



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Prob & Admin Cause 286 of 2002

IN THE MATTER OF THE ESTATE OF TABITHA NDOTI MUSOMBA (DECEASED)

DANIEL MUTUSE WAITA.....PETITIONER/RESPONDENT

VERSUS

JUSTUS KITILI MUSOMBA.....APPLICANT/OBJECTOR

RULING OF THE COURT

1. The hearing of this Cause is ongoing, with four witnesses having completed their testimonies in support of the Petitioner's case. During the testimony of one Waita Musomba (PW5) he sought to produce minutes of a clan meeting which distributed the disputed property between himself and his step-mother, Ndoti Musomba. Waita Musomba said that he was one of the people who attended the meeting and that he, like all those others who attended the meeting, signed the minutes.
2. Mr. P.M. Mulwa for the Objector, objected to the production of the said document by Waita Musomba, arguing that Waita Musomba was not the author of the document. Citing the provisions of section 35 of the Evidence Act, Cap 80 Laws of Kenya, Mr. Mulwa urged the court to find that since the document sought to be produced are minutes of a clan meeting, it is only the person who wrote the minutes that should produce them. He was of the view that Waita Musomba can only identify the document.
3. On his part, Mr. O.N. Makau contended that since Waita Musomba had not only signed the document but had custody of it all along, then section 35 of the Evidence Act, gave him the power and authority to produce the document. In Mr. Makau's view, the maker of a document referred to in section 35 of the Evidence Act is the one who signs the document. I am doubtful that Mr. Makau's interpretation is correct. Section 35 of the Evidence Act governs the admissibility of documentary evidence as to facts in issue in civil proceedings upon the following conditions:-
 - (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 these matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the conditions that the maker of the statement shall 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”.

4. It is not in doubt that Waita Musomba is not the maker of the document that he seeks to produce. What then should the court do in the circumstances? I think that in the circumstances of this case, I would invoke the provisions of section 35(2) of the Evidence Act and allow Waita Musomba to produce the document that he seeks to produce. The reason for reaching this conclusion is that this is an old land dispute involving close family members and for the court to require that the secretary to the clan meeting that shared out the suit land between Waita Musomba and Ndoti Musomba be called to produce the document is likely to cause undue delay that could work against the interests of the family. As of now, it has not been made clear by either side whether the maker of the said minutes is dead or alive. In any event, the Objector is not disputing the fact that the clan elders met and distributed the land. The Objector’s only concern is that the person who wrote the document, namely the secretary to the clan meeting, should be the one to produce the document. The earlier this matter is resolved, the better for all parties concerned.

5. In the result, the objection by Mr. P.M. Mulwa for the Objector is overruled. Mr. Waita Musomba, PW5, may proceed to produce the document dated 7/12/1990.

It is so ordered.

Dated and delivered at Machakos this 15th day of April, 2008.

R.N. SITATI

JUDGE

Delivered by: Lenaola J

In the presence of::

Miss Katunga holding brief for Mr. Makau for Petitioner

Mr. Musyoka holding brief for Mr. Mulwa for Objector

I. LENAOLA

JUDGE

16.4.07