



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**Civil Case 2012 of 1999**

**SIMON KIMONDO MUBEA.....PLAINTIFF**

**VERSUS**

**RITA S. WAUDO.....DEFENDANT**

**RULING**

The plaintiff filed this suit against the defendant seeking judgment for:

- (a) An order of ejectment of the defendant from the suit premises known as LR NO.209/13539/20 and vacant possession thereof to be delivered to the plaintiff.
- (b) An order for a monthly mesne profits, the quantum thereof to be determined by this Honourable Court from the month of June 1999 until vacant possession of the suit premises is delivered to the plaintiff.
- (c) Costs of the suit.
- (d) Interest on (b) and (c) at court rates.
- (e) Such other and/or further relief as this Honourable Court may deem fit and just to grant in the circumstances of this matter.

When the suit came up for hearing Mr. Machira counsel for plaintiff in his opening remarks stated that the suit was filed by the plaintiff in 1999 on the basis that the plaintiff is the registered proprietor of the suit premises. The plaintiff sought ejectment of the defendant from the suit premises and he also sought mesne profits.

Defence was filed by the defendant to the claim and reply to defence was filed by the plaintiff. Subsequently the defence was struck out on application by the plaintiff. That application was heard by the Deputy Registrar of this court. The defendant appealed to the High Court but the appeal was dismissed by Visram, J on 22<sup>nd</sup> September 2004 and the suit has come up for formal proof. He then led the plaintiff in Evidence in Chief.

The plaintiff in his evidence told the court that he is the registered proprietor of the suit land being LR NO. 209/13539/20. The property comprises of a residential house being House No. 93. The suit premises is situated off Suna Road Nairobi commonly known as WOODLEY ESTATE. The property was allocated to him by the Nairobi City Council formerly known as Nairobi City Commission through a letter of allotment dated 24<sup>th</sup> August 1992 and he paid Kshs.1,110,000/= as consideration as stipulated in the letter of allotment. But when he wanted to produce the said letter of allotment as Exhibit Miss

Luvuna, counsel for the defendant objected to the same on the ground that the said letter of allotment the plaintiff intended to produce was a photocopy, hence a secondary evidence. She submitted that there was a legal notice issued by the Government on 19<sup>th</sup> July 2002 in the Standard News Papers regarding the suit property. The allotment was nullified and cancelled and the allottees were required to get refund of any money paid to the Nairobi City Council. The fact that the legality of the allotment is in question it would require that the original letter of allotment should be produced (primary evidence). There should be evidence that this letter of allotment was verified by the City Council.

Miss Luvuna also referred to Hansard Report in Parliament whereby the the Minister for Local Government HON. UHURU KENYATTA answering a question put in Parliament by Member of Parliament for Dagoretti informed the House that the purported sale of Woodley Estate Houses was illegal as the same was sanctioned secretly by some Senior Officers of the Council without the approval of the Council and the Minister. She also referred to a Public Notice by the Nairobi City Council which informed the General Public that all transactions involving that sale and transfer of plots, houses, flats, open spaces, etc in all that property known as LR NO.209/13539 commonly know as Woodley Estate/Joseph Kangethe Estate have now been found to be irregular and illegal and all such transactions have now been nullified by the Government. The City Council also requested all persons who hold any documents, receipts, or agreement relating to the houses, leases, sub-leases, in respect of property in or curved out of LR NO.209/13539 to present such documents for verification for purposes of refund of any moneys that may have been paid to the City Council.

Mr. Machira in answer to the objection submitted that the court cannot rely on the information said to be contained in the Hansard Report since the Hansard itself was not produced in court for verification. Secondly the court does not receive its evidence from the News Paper cuttings. Thirdly there is a judgment of this court whereby the defendants defence was struck out by the Deputy Registrar on 29<sup>th</sup> February 2000 and interlocutory judgment was entered. The defendants appeal against the decision of the Deputy Registrar was dismissed. Mr. Machira further submitted that the issues that the allotment was irregular and illegal does not arise at this stage the defence having been struck out by the Deputy Registrar Reference to the Ministers' statement in the Hansard and the Notice by the City nullifying the allotments is irrelevant, and of no value.

Miss Luvuna in reply submitted that the court cannot proceed in a vacuum. It must consider the law and at the same time the Government Policy. These issues came up after the defence has been struck out but nevertheless the plaintiff is required to formerly proof his case. The issue here is the production of secondary evidence.

The provisions of the Evidence Act Cap 80 are quite explicit on proof of contents of a document Section 64 provides that the contents of a document may be proved either by primary or by secondary evidence. Primary evidence means the document itself produced for the inspection of the court while secondary evidence includes copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies or copies made from or compared with the original.

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

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, or not subject to the process of the court
  - (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.

Section 69 provides thus:-

*“69” Secondary evidence of the contents of the document referred to in Section 68(1)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case.”*

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases:-

- (i) When the document to be proved is itself a notice;
- (ii) When from the nature of the case the adverse party must know that he will be required to produce it;
- (iii) When it appears or is proved that the adverse party has obtained possession of the original by fraud;
- (iv) When the adverse party or his agent has the original in court;
- (v) When the adverse party or his agent has admitted the loss of the document;
- (vi) When the person in possession of the document is out of reach, or not subject to the process of the court.
- (vii) In any other case in which the court thinks fit to dispense with the requirement.

The letter of allotment is issued in its original form containing the full names of the allottee, the land number allotted and signed by the authorized person issuing the same. It is presumed to be in possession of the plaintiff and having not satisfied the requirements of the Provisions of Section 69 of the Evidence Act above stated he is not covered by the provisions of the Act

Accordingly and for the reasons above stated the objection by the defendant to the production of a photo copy of the letter of allotment by the plaintiff is upheld and the same is therefore rejected.

Dated and delivered in Nairobi this 31<sup>st</sup> day of October 2005.

**J.L.A. OSIEMO**

**JUDGE**