



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION NO. 23 OF 2016

IN THE MATTER OF THE ESTATE OF MUKIRA NABEA (DECEASED)

AND

IN THE MATTER OF SECTION 45 OF THE LAW OF SUCCESSION ACT AS READ WITH ARTICLES 19, 22, 23, 40, 47 OF THE CONSTITUTION OF KENYA AND SECTION 24 AND 25 OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF L. R. NTIMA/NTAKIRA/1084

JENIFFER GACHERI M'MUGAMBI.....1ST PETITIONER

KINYUA M'MUGAMBI.....2ND PETITIONER

LEGAL REPRESENTATIVES OF THE ESTATE OF MUKIRA NABEA

VERSUS

LEONARD GITONGA RINTAUGU.....1ST RESPONDENT

REGISTRAR OF LANDS MERU.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This ruling appertains to the directions given by the court on 2/11 2020 in regard to the document/letter on page 16 of the 1st respondent's paginated bundle dated 14/11/2017, of which the said letter is dated 27/8/1993. Counsel for the petitioner had raised an objection on the production of the aforesaid document averring that Mukira Nabea died in 1968, yet the agreement was made in 1993. Therefore, the deceased could not have entered into an agreement of 1993. Petitioner's counsel informed the court that they desired to cross-examine the author of the document who is a Chief.

2. In response, counsel for the 1st respondent stated that the Chief who is the author of the document in question is deceased and he doubts whether the current Chief is seized of the contents of that letter. He further stated that Ntima Location ceased to exist and the area is now known as Ngonyi location. Thus it is difficult to get the author of the letter. If the application by the petitioner is allowed, it will cause delay of the case and it will be expensive to bring the record to court. It was argued that the 1st respondent can be cross examined on the said document.

3. *Section 35 of the Evidence Act* states as follows:

"1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-

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 those matters; and

b) if the maker of the statement is called as a witness in the proceedings, provided that the condition 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. [Emphasis added]

2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence.

a) notwithstanding that the maker of the statement is available but is not called as a witness;

b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve as the case may be”.

4. The alleged author of the letter dated 27.8.1993 is deceased. Hence, it is left to the court’s discretion to determine whether to admit the document and determine whether it will attach any weight to the circumstances of the case as stated under **Section 144 of the Evidence Act.**

5. In the case of **Evangeline Nyegera (suing as the legal representative of Felix M’ikiugu alias M’ikiugu Jeremiah M’Raibuni (deceased) vs Godwin Gachagua Githui (2017) eKLR,** it was held that;

“The test for admission of evidence is relevancy..... There is need for fair determination 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 be necessary. (EMPHASIZE ADDED)”.

6. I have considered the contents of the letter in question. It is not a complex document. The author of the letter merely stated that Mukira Nabea is the owner of the suit parcel. The court will in the final analysis determine the probative value of this document. Further, the witness, 1st respondent will be cross examined on the said document. In the circumstances, the objection is not sustained, and the document is hereby considered as admissible.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 19TH DAY OF JANUARY, 2021 IN PRESENCE OF:

C/A: Kananu

Gikunda A. for petitioner

Mwirigi for 1st respondent

Kiety for 2nd and 3rd respondents

1st respondent

HON. LUCY. N. MBUGUA

ELC JUDGE-MERU