



**Oboko v Rotich & another (Environment & Land Case 120 of 2019)
[2022] KEELC 15320 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 120 OF 2019
LA OMOLLO, J
DECEMBER 8, 2022**

BETWEEN

ROBERT OBWOCHA OBOKO PLAINTIFF

AND

BENARD KIPLAGAT ROTICH 1ST DEFENDANT

MICAH CHESEREM ROTICH 2ND DEFENDANT

RULING

1. This ruling is in respect to the Plaintiff/Applicant's Notice of Motion dated 5th May, 2022. It is expressed as being brought under Section 35(2)(b), Section 68(1)(2)(iii), 68(1)(c) & Section 146(4) of the Evidence Act Cap 80 and Sections 3A & 22(a) & (b) of the Civil Procedure Act together with Order 18 rule 10 of the Civil Procedure Rules.
2. The application seeks the following orders:
 - i. That this Honourable Court be pleased to order that the Plaintiff- Prof. Robert Obwocha Oboko (PW1) who had already testified in the matter be recalled so as to produce as an exhibit the certified bank statements from Stanbic Bank Harambee Avenue Branch, Nairobi for the bank account of Mugambi and Kariuki Co. Advocates being account No. XXXXXX for the period running between 8th March, 2006 to 28th September, 2006 and which bank statements had already been referred to in evidence and marked as P.MFI.8.
 - ii. That still, if the need arises the Plaintiff - Prof. Robert Obwocha Oboko (PW1) be subjected to further examination-in-chief and/or further cross-examination with re-examination respectively but only in respect to the said bank statements if produced as an Exhibit.
 - iii. That the costs of this application be in the cause.



3. The application is based on the grounds on its face and supported by the affidavit sworn on 30th May, 2022 by one Prof. Robert Obwocha Oboko.

Factual Background

4. The Plaintiff/Applicant commenced this suit vide a plaint dated 7th October 2019. In the plaint, it prays for judgment against the Defendants for:
 - a. A declaratory order that the plaintiff is entitled to exclusive and unimpeded possession of the suit property L.R Number 13287/37 I.R. 50164 North of Njoro Town, Nakuru measuring approximately 10.12 Hectares (25 Acres) and that the Defendants are trespassers occupying the plaintiff's parcel unlawfully
 - b. Eviction orders and/or mandatory injunction orders for vacant possession against the Defendants to move out of the parcel L.R Number 13287/37 I.R. 50164 North of Njoro Town, Nakuru belonging to the Plaintiff immediately within thirty (30) days from the court's order failure to which the plaintiff to seek the services of a licensed court bailiff with the assistance of the O.C.S. Ngata Police Station, Nakuru so as to evict the Defendants.
 - c. A permanent injunction restraining the Defendants their servants/agents or family members from interfering, remaining, using and/or in any way dealing with all that parcel of land known as L.R Number 13287/37 I.R. 50164 North of Njoro Town, Nakuru in a manner that would prejudice the plaintiff's registered interests on his said parcel.
 - d. General damages for trespass to land and unlawful occupation.
 - e. Costs and interest at court rates.
5. The Defendants filed their statement of Defence and Counter-claim dated 8th November 2019 wherein they denied the Plaintiff's allegation in the plaint. In their Counter-claim, they sought for the following orders:
 - a) The plaintiff's (now defendant) suit to be dismissed with costs.
 - b) A declaration that the transfer of the suit property was illegal as the 2nd defendant had no authority and title to pass to the plaintiff (now 1st defendant).
 - c) An order cancelling and/or nullifying the title deed in the name of the plaintiff (now 1st defendant).
 - d) Permanent Injunction restraining the now defendants, their employees, agents, officials or any person claiming under them from trespassing, encroaching, intruding, remaining onto, occupying, constructing and/or subdividing the parcel of land or in any way dealing with the plaintiff's parcel of land registered as L.R 13287/37 within Nakuru County.
 - e) Costs and interest of the suit
 - f) Any other relief the Honourable court may be pleased to decree.
6. The Plaintiff/Applicants case was heard on diverse dates. The plaintiff and his witnesses testified and after the testimony of Pw5 on 18th May, 2022 the counsel for the plaintiff intimated that he may need to recall the Plaintiff. He sought a mention date to think through his decision to recall the Plaintiff and probably file an application.



7. Subsequently, the Plaintiff/Applicant filed the instant application seeking orders for re-call of the Plaintiff.
8. The 2nd Defendant/Respondent in the counter-claim stated that they do not oppose this application.
9. The said application now forms the basis of this ruling.

Plaintiff/applicant's Contention.

10. The Plaintiff/Applicant contends that he testified on 14th October, 2021 and during his testimony he referred to a bank statements from Stanbic Bank Harambee Avenue Branch for Mugambi and Kariuki Co. Advocates being account no. XXXXXXX.
11. He deposes that the said bank statements had been marked as PMIFI 8. He further deposes that the bank statements highlighted that the firm of Mugambi & Kariuki Advocates had between 13th March, 2006 to 8th August, 2006 paid a sum of Kshs. 10,055,000 to Kiprotich Kibowen-Vendor in regard to purchase of property L.R No. 13287/37 North Of Njoro Town- Nakuru on his behalf.
12. It is the Plaintiff/Applicant's contention that Lucas Murage an advocate (PW2) testified and had been cross-examined in respect of the said bank statements.
13. He further contends that the firm of Mugambi & Kariuki Advocates had been wound up around September, 2018 following the death of their Managing Partner and that Mr. Kiprotich Kibowen also passed on 31st December, 2018.
14. The Plaintiff/Applicant further contends that the Defendants/Respondents' counsel objected to the production of the said bank statements and that the Defendants' counsel insisted that the bank being the maker of the statements should be the one to produce the statements.
15. It is the Plaintiff/Applicant's contention that PW5 being a witness from Stanbic Bank produced a letter stating that the bank could not verify the statements since the request fell outside the seven (7) year statutory period of maintaining bank records.
16. The Plaintiff/Applicant contends that he is the only competent witness to produce the certified copies of the bank statements which statements had been handed over to him by the deceased advocate. He contends that the said bank statements form part of a continuous record/transaction for purchase of the suit property.
17. He ends his deposition by stating that the application ought to be allowed in order to avoid miscarriage of justice.

Respondents' Response

18. In response to the application, the Respondents filed their Replying Affidavit dated 15th June, 2022. It is sworn by one Benard Kiplagat Rotich with the authority of the 2nd defendant. He contends that the owner of the said account is Mugambi & Kariuki Co. Advocates.
19. He contends that the relationship between banker and customer is based on contract. He added that there exists an implied term that the banker will not divulge to third parties without the customer's consent the details of an account held by them, unless compelled by a court order, public duty to disclose or under the banks own interest.



20. He further contends that there exists a fiduciary duty relationship between Stanbic Bank and Mugambi & Kariuki Co. Advocates. He contends that the bank is therefore duty bound to safeguard any confidential information regarding account number XXXXXXX.
21. He contends that PW5 could neither confirm nor deny the veracity of the bank statements and that as a result the statements cannot be said to be in the Plaintiff/Applicant's possession or custody.
22. He further contends that the Plaintiff/Applicant did not enjoin Stanbic Bank to the present suit or demonstrate the existence of special circumstances in production of the statements by himself. He further contends that granting the said orders, would result in to a breach by Stanbic Bank of its duty owed to its customer not to disclose its affairs.
23. In conclusion the defendants contend that allowing the Plaintiff/Applicant to produce the statements already disapproved by the maker is to the 1st Respondent's disadvantage and would lead to gross miscarriage of justice.

Issues For Determination

24. The Plaintiff/Applicant filed its submissions dated 8th July, 2022 on the same day where it gave a brief background of the case and identified the following issues for determination:
 - a. Whether the plaintiff's application has merit.
 - b. Whether the defendants will suffer any prejudice if the plaintiff's application is allowed.
25. On the first issue, the Plaintiff/Applicant relied on Section 66, 68 and 146(4) of the *Evidence Act*. He further relied on the case of *Re Estate of the Late Alice Nyambura Waninaina* on admissibility of documentary evidence and the Court of Appeal case of *Evangeline Nyegera (Suing as the Legal Representative of Felix M'ikiugu alias M'ikiugu Jeremia M'raibuni (deceased) v Godwin Gachagua Gitbui* [2017] eKLR. The Plaintiff/Applicant submits that the courts have already stipulated that the test for admission of evidence is relevancy and on that basis any evidence relevant to the matter in question should be taken account during trial as in the present case.
26. On the second issue the Plaintiff/Applicant relied on the case of *Paul Nduati Mwangi v Stephen Ngotho Mwangi & 9 others* [2022] eKLR and submits that the Defendants/Respondents will not suffer any prejudice if the application is allowed. He further submits that the court is obligated to look at the totality of the case to ascertain whether the Plaintiff will have proved his case to the required standard. He argues that the Defendants would be accorded the right to cross-examine on the contents of the documents produced as evidence.
27. The Plaintiff/Applicant argues that the bank had been issued with a court order to produce the bank statements but it could not because of non-retention of bank statements on account of statutory limitations.
28. The defendants filed submissions dated 12th June, 2022 and identified the following issues for determination:
 - a. Whether the Plaintiff/Applicant should be recalled to produce as an exhibit the certified bank statements from Stanbic Bank Harambee Avenue Branch, Nairobi for the bank account of Mugambi & Kariuki Co. Advocates being account no. XXXXXXX for the period running between 8th March, 2006 to 28th September, 2006.
 - b. The Banker-Customer Relationship.



29. On the first issue, they cite Section 35 of the *Evidence Act* and submits that the production of a document in civil proceedings has to be made by the maker of the statement. They further submit that the said condition may be dispensed with if the maker is dead, cannot be found, incapable of giving evidence or his attendance cannot be procured without delay. In support of this point, they rely on the decision in *Advocates v Advocates* (Miscellaneous Civil Application E386 of 2020) [2021] KEHC 359 (KLR) (Commercial and Tax) and submit that the disclosure of the account no. XXXXXX might be relevant but not necessary. They argue that the Plaintiff/Applicant having made payment of the purchase price, he has alternative means of access through other documents such as banking slips, banker's cheques or RTGS to prove payment.
30. The Defendants/Respondents submit that the death of a customer terminates the bank's mandate from him once it receives notice of it. They further argue that it is the receipt of the notice and not the death that fixes the date of the termination of the mandate but only upon receipt of the notice of the customer's death that the bank would close account.
31. On the second issue, they rely on the decision in *N. Joachimson (A firm Name) v Swiss Bank Corporation* as cited in with approval in *Intercom Services Ltd & 4 others v Standard Chartered Bank*. They submit that the bank owes its customers an implied duty not to divulge information about them to any third party but must keep the affairs of a customer secret.
32. They further argue that the bank was unable to comply with the Plaintiff/Applicant's request as the documents fell outside the specific statutory period as well as CBK's Prudential Guidelines requiring them to maintain records for a period of (7) years from the date of occurrence of the transaction. He submits that no rebuttal has been offered by the Plaintiff/Applicant and urges the court to dismiss the instant application with costs.
33. Upon perusal of the Application, Supporting Affidavit, Replying Affidavit and Submissions filed in respect of this Application, the two issues that arise for determination are as follows:
 - a) Whether the Plaintiff/Applicant is entitled to the orders sought.
 - b) Who should bear the costs of this application.

Analysis and Determination.

A. Whether the Plaintiff/Applicant is entitled to the orders sought.

34. The record shows that this matter is partly heard. PW1, PW2, PW3, PW4 and PW5 testified.
35. PW1 made reference to certified copies of bank statements of 8th March, 2006 to 28th September, 2006 from Stanbic Bank and the same was marked for identification as -PMFI 8.
36. Witness summons were issued to Stanbic Bank to produce a statement of account of Mugambi and Kariuki Co. Advocates held at Harambee Avenue branch in Nairobi. The statements of account were for the period 1st March, 2006-30th September, 2006. It is the same ones referred to by PW1 and marked as PMFI8.
37. Stanbic Bank heeded to the witness summons and sent PW5- The Nakuru Branch Manager. The testimony of PW5 was to the effect that he could not verify the bank statements that the plaintiff called him to produce for the reason that they were more than 15 years old and they no longer have records for that period and further that the law only obligates them to keep records pertaining to customer accounts for only 7 years. He cited section 46 of the *Proceeds of Crime and Anti-money laundering Act* and Schedule 8 of the Central Bank of Kenya Prudential guidelines.



38. PW5 produced the court order and letter in response to the court order as Exhibit 8 (a) and 8 (b) respectively. In cross examination he reiterated that he could not verify the bank statement that the plaintiff wishes to rely on for the reason that they do not keep bank records for more than 8 years.
39. The Plaintiff/Applicant's advocate has made this application to have PW1 recalled to produce the bank statements that had been marked for identification. The Plaintiff/Applicant contends that he is the only competent witness to produce the certified copies of the bank statements.
40. The Defendant/Respondent on the other hand objected to production of the said statements and insisted that the bank being the maker of the statements should be the one to produce the statements.
41. The law pertaining to recalling witnesses is found in the *Evidence Act* and the Civil Procedure Rules. Section 146 (4) of the *Evidence Act* generally grants the court powers to recall a witness. It provides as follows:
- “(4) The court may in all cases permit a witness to be recalled either for further examination –in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”
42. Order 18 Rule 10 of the *Civil Procedure Rules* grants the court powers to recall any witness who has been examined. It provides thus:
- “10. The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”
43. What is apparent from the provisions cited above is that the trial court has discretion to recall a witness. As always, discretion must be exercised judiciously.
44. In my view judicious exercise of discretion should take into account such questions as: whether the proposed recall is prejudicial to the opposite party, whether there has been inordinate delay, whether the recall, if to produce documents, is of documents that could not have been obtained with reasonable diligence at the time of hearing his case, whether the evidence/document is such that if admitted, would probably help the court in arriving at a just conclusion of the dispute (though it need not be decisive) and whether the evidence/document is apparently credible, though it need not be incontrovertible.
45. The reason for recall of the plaintiff is to produce a document marked as PMFI8 which the plaintiff hoped would be produced by the witness PW5 but which document PW5 was not able to verify and produce for reasons he gave.
46. The Court of Appeal in the case of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] eKLR held as follows: -

“How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document



becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.” [Emphasis mine]

47. The bank statements have been referred to by the Plaintiff/Applicant’s witnesses. It is my considered view that the said statements are relevant documents that will enable the court reach a just determination.
48. This document proposed to be produced has been in the possession of the plaintiff/applicant, witnesses have referred to it. The plaintiff/ applicant is seeking orders to have him recalled for purposes of having this document (PMFI 8) admitted in evidence.
49. I note that the plaintiff has addressed the question of admissibility in his submissions by stating the law and circumstances under which secondary evidence may be admitted. The defendants have also given reasons why it should not be admitted in evidence by citing bank customer relationship and confidentiality. The question of admissibility of secondary evidence is a question to be dealt at the hearing if and when objections are raised. There is no doubt that its admission in evidence shall be dealt during the hearing. It’s premature to make a determination at this stage.
50. I find that the evidence of the bank statements would certainly help in the fair determination of the dispute between the parties and is therefore relevant. Further, the Defendants/Respondents who have not tendered evidence, will have an opportunity to cross examine the plaintiff and also present controverting evidence should they feel the need to. I am not persuaded that the Defendants/ Respondents will suffer any prejudice.
51. According to the decision in *Kenneth Nyaga Mwige v Austin Kigua & 2 other* (Supra) the document MFI P8 has only gone through the first stage of a document become part of the evidence in this case. This application seeks to set in motion stage 2 that is to say to have it form part of the judicial record so that the court can apply its judicial mind to it and form a judicial opinion.

B. Who shall bear the costs of this application?

52. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the Provisions of Section 27 of the *Civil Procedure Act* (Cap. 21).

Disposition.

53. In view of the foregoing, this court finds that the application dated 30th May, 2022 is merited. In exercise of this Honourable Court’s discretion, the application is hereby allowed in the following terms:
 - a. The Plaintiff- Prof. Robert Obwocha Oboko (PW1) is hereby recalled so as to the certified bank statements from Stanbic Bank Harambee Avenue Branch, Nairobi for the bank account of Mugambi and Kariuki Co. Advocates, being account No. XXXXXXX, for the period running between 8th March, 2006 to 28th September, 2006.
 - b. The Plaintiff - Prof. Robert Obwocha Oboko (PW1) shall, for purposes of production of the document in (a) above, be subjected to further examination-in-chief and/or further cross-examination and re-examination.
 - c. The cost of this application shall abide the outcome of the suit.



54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8th DAY OF DECEMBER, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kanyi Ngare for the Plaintiff/Applicant.

Miss Aoko for Kisila for the 1st Defendant/Respondent.

AG for 2nd Defendant in counter claim- Absent

Court Assistant; Ms. Monica Wanjohi.

