



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 420 OF 2013

**IN THE MATTER OF THE ESTATE OF THE LATE CHARLES NDEGWA KIRAGU alias
NDEGWA KIRAGU-DECEASED**

MARY NYAWIRA KARIRA.....APPLICANT

VERSUS

BEETHOVEN KIRAGU NDEGWA.....PROTESTOR

RULING

At the hearing of the protest herein, Mary Nyawira Karira (the applicant herein) in her testimony alluded a meeting involving family members said to have been chaired by the local area chief. The meeting is said to have taken place on 17th May 2000. Her evidence was that at the said meeting it was agreed on how the family land would be shared. The witness testified that all the parties agreed to the said distribution and that the deliberations of the said meeting were reduced into writing and that all were satisfied and all including the protestor signed the said document. The document the witness had in court was a copy and she sought to produce it triggering an objection from counsel for the protestor.

Counsel for the applicant stated that he would avail the current chief to produce the document and asked for the witness to be stepped down and applied for witness summons to be issued upon the said chief to attend court and produce the said document. The said application was allowed and the case was adjourned to 27th January 2016 for further hearing.

On 27th January 2016 counsel for the applicant applied to have the said copy produced under the provisions of Section **68** of the Evidence Act. Counsel submitted that the document in question is secondary evidence hence admissible. Counsel submitted that they served the chief with witness summons but the chief did not attend court and added that the document was not denied by the protestor who recognized his signature and that the existence of the document is not in dispute. Counsel said that the copy is certified.

Counsel for the protestor opposed the production of the copy and submitted that the so called certified copy falls within the exceptions of the provisions of the Section **68** of the Evidence Act. Counsel submitted that the copy is purported to be certified by the assistant chief who is not identified nor is he the maker or custodian of the original document. Counsel further submitted that certification requires comparison with the original and it's not clear who has custody of the original. Counsel also submitted that no explanation was offered as to why the chief could not attend court and that no notice was issued under Section **69** of the Evidence Act. Counsel also submitted that he requires to cross-examine the maker

of the documents on for its contents.

In the case of *Jane Wambui vs Stephen Mutemi & another* the court had the following to say;

“under Section 67 of the Evidence Act, documents must be proved by primary evidence except in cases set out in Section 68 of the Act where secondary evidence may be given of the existence, condition, or content of a document. The definition of primary evidence is to be found in Section 65 of the same Act. Generally speaking, primary evidence means document itself produced for the inspection of the court”

Section 67 of the Evidence Act provides that documents must be proved by primary evidence except in the cases hereinafter mentioned. Section 67 is the basis of what is called the best evidence rule, which provides that documents must be proved by the best evidence. The allowance of secondary evidence is a concession by the law to allow the second best. The optimal will be the document itself or whatever would comprise the primary evidence. It is rarely the case that secondary evidence will be allowed where a party could have produced the original.

Secondary evidence, as a general rule is admissible only in the absence of primary evidence. Essentially, secondary evidence is evidence which may be given in the absence of that which the law requires to be given first, when a proper explanation of its absence is given.

The **best evidence rule** is a legal principle that holds an original copy of a document as superior evidence. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, means that so long as the higher or superior evidence is within the possession of a party, or may be reached by the party, no inferior proof will be allowed. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the exceptions provided under Section 68 of the Evidence Act. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. The rule specifies that secondary evidence, such as a copy will not admissible if an original document exists and can be obtained.

The best evidence rule has its origins in the 18th century case *Omychund v Barker* wherein Lord Harwicke stated that no evidence was admissible unless it was *"the best that the nature of the case will allow"*.

According to *Blackstone's Criminal Practice* the best evidence rule in Britain and Wales as used in earlier centuries *"is now all but defunct"*. **Lord Denning MR** stated that *"nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight and not to admissibility."*

In the USA the best evidence rule is part of Article X of the Federal Rules of Evidence (Rules 1001-1008). The rule specifies the guidelines under which one of the parties of a court case may request that they be allowed to submit into evidence a copy of the contents of a document, recording or photograph at a trial when the *"original document is not available."* If the party is able to provide an acceptable reason for the absence of the original then *"secondary evidence"* or copies of the content of the original document can be admitted as evidence. The best evidence rule is only applied in situations where a party attempts to substantiate a non-original document submitted as evidence during a trial.

The Indian Evidence Act, 1872 lays down the law on pre-conditions for leading secondary evidence; these are original document could not be produced by the party relying upon the documents in spite of best efforts, that inability to produce the document must be beyond his control, that either the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used. This position was restated in the case of *Rakesh Mohindra vs Anita Beri & others*.

Further, in the said case the court held that where a party wishes to lead secondary evidence, the court is obliged to examine the probative value of the document produced in the court or its contents and decide

the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally settled that mere admission of secondary evidence, does not amount to its proof. The genuineness, correctness and the existence of the document shall have to be established during the trial and the trial court shall record the reasons before relying on the secondary evidence.

Section 66 of the Evidence Act provides inter alia that secondary evidence includes certified copies given under the provisions contained in the Act; copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies; copies made from or compared with the original; counterparts of documents as against the parties who did not execute them; oral accounts of the contents of a document given by some person who has himself seen it.

Section 68 of the Evidence Act provides as follows:—

68. Proof of documents by secondary evidence

(1) 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;

(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;

(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;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 79 of this Act;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) (a) In cases mentioned in paragraphs (a), (c), and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in subsection (1) (b), the written admission is admissible.

Section 69 lays down the instances under which secondary evidence may be admitted. It provides as follows:—

69. 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:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- (i) when the document to be proved is itself a notice;
- (ii) when from the nature of the case, the adverse party must know that he will be required to produce it;
- (iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (iv) when the adverse party or his agent has the original in court;
- (v) when the adverse party or his agent has admitted the loss of the document;
- (vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court;
- (vii) in any other case in which the court thinks fit to dispense with the requirement.

My interpretation the above provisions of the Evidence Act is that secondary evidence as a general rule is admissible only in the absence of primary evidence and when a proper explanation of its absence is given. Such secondary evidence cannot be admitted without the non-production of the original being first accounted for in a permissible manner and only after satisfying the conditions provided for under Section 68 of the Act.

In other words, there must be proper justification to allow a party to adduce secondary evidence. In the present case I am not satisfied that non production of the original was satisfactorily accounted for.

In *Lee vs Tambag* it was held that before a party is allowed to adduce secondary evidence to prove contents of the original, the party must prove the following:- **(i)** the existence or due execution of the original; **(ii)** the loss and destruction of the original or the reason for its non-production in court; and **(iii)** on the part of the party, the absence of bad faith to which unavailability of the original can be attributed. The correct order of proof is as follows; existence, execution, loss, and contents. A photocopy may not be produced without accounting for the original.

The document sought to be produced in this case is a copy. It's not clear who has the custody, power or control of the original. It's not clear whether the document allegedly held by the chief is an original because the copy which the applicant sought to introduce is a copy of a certified copy. It's not clear whether the chief is holding the original or a copy. The reason offered for the inability to avail the original is that the chief had failed to attend court. He was only served once and there was no application or effort to make a second attempt. It was not shown that the inability to produce the original fell under any of the above exceptions. Above all, no notice was served upon the said chief as provided for under the above section.

I find no reason to dispense with the best evidence rule which requires the production of an original document. The application to dispense with the production of the original as sought and allow a copy of the document in question to be produced in this case is hereby refused.

Right of appeal 30 days

Dated at Nyeri this 15thday February 2016

JOHN M. MATIVO

JUDGE
