



Lunani & another (Suing as the Executors of the Will of the Late Stephan Lunani Walela) v Carlsberg International Limited & 4 others (Environment & Land Case E025 of 2022) [2023] KEELC 22190 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22190 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E025 OF 2022
FO NYAGAKA, J
DECEMBER 15, 2023**

BETWEEN

**ELKANA WALELA LUNANI 1ST PLAINTIFF
KHAYANGA LUNANI 2ND PLAINTIFF
SUING AS THE EXECUTORS OF THE WILL OF THE LATE STEPHAN
LUNANI WALELA**

AND

**CARLSBERG INTERNATIONAL LIMITED 1ST DEFENDANT
DKO INVESTMENTS LIMITED 2ND DEFENDANT
DAWN INNOVATIONS LIMITED 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT
CHIEF LAND REGISTRAR 5TH DEFENDANT**

RULING

1. While this matter progressed towards compliance in terms of Order 11 of the Civil Procedure Rules, the Plaintiffs made a Request for Documents under Order 11 Rule 3 to the legal counsel for the 4th and 5th Defendants – the Office of the Attorney General. The request was dated 18/09/2023. It sought the availing of the original of two sets of documents in Court, with particulars contained. The two were (a) the Original File in respect of LR 3803 and (b) the Original File in respect of LR. 3803/3. They stated that the request was in line with Paragraph 9A of the Amended Defence dated 07/09/2023.
2. At the same time they applied for witness summons to issue against one Ngetich an officer in the offices of the 4th and 5th Defendants' offices. The 4th and 5th Defendants objected to both the Notice to Produce



and the issuance of the witness summons to the said Mr. Ngetich. The bone of contention is that the Notice to Produce is invalid because the parties to whom it was issued do not have the documents. In essence the parties' argument is that they cannot produce what they do not have.

3. Regarding the objection to the issuance of witness summons is that the said Mr. Ngetich is a witness of the 4th and 5th Defendants hence he cannot be called to testify on behalf of the Plaintiffs as that would prejudice their case.
4. The Plaintiffs filed submissions dated 26th September 2023. In the submissions, the Plaintiffs began by giving the history of the requests. They then submitted that the 4th and 5th Defendants were enjoined as parties to the suit and they are vested with the obligation by the public to maintain records relating to land in that behalf. They submitted that the said Defendants filed an Amended Defence in which at Paragraphs 9A they pleaded that they did not participate in any fraud alleged in the matter save that they were custodians of records. At Paragraph 9B they pleaded that the records in their possession outlined the history relating to parcel No. LR 3803/3 and that the said parcel number is a subdivision from LR 3803 which was effected on 08-09-1960 and that their records did not show that LR. No. 3803/3 was registered to any person.
5. They referred to the bundle of documents they (Plaintiffs) filed which contained copies of title documents showing transfer of the property to the late Shaphan Lunani and some historical documents relating to the said transfer. They then stated that the Defendants were not keen to produce the said records. They argued that the parties were in agreement that there were records relating to the movement of the land, including subdivision and allocation of the two subdivisions. They argued that the Court would be required to determine how the parties obtained their titles and who the rightful owner was.
6. They submitted that apart from pleading fraud against the 1st-3rd Defendants by the Plaintiffs pleaded in their Amended Complaint, the 4th and 5th Defendants parties invited the Plaintiffs and Defendants to strict proof on how they obtained registration of the titles to parcel No. LR. 3803/3. They submitted further that since the Court sole purpose was to do justice, it could not do so without the records held by the 4th and 5th Defendants who were the sole custodians of the records and supposed to be neutral.
7. They submitted that the purpose of Case Management under Order 11 of the Civil Procedure Rules was for parties to make discovery and have summons issued to witnesses. That that was the reason that necessitated the issuance of the Notice to Produce. They questioned why the 4th and 5th Defendants did not seek to produce the entire record relating to the suit land.
8. Their argument was that it was the reason why they made a checklist in the Case Management documents wherein they required the 4th and 5th Defendants to produce the documents. That it was the obligation of the Court, in the interest of justice, to order the production of the complete record. They relied on Order 11 of the Civil Procedure Rules and Sections 1A and 3A *Civil Procedure Act* to ask the Court to discharge its overriding objective.
9. They relied on the case of Mradula Suresh Kantara and Suresh N. Kaptaria Civil Appeal No. 227 of 2005 (unreported) as cited in Athi River Steel Plant Limited v. Philip Mukula Moki [2021] eKLR which summarized the purpose of the "OO Principle".
10. They differed in argument with the 4th and 5th Defendant by submitting that from the List of Documents and List of Witnesses they filed, it was clear that the only documents they Defendants were keen to produce were the contested ones and that the witness they intended to call was only the 4th Defendant who issued the documents contested and not the Principal Officer, the custodian of the records.



11. They relied on the case of Kenya Bus Service Limited & Another v. Minister for Transport & 2 others [2012] EKLK which discussed the position of the Attorney-General in the justice system as provided for under Article 156(4) and (6) of *the Constitution*. They submitted then that the witness they sought to be called should be so called. Further that the Attorney General has the duty to assist the Court to arrive at a just conclusion.
12. The Plaintiffs submitted that no prejudice would be occasioned by a public official being asked to produced records in his custody.
13. The 4th and 5th Defendants filed submissions dated 06/10/2023 on 11/10/2023. They began by stating that there were only two issues for determination by the Court. These were whether the Notice to Produce coined as Request for Documents was proper and whether the Plaintiff can summon the 5th Defendant as their witness.
14. They submitted that Order 11 Rule 3 deals with case conferencing and not the question of production of documents. They submitted that the Request was thus fundamentally flawed since it was based on a non-existent provision.
15. They submitted that the provision on Notice to Produce was provided for under Section 69 of the *Evidence Act*, Chapter 80 of the Laws of Kenya. They relied on the decision of Concord Insurance Company Limited (under Statutory Management) V. Nic Bank Limited [2020] EKLK which discusses the purpose of a Notice to Produce. They also relied on the case of Fatuma Zainabu Mohamed V. Ghati Dennitah & 10 others [2013] EKLK. They submitted that the Defendants were in possession of the secondary documents they wanted the court to order that they produce. They submitted that since the Defendants had indicated that they would be producing the filed for the suit properties, the Notice to Produce was a red herring.
16. Regarding the Plaintiffs' request for the Court to summon the 5th Defendant as the Plaintiff's witness, they submitted that the said party was a 5th Defendant who was represented by the Attorney-General. They submitted that in the event that the order was given and the witness was called as prayed, it would amount to 'self-incrimination' and a violation of the party's right to fair hearing when the said party had filed a Defence disputing the Plaintiffs' claim.
17. They submitted further that since the Plaintiffs had accused the said Defendants of being parties to the alleged fraud it would amount to asking the said party to give up his position as a Defendant yet he was entitled to a right to fair hearing as contained in Article 50(1) of *the Constitution*. They relied on the case of Thomas Kinyua Mbeu v. Maurice Ndambuki Kitivo [2022] EKLK wherein it was held as follows:-

“The Land Registrar came to Court to respond to and answer the allegations of fraud and illegality against her office. She was not in Court as a witness of the Plaintiff.”
18. They submitted that the Registrar having been accused of serious violations could not be called as the Plaintiff's witness but rather as a Defendant whom he was.

Issue, Analysis and Determination

19. I have considered the prayers sought and the facts thereto vis-à-vis the objection. I have also given due regard to both the law and the submissions by learned counsel. The objection was basically a battle between the Plaintiff and the 4th and 5th Defendants given that the 1st – 3rd Defendants neither objected



to the prayers sought nor participated in the arguments thereon. I am of the view that only three issues lie before me for determination. These are:

- a. Whether the application for Notice to Produce is merited
 - b. Whether the prayer for witness summons against the Chief Land Registrar is merited
 - c. Who to bear the costs of the objection.
20. On 19/09/2023 the Plaintiffs filed a summary of a Case Management Checklist in which at Paragraph 19 they stated, “Discovery, Production or inspection of Documents?” To it they answered, “Notice to Produce Original files in respect of LR No.3803 and LR No. 3803/3 issued.” It is not in dispute that there was no Notice to Produce Documents issued but a “Request for Documents” which was dated 18/09/2023 and filed on 19/09/2023 together with the Case Management Checklist.
21. The “Request for Documents” was indicated it be brought under Order 11 Rule 3 of the Civil Procedure Rules and was issued to the office of the Attorney-General which represents the 4th and 5th Defendants herein. It was to the effect that the Plaintiffs require the following documents in line with Paragraph 9A of the Amended Defence dated 7th September, 2023. They specified the documents to be the original files in respect to LR No. 3803 and LR No. 3803/3. They then stated that the Defendants were required to avail the original in Court with the particulars contained.
22. The 4th and 5th Defendants opposed strongly this request. The issue before the Court is under what circumstances is a Notice to Produce Documents issued and in what manner? The Plaintiffs indicated that the “Request for Documents” was made under Order 11 Rule 3 of the Civil Procedure Rules, 2010.
23. The provision is about case conferencing. In regard to production of documents I have carefully read the provision. The relevant sub-rule reads as follows: “(2) In addition to any other general power the court may at the case conference— (d) order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case;” In essence, it is provided that at the Case Conferencing stage the Court may order for the production (of documents). But how and the circumstances that may be done is not stipulated. Thus, the Court has to fall back to the parent law on production of documents. For that reason, the Court agrees with learned counsel for the 4th and 5th Defendants that Court should rely on Section 69 of the [Evidence Act](#), Chapter 80 of the Laws of Kenya.
24. Section 69 of the Act provides that:
- “Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:”
25. It is clear that a Notice to Produce documents relates to production of secondary evidence. It has nothing to do with the production of primary evidence. The definition of primary evidence is given in the Act itself. Under Section 65 (1) – (4) of the Act, primary evidence is defined as:
- “(1) Primary evidence means the document itself produced for the inspection of the court.



- (2) Where a document is executed in several parts, each part is primary evidence of the document.
- (3) Where a document is executed in counterpart each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
- (4) Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.”

26. The definition of secondary evidence is then easy to get. It is all that is not primary evidence. Section 66 of the Act defines it by giving categories of what constitutes such evidence. It provides that it

“...includes—

- (a) certified copies given under the provisions hereinafter contained;
- (b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
- (c) copies made from or compared with the original;
- (d) counterparts of documents as against the parties who did not execute them;
- (e) oral accounts of the contents of a document given by some person who has himself seen it.”

27. The Act then proceeds to give the manner in which proof of secondary evidence may be proved. Section 68(1) provides for the circumstances under which secondary evidence may be given to prove the existence, condition or contents of a document. It stipulates that

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

- (a) when the original is shown or appears to be in the possession or power of—
 - (i) the person against whom the document is sought to be proved; or
 - (ii) a person out of reach of, or not subject to, the process of the court; or
 - (iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;”

28. Therefore, it is clear that a Notice to Produce a document is given when the party issuing it has a copy of the primary (or original) document which happens to be in the power or possession of the adverse party. Two things must be clear here: that the original exists or existed and there is proof thereof that is needed. Also, the issuer of the Notice to Produce cannot through any reasonable and lawful means obtain the original and that original is in the power or possession of the adverse party. If it does not exist, the adverse party cannot be compelled to give it because it is not in existence. He cannot have power or possession of a non-existent document. Again, the law did not contemplate the compulsion



of the other party to produce an original: rather the party claiming that the original exists is permitted to produce the secondary document thereof upon satisfaction of Section 68 of the Act. 2

29. In *Gari & 2 others V Republic* [1990] KLR it was held that “A notice to produce secondary evidence under Section 69 of the *Evidence Act* (Cap 80) is given to an adverse party who has the document in question or under whose power the document is.”

30. My understanding of the provisions referred to herein-above is that they do not encompass the larger province of discovery in evidence. There is a distinction between issuance of a Notice to Produce documents and “Discovery” as contemplated in the law. This Court need not concern itself with the differences as of now. Suffice it to say that in Halsbury’s Laws of England Vol 13 at paragraph 1 the learned authors state, of the purpose of discovery, as follows:

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation”.

31. As I understand the Plaintiff’s request which is termed as a Notice to Produce in the instant case, he wants the 4th and 5th Defendants to be ordered to produce original files. But in the process he expects, in terms of his submissions, that the court orders that the said parties produce originals of copies of the documents they filed constituting pages 18-27 and 61-70. To the extent that the Plaintiffs pray for such an order and it relates to the production of documents that may not be in existence in the 4th and 5th Defendants’ records the request is flawed and fails. In any event, the 4th and 5th Defendants have indicated that they are not part of the fraud, if any in relation to the transactions alleged to have led to the suit land being registered in the names of the parties claiming them. Additionally, they have signified their intention to avail to Court at the appropriate time the documents in their possession in relation to the parcels of land in issue. Thus, the request fails.

32. In regard to summoning the Chief Land Registrar to testify on behalf of the Plaintiff, it boils down once more to the provisions of the *Evidence Act* regarding competence and compellability. In my view the said witness is competent to testify. However, the issue that remains is whether he is compellable on the part of the Plaintiff.

33. It is my view that it would constitute an unfair trial which would be prejudicial to the part of the said Defendants if the court were to compel the witness to testify for an adverse party. The said parties have been sued as Defendants. They have a Defence on record. They have a line of defence they wish to pursue and prove. They have lined the witness sought to be summoned on behalf of the Plaintiff as their own. To call upon the witness to testify on behalf of the Plaintiff would be akin to calling upon the Defendant to take a course of proceedings different from that of the co-defendant. As was ably put by Sir John Romilly Mr in *Wedderburn –v- Wedderburn* (1853) 51, E.R. 993 where a similar application was made for a Defendant who was to give evidence for the adverse party:-

“Mr. and Mrs. Hawkins may in concurrence with the other four co-plaintiffs remove their solicitor and the other four may allow him to conduct the proceedings for all. But if the Plaintiffs do not all concur, Mr. Hawkins cannot take a course of proceeding different and a part from the other co-plaintiffs for the consequence would be, their proceedings might be totally inconsistent. When persons undertake the prosecution of a suit, they must make up



their minds whether they will become co-plaintiffs, for if they do, they must act together. I cannot allow one of several Plaintiffs to act separately from and inconsistently with the others.”

34. Similarly, back home here, in Peter Agweli Onalo – vs- Eliakim Ludeki & 2 Others (2006) eKLR; a similar argument arose in which the Petitioner wanted the court to compel the Respondent (Commission’s) officers to be compelled to testify on behalf of the Petitioner on matters in issue before the Court, the court stated as follows;

“...in defence of that allegation or allegations, the first respondent would be entitled to summon the officers who worked under him, including inspector John Ndangwa, to contest those allegations. He is therefore a potential witness for the first respondent. Accordingly, the petitioner has no right to have him summoned to give evidence on his behalf.”

35. In the Agweli Onalo (supra) decision The court went on to state further that:-

“The petitioner is not entitled to summon the presiding officers...because these were officials employed by, and working under the direction of, and answerable to the Electoral Commission of Kenya, the third respondent. The decision as to whether or not to call them as witnesses must be left to the Electoral Commission of Kenya. Summoning them as witnesses for the petitioner would undermine the third respondent’s legal rights as a party to this petition. The request by the petitioner to call these two presiding officers to give evidence on his behalf is accordingly denied.”

36. Persuaded by the above authorities I am of the humble opinion that the prayer by the Plaintiff for witness summons to issue to the said Chief Land Registrar to testify on their behalf must fail. I dismiss the request, with costs to the 4th and 5th Defendants, who opposed it.

37. This matter shall be mentioned virtually on 18/01/2024 for further directions.

38. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE ON THIS 15TH DAY OF DECEMBER, 2023.

HON. DR.IUR NYAGAKA

JUDGE

