



**Cheptogoch & 3 others ((suing as administrators of the estate of Rhoda Teriki Cheptogoch (deceased)) v Cheserem (Environment & Land Case 232 of 2018) [2022] KEELC 12692 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12692 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 232 OF 2018  
FM NJOROGE, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**RHODA TERIKI CHEPTOGOCH ..... 1<sup>ST</sup> PLAINTIFF  
ZIPPY JEROTICH KOSGEY ..... 2<sup>ND</sup> PLAINTIFF  
WILLIM KAPKWANG CHEPTOGOCH ..... 3<sup>RD</sup> PLAINTIFF  
SELINA LINDA ALWORA ..... 4<sup>TH</sup> PLAINTIFF  
(SUING AS ADMINISTRATORS OF THE ESTATE OF RHODA TERIKI  
CHEPTOGOCH (DECEASED))**

**AND**

**KIPROP KIPSANG CHESEREM ..... DEFENDANT**

**RULING**

1. This is a ruling in respect of the objection raised by the defendant’s counsel regarding the production of some of the plaintiffs documents as exhibits. On June 15, 2022 the plaintiffs’ case came up for hearing and when PW1 was testifying, she attempted to produce copies of receipts on page 22 of her bundle of documents as exhibits when the defendant’s counsel objected to their production.
2. The defendant’s counsel submitted that the receipts were not originals but copies purporting to pay for plot number 8. He stated that the plot in 1990 had transitioned to 114 and he therefore needed the original receipts for his comparison. He further stated that if he conceded to their production, it would confirm that he accepts the offer letter. He stated that the town administrator should instead be the one to produce them.
3. In response to the objection, the plaintiff’s counsel stated that the receipt dates are quite old and were issued by the County Council of Baringo hence she could not confirm whether the council has the



original receipts. Further she submitted that the Transitional Authority is defunct. She explained that the court is empowered under the *Evidence Act* to admit secondary evidence. She also stated that the documents were served in the year 2014 when the plaintiff was still alive and terms the objection as mischievous as it was brought late. She further explained that they had a pretrial conference the previous week and that the receipts refer to plot No. 8. She finally stated that the objection was unmerited and that receipts No 47067 and 46899 should be admitted as secondary evidence.

4. The defendant's counsel stated that the plaintiff had not indicated that any copies would be produced and further they had indicated to the plaintiff's during pretrial that they would require more time to consider their documents.

5. Sections 64 and 65 of the *Evidence Act* provide as follows:

64. Proof of contents of documents

The contents of documents may be proved either by primary or by secondary evidence.

65. Primary evidence

(1) Primary evidence means the document itself produced for the inspection of the court.

6. Secondary evidence is not expressly barred in all cases. It can be relied on by the court in deserving cases. Section 66 of the Act provides as follows:

66 Secondary evidence

Secondary evidence 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.

7. 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 the 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 paragraph (b) of subsection (1) of this section, the written admission is admissible.
- (c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.
- (d) In the case mentioned in paragraph (g) of subsection (1) of this section

8. In the Court of Appeal Case No 28 of 2016 *Evangeline Nyegera (suing as the representative of Felix M'Tkiugu alias M'Tkiugu Jeremiah Raibuni – deceased) vs Godwin Gachagua Gitbui*, it was held that:

“The test for admission of evidence is relevancy.... There is need for fair administration of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence. We hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross-examine on veracity and legitimacy if it is necessary”.

9. The receipts in issue in the instant case had already been marked as P Exh 8 by consent of the parties as at the time of objection. They are two receipts for Kshs 410.70 and Kshs 3,080 respectively, being payment for stand premium of the allotment offer letter dated April 20, 1979 by the plaintiff. It is important to note that the said receipts appear on their face to have been issued by the County Council of Baringo on June 12, 1979, the predecessor to the current Baringo County Government. Both counsels admit that the County Council is defunct. The plaintiff's council avers that the Transitional Authority is also defunct.

10. The payments were received by an officer whose name was not indicated. This court recognizes that the receipts appear to have been issued long time ago and it may therefore be an exercise in futility to ask



the plaintiff to avail the maker of the same. Furthermore, parties had conducted a pretrial conference and the matter substantively advanced and the copies of receipts were admitted in evidence by consent midway during the hearing.

11. It is the opinion of this court that in the circumstances of this case, the copies of the disputed receipts can be admitted in evidence under section 68 (1)(c) of the [Evidence Act](#) set out as above.
12. This court is of the view that the defendant's objection has not been satisfactorily supported. In addition, it is clear that this court would also be amiss if it allows the said objection and adopts the course suggested by the defendant's counsel, as considerable delay in the administration of justice may ensue.
13. I do not need to overemphasize that article 159 of the [Constitution](#) also frowns on delayed justice.
14. Upon careful consideration, this court is convinced that the receipts No 47067 and No 46899 on page 22 of the plaintiff's trial bundle dated 6/06/2022 ought to be admitted pursuant to the proviso to 68(1) (c) of the [Evidence Act](#).
15. Consequently, the defendant's objection is overruled and the said receipts documents are admitted in evidence in this case and shall continue being referred to as P Exh 8(a) and P. Exh 8(b).

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU.**

