



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO.326 of 2008**

**RUTH NJERI KUNIARA.....PLAINTIFF/APPLICANT**

**VS.**

**INDUSTRIAL & COMMERCIAL**

**DEVELOPMENT CORPORATION.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**WATTS ENTERPRISES .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CATHERINE NJERI NGUNJIRI (suing and being sued as the Legal**

**Representative of Anthony N. Ngunjiri).....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This matter is partly heard and the Plaintiff has completed giving her testimony. There has been an interruption in the hearing to enable this Court deal with the Application of 2<sup>nd</sup> May 2017 which is brought under the provisions of Section 35(1)(b) of the Evidence Act (hereafter the Act) for the following prayers:-

- 1. THAT the witness statement made by Wanjiru Kuniara be admitted as evidence.**
- 2. THAT this Honourable Court does dispense with the physical appearance of Wanjiru Kuniara who cannot be traced.**
- 3. THAT the witness statement be allowed to form part of evidence as the document in question forms part of the record and was within the personal knowledge of the maker.**

2. The Statement sought to be admitted is that made by one Wanjiru Kuniara (Wanjiru) on 15<sup>th</sup> October 2012. It is a short Statement which I reproduce hereunder:-

**“I, Wanjiru Kuniara am of the above particulars and wish to state as follows:-**

**I am the daughter of the Plaintiff herein, Ruth Njeri Kuniara. There exists in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants bundle of documents, a letter dated 10<sup>th</sup> March 2008 and sent by registered post. The letter is a notice of sale for the property title NO.14225/171(I.R.53502) KAHAWA**

**WEST-NAIROBI.**

**The letter bears my name on it, with a signature under my name. I would like to state that I have never seen nor received such a letter and the signature that has been affixed on the said letter is not mine.**

**That is all I wish to state now”.**

3. Ruth Njeri Kuniara (the Plaintiff) is the mother of Wanjiru. In an affidavit in support of the Application, she avers that she last saw Wanjiru on 15<sup>th</sup> October 2012 at the offices of her Advocates Messrs Khaminwa & Khaminwa, where Wanjiru was recording a statement. She deponed that she and other members of her family have not been in good terms with Wanjiru as a result of which Wanjiru left home in the year 2011. And that she only saw her once since 2012. The Plaintiff cannot trace her.

4. The Plaintiff states that she has made several attempts including making inquiries with some relatives but to no avail. It is also her evidence that on one occasion she heard that Wanjiru was in Mombasa and one of her brothers Moses Kuniara personally looked for her with no luck. Further that she received information that she may be in Bukoba, Tanzania but her friends were unable to verify this information.

5. The Plaintiff neither has the phone contact nor knows the physical address of Wanjiru. It is her argument that the physical appearance of the witness will occasion a delay of the finalization of this matter.

6. The Defendants oppose the Application. In a sum the Defendants take the position that the Orders sought are in contravention of the mandatory provisions of Section 35(3) as the statement sought to be allowed as evidence was made whilst these proceedings were pending. Further that the Statement is made to assist the Plaintiffs case and would not find favour in the provisions of Section 36(1) of The Evidence Act.

7. It is further argued that the Defendants are entitled to the test, the contents of the Statement through cross-examination and its admission without calling the Maker infringes on their right to cross-examination which goes to the root of a Right to a fair Hearing as enshrined in Article 50 of The Constitution.

8. This Court has read and understood the written arguments made by Counsel for the parties herein and takes them into account in deciding this application.

9. Section 35(1) and 35(2) provides as follows:-

**“(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”.**

10. Now, the Statement of Wanjiru which is sought to be admitted was made on 15<sup>th</sup> October 2012 pursuant to provisions of Order 3 Rule 2 of The Civil Procedure Rules 2010 which requires all suits filed by way of Plaint, except small claims, to be accompanied by a list of witnesses to be called at the trial and written statements signed by the witnesses excluding expert witnesses.

11. Without a shadow of doubt, the Statement was made specifically for purposes of these proceedings and is in support of the Plaintiffs claim. For that reason this application must be considered against the contemplation of the provisions of Section 35(3) of The Evidence Act which reads,

**“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”.** *(my emphasis)*

12. Section 35 is in respect, generally, to statements in Documents made either before proceedings and are filed or there is anticipation of a dispute or proceedings. The policy objective would be that Statements made when proceedings are pending or when disputes are anticipated may be motivated by an incentive to conceal or misrepresent facts and so there is an inherent danger and difficulty in admitting them without testing them through cross-examination.

13. Yet Section 35(3) only bars admission of Statement made by a person interested and so a question to be asked is whether Wanjiru is a person interested. In his opening address to Court, Dr. Khaminwa for the Plaintiff emphasized that the Plaintiff Claim was an attempt, inter alia, to protect a property which her children and grandchildren know as their home. Wanjiru is a child of the Plaintiff and it was incumbent upon the Plaintiff to demonstrate that Wanjiru is not an interested person and is neutral so as not to be caught up by the provisions of Section 35(3) of The Evidence Act. The Plaintiff makes no attempt to do so and by dint of the provisions of Section 35(3) alone, I would disallow the application.

14. But even if I were to have misconstrued the Application of Section 35(3) and its applicability to this matter, I would have nevertheless still declined the application.

15. The bringing of this application was not the first attempt by the Plaintiff to introduce this Document, she had tried to do so when she testified on 7<sup>th</sup> February 2016. On that day she told Court,

**“Wanjiru Kuniara is at Bukoba”.**

She reiterated this while under cross-examination by Counsel Nduta for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

16. The Plaintiff now says that she got information that at one time Wanjiru was in Mombasa and her brother Moses Kuniara looked for her but with no luck. However Moses does not make an affidavit to support this or to demonstrate the efforts he has made.

17. In respect to Bukoba, the Plaintiff depones,

**“That in one occasion, I received information that she may be in Bukoba Tanzania from her friends but was unable to verify the same”.**

But who are these friends? We are not told! We are also not told why these friends could not give evidence as to the difficulties in tracing Wanjiru.

18. Admitting a Witness Statement into Evidence without testing its contents in cross-examination is not a matter to be taken lightly. The Right to challenge evidence, including by way of cross-examination, is an integral component of a right to fair hearing. That right can only be compromised for extremely good reasons. If the reason given like here, is that the presence of the Witness cannot be procured without undue delay, then there must be cogent evidence of that difficulty. I am afraid I am unable to find that the evidence placed by the Plaintiff is sufficiently strong.

19. The upshot is that the Notice of Motion dated 2<sup>nd</sup> May 2017 is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 18<sup>th</sup> day of May ,2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Dr. Khaminwa for Plaintiff/Applicant

Ouko for 2<sup>ND</sup> AND 3<sup>RD</sup> Respondent/Defendant

Ouko h/b for 3<sup>rd</sup> Respondent

Nixon - Court Assistant