



**Waigwa v Mary Help Of The Sick Hospital (Civil Appeal
29 of 2019) [2023] KEHC 404 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 29 OF 2019
LN MUGAMBI, J
JANUARY 27, 2023**

BETWEEN

GATAMU WAIGWA APPELLANT

AND

MARY HELP OF THE SICK HOSPITAL RESPONDENT

(An appeal from the Ruling of the Chief Magistrate's Court at Thika (Hon. B.M. Ekhubi, SRM) dated 15th January, 2019 in Civil Suit No. 72 of 2012)

JUDGMENT

1. This is an appeal against the ruling of the trial court sitting at the Chief Magistrate's court at Thika in which the court upheld an objection raised by the respondent against the production of a copy of theatre register for non-compliance with the relevant provisions of the evidence Act on admissibility of secondary evidence. The appellant was aggrieved by the decision of the trial court hence this appeal.
2. The memorandum of appeal raises nine grounds but the real issues contention are captured from ground number six onwards, namely:-
 - ' 6. The learned trial magistrate in his ruling failed to consider the legal principles governing the production of the evidence:-
 - a. The fact that the original theatre register is in possession of the person against whom it is sought to be proved.
 - b. The defendants were served with notice to produce the original register as required by section 69 of the Evidence Act but refused to do so when the matter came up for hearing.



- c. The defendant had in their evidence mentioned existence of theatre register though they did not produce the same in court.
 7. The learned trial magistrate erred in law and in fact and failed to consider the circumstances in relation to the production of the operating theatre register.'
3. The above grounds form the crux of this appeal. In the appellant's submissions, he said that the register is relevant to his case for two main reasons:-
 - i. To prove that contrary to the respondent's claim that the appellant's contract expired on June 1, 2021, the register will show that the contract had been stopped much earlier i.e. by November 14, 2011.
 - (ii) that the respondent had failed to give the appellant 1st priority when conducting theatre procedures as per the contract and the register will show diminishing frequency of procedures assigned to the appellant.
4. In its submission; the respondent gave a brief history of these proceedings. It was the submission of the respondent that on October 19, 2015, the defence testified and closed its case before the trial court.
5. However, on November 13, 2017, the appellant successfully moved the court for reopening of this case vide a ruling delivered by the trial court on November 29, 2018.
6. The appellant's case thus re-opened and on December 5, 2018, the plaintiff attempted to produce a copy of theatre register but counsel for the respondent mounted a successful objection.
7. It is as a result of that the ruling that the appellant brought this appeal which the respondent now opposes on two main grounds:-
 - 1) That this Court lacks jurisdiction to entertain this appeal.
8. The respondent argues that Order 43(1) sets out orders from which appeal lies as of right and that Order 43(2) mandatorily provides that any appeal from orders not listed in Order 43(1) shall lie with leave of the court. That in S.75 of the Act, such leave shall be sought from the court of 1st instance orally at the time the order is made or within 14 days from the date of the order. Counsel argued that at the time of filing this appeal, no such leave had been granted by the court as per rule 43 rule 1(3) of the *Civil Procedure rules*. The respondent cited the case of *Isaac Mbugua Ngirachu Vs. Stephen Gichobi Kaara (2021) eKLR* in which failure to comply with Order 51 Rule 4 of the Civil Procedure Rules (an Order outside those enumerated under Order 43 hence leave had to be sought), it was ruled by the appellate court that it lacked jurisdiction to hear or determine the appeal unless leave had been sought and granted.
9. The second point urged by the respondent was on whether the evidence/document in question (being theatre register) was properly excluded by the trial court. Counsel for the respondent argued that the appellant had in his testimony acknowledged he was not the maker of the said register, a fact that led to counsel of the respondent to oppose the production on account that the conditions set out in Section 35(3) of the Evidence Act had not been demonstrated before the appellant could be allowed to produce the documents instead of its maker.
10. He submitted that the appellant did not provide any proof that the maker of the documents had refused to appear before the lower court to produce the document or was not available.
11. Counsel also contended although the appellant had filed the notice to produce dated November 20, 2013, he had not done effective service of the same and further, the document was not listed in the



appellant's list of documents and as such, the respondent had no way of knowing it was required to produce the said document.

12. As such, counsel argued that the respondent had not sufficiently invoked the provisions of Section 68 of the Evidence Act and the lower court was thus right in sustaining the respondent's objection.
13. In a rejoinder, the appellant filed a further replying affidavit pursuant to the leave granted by the Deputy Registrar on October 19, 2022.
14. In the replying affidavit sworn on October 28, 2022 and filed in court registry on November 10, 2022 the appellant swore to specific facts as follows:-

Paragraph 4 of the affidavit:

' The allegation that notice to produce was not properly effected are total fabrication given that even going by annexure marked 'GW1' it is crystal clear that the notice was verily served upon the respondent on November 23, 2013 which they acknowledged service hence my secondary evidence should be admitted.'

15. The annexure referred to as 'GW1' is clearly worded: -

' Notice to produce and inspect documents under Order 14 of the Civil Procedure Rules (2010) Laws of Kenya' and bears the stamp of 'Wanyonyi & Munia Advocates' marked 'received and dated 'November 25, 2013.'

Determination

16. The first question to resolve is whether this Court has jurisdiction to entertain this appeal or not. Is this an appeal arising out of non-compliance with the procedural requirements under the Civil Procedure Rules for which Order 43 applies so that in absence of leave having been granted, the court should down its tools and refuse to entertain this appeal?
17. With all due respect to the advocate for the respondent, I do not agree with that position. This is a matter dealing with admissibility of the evidence where the governing Statute is the law of Evidence Act Cap 80 Laws of Kenya. Indeed, a large chunk of both sides' submissions was based on the provisions of Evidence Act, not the Civil Procedure Act or the Rules thereunder.
18. It is thus a misconception on the part of the respondent's counsel to urge this court to decline jurisdiction over this appeal on account of provisions of Order 43 of the Civil Procedure Act.
19. I will now address the question of whether it was proper for the trial court to stop the appellant from relying on the copy of the theatre register which he attempted to produce.
20. From the replying affidavit of the appellant on record, he attached the notice to produce dated November 20, 2013. The said annexure 'GW1' reads as follows: -

' Notice To Produce And Inspect Documents Under Order 14 Of Civil Procedure Rules (2010) Laws Of Kenya

Take notice that the plaintiff herein shall require you to produce for inspection the following document before the next hearing date namely:-

- a. The original, theatre register for period between March 1, 2011 to December 31, 2011.



Dated November 20, 2013

21. On the said Notice there is a conspicuous stamp of Wanyonyi & Munia Advocates reading 'received' and on it, there is a date of 'November 25, 2013'.
22. In the ruling by trial magistrate on the said notice to produce, he ruled:-
 - ' The plaintiff filed a notice to produce dated November 20, 2013 and filed on the same day. However, he did not present the same including effecting service on the defendant.

In this regard, I concur with Ms Beanco that only maker of theatre register is competent witness to produce it. I further concur the plaintiff has not exhausted all avenues in ensuring the maker of the document is availed in court to produce it. Moreso, nothing has been tendered to demonstrate the maker is out of reach of courts jurisdiction as stipulated by Section 68 of Evidence Act.'
23. The notice to produce is expressed in its title as being founded under Order 14 of Civil Procedure Rules 2010 yet a reading of the Civil Procedure Rules that were introduced in 2010 do not have provision for such notice. Such notices were there pre-2010 rules. The Notice therefore stood on quicksand and was unenforceable.
24. Post 2010; such preliminaries as relating to discovery, production, inspection and interrogatories now fall under Order 11 of the Civil Procedure Rules, (see Order 11, Rule 3(2)(d). The notice therefore is legally ineffectual in so far as the Civil Procedure Rules, 2010 are concerned. Whether served or not, it was not provided for under the post-2010 Civil Procedure Rules.
25. In any case, the court has already made a finding that this is purely a matter of admissibility of evidence where the applicable statute is the Evidence Act. It is trite law that under the best evidence rule documents must be proved by primary evidence. Primary evidence is the document itself being produced for inspection by the court. (see section 67 of the Evidence Act).
26. There are however instances where primary evidence is not available and thus the only evidence available is what is described as secondary evidence. Secondary evidence as per Section 66 would include:-
 - i.' Certified copies of the document.
 - ii. Copies made from original by mechanical process.
 - iii. Copies made from or compared with the original.
 - iv. Counterparts of documents against parties who did not execute them.
 - v. Oral account of documents given by some person who has seen it.'
27. Prior to production of secondary evidence, certain conditions outlined in Section 68 of the Evidence Act must be met, namely:-
 - a. 'When the original is shown or appears to be in possession of:-'
 - i. The person against whom the document is sought to be proved and when, after notice required by section 69 of this Act has been given, such person refuses or fails to produce it.
28. Clearly, the notice referred to is notice under the Evidence Act, it is not the purported notice under Order 14 of the Civil Procedure Rules, exhibited in these proceedings by the appellant.



29. It is thus safe to conclude that there was no legally enforceable notice that was served under Section 69 of the *Evidence Act* by the appellant.
30. However, Section 69 of the Evidence Act has a proviso which the trial court did not address its mind to. Though it states that secondary evidence shall not be given unless the party proposing to give such evidence has previously given notice to the party or the party's advocate in whose possession or power such document is, the same section goes further to state as follows: -
- ' Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases: -
- (i) Will only list what I consider relevant in this determination)
 - (ii) When from the nature of the case, the adverse party himself knows that he will be required to produce it.
 - (iv) When the adverse party or his agent has the original in court.'
31. In his testimony before the court, the sole witness who testified on behalf of the respondent, Martin Mbugua Ndungu not only made referred to the said theatre register in his testimony but also told the court that he had the original theatre register in court at the time he was giving that testimony. He said on September 14, 2015:-
- ' The plaintiff worked and the contract was never terminated. He worked throughout the period. His contract was to end on June 1, 2012. I have the original theatre register.'
32. He mentioned the appellants contract in relation to the theatre register but he did not produce it yet he had the said original register before the court.
33. This is a strong pointer that from the nature the case, the respondent knew the said theatre register was a crucial piece of evidence in this case notwithstanding that notice to produce was not issued by the appellant.
34. In any event, the production of copy of theatre register would thus not have amounted to an ambush as the respondent had conceded he was in possession of the original and could thus have been able to be cross-examined on the said register, having himself referred to it in his evidence and also admitting that he had the original. Production of the copy of the register by the appellant after the respondent declined to produce the original which he had in fact referred to would thus not have prejudiced the respondent at all. This was an objection taken and allowed for the sake of it.
35. The trial court did not address its mind properly to all the circumstances of this case and the relevant provisions of the Evidence Act on secondary evidence when it denied the appellant the opportunity to produce a copy of the theatre register.
36. I set aside the ruling of the trial court and order that the appellant shall be allowed to rely on the copy in his possession and produce the same in evidence.
37. I thus allow the appeal with costs to the appellant.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JANUARY, 2023.

L.N. MUGAMBI

JUDGE



In the presence of :-

Coram:

Court Assistant: Kinyua

Appellant: Absent

For Respondent: Amondi HB for Ms. Beanco

court

Judgment delivered virtually.

L.N. MUGAMBI

JUDGE

