



**Oike Keenyokie Suswa Trust Registered Trustees v County Government of Narok & 2 others
(Environment & Land Case E003 of 2022) [2023] KEELC 17914 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E003 OF 2022**

**CG MBOGO, J
JUNE 14, 2023**

BETWEEN

OIKE KEENYOKIE SUSWA TRUST REGISTERED TRUSTEES PLAINTIFF

AND

COUNTY GOVERNMENT OF NAROK 1ST DEFENDANT

COUNTY LAND REGISTRAR NAROK 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. During the hearing of the plaintiff's case on May 31, 2023, and while PW1 was under examination in chief, the counsel for the 2nd and 3rd defendants raised an objection as to the production of documents from pages 26-51 on the grounds that they are photographs that have been attached without certificates. The 3rd defendant also objected to the production of documents at pages 6 and 22 which is a development plan that is undated and unsigned on claims that the plaintiff is not the maker of the same.
2. In response thereto, Mr Pareno, the counsel for the plaintiff submitted that when the matter came up for pre-trial directions, there was full compliance with Order 11 of the *Civil Procedure Rules* and the learned counsel ought to have applied for the objection then. That the photographs are being produced by the maker who is present. Also, that recent jurisprudence by Justice Mumbua Matheka in the case of *Peter Ngethe Ngare T/A PNN Funeral Services v Standard Group Limited PLC* [2020] eKLR, where faced with a similar situation, stated that "in my view, the objection is superfluous". That in essence, the court was saying of the person who took the photographs, the conditions under Section 106B of the *Evidence Act* is met. Further, that the person who took the pictures can be cross examined.
3. With regard to the development plan on pages 6 and 22, the counsel submitted that they are public documents which were produced by the Ministry of Land and Settlement department of planning,



and which satisfy Section 60 of the *Evidence Act*. That in any event, if the 3rd defendant disputes the same, the defendants are better placed to question the veracity of the documents by summoning the officials of the government.

4. In reply, Ms Mwalozi for the 2nd and 3rd defendants submitted that the documents in pages 6 and 22 do not bear any stamp and it is upon the plaintiff to call the maker and to build their case. In response to the photographs, the counsel submitted that the witness has not stated that he took the pictures or went to the ground to take them as that was not in his statement. Also, that when the matter came up for pre-trial, the 2nd and 3rd defendants, had never been served with any pre-trial notice to this suit.
5. In rebuttal, Mr Pareno, reiterated Section 60 of the *Evidence Act* and submitted that there is no need to produce the maker of the photographs as it is evidence in paragraph 11 of the witness statement. That it is suspicious that the counsel is present having never participated in the pre-trial as required under Order 11 of the *Civil Procedure Rules*.
6. I have considered the oral submissions by both counsel and the issue for determination is whether the objection raised by counsel for the 2nd and 3rd defendants as to the production of the documents ie, photographs contained in pages 26-51 and maps in pages 6 and 22 is merited.
7. On the issue of photographs, the authenticity of the same has not been challenged. Ms Mwalozi objection was that PW1 was not the maker and the same do not have certificates. The Court of Appeal in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR held that:

“Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced...

The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.” (Emphasis mine)

8. I have perused the witness statement of PW1 and in paragraph 11, there is on record the statement as to the production of the photographs. On this, I am of the view that PW1 can be cross-examined on the same.
9. On the maps contained in pages 6 and 22 of the plaintiff’s bundle of documents, Ms. Mwalozi, the counsel for the 2nd and 3rd defendants contended that PW1 is not the maker of the document and cannot produce the said maps. In rebuttal, Mr Pareno contended that these are public documents and that the 2nd and 3rd defendants are better placed to summon the officials responsible for the documents.
10. The Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (herein referred to as the “Mutunga Rules”) especially rule 28 thereof is applicable herein. The Sub-Rule gives further directions to those of Order 11 and Order 3



Rule 2 of the Civil Procedure Rules. It deals with objections to documents at the Pre-trial conference if a notice thereof has been issued to a party.

11. In the case of *Ntarangwi M'Tkiara v Jackson Munyua Mutuera* [2018] eKLR, the court cited the case of *Evangeline Nyegera (suing as the legal representative of Felix M'Tkiugu alias M'Tkiugu Jeremiah M'Raibuni (deceased) v Godwin Gachagua Githui*, where the Court of Appeal Civil Appeal No 28 of 2016 held that;

“The test for admission of evidence is relevancy..... There is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence. We hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross examine on veracity and legitimacy if it be necessary”. (Emphasis mine).

12. My analysis of the above is that it would not be in the interest of the parties to uphold the objection raised by the 2nd and 3rd defendants' the counsel at this stage. Pursuant to the practice directions cited above, the counsel for the 2nd and 3rd defendants was required to file any objection as to the production of any documents. However, this was not done. Also, in any case, the defence will have their time to cross examine on the said documents, if need be.
13. For the reasons stated above, the objection raised by Ms Mwalozi, the counsel for the 2nd and 3rd defendants is dismissed. Parties to take directions as to the further hearing of the plaintiff's case. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 14TH DAY OF JUNE, 2023.

HON. MBOGO C.G.

JUDGE

JUNE 14, 2023

In the presence of:

CA:Chuma

