



**Gikonyo v Housing Finance Company of Kenya Limited & 2 others (Civil Case 672 of 2006) [2023] KEHC 4029 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4029 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 672 OF 2006**

**A MSHILA, J**

**APRIL 28, 2023**

**BETWEEN**

**NANCY ELIZA MUTHONI GIKONYO ..... PLAINTIFF**

**AND**

**HOUSING FINANCE COMPANY OF KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**RUPINDER SINGH SEHMI ..... 2<sup>ND</sup> RESPONDENT**

**LIFELINE TRADERS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 18<sup>th</sup> November 2020 was brought under Sections 7A, 3A, 22(b) and 63(e) of the *Civil Procedure Act*, and Rule 51 (1) of the Civil Procedure Rules for the following orders;
  - a. The Court to issue an order and/or summons to Patricia Nyokabi Mbugua to attend court during the hearing of the main suit on 26<sup>th</sup> November 2020, for purposes of being cross-examined on the contents of the Agreement for Sale dated 7<sup>th</sup> June 2007 and the Transfer dated 19<sup>th</sup> July 2007.
  - b. The Court to issue an order and/or summons to Land Registrar CS Maina (235) to attend court during the hearing of the main suit on 26<sup>th</sup> November 2020, for purposes of being cross-examined on the authenticity of her signatures on Entry Numbers 8 and 9 on one hand as well as Entry Numbers 10 and 11 on the other hand, all appearing on the Certificate of Title over LR No. 7785/311 Original Number 7785/309, allegedly authored by her.
  - c. The costs of this Application be borne by the Respondents.



2. The Application was supported by the sworn Affidavit of Nancy Eliza Muthoni Gikonyowho stated that the main case herein is slated for hearing on 26<sup>th</sup> November 2020, before the Court, both the Plaintiff and the Defendants have complied with all the pre-trial steps and have confirmed that they shall be proceeding with the said hearing as slated.
3. While preparing for the said hearing scheduled for 26<sup>th</sup> November 2020, the Plaintiff together with her Advocates, discovered that Patricia Nyokabi Mbugua an Advocate of the High Court, is the one who prepared the Agreement for Sale dated 7<sup>th</sup> June 2007, as well as the Transfer thereto dated 19<sup>th</sup> July 2007, both of which are disputed by the Plaintiff.
4. Earlier on, the Plaintiff and her Advocates had also noted that the signatures of C.S. Maina 235, a Land Registrar, appearing on Certificate of Title to the suit property under Entry Numbers 8 and 9, are so different and distinct from her purported signatures appearing under Entry Numbers 10 and 11 on the same Certificate of Title.
5. Further, the Plaintiff questions and disputes the circumstances under which the 2<sup>nd</sup> Defendant obtained a loan of USD 836,000 from Standard Chartered Bank as evidenced under Entry Number 11 of the said Certificate of Title.
6. In the premises, in order for court to fully understand the correct and real facts surrounding the issues in controversy, it is so important that the said Patricia Nyokabi Mbugua as well as the said CS. Maina (235), be ordered and/or summoned to appear before the court for purposes of being cross examined and shedding light on the disputed facts.

### **Applicant's Case**

7. The Applicant submitted that Section 125 of the [Evidence Act](#) provides that all persons are competent witnesses, it is for the person alleging incompetence to demonstrate or provide proof of incompetence. Such incompetence must fit the categories of exception mentioned in the Section by which the person sought to be declared incompetent is shown to be incapable of understanding the question put to them, or of giving rational answers to those questions.
8. Further, Section 128 of the [Evidence Act](#) instead reinforces that a witness shall not be excused from answering any question as to any matter relevant to the questions in issue in any civil or criminal proceeding, even on grounds that the answer may potentially incriminate them. Even then, self-incrimination is only outlawed under Article 50 (2) (l) of [the Constitution](#) in respect of evidence of an accused person. Accordingly, every such person is compellable as a witness.
9. It was the Applicant's position that the conditions precluding any person from testifying under Section 125(1) of the [Evidence Act](#), do not apply to Patricia Nyokabi Mbugua, as she is competent and compellable to testify to the contents of the Agreement for Sale as well as the transfer documents.
10. C. S Maina (235) purportedly having been the one who signed against entries numbers 8, 9, 10 and 11 when the suit property was transferred to the 2<sup>nd</sup> Defendant, should be summoned before court in order to shed light on the issues, especially on-fraud and illegality, which have been raised by the Applicant in her Complaint, now that his/her signatures appearing on the entries have been disputed by the Applicant.
11. The Plaintiff/ Applicant subjected the Certificate of Title to a forensic document examiner. The report delivered by the expert indicated that the signatures made on the Certificate of Title at entry Numbers 8 and 9 on one hand as well as entry Numbers 10 and 11 on the other hand differ and were not made by the same hand.



12. While relying on the holding in the case of Republic v FME [2020] eKLR, it is trite fact that the CS Maina, the Applicant submitted that the Land Registrar is a competent and a compellable witness. In any event the 1<sup>st</sup> Respondent has not adduced any rebuttable evidence proving why CS. Maina cannot be summoned before court for purposes of examination.

### **Respondent's Case**

13. In response, the Respondent argued that the fact that Patricia Nyokabi Mbugua prepared the Agreement for Sale dated 7<sup>th</sup> June 2007 and the Transfer dated 19<sup>th</sup> July 2007 is not in issue. Patricia is being summoned in her capacity as the advocate on record for the 2<sup>nd</sup> Defendant during the material time. It is trite law therefore that an advocate-client relationship arose upon the creation of a retainer between the two and thus communications made between them acquired the status of privileged information hitherto.
14. In Oriental Commercial Bank Limited v CBK [2012] eKLR, the Court stated thus, “it is trite law that a client advocate relationship arises when a client retains an Advocate to offer legal services specifically or generally that advocate-client confidentiality is statutory underpinned under Section 134(1 of the [Evidence Act](#).” However, this privilege is not absolute and is subject to certain limitations. The Act sets a three-part test to justify the limitation: the client’s consent; prevention/redress of an illegality; and prevention/redress of a crime.
15. The said tests were affirmed by the Court of Appeal in the case of Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd [2015] eKLR in the following terms: ‘advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal purpose or where the advocate observes that the client used the privilege to commit a crime.
16. Further, a pre-trial conference was conducted on 6<sup>th</sup> February 2020 and confirmed for hearing on 23<sup>rd</sup> March 2020 and this Application has therefore been brought well after the time required to make this Application and the delay is yet to be explained.
17. Equally the Plaintiff/Applicant is yet to demonstrate how the attendance of Patricia Nyokabi is material to the issues raised in the suit. The Plaintiff has failed to demonstrate the probative value of the evidence to be adduced by the proposed witness which issues were not sufficiently addressed during the Plaintiff’s testimony and by the documents on record.
18. Reference to the Law Society of Kenya Code of Standard of Professional Practice and Ethical Conduct (SOPPEC) of June 2016 which provides that advocate-client confidentiality is one of the overriding principles in which the conduct of professional conduct and ethics is coded<sup>9</sup>. Under Part III of the Code, one of the listed standards of professional practice and ethical conduct (Soppec) is confidentiality and advocate-client privilege.
19. It was the Respondent’s submission that the Plaintiff has failed to satisfy the test laid in Article 134 of the [Evidence Act](#) to justify the breach of Advocate-client privilege submit that CS Maina is not a compellable witness as Section 32 of the [Evidence Act](#) provides that public officers are not compellable witnesses in Court Proceedings.
20. The Plaintiff has failed to demonstrate to this Court that she requested the said witnesses to appear and they refused before requesting the Court’s intervention on the same. The Plaintiff has failed to demonstrate the probative value of the evidence to be adduced by the proposed witness which issues were not sufficiently addressed during the Plaintiff’s testimony and by the documents on record.



21. Further, the documents/forensic examiner's report regarding the signatures on the impugned documents. On that matter the Respondent submitted that unless two signatures are materially so different in style as to lead to a prima facie conclusion that they were signed by two different persons, it is not sufficient to question the signature of Patricia Nyokabi on the mere basis of a difference in character arrangement, pen speed, pen pressure, character spacing and writing quality, inter alia.

### Issues For Determination

22. The Court has considered the Application and the submissions by the parties and frames the following issue for determination;
- a. Whether Patricia Nyokabi Mbugua and Land Registrar CS Maina (235) should be summoned to attend court during the hearing of the main suit for purposes of cross examination?

### Analysis

23. The Applicant argued that she had averred fraud, illegality and/or collusion as regards the transfer of the suit property from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant. That the persons at the center of the impugned Sale and Transfer of the suit property are Ms. Patricia Nyokabi Mbugua being the 2<sup>nd</sup> Defendant's Advocate who drew and prepared the Agreement for Sale as well as the Transfer Document. This is the Applicant's ground for her to be summoned for cross examination.
24. The said Ms. Patricia Mbugua is neither a deponent or a party to this suit. Further, by the Applicant's own admission, she stated that the 2<sup>nd</sup> Defendant frustrated her intention to cross examine him, when he deliberately failed to further instruct his Advocate.
25. Section 134 of the *Evidence Act* provides –
- Privilege of advocates.
- (1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
- Provided that nothing in this section shall protect from disclosure—
- (a) any communication made in furtherance of any illegal purpose;
- (b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.'
26. It is notable that the Applicant has not annexed any evidence to support her allegations of Fraud/ illegality and/or Collusion committed by the 2<sup>nd</sup> Defendant.
27. With regard to the Land Registrar CS Maina (235) who is a Public Official, the Applicant took the position that her role is to clarify whether or not the signatures under entries number 8 and 9 are hers or not. Further, the Applicant alluded to the documents/forensic examiner's report regarding the signatures on the impugned documents as the basis for having Land Registrar CS Maina cross examined.



28. Section 132 of the *Evidence Act* provides that;

“...No public officers shall be compelled to disclose communications made by any person to him in the course of his duty, when he considers that the public interest would suffer by the disclosure...”

29. In *Jeremiah Creek Limited v Tabitha Ndung’u; Andrew Thiaine Imwati (Interested Party)* [2022] eKLR the court held;

“Generally, there no express provision hindering the officers of an adverse party’s institution to testify however, the question is can such witnesses be compellable witnesses? Section 132 of the *Evidence Act* provides that public officers are not compellable witnesses in Court proceedings.”

30. Going by the above findings, Land Registrar CS Maina (235) will not be compelled to attend court during the hearing of the main suit for purposes of cross examination.

31. The upshot of the above is that the Applicant’s application is found to be devoid of merit.

### **Findings And Determination**

32. In the light of the forgoing this court makes the following findings and determinations;

- i. This court finds the application to be devoid of merit and it is hereby dismissed.
- ii. The applicant to bear the costs.
- iii. Mention on 3/05/2023 before the Deputy Registrar for fixing a hearing date.

Orders accordingly.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2023.**

**HON. A. MSHILA**

**JUDGE**

**In the presence of;**

**Titus Makhanu for the Plaintiff/Applicant**

**Mukuria holding brief for Ndirangu for the 1<sup>st</sup> Defendant/Respondent**

**Sarah -----Court Assistant**

