



Scorpion Properties Ltd & another v Mody & 8 others; Mody (Plaintiff to the Counterclaim); Scorpion Properties Limited & 4 others (Defendant to the Counterclaim) (Environment and Land Case Civil Suit 2156 of 2007 & 196 of 2015 (Consolidated)) [2025] KEELC 1489 (KLR) (24 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1489 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT
2156 OF 2007 & 196 OF 2015 (CONSOLIDATED)

CA OCHIENG, J

MARCH 24, 2025

BETWEEN

SCORPION PROPERTIES LTD PLAINTIFF

AND

P.I MODY 1ST DEFENDANT

ROBERT OTACHI 2ND DEFENDANT

THE NATIONAL LAND COMMISSION 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE COUNTY GOVERNEMENT OF NAIROBI 5TH DEFENDANT

TONIE LESLIE WESONGA 6TH DEFENDANT

AND

P.I MODY PLAINTIFF TO THE COUNTERCLAIM

AND

SCORPION PROPERTIES LIMITED DEFENDANT TO THE COUNTERCLAIM

ROBERT OTACHI DEFENDANT TO THE COUNTERCLAIM

THE NATIONAL LAND COMMISSION DEFENDANT TO THE COUNTERCLAIM

THE CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM



**THE COUNTY GOVERNEMENT OF NAIROBI DEFENDANT TO THE
COUNTERCLAIM**

**AS CONSOLIDATED WITH
ENVIRONMENT AND LAND CASE CIVIL SUIT 196 OF 2015**

BETWEEN

KENYA WINE AGENCIES LIMITED PLAINTIFF

AND

JINA HARJI VARSANI 1ST DEFENDANT

VERBAL DHANJI VARSANI 2ND DEFENDANT

THE COMMISSIONER OF LANDS 3RD DEFENDANT

RULING

1. This ruling relates to an objection raised by Counsel for the 4th Defendant in the main suit to PW1 (Rahim Chatur)'s production of the following documents as exhibits:
 - a. City Council of Nairobi Minutes of proceedings of the council and meetings thereof for the month of December 2010, February, March, April and May 2011 respectively.
 - b. Letter dated the 25th May 2000 addressed to Oyugi & Company Advocates from the Ministry of Lands and Settlement.
 - c. Letter dated the 26th September 2017 addressed to the Land Registrar by the National Land Commission.
 - d. A report of Nairobi City County Assembly's Planning and Housing Committee on Commercial Residential plot No. Nairobi/Block 91/56.
 - e. A Valuation report of May 2019 prepared by Sedco Valuers (k) Ltd for valuation of LR No. Nairobi/Block 91/56.
2. Counsel for the Plaintiff conceded to marking the Valuation Report by SEDCO for production by a valuer but contended that the rest of the documents are public documents within the meaning of Section 79 of the *Evidence Act* and hence PW1 was competent to produce them.
3. In rejoinder, Counsel for the 4th Defendant contended that the Letters objected to, were not addressed to PW1 or the Plaintiff company. He referred Court to Sections 79, 80 and 81 of the *Evidence Act* and argued that if the documents are not produced by the maker, then certified copies should be produced.
4. Further, that under the provisions of Article 35 of *the Constitution* and *Access to Information Act*, the law stipulates the procedure a party should adhere to, if he wishes to rely on public documents. The court was urged to consider the Supreme court's decision in the case of Kenya Railways Corporation & 2 Others v Okoiti & 3 Others (Petition (Application) 13 (E019) of 2020 & Petition 18 of 2020 (Consolidated); [2022] KESC 68 (KLR) Analysis and Determination



5. Counsel for the Plaintiff having conceded to marking document no. (e) as listed at paragraph 1 herein for production by the maker, the issue for determination is whether PW1 is a competent witness to produce the aforementioned documents listed in (a) to (d) above. Counsel for the Plaintiff contends that the witness can do so because the documents are public documents.

6. Section 35 of the Evidence Act requires that documents must be produced by the maker. There are however exceptions to the Rule as set out at Section 35 of the Evidence Act. In *Kenneth Nyaga Mwigwe v Austin Kiguta & 2 Others* [2015] eKLR the Court of Appeal stated as follows:

“The law is that the maker of the document should do so. This is provided for in section 35 (1) (b) of the Evidence Act. The exceptions thereto are given in the proviso to the Sub-section. It provides that the maker need not be called if it is shown to the satisfaction of the Court that either the maker is dead, or cannot be found, or incapable of giving evidence; or his attendance can only be procured with an amount of delay or expense which in the court’s view would be unreasonable in the circumstances of the case.”

7. The 4th Defendant’s counsel contended that the aforementioned documents are public and that proper procedure has to be adhered to, if they are to be produced by PW1. Section 80 of the Evidence 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.”

8. In *Kenya Railways Corporation & 2 others v Okoit & 3 others* [2023] KESC 38 (KLR), the Supreme court stated as follows when referring to public documents;

“We agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or contents of the documents was not questioned by the Appellants, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the documents in the manner set out under sections 80 and 81 of the Evidence Act or requested for information under article 35 of the Constitution, the documents are inadmissible, we so declare.

It does not matter, in our view, that some of the documents in issue had been readily tabled before Parliament and were subjected to debate at the different committees. It is trite that parliamentary processes are subject to certain privileges and immunities. Article 117 of the Constitution provides for powers, privileges and immunities. The objective of the powers, privileges and immunities as set out in article 117(2) is for the purpose of the orderly and effective discharge of the business of Parliament. These powers, privileges and immunities extend to the Parliamentary Committees, the chairpersons of committees and



members of parliament. In the same breadth, Parliament is empowered under article 125 to call for evidence including the production of documents. Having said so, it cannot be that documents obtained pursuant to parliamentary processes mutate into public documents just because the respondents somehow are in possession of the said documents through an otherwise opaque process. The 1st to 3rd Respondents have not demonstrated how they gained possession of the impugned documents ...”

9. From the facts before this Court while relying on the legal provisions quoted and authorities cited, I opine that PW1 does not have capacity to produce City Council of Nairobi Minutes of proceedings of the Council and meetings thereof for the month of December 2010, February, March, April and May 2011 as well as report of Nairobi City County Assembly’s Planning and Housing Committee on Commercial Residential plot No. Nairobi/Block 91/56 as he did not demonstrate the role he played in the said meetings. In my view an official from the Nairobi City County Government and Nairobi City County Assembly has to be summoned to produce the impugned report and minutes. In the circumstances, I will hence uphold this objection and mark the said minutes for identification.
10. As for production of Letter dated the 26th September 2017 addressed to the Land Registrar by the National Land Commission. I have had a chance to peruse the said letter and note it was not copied to the Plaintiff nor the vendor who sold to it, the land. It is trite that it is the maker who should produce a document or a recipient can do so. I note the said letter is not certified as a true copy of the original. In the foregoing, I will uphold the objection and direct that the said letter be marked for identification.
11. In relation to production of letter dated the 25th May 2000 addressed to Oyugi & Company Advocates from the Ministry of Lands and Settlement. I note the said letter was copied to the Permanent Secretary, Ministry of Lands and Commissioner of Lands. PW1 did not state how he acquired the said letter. Further, the said letter is not certified as a true copy of the original. In the circumstance, I find that PW1 is not a competent witness to produce the said letter and will uphold the objection.
12. I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24th DAY OF MARCH 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Mbithi for Plaintiff

Kamau for 1st Defendant

Ms Kendi for 2nd Defendant

Githui for 1st Defendant

Ms Oduro for Nyakoe for 5th Defendant

Ayieko 6th Defendant

Court Assistant: Joan

