



In re Estate of Muthami Githinji (Deceased) (Succession Cause 285 of 2009) [2023] KEHC 18013 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 285 OF 2009
EM MURIITHI, J
MAY 30, 2023
IN THE ESTATE OF MUTHAMI GITHINJI (DECEASED)
WANGARI GITHINJI**

BETWEEN

WANGARI GITHINJI APPLICANT

AND

DANIEL WANJIGO PETITIONER

RULING

1. The *Evidence Act* cap 80 laws of Kenya provides at section 35 as follows:

“ 35. Admissibility of documentary evidence as to facts in issue.

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 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.

- 2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—
 - a. notwithstanding that the maker of the statement is available but is not called as a witness;
 - b. notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.
- 3. Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.
- 4. For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.
- 5. For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw



any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.”

2. Sections 79, 80 and 81 of the Evidence Act relating to proof of public documents are in the following terms:

79. Distinction between public and private documents.

(1) The following documents are public documents—

(a) documents forming the acts or records of the acts—

(i) of the sovereign authority; or

(ii) of official bodies and tribunals; or

(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;

(b) public records kept in Kenya of private documents.

(2) All documents other than public documents are private.

80. Certified copies of public documents.

(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.

81. Proof by certified copies.

Certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies.”

3. The Counsel for the Applicant objects to the production in evidence before the court of certain documents listed in the Petitioner’s List of Documents by the witnesses proffered by the Petitioner and requires production by persons in the employ of offices where the said documents were prepared and maintained.

4. The Counsel for the Petitioner respondents that the documents in question are in the nature of public documents which could be produced under section 35 of the Evidence Act by way of “a copy thereof by a party or witness in the matter”.

5. With respect, it is the mode of proof of the contested documents which is in issue. While the court may under section 35 (2) of the Evidence Act permit the production by a person other than the maker



of a document other the original thereof, and while proof by certified copies is permissible in case of public documents under section 81, it is in the discretion of the court and the court may still require production of the same by the officer presently in charge of the office where public documents are held, where the discretion of the court is not properly invoked.

6. In this case, while there is no doubt as to the non-availability of the makers of the documents, some whom are deceased and in view of the passage of time since the making of the documents, it has not been shown that the original documents are not in existence and there is no difficulty shown in securing the attendance of the persons presently holding the offices where the documents were made and are maintained, and the original documents may be produced.
7. The Court has considered the submissions by the respective counsel and, particularly, in view of the disputed fact of the validity of the said documents, some which exist in multiple versions, as shown in the examination of the previous witnesses in this matter, requires production of these documents in evidence by a suitable officer in the respective public office where the document in issue was made and retained and who has custody of the original of the said documents.

Orders

8. Accordingly, the following documents on the List of Documents relied upon by the Respondents shall be produced by the appropriate officers currently holding the offices where the said public documents were made, received and or retained:
 1. Certificate of Death Document No. 1 on the Petitioner's List of Documents;
 2. Burial permit dated 6/3/1993 Document No. 4 on the List of Documents;
 3. Letter by Area Chief Document No. 4 on the List of Documents;
 4. Letter of Area Chief Document No. 8 on the List of Documents;
 5. Letter of the Deceased dated 20/2/1991 delivered to the Chief then in office.
9. Costs in the cause.
Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Carlpeters Mbaabu Advocate for the Respondent/Petitioner

Ms. Kiome Advocate for the Objector/Applicant.

