



Mugalla & another (Both Suing as Legal Representatives and on Behalf of the Estate of the Late Joseph Jolly Mugalla a.k.a Joseph J. Mugalla) v Shivachi (Environment & Land Case 3 of 2017) [2023] KEELC 17488 (KLR) (24 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 3 OF 2017**

DO OHUNGO, J

MAY 24, 2023

BETWEEN

ANTHONY MWABISHI MUGALLA 1ST PLAINTIFF

CASTRO FELIX MUSIYIKHU MUGALLA 2ND PLAINTIFF

**BOTH SUING AS LEGAL REPRESENTATIVES AND ON BEHALF OF THE
ESTATE OF THE LATE JOSEPH JOLLY MUGALLA A.K.A JOSEPH J. MUGALLA**

AND

LABAN LIJODI SHIVACHI DEFENDANT

*(Both suing as legal representatives and on behalf of the estate of
the late JOSEPH JOLLY MUGALLA a.k.a JOSEPH J. MUGALLA)*

RULING

1. At the hearing of this matter on November 21, 2022, the first plaintiff who was testifying as PW1 sought to produce a photocopy of a sale agreement dated August 17, 1993 and copies of some diary pages said to be acknowledgments of payments. The documents were found to be illegible and were therefore marked PMFI 3 and PMFI 4 respectively and the plaintiffs were granted an adjournment to enable them to produce the originals.
2. When the matter next came up for further hearing on February 15, 2023, Ms Ikhumba, learned counsel for the plaintiffs, stated from the bar that the plaintiffs had been unable to trace the originals and that the first plaintiff's house was vandalized and some documents went missing. She stated that the originals of PMFI 3 and PMFI 4 are lost and that she had obtained clearer colour copies of the said documents. She added that the documents are crucial to the plaintiffs' case and urged the court to allow production of the copies under Section 68 (1) (c) of the *Evidence Act*.



3. Mr Manyoni, learned counsel for the defendant, opposed the application and relied on Sections 66 and 68 of the Evidence Act. He argued that the conditions under said sections had not been met and urged the court to dismiss the application.
4. I have considered the application and the submissions. .
5. Pursuant to Section 67 of the Evidence Act, documents must be proved by the document itself produced for the inspection of the court, except in the circumstances provided under Section 68 of the Act which permit production of a copy. The plaintiffs have sought to rely on Section 68. (1) (c) of the Act which provides that secondary evidence may be given of the existence, condition, or contents of a document “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.”
6. Needless to state, evidence is required to demonstrate that the original has been destroyed or lost. A proper basis must be laid by way of admissible evidence. Statements or submissions from the bar do not constitute evidence. The plaintiffs have not offered any evidence to show that the originals of PMFI 3 and PMFI 4 are lost.
7. I find no merit in the plaintiffs’ application for admission of secondary evidence in respect of PMFI 3 and PMFI 4. I therefore dismiss the application. Costs to the defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Muthami holding brief for Ms Ikhumba for the plaintiffs

The defendant present

Court Assistant: E. Juma

