejudice” and other communications are protected to the extent that they relate to the same action and are between the same parties, and not between a party and third persons.

In *Fawehinmi v. N.B.A (NO2)*²³ The appellant, by originating summons dated 19th day of November 1984 instituted a civil action against the Nigerian Bar Association and the General Council of the Bar. On the 23rd of January 1985 Rt. Hon. Sir Adetokumbo Ademola conveyed his intention to the appellant to settle the matter out of Court. Meeting was fixed in the residence of Rt. Hon. Sir Adetokumbo Ademola. However, the appellant insisted amongst other things that he must be allowed to come with his tape records to tape every word that will be uttered by the representative of the Nigerian Bar Association.

On the 25th of February, 1985, the appellant attended the meeting in the house of Rt. Hon. Sir Adetokumbo Ademola. Those present at the meeting were; Rt. Hon. Sir Adetokumbo Ademola

²² 4 NWLR (pt. 67).

²³ (1989) 2 NWLR (pt. 105) at 558.



(the chairman), Chief B. O. Benson (counsel to N.B.A), Chief F.R.A. Williams S.A.N, Chief E.A. Molaja S.A.N, Mr. Kehinde Sofola S.A.N

At the meeting Rt. Hon. Sir Adetokumbo Ademola blamed the Nigerian Bar Association for the boycott which he described as wrong. He said further that the resolution to boycott the military tribunals was “childish” but he added that efforts should be made to resolve the dispute to save the name of the profession.

Mr. Kehinde Sofola S.A.N was the next to speak and he said amongst other things as follows: -

- a. That he opposed the boycott of the tribunals
- b. That the relationship between a lawyer and a client is personal and it is not the business of the Nigerian Bar Association to intervene in such relationship.
- c. That the Bar cannot go on strike or boycott a court or Tribunal.

Chief F.R.A Williams S.A.N said amongst other things as follows: -

- a. That he was completely opposed to the boycott of the special military Tribunals.
- b. That the Bar had no power to boycott the tribunal.

Chief E. A. Molajo S.A.N agreed with the view expressed by Rt. Hon. Sir Adetokumbo, Chief Williams and Kehinde. The panel urged the appellant to withdraw the case while the appellant also urged the members of the panel to prevail over N.B.A to withdraw its boycott to pave way for settlement for the settlement of the dispute but they all refused consequently the meeting broke down and the appellant left.



On the 19th of March 1985 Chief F.R.A Williams S.A.N, Mr. Kehinde Sofola S.A.N and Chief E. A. Molajo S.A.N announced their appearance for the Nigerian Bar Association. The appellant filed a motion objecting their appearance, principally because of the tape record of their statements during the settlement. The trial court upheld his objection. Chief F.R.A Williams S.A.N, Mr. Kehinde Sofola S.A.N and Chief E. A. Molajo S.A.N lodged separate appeals against the decision of the lower Court. The Court of Appeal allowed the appeal. Chief Gani Fawehinmi. therefore, initiated this appeal to the supreme Court in unanimously dismissing the appeal, per Agbaje J.S.C observed as follows:

Offers of compromise made expressly or impliedly “without prejudice” cannot be given in evidence against a party as admission, for the law has as its policy the protection of negotiations bona fide for the settlement of disputes. The rationale of the doctrine is a complex of factors. The policy of the law is to encourage settlements; it is thought to be unfair that advantage should be taken of the willingness of one party to negotiate; and some cases discover an express and implied contract between the parties that without prejudice communications should not be disclosed. It is probable that the modern rule extends to all third parties who act as a mediator with a view to enabling the parties to reach a settlement or compromise, whether or not that third party is a legal representative.

CODIFICATION OF THE RULE UNDER THE EVIDENCE ACT 2011

The rule was codified by the Evidence Act 2011 in sections 26 and 196 as follows:

26. In civil cases, no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or in circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.



196. A statement in any document marked “without prejudice” made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceedings in proof of the matters stated in it.

The both sections share close similarities in its application and consequences in the relevance and admissibility of documents. Although, section 196 principally limits itself with documents marked “without prejudice” made during trial in a proceeding arising from out of court settlement. Section 26 is rather broader as the document need not to be marked without prejudice provided it is a product of a compromise arising from attempt for the settlement of dispute between the parties.

The court applied section 126 of the Evidence Act 2011 in *Spring Capital Market plc v. Ikara*²⁴ the appellant and the respondent started to negotiation to settle the suit amicably out of court. The appellant wrote two letters (both marked “without prejudice”) to the respondent. In the first letter, the appellant offered to pay the respondent the sum of N185,798.61 as full and final settlement of his claim. in the second letter, the appellant increased its offer to the sum of N423,985.99 and asked the respondent to confirm if he accepted its offer as full and final settlement of his claims.

Subsequently, on the basis of the appellant’s letters, the respondent filed an application for judgment in the sum of N423,985.99 on the ground of admission and interest on the sum.

²⁴ (2016) 9 NWLR (Pt. 1516) 173.



The trial Court held that the appellant’s letters amounted to admission of the respondent’s claim. It relied on the letters and entered judgment for the sum of N423,985.99 and interest thereon in favour of the respondent.

The appellant was dissatisfied with the judgment of the trial court and it appealed to the Court of Appeal. The court unanimously allowing the appeal held thus:

By virtue of section 196 of the Evidence Act, 2011, a statement in any document marked “without prejudice” made in the course of negotiation for a settlement of dispute out of court shall not be given in evidence in any civil proceeding in proof of the matters stated therein. In this case the trial court ought to have taken cognizance of the law that the appellant’s letters marked “without prejudice” ought not to have been treated as an admission against the interest of the appellant even in the absence of any objection by the appellant to the respondent’s application.

The rule is restricted only to cases where there is a dispute or negotiation and not to just any letter emanating from a legal practitioner’s chambers.

EXCEPTIONS TO THE RULE

To the general rule there are exceptions. The courts have developed some exceptions to this exclusionary rule. Section 196 of the Evidence Act, 2011 also admits of two exceptions against the admission of documents marked “without prejudice”. The first exception as can be gleaned from the provision of section 196 is that the application of the doctrine is only limited to civil



proceedings. The second exception is that the exclusion will not apply if the document is tendered for any other purpose other than proving the matters stated in it.²⁵

The rule is restricted only to cases where there is a dispute or negotiation and not just any letter emanating from a legal practitioner's chambers.²⁶ Before an admission in writing headed "without prejudice" is excluded from evidence, it must first be shown to have been made in good faith and must have been made in course of exchange of compromises to settle a genuine dispute.²⁷ The rule also does not apply if the party sought to be caught by the rule was not a party to the document marked "without prejudice"²⁸ The piece of evidence concerned must relate to an admission by the person against whom the evidence is to be given.²⁹ The admission must be made upon an expression or condition that evidence of it is not to be given;³⁰ the admission must have been made in the circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.³¹

CONCLUSION.

The heading "without prejudice" does not conclusively or authoritatively render a document so marked privileged. If privilege is claimed but challenged, the court can look at a document so headed "without prejudice" to ascertain if it bears the characteristics and the factors delineated

²⁵*Jadesimi v. Egbe* (2003) 10 NWLR (PT. 827) at 1.

²⁶*Obeya v. First Bank of Nigeria Plc.* (2012) ALL FWLR (Pt.636) 544.

²⁷*United Bank for Africa Limited v. I.A.S Company Limited* (2001) ALL FWLR (Pt.75) 578.

²⁸*Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) 718 at 736.

²⁹*Acmel (Nig.) Ltd. v. F.B.N Plc.* (2014) 6 NWLR (Pt. 1402) 158.

³⁰*Jadesimi v. Egbe* (2003) 10 NWLR (Pt. 827) 1.

³¹ Section 26 of the Evidence Act 2011.



by law to acquire such privilege. The privilege provided by this doctrine does not inure on all documents marked “without prejudice”.

This time-honoured exclusionary rule was designed as a shield but not to operate as a sword, because it is to enable parties negotiate fully and sincerely without being hindered by the fear that any admission made by them in the course of such negotiation might be used against them later in the court.