



**Obwocha v Rotich & another (Environment & Land Case
120 of 2019) [2023] KEELC 16671 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 120 OF 2019
LA OMOLLO, J
MARCH 28, 2023**

BETWEEN

PROF. ROBERT OBWOCHA PLAINTIFF

AND

BENARD KIPLAGAT ROTICH 1ST DEFENDANT

MICAH CHESEREM ROTICH 2ND DEFENDANT

RULING

1. This ruling is in respect of an objection raised by counsel for the defendants during the examination of PW1 (Prof Robert Obwocha). The objection relates to the production of a bank statement allegedly issued by Stanbic Bank, Harambee Avenue Branch- Nairobi.
2. The said bank statement is for the period March 8, 2006 to September 28, 2006. The account held at the said Bank is in the name of Mugambi & Kariuki Advocates. The bank statement is intended to serve as evidence of payment of Kshs 10,400,000 to one Kiprotich Kibowen.

Factual Background.

3. On October 14, 2021 when this suit came up for hearing, counsel for the defendants in the main suit cited section 35 of the *Evidence Act* requiring that a document be produced by the maker and objected to the production of documents appearing at No 3, 8 and 10 of the plaintiff's list of documents. However, he agreed to the production and marking of all the remaining documents as exhibits.
4. On account of this objection document No 8 on the list ie the bank statement from Stanbic Bank for the period March 8, 2006 to September 28, 2006 in the name of Mugambi & Kariuki Advocates was marked as MFIP8.



5. Subsequently, counsel for the plaintiff prayed that witness summons be issued to Branch Manager of Stanbic Bank Harambee Avenue. This prayer was allowed.
6. On May 18, 2022 one Leonard Surmat, The Branch Manager of Stanbic Bank- Nakuru Branch, appeared in court. He testified that an order had been issued by the Nakuru Chief Magistrates court compelling his attendance to furnish bank statements for account No xxxx held in the name of Mugambi & Kariuki Advocates for the period March 8, 2006 to September 28, 2006.
7. It was his testimony that the bank (through its Legal and Governance) wrote a letter dated February 17, 2022. He explained that the response by the bank was that it could not provide the said statement for the reason that section 46 of *Proceeds of Crime and Anti- Money laundering Act* as well as schedule 8 of the *Central Bank of Kenya Prudential guidelines* only require them to keep records for 7 years from date of business transaction. He added that the records requested are more than 15 years old, that they fall outside the statutory period and that the bank could not provide the said statements. He further stated that he could not verify the Bank statement for the same reason. He further explained that the bank had a branch along Harambee Avenue but the same was closed in 2018.
8. After PW5's testimony, counsel for the plaintiff made an application dated May 5, 2022 to recall the plaintiff for purposes of producing the bank statement- (MFIP8). In his submissions in support of the application to recall the witness (PW1), the plaintiff took the liberty to address the question of admissibility. More particularly, the law and circumstances under which secondary evidence may be admitted. The defendants also made submissions on why MFIP8 (bank statement) should not be admitted in evidence.
9. This court delivered its ruling on December 8, 2022 allowing the recall of the plaintiff to produce of the certified bank statement and that for that purpose, PW1 would be subjected to further examination-in- chief, cross- examination and re-examination if need be. In the said ruling, this court opined that the question of admissibility of the bank statement (MFIP8) would be dealt if and when an objection to its production was raised during the examination in chief of PW1. The date for the recall was set as March 7, 2023.
10. On March 7, 2023 PW1 took the witness stand. He introduced himself and stated that he was in court on October 14, 2021 and I had testified in this suit.
11. It was his evidence that in his testimony he mentioned bank statements in respect of payment to Kiprotich Kibowen adding that the statements were issued by Stanbic Bank, Harambee Avenue Nairobi. He stated that the bank statement is in name of Mugambi Kariuki Advocates and are for Account number xxxx for the period March 8, 2006- September 20, 2006.
12. It was his further evidence that the statements were given to him in the year 2016 by an Advocate whose name is Samuel Gathingu Mugambi adding that the said advocate was a managing partner of Mugambi Kariuki and Co Advocates. He went on to testify that he had written to the said firm vide a letter dated October 27, 2016 (exhibit P5) to request that they furnish him with evidence of having paid the seller. The letter was produced as exhibit P5.
13. It is PW1's testimony that Mr Mugambi (Advocate) was his lawyer for many years and that he passed away on May 20, 2018. He added that seller of the suit property is Kiprotich Kibowen and that he passed away on December 31, 2018.
14. PW1 further stated that on May 18, 2022 a witness from Stanbic Bank testified and that his testimony was to the effect that time for keeping statements had lapsed and the bank could also not verify the said bank statement as against their records.



15. PW1 stated that the bank statement is in his possession, that it is certified by Stanbic Bank and that he wishes to produce it as evidence.
16. Counsel for the defendants in the main suit, at this point, raised an objection to the production of the said bank statement (MFI8) by the plaintiff and made his submission to this objection.

Defendant's Submissions On The Objection.

17. Counsel submitted that he objects to the production of the bank statements for the reason that the witness is not the maker of the document he purports to produce.
18. He further submitted that the maker of the statement is Stanbic bank adding that the witness is neither an account holder nor a representative of the said firm.
19. It was his submission that if the maker is deceased, considering that the firm was not a sole proprietorship, the surviving partners can attend court to produce the statements. In the alternative, he submitted that there is a succession process for law firms and that the Law Society of Kenya should be able to verify this account number.
20. Counsel for the defendants submitted that on May 18, 2021. The stanbic witness was not able to authenticate the said statement adding that his clients believe that the bank statement is a forgery.
21. He also submitted that the witness from stanbic testified that the document falls outside the period required by law for them to keep records of transactions relating to accounts. He submitted that PW5 stated that if the court required this statement, it is was possible for it to be obtained.
22. Counsel went on to submit that if the document is certified then the original must be available. He added that the bank statement is expressed to be domiciled in Harambee avenue but it is certified by managers Kenyatta avenue branch, which branch is unknown.
23. He submitted that a proper witness can be made available to produce the bank statement adding that the plaintiff is the least qualified person to produce it.
24. It was his further submission that documents purporting to be from Kenya Revenue Authority were found to be forgeries and stressed that the maker of the document must come to court and be subjected to cross examination. He urged the court to order that a representative of Harambee avenue branch attends court to testify and produce the said bank statement.
25. He ended his submission by stating that the letter from Stanbic Bank does not state that the bank statements are not available.

Response By The Plaintiff.

26. Counsel for the plaintiff submitted that the witness had laid a basis upon which he can produce this document.
27. He submitted that Stanbic bank were served with summons exhibit P8(a) and the witness who appeared stated that documents could not be made available on account of the time that had lapsed.
28. He further submitted that the witness stated that the account holder is deceased and that section 35 of the *Evidence Act* is therefore applicable.
29. It was his submission that the court order was served and a representative from the bank appeared in court. He also submitted that section 66 of the *Evidence Act* states that certified copies maybe produced. It was his further submission that the banks usually certify copies and retain originals.



30. He submitted that the defence has alleged that the bank statement is a forgery and adding that they can call evidence to prove the fact of forgery.
31. He submitted that the plaintiff should be allowed to produce the statements for the reason that they were given to him by the deceased advocate.

Response By The Defendant.

32. Counsel for the defendant submitted that a certified copy is produced by the person who certified it and who can confirm that it was certified as against the original adding that the bank who certified the document should appear in court and state that it has the original.
33. Counsel for the defendants submitted that they reiterate the objection adding that this is not about shifting the burden of proof but a requirement of the law. It was his further submission that section 35 and 66 of the Evidence Act sets out circumstances under which a document may be produced by a person who is not maker.
34. He ended by stating that the court order was to facilitate production of the genuine documents and that the Legal department, as PW5 stated, should be summoned to court to produce the bank statement adding that there is nothing magical about the 7 year period.

Analysis And Determination.

35. It is import to state from the onset that the burden of proof rests on he who alleges. Section 107 of the Evidence Act provides as follows;

“Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of nay fact it is said that the burden.”

36. While it would seem that the bank statements (MFIP8) are important to the plaintiff in support of his claim, their production and admission in evidence must be in accordance with the provisions of the Evidence Act.
37. The plaintiff has in his possession a bank statement which he wishes to produce in support of his case. Even when he makes attempts to do so, such attempts must be within the confines of the law.
38. The law relating to admissibility of documentary evidence as to facts in issue is found is Section 35 of the Evidence Act. It provides as follows;
 1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on
 2. production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - (a) if the maker of the statement either—
 - (i) had personal knowledge of the matters dealt with by the statement; or



- (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
 - (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.
- 39. An analysis of section 35 of the [Evidence Act](#) points to the fact that documents tendered in evidence must be original documents and are only admissible if produced by the maker. The maker shall, further, fulfil the following conditions:
 - a. He must have personal knowledge of the matters dealt with by the statement; or
 - b. He must in the performance of his duties have recorded information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters.
- 40. Section 35 makes exception to this general rule and provides that a document need not be produced by the maker if the maker is:
 - a. Dead;
 - b. Cannot be found;
 - c. Is incapable of giving evidence;
 - d. His attendance cannot be procured without an amount of delay or expense- which appears to the court unreasonable.
- 41. It is not in contention that the plaintiff is not the maker of the bank statement. It is also not in contention that the Bank statement relates to an account held at Stanbic Bank in the name of Mugambi Kariuki and Co Advocates.
- 42. The maker is not dead, the maker can be found. In fact, the maker attended court pursuant to a court order and stated that the bank was not able to verify the bank statement as against their records for the reason that the statement fell outside the period that the law requires banks to keep customer records, that period being 7 years from the date of business transaction. With this evidence on record, it is clear that something more is required of the plaintiff in order that the said statements are admitted in evidence. This burden is on the plaintiff and he must discharge it.
- 43. The plaintiff states that his advocate is deceased but has not explained the whereabouts of the remaining partners at Mugambi Kariuki and Co Advocates or why the said partners cannot attend court to produce the bank statement.
- 44. Counsel for the defendants stated that the Law Society of Kenya has elaborate rules relating to winding up of law firms of its deceased members. The plaintiff has not shed light on this process and/or what became of it.



45. The plaintiff submits that the bank statement is a certified copy and that he should be allowed to produce it. My understanding of certification is that the person certifying is known and confirms that he has compared the copy with the original and confirms that it is a true copy of the original. PW5 was not able to confirm this.
46. Part III of the *Evidence Act* deals with documentary evidence. Section 64 states that contents of documents may be proved either by primary or secondary evidence. Section 66 defines secondary evidence to include:
- a. Certified copies of documents listed in this section.
 - b. Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
 - c. Copies made from or compared with the original;
 - d. Counterparts of documents as against the parties who did not execute them;
 - e. Oral accounts of the contents of a document given by some person who has himself seen it.
47. Section 67 provides that documents must be produced by primary evidence except under circumstances set out in section 68. Section 68 provides as follows:

Secondary evidence may be given of the existence, condition or contents of a document in the following cases—

- a. when the original is shown or appears to be in the possession or power of—
 - i. the person against whom the document is sought to be proved; or
 - ii. a person out of reach of, or not subject to, the process of the court; or
 - iii. any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;
- (b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;
- (d) when the original is of such a nature as not to be easily movable;
- (e) when the original is a public document within the meaning of section 79 of this Act;
- (f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;



- (g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

48. The certified copy of the bank statement is secondary evidence which is only admissible under circumstances set out in section 68 of the [Evidence Act](#).
49. The maker of the bank statement is not dead and/ or has not been wound up, in fact, a witness from the bank was not able to testify as to its veracity, citing unavailability of records to compare the said bank statement with. Further, the bank statement does not relate to the plaintiff's account.
50. The plaintiff claims that the bank statement was given to him by his deceased advocate as a confirmation of the fact of payment to the vendor. No letter forwarding the said bank statement has been mentioned or introduced in evidence.
51. I am of the view that if the plaintiff paid money to his advocate's account to transact on his behalf, it is also possible for him to produce his deposit slip, copy of cheque, copy of banker's cheques, RTGS or a certified copy of his bank statement as evidence of movement of money relating to the purchase of the suit property paid by him into his advocate's account.
52. The plaintiff also has the option of inviting the caretaker of the deceased advocate's law firm nominated for purposes of winding up the law firm (in accordance with the practice, rules and/or regulations of the Law Society of Kenya) to produce the Bank statement or shed light on its existence and/or operation.

Disposition.

53. In the result, I find that the plaintiff has not been able to bring himself within the exceptions under section 35 and 68 of the [Evidence Act](#) which might allow this court to admit the bank statement (MFIP8) in evidence.
54. Consequently, the objection raised by the defendants is upheld.
55. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28th DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kanyi Ngure for plaintiff

Mr. Kisila for the Defendants.

No appearance for 2nd Defendant in counter claim

Court Assistant; Ms. Monica Wanjohi.

