



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 95 OF 1995

IN THE MATTER OF THE ESTATE OF THERESIA KHANYANJE ALBOKWO (DECEASED)

IN THE MATTER OF CECILIA KAPESA MUSOSO....APPLICANT

RULING

This ruling concerns the admissibility of certain documents which have been referred to by **DW3 ISSA MUYOMBA LUSOME**. Counsel for the petitioner **MR. TINDIKA** objected to the production of the letters by this witness on the basis that the witness was not the maker. **MR. NJOROGE** for the defence urged the court to admit the documents on the basis that the witness had personal knowledge of the events surrounding this case. I am guided in coming to a decision by section 35 of the Evidence Act which provides as follows:

“35(i) 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 matter, 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 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.”

This is a case where in my view section 35 (a) (i) squarely applies. **DW3** has told the court that he has personal intimate knowledge of the matters being addressed herein. He personally attended the meeting at which the question of how to distribute the estate of the deceased was discussed. **DW3** told the court that he has resided in Shamakhokho location, where the deceased was buried, from his birth and that from 1988 he was the Assistant Chief. He is clearly not a stranger to the matters in question.

Counsel for the petitioner raises issue with the failure to produce a death certificate for **Chief Abinayo Aburuli**, the maker of one of the documents. A death certificate is not a public document and is not accessible to anyone. It would only be readily accessible to family members of which **DW3** was not one. In any event I hardly think that **DW3** would come to court and state on oath that the maker of that document was deceased if that were not the case. Regarding the former District Officer Jude Wesonga **DW3** states that he was transferred away from their district in 1999 to some unknown place. Once again I see no reason why **DW3** would lie about this. It would cause some delay and indeed expense to expect the defendant to track and trace the former District Officer (who may well have left public service by now). As stated earlier **DW3** is testifying on matters in which he personally participated and had intimate knowledge of. As such I do rule the letters referred to are admissible as evidence and may be produced by this witness. No prejudice will be suffered by the other party as counsel for the petitioner will be accorded an opportunity to cross-examine **DW3** on the events he claims to have knowledge of. It is so ruled.

Dated and delivered in Mombasa this 5th day of August, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Wanjala h/b Mr. Tindika for Appellant

Ms. Ngugi h/b Mr. Njoroge for Defendant

Court Clerk Mutisya

Court:

Further hearing of Respondent case on 7th October, 2013.

M. ODERO

JUDGE

5TH AUGUST, 2013