



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C. NO. 382 OF 2017

PAUL NDUATI MWANGI..... PLAINTIFF/APPLICANT

-VERSUS-

STEPHEN NGOTHO MWANGI.....1ST DEFENDANT/RESPONDENT

JOHN MWANGI (legal representative of LAWRENCE IRUNGU

MWANGI deceased.....2ND DEFENDANT/RESPONDENT

IGNATIUS IRUNGU MWANGI.....3RD DEFENDANT/RESPONDENT

ALICE KABURA MWANGI.....4TH DEFENDANT/RESPONDENT

ELIZABETH MUTHONI (legal representative of JOSEPH MACHARIA

MWANGI-deceased.....5th DEFENDANT/RESPONDENT

MIRIAM NYAMBURA MUGO (legal representative of THOMAS MUGO

MWANGI – deceased) 6th DEFENDANT/RESPONDENT

ANGELINA WAMBUI MWANGI.....7TH DEFENDANT/RESPONDENT

PETER K. GIKUNGU..... 8TH DEFENDANT/RESPONDENT

GRACE NJERI MWANGI.....9TH DEFENDANT/RESPONDENT

KEZIAH WAIRIMU MWANGI.....10TH DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant herein has sought for the following orders vide a **Notice of Motion Application** dated 23rd November 2021.

a. That the Plaintiff/Applicant be granted leave to rely on and produce photocopies of the following documents in place of the originals at the hearing of this suit on account of the loss/misplacement of the originals.

i. Agreement dated 8th May, 2004

ii. Agreement dated 11th June, 2007

b. That costs be provided for.

The Application is premised upon the following grounds;

1. That the Plaintiff who had the custody of the original documents as named above lost them in his house and despite all efforts in searching for them, they have not been traced.

2. That the copies of the said documents are in the Court file, and with both Advocates hence there will be no prejudice occasioned if the application is granted.

The Application is further supported by the affidavit of **Paul Nduati Mwangi**, wherein he averred that; He has always retained the originals of the case documents and was ready to avail them to his Advocate at the time of the case preparation.

That on **25th October 2021**, he checked his documents at home which were inside a **box** where he had always kept them and found the two original Sale Agreements dated **8th May 2004** and **11th June 2007**, were missing. That he thoroughly searched the house, but was not successful despite repeated searches several times. That his Advocate has informed him that he does not have the original documents too.

He therefore believe that the said documents are irretrievably lost and when he informed his Advocate on record, he advised him to seek permission from the Court to produce copies during the hearing. Further that copies of the said agreements are in the Court file as well as Advocates of the Defendants/Respondents and hence there will be no prejudice if the Court allows the production of the said copies in evidence during the main hearing. He urged the Court to allow her Application.

The said Application is opposed and **Ignatius Irungu Mwangi**, the 3rd Defendant/Respondent swore a Replying Affidavit dated **27th November 2021**, on behalf of himself and the other Defendants/Respondents and objected to grant of the Orders sought. He averred that the contract of sale is denied and this matter was filed in the year **2014**, at **Nyeri Environment and Land Court**, and later transferred to this Court and the Plaintiff/Applicant had never raised the said issue that the Sale Agreements were lost.

Further that his Advocate has advised him that the Plaintiff/Applicant has never portrayed nor shown either to the Court and/or his Advocate the original Sale Agreements and he is apprehensive that the Application herein is a ploy to hoodwink the Court.

Further, that even if the Plaintiff/Applicant original copies were lost, his Advocates original copies would suffice, since procedurally, one of the copies is left with the Advocate. He further averred that there was no record of report to the Police or Police Abstract for loss of the alleged documents to prove the alleged loss.

It was his contention that it would be prejudicial to allow the **Orders** sought, as the Defendants/Respondents would loose their property unjustifiably by use of uncertified photocopies which are already in dispute. He urged the Court to dismiss the Application.

The Plaintiff/Applicant filed a further affidavit and averred that the loss of the two documents could not be addressed before the loss occurred. That the Defendants/Respondents too received their originals of the Sale Agreements and are in a position to show the originals to their Advocate and the Plaintiff/Applicant could only show his original at the hearing of the suit. Further, that his Advocate has informed him, which information he believes to be true that he did not retain copies of the said agreement. He contended that the Application is made in good faith and is not a wild goose chase as alluded by the Defendants/Respondents. He reiterated that he is not feigning lose of the two original Sale Agreements and it is in the interest of justice that the application should be allowed.

The Application was canvassed by way of written submissions which this Court has read and considered. **The issue for determination is whether the Application is merited?**

In his submissions, the Plaintiff/Applicant relied on **Section 68(1) (c)** of the Evidence Act which provides;

(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;

Further that proof of such loss is on a balance of probabilities since this is a Civil matter and therefore a Police report was not necessary. Further, that the Plaintiff/Applicant gains absolutely no advantage in this case by deliberately withholding the original Sale Agreements.

That it is not correct that if the copies of the Sale Agreements are produced, the Defendants/Respondents will loose their family land as the Court determination is not hinged only on whether the document is original or not, but on the genuineness of the same. Further, the Defendants/Respondents will have an opportunity to cross examined the witness who will produce the said copies and authenticity of the said documents will be tested. He relied on the **Article 50(1) of the Constitution on Fair hearing** and submitted that the hearing would not be fair if evidence would be shut out on the basis of being **Secondary evidence** and hence not the best evidence even when explanation is offered.

The Defendants/Respondents submitted that the reasons advanced by the Plaintiff/Applicant on loss of the original Sale Agreements are suspect and the Defendants/Respondents are skeptical of the alleged loss and do object to the Orders sought. They further submitted that proper explanation has not been given and no acceptable reason has been demonstrated and thus there is no justification to allow the Plaintiff/Applicant adduce secondary evidence. They relied on the Indian case of **Rakesh Mohindra vs Anita Beri & Others** Supreme Court of India **Appeal No. 13361 of 2015** where the Court held;

“It was observed 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.”

They also relied on the case of *Lee vs Tambag* where it was held that before a party is allowed to adduce secondary evidence, the party must prove: -

- a. The existence of the due execution of the original.**
- b. The loss and destruction of the original or the reason for its non-production in Court.**
- c. On the part of the party, the absence of bad faith to which unavailability of the original can be attributed.**

That since there is no proof of loss as no report was made to the Police, then the Application should be denied.

Further the Defendants/Respondents relied on *the Succession Cause No 420 of 2013 at Nyeri High Court: - Mary Nyawira Karira vs Beethoven Kiragu Ndegwa* where the Court held that;

“I find no reason to dispense with the best evidence rule which requires the production of an original document..”

This Court has considered the instant Application which is brought under **Section 68(1) (c) of the Evidence Act** and all enabling provisions of the Law.

The said provisions of the **Evidence Act** provides that secondary evidence may be adduced..... (c) **“when the original has been destroyed or lost or when the party offering Evidence of its contents cannot produce the original, for any other reason arising not from his own default”.**

The Plaintiff/Applicant has alleged that he has lost his two original Sale Agreements that he had kept in a box inside his house but after a thorough search and before the hearing of this matter on **25th October 2021**, he failed to trace the two Sale Agreements.

The Defendants/Respondent resisted the said Application and contended that this suit was filed in the year **2014**, at **Nyeri** and the Plaintiff/Applicant had never alluded to loss of the said original Sale Agreements.

It is trite that the best evidence is ordinarily the Primary evidence. However, the Law is also very clear that at times Primary evidence may not be available due to loss, or destruction and the party intending to produce the Primary evidence may not be in a position to do so.

Due to the above fact, **Section 68(1) of the Evidence Act** was enacted. **Section 68 (1) (C)** provides that Secondary evidence may be given if the said Primary evidence is lost or destroyed out of no default of the party intending to produce the same.

It is not in doubt that the suit herein was filed in the year **2014**. The Defendants had even objected to the Plaintiff’s Advocate appearing for the Plaintiff on the basis that he witnessed the said Sale Agreements and the Defendants/Respondents might call him as their witness. The Court gave a Ruling on the said **Preliminary Objection** on **6th March 2014**. The Defendants/Respondents are therefore aware of the said Sale Agreements as they had contended that Counsel for the Plaintiff was in conflict of interest having acted for both the Plaintiff and some of the Defendants and drew the Sale Agreements in issue.

Therefore, from the Court record, it is evident that the Defendants/Respondents are aware of the said Sale Agreements which they intend to challenge in this trial.

The Plaintiff/Applicant has alleged that the two original Sale Agreements are now lost and he cannot get hold of them even after frantic search. This matter went through pre-trial conferences and documents were exchanged. The Defendant have not denied that they were served with the list of documents that the Plaintiff/Applicant intends to produce as his exhibits in Court. In any event, the Defendants/Respondents are aware that the two Sale Agreements would form part of the Plaintiff’s exhibits and that is why they had raised an objection in the year 2014.

The two copies of the Sale Agreement are Secondary evidence and since the Plaintiff/Applicant has alleged that the originals(Primary) Sale Agreements are now lost, the law allows the production of Secondary evidence since if the two agreements cannot be traced, then the Plaintiff/Applicant would not be in a position to produce the originals or the primary evidence.

Production of documents whether original or secondary does not mean that the case has been proved on the required standard. Sufficient evidence has to be called to satisfy the Court that indeed the party making allegations has proved its case on the required standard. Production of Secondary documents would not be prejudicial to the Defendants/Respondents herein because at the hearing stage and after production of the said documents, the Defendants/Respondents through their Advocate will have an opportunity to cross-examine the witness who will produce the said documents (Sale Agreements) and poke holes where necessary.

Article 50(1) of the Constitution provides that parties should be accorded a fair hearing. Fair hearing entails adducing of evidence and production of all necessary exhibits. If the original documents are lost and since the law provides instances when Secondary evidence can be produced, then this Court finds that allowing production of Secondary evidence herein would accord the parties a **Fair hearing**.

Further **Article 159(2) (d) of the Constitution** binds the Court to administer justice without undue regard to technicalities. Shutting out the

Plaintiff's production of Secondary evidence even after alleging that the originals are lost is tantamount to upholding a technicality which goes against the tenets of the Constitution.

Further the Application herein is brought **under all other enabling provisions of law. Section 3A of the Civil Procedure Act** grants the Court inherit powers to make such **Orders** that are necessary in ensuring that end of justice is met. The end of justice will be met herein by allowing the Plaintiff/Applicant to produce the Secondary evidence; that is copies of the two Sale Agreements.

Having now carefully considered the instant **Notice of Motion Application** dated **23rd November 2021**, the Court finds it merited and the same is allowed entirely in terms of **prayer No. 1**, with costs to the Plaintiff/Applicant herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF JANUARY, 2022

L. GACHERU

JUDGE

Delivered online;

In the presence of

M/s Murira H/B J N Mbuthia for the Plaintiff/Applicant

N/A for the Defendants/Respondents

Kuiyaki - Court Assistant

L. GACHERU

JUDGE