



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC CRIMINAL APPLICATION NO. 01 OF 2017

SAMUEL KIBUE MAINA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The notice of motion before me is brought under section 362 and 364 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya.

It seeks orders *inter alia* that this honourable court be pleased to call and examine the ruling /order of the subordinate court in Nyeri Criminal Case number 809 of 2014 Republic versus Samuel Kibui Maina, to satisfy itself on the correctness or otherwise of the order dated 14th February 2017. That in addition and/ or in the alternative this honourable court be pleased to alter and/ or reverse the order of the learned magistrate dated 14th January 2017.

The application is supported by the affidavit of the applicant and on the following grounds;

1. that the ruling allowing the production of secondary evidence is prejudicial to the applicant and goes against the standard of proof in criminal cases,
2. that no explanation was given by any witness for the production except mere statements from the witness box,
3. That conditions of section 68 (1) (c) had not been met.

The application is opposed through the replying affidavit of the prosecuting counsel sworn on the 25th day of March 2017. The main ground for the opposition is that the prosecution did call a witness who clarified why the original documents could not be found. Further that the applicant would not suffer any prejudice whilst the secondary evidence was tendered in court as provided for by the Evidence Act.

In order for the court to determine the application the proceedings from the lower court had to be typed and certified and placed before the court. These proceedings were only ready by the 15th February 2018.

The applicant is the accused person in subordinate court where he faces two counts; forgery contrary to section 345 as read with section 349 of the Penal code *where it was alleged that on the first day of October 2009 at Nyeri township within Nyeri County within the Republic of Kenya jointly with others not before court with intent to defraud forged are a certain document namely letter of consent for transfer of land parcel no. AGUTHI/GAKI/1887, purporting it to be a genuine letter of consent issued by the chairman Tetu East land control board; a second count of obtaining land registration by false pretences contrary to section 320 of the Penal Code. It is alleged that on the 13th Day of May 2010 at Nyeri lands or face in Nyeri County within the Republic of Kenya he willfully procured for himself land registration for land parcel number AGUTHI/GAKI/1887 by falsely pretending that he had consent of transfer from James Justus Wanyaga Gathaka the rightful owner of the seed land parcel of fact he knew to be false.*

This application was provoked by the ruling of the trial magistrate delivered on 14 February 2017 where she allowed the production of secondary documentary evidence.

The ruling arose out of objections raised by Mr. Ng'ang'a counsel for the accused person, during the testimony of the investigating officer who was PW7 no. 61677 PC N. Richalo, when he stated, with regard to the documents that he wished to produce certified copies. The record shows that counsel objected on the ground that the law of evidence is that originals must be produced otherwise the prosecution must demonstrate efforts made to trace the originals.

The prosecuting counsel responded that the Evidence Act provides for when secondary evidence may be adduced and that the investigating officer had explained clearly the efforts he had made to trace the same documents. And that they had gone further to produce a witness PW5

to explain the same.

PW5 Samwel Nderitu Ndirangu testified that at the material time he was the Land Registrar Nyeri County. On 5th February 2012 he received a letter from the DCIO requesting for certified copies of documents related to land parcel Aguthi/Gaki/1887. His evidence was that on 10th May 2013 documents with regard to the parcel of land in question were taken to him by his in charge for certification. These documents were, the transfer form, the letter of consent for the land control board, the application to land control board. He stated on oath that when he certified the said copies, he saw the originals. These originals were kept under lock and key.

Later on 4th July 2014 he received a letter requesting for the original letter of consent. When he went to check where these documents were being kept under lock and key the documents were missing.

It is with this background that the Hon. J. N Wambilyanga PM made a finding that the investigating officer had explained that the primary evidence was lost, that the Land Registrar who was the custodian of the said documents was called as a witness, who testified that the documents which were under lock and key had disappeared. And therefore the prosecution had satisfied the requirements under section 68(1) (c) of the Evidence Act.

I have carefully considered the foregoing circumstances. I have perused the record and in particular the evidence of PW5 and PW7.

It is very clear that the investigating officer made efforts to obtain the original documents. It is also clear that the custodian of the said documents who was PW5 testified under oath that at the time he meant the copies which PW7 sought to produce, he did see the originals, but when the originals were sought at a later date they were found to be missing. This clearly brings this case under the ambit of s. 68(1) (c) of the Evidence Act.

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—

(c) 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;

What was stated by PW5 was evidence on oath which was subjected to cross examination by the defence therefore it cannot be said to be mere statements from the witness box as alleged by the defence. That evidence was corroborated by the evidence of PW the I.O. the defence deal has the opportunity to the weight of the evidence as matters stand now it appears that that is the best evidence that the prosecution could produce in the circumstances.

It is my considered opinion that in the circumstances of this case the trial magistrate arrived at the correct finding that the prosecution had discharged its duty in meeting the conditions set out in the Evidence Act.

In the upshot I find that the application is not merited and is dismissed.

Dated, delivered and signed in open court at Nyeri this 30th day of April 2018.

Mumbua T. Matheka

Judge.

In the presence of:

Court assistant: Albert Atelu

Prosecuting counsel: Mr. Murang'a

applicant: N/A

Counsel for the applicant: Ms. Ndegwa for Mr. Ng'ang'a for applicant