

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 791 OF 2009

STEPHEN KILONZO.....PLAINTIFF

VS

HELLEN WANGARI

**MACULATE NGINA (sued as administratrix of the estate of
the late Obed Mwangangi).....DEFENDANTS**

RULING

1. Hearing of the above suit started on 2nd July 2012 when in the course of cross-examination of the Plaintiff counsel for the Defendants Ms. Njoroge objected to production of a sale agreement dated 14th November 2000 on grounds that the document could only be produced by the maker and not by the Plaintiff. It was also contended that the document was prepared by the firm of Mutula & Co. Advocates at a time when J. Mutula was not authorized to practice as an advocate. Finally, the Defendant contended that the signature of the late Obed Mwangangi appearing in the Sale Agreement had been forged.
2. In reply, counsel for the Plaintiff Ms. Kamende submitted that the Plaintiff had capacity to produce the document as the original was available and this constituted primary evidence which was admissible. She submitted that the agreement was between the Plaintiff and the late Obed Mwangangi and the Plaintiff was in a position to produce the original. The Plaintiff was a beneficiary of the agreement and had the original. She argued further that at the time the agreement was prepared, there was a stay of the orders of the Complaint's Commission regarding Mr. Mutula's suspension. The Notice of non-admission was therefore not merited.
3. I have considered the rival submissions by counsel relating to admissibility of the sale agreement.
4. Section 35(1) of the Evidence Act provides that any statement made by a person in a document and tending to establish a fact shall, on production of the original document, be admissible as evidence of that fact if two conditions are met, namely, if the maker had personal knowledge of the matters dealt with by the statement, and, secondly, if the maker of the statement is called as a witness in the proceedings. The only proviso to these conditions is where the maker is dead, or cannot be found 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.
5. In the context of the present suit, the above provision portends that the Plaintiff not being the maker of the agreement dated 14th November 2000 is incapable of producing it even if he was party to it and indeed executed his part of the agreement. Consequently, I hold that it would be necessary for Mr. Jacob Mutula Advocate being the maker of the document to appear in court and produce it as evidence. No evidence has been tendered to demonstrate to the court any difficulty the Plaintiff would have in procuring Mr. Mutula's attendance to court as to bring into operation the proviso to Section 35(1) of the Evidence Act.
6. In addition, there are other two concerns, namely, whether the advocate who prepared the agreement was duly authorized to practice law and also whether the signature of the deceased Obed Mwangangi was forged. These go into the fundamentals of validity of the document. These concerns are therefore best addressed by the advocate who prepared the sale agreement. Mr. Mutula will therefore need to be cross-

examined on the two fronts of whether he was not in suspension at the time he prepared the document and also whether he witnessed the document being signed by Mr. Obed Mwangangi. In addition, the Defendant should be at liberty to call an expert to testify whether the signature of the late Mwangangi is authentic.

7. I therefore direct that witness summons do issue against Mr. Jacob Mutula to appear and produce the sale agreement and also for cross-examination on the concerns raised relating to the agreement, at the next hearing of the suit.

8. I further direct that the parties do fix the suit for hearing on a priority basis.

IT IS SO ORDERED

DATED SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2012.

J.M. MUTAVA
JUDGE