



**Lowoton & another v Lorogoi & 4 others; Kamario & 3 others (Interested Parties)
(Environment & Land Case 176 of 2016) [2025] KEELC 3175 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 176 OF 2016
FO NYAGAKA, J
MARCH 25, 2025**

BETWEEN

**NICODEMUS EMURON LOWOTON 1ST PLAINTIFF
NGAMIA CONSULTING COMPANY LIMITED 2ND PLAINTIFF**

AND

**CHARLES EJORO LOROGOI 1ST DEFENDANT
DAVID MERIMUG 2ND DEFENDANT
KANU TURKANA CENTRAL 3RD DEFENDANT
MINISTRY OF LANDS, PHYSICAL PLANNING & HOUSING & URBAN
AREAS MANAGEMENT, TURKANA COUNTY 4TH DEFENDANT
KENYA AFRICAN NATIONAL UNION 5TH DEFENDANT**

AND

**ENOCK KAMARIO INTERESTED PARTY
JOSEPH LONGOLE INTERESTED PARTY
LOKWATUBWA LOMODEI INTERESTED PARTY
IMMANUEL LOMUKINY INTERESTED PARTY**

RULING

Brief Facts

1. The Plaintiffs filed the instant application dated 31st January, 2024 after they and all the parties who participated in the hearing herein had closed their cases and the matter was pending preparation of the



judgment. They brought it under Sections 1A, 3, 3A and 63(e) of the Civil Procedure Act and Order 51 Rules 2 of the Civil Procedure Rules and all enabling provisions of the law.

2. They sought the following orders:
 1. That this Honourable court be pleased to expunge the 1st interested party (Enock Kamario) list of documents for being illegible, unclear and/or their authenticity.
 2. That costs of this application be in the cause
3. The Application was based on grounds set out in the body of the application. It was supported by the Affidavit of David Rioba Omboto, the Applicants' learned counsel herein. It was sworn on 31st January, 2024. He stated that the 1st Interested Party applied to be joined as a party. It was apparent that the documents exhibited in support of his assertions were not legible. He stated further that efforts to trace the Party or his advocates to furnish the court with clear documents had been futile. He urged the court to expunge the documents and proceed to deliver the judgment.

Response

4. There was no response filed by any of the parties. That notwithstanding the court is obligated to determine the merit of the application.

Submissions

5. None of the parties filed submissions over the application.

Analysis and Determination

6. This court has carefully considered the application and law. It is of the view that the issue for determination is whether the application is merited. There are many types of evidence that may lead to prove the existence or non-existence of a fact. But when it relates to documents, Section 64 of the Evidence Act provides that the contents of documentary evidence may be proved either by primary evidence or secondary evidence. The practice that seldom courts to allow secondary evidence where the original can be produced. Only in instances where it is practically not possible to produce the original that secondary evidence is admissible.
7. For clarity, primary evidence refers to the original of the document, that is to say, the document itself, while secondary evidence constitutes copies or a reproduction of a document from the original. Courts tend to use the best evidence rule, which is that a party must furnish the court with the original of the document to enable it to scrutinize it. This does not remove the exceptions to the Rule, as created by the law or the Evidence Act.
8. Section 67 of the Evidence Act, Chapter 80 of the Laws of Kenya provides that:-

“Documents must be proved by primary evidence except in the cases hereinafter mentioned.”
9. Section 68 of the Act then comes into play regarding proof of documents by secondary evidence. It provides that:-
 - “ 1) 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.
- (2) (a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.
 - (b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.
 - (c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.
 - (d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.

10. Of public documents, Section 80 of the Act provides as follows:

- “(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment



of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

- (2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.”

11. In the case of *Hezekiah Oira v Patrick Quarcoo* [2017] KEHC 2536 (KLR) the court held that:

“...The law provides that public documents should be produced by the makers in which case the person producing the same should have the copies properly certified and or/sealed. This is the law as per section 80 of the *Evidence Act* which provides that “. (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies...”

12. In the instant case, the Applicants’ contend that the 1st Interested Party’s documents ought to be expunged from the court record on the ground that they are illegible. The applicant was not clear as to which documents he sought to be expunged. But this Court clarifies that the record is clear that the only documents the court found to have issues with when preparing the judgment herein and asked the parties to address the issue of their status were two: the 1st Interested Party’s Exh 2(a) and 2(b) which were a letter dated 23rd January 2009 written by the KANU Executive Officer, KANU Turkana Central Branch, and Exhibit 2(b) being a copy of a receipt No. 39, being a copy of a receipt allegedly issued by the KANU Turkana Central Sub-Branch on 19/04/2012. Both were photocopies, which were certified true copies of the original by an Advocate named Isaac Bungei on 06/04/2022.
13. The question is whether the said documents were public or private. This depends on the makers of the same. KANU (Kenya African National Union) was or is a political party in Kenya. It is a private entity to the extent that it is limited to members only. If it issued a document, as long as the same remained in its custody or was given to a private individual, it remained private. Thus, it is not in contention that the said documents are not public documents, thus not subject to Section 80 (supra). This provision of law does not envisage certification of private documents.
14. It is worth noting that regarding proof of documentary evidence, there are four stages it happens. First, the copy of the document or the scanned document is filed in Court, in terms of Order 3 Rule 5 and or Order 7 Rule 5 of the Civil Procedure Rules and served on the adverse party. Second, at the hearing, the document, original or a certified copy in case the original is not available, or a photocopy thereof if the basis for the lack of original is sufficiently explained to the satisfaction of the Court, is introduced in evidence through the witness seeking to prove it. Third, the Court considers the relevance thereof and admits it as an exhibit while respecting or observing the provisions of Section 35(1)(a) of the *Evidence Act*. Fourthly, the contents of the documents are proved: this is the stage at which the legibility and issue of who and why certification of the copy was made come into question to challenge the weight of the evidence in it.



15. In *Sofie Feis Caroline Lwangu v Benson Wafula Ndote* [2022] KEELC 986 (KLR) (<https://new.kenyalaw.org/akn/ke/judgment/keelc/2022/986/eng@2022-03-02>), this Court stated:

“In the ruling delivered on 10/11/2021 regarding the production of the copy of the Agreement, this Court explained in detail the four stages of production and proof of documentary evidence. In summary it stated that first, the document is filed in court (according to the rules or legal requirements. Second, if the document is not the original, the party wanting to produce it will lay the basis for the production of the copy and not the original. Once the Court is satisfied with that basis, then third, the party will lay a further basis for production of the document. Fourth, the party will then prove the contents, state or physical appearance of the document. In this regard, I refer to the ruling in *Lwangu v Ndote* (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) (Ruling).”

16. Regarding the application herein, it is this Court’s view that once a document has been produced as an exhibit, it has passed to the second stage: proof of its contents. The documents in contention were secondary documentary evidence. If its contents are not legible as was in the instance of the two documents whose content was somehow cut out in some parts, it only turns out that proof of its contents is what would be vitiated. The evidence cannot be expunged by mere illegibility. The weight to be attached to the document is what is in issue. Thus, the contents can only be expressed as being insufficient for proof.
17. Further, it is also not in contention that the documents have been certified by an advocate other than their maker. It is this court’s humble view that it cannot amount to a reason to expunge them. What is vital in the law of evidence since the admissibility of the documents was not taken up by any of the parties at the hearing and therefore were admitted by consent is the proof of the contents, which itself was also done by way of cross-examination of the witness who produced them, and the weight to be attached to them or their content. The latter is the function of the court in analyzing the evidence thereon. The effect of a party or body not duly authorized purporting to certify the same is that the purported certification is neither here nor there. The mischief sought to be cured by the legislature when it provided for certification of a copy of a document as a true copy of the original was that the copy sought to be certified is compared with the original (which remains with the maker in the office) or a duplicate thereof that the maker retains. Where it is a private document whose copy is sought to be certified, unless the party certifying the same can attest to having in possession of the original it is difficult, in the era of multiplicity of lies, for that person certifying to vouch for authenticity except the maker thereof or the person to whom it was addressed or sent confirming that indeed it corresponds with that which he/ they received. A document ought to be certified by only the maker or by the office/ institution that made it as a true copy of the original.
18. Consequently, I find that the application dated 31st January, 2024 is without merit. It is therefore dismissed with no order as to costs. This Court proceeds to conclude the preparation of the judgment accordingly.
19. It is so ordered.

RULING DATED SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 25TH DAY OF MARCH, 2025.

HON. DR. IUR F. NYAGAKA

JUDGE



In the presence of:

Mr. Omboto Advocate acting alongside MS. Kosgei Advocate for Plaintiffs.

Ondabu Advocate for the 1st - 3rd Defendants

PARA 3.

Otieno Advocate for the 5th Defendant

