**Mutwol v Mutwol & 4 others (Environment & Land Case 37 of 2020) [2024] KEELC 7352 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7352 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT & LAND CASE 37 OF 2020**

**FO NYAGAKA, J**

**NOVEMBER 6, 2024**

**BETWEEN**

**PHYLIS JEROTICH MUTWOL ..... PLAINTIFF**

**AND**

**EMMY JEPKEMOI MUTWOL ..... 1ST DEFENDANT**

**AGRICULTURAL FINANCE CORPORATITION ..... 2ND DEFENDANT**

**COUNTY LAD REGISTRAR, TRANS-NZOIA COUNTY ..... 3RD DEFENDANT**

**SARAH CHEPTENGENY BUSIENEI ..... 4TH DEFENDANT**

**MESHACK KIMUTAI KETER ..... 5TH DEFENDANT**

**RULING**

1. This Ruling is pursuant to an objection made orally on the admissibility and production in evidence of four documents by the 1st Defendant during the hearing of her defense case. The objection was made on 30/10/2024. It was raised by the Plaintiff's learned counsel. The objection was opposed by all three learned counsel for the different Defendants they represented, being the 1st, 2nd, 3rd and 5th respectively.

**Background**

2. The brief background of the objection is that the instant suit was filed on 29/06/2020 vide a Plaint dated 24/06/2020 and verified by an Affidavit sworn by the Plaintiff the same date. The Plaint was accompanied by an interlocutory application dated the same date. It sought among others a prayer for injunction against the Defendants. The record shows that the Application was determined by the Court subsequent to which the suit was set down for hearing.

3. Pertinent to the Application herein is the record on the events leading to the matter being fixed for hearing. Prior to the fixing of the hearing the court directed parties to be ready for compliance with

Order 11 of the Civil Procedure Rules, 2010. The record shows further that the hearing date was taken in Court on 03/06/2021 following a request in the registry on an earlier date for mention on the material date, by the Plaintiff's learned counsel. The hearing date was fixed in the presence of the learned counsel for the Plaintiff, the 1st and 3rd Defendants who attended Court.

4. On the date of fixing the hearing, learned counsel for the plaintiff insisted and prayed for the matter to be fixed for hearing but learned counsel for the 3rd Defendant informed the court that he had just been served with the Plaintiff's documents that morning. He prayed to be given three weeks to comply with the Civil Procedure Rules but it was objected to by the other learned counsel who were ready to take a hearing date. The court, upon considering the Application fixed the matter for mention on the 24/05/2021. The Defendants and the Interested Party were given time to comply but fixed the suit for hearing on 24/05/2021.

5. Come 24/05/2021 the court rescheduled the hearing date for 11/11/2021. On the latter date it occurred that learned counsel for the 1st Defendant was bereaved. For that reason, the suit could not be heard. On the same date learned counsel for the 2nd defendant informed the court that his client had signed and released the discharge of charge of the property on 17/06/2020 to the right party and therefore had had no interest in the suit land. The Court directed that the issue of repayment of the loan be communicated in writing to the parties before the 2nd Defendant could be removed from the suit.

6. Subsequent to that the Plaintiff filed an Application for amendment of the Plaint. On the 18/01/2022 it was allowed by consent and the Plaintiff given 14 days to file and serve the Amended Plaint. The parties were given 21 days from the date of service of the Amended Plaint, to file trial bundles, paginated in accordance with Order 11 of the Civil Procedure Rules.

7. By 24/04/2022 the parties had not complied. They were given more time 14 days. Once more they did not. Of relevance is that the Plaintiff delayed in compliance, and on 21/07/2022 she was given 14 more days to file the paginated trial bundle and file and serve. On that date she had not made up her mind as to which documents she would object to. She was given time to consider and specify which documents to object to. The matter was fixed for mention on the 11/10/2022 when the parties did not appear. The Court served them for further mention but still by the subsequent date the Plaintiff had not complied and on 07/03/2023 the Court gave the parties a last mention. Come 22/05/2023 the court fixed the matter for hearing at the instance of the plaintiff and 3rd Defendant. The date was 04/07/2023 which did not materialize. Finally, after two subsequent mentions the hearing proceeded for the first time on 12/10/2022.

**The Objection**

8. After the Plaintiff testified as DW1 and closed her case, the 4th Defendant also testified and closed her case. The 1st Defendant's turn came. It was during her turn to testify that the objection was raised, soon after she adopted her written witness statement and prayed that the documents listed in her List of Documents dated 12/09/2024 be admitted in evidence and be produced. Then learned counsel for the Plaintiff objected to the admission and production of four out of the 11 documents listed, despite the fact that the 1st Defendant had the originals in Court. These, as per the 1st Defendant's List of Documents, were:-

    1. A Consent of the Land Control Board to transfer the suit land from Sarah C. Busienei (the 4th Defendant) to the 1st Defendant.

    2. A land purchase agreement between the 1st Defendant and the Interested Party (now the 5th Defendant).

3. A Consent of the Land Control Board to transfer the suit land from the 1st Defendant to the 5th Defendant.

4. A land sale agreement between the 1st Defendant and the 5th Defendant.

9. On the objection, learned counsel for the Plaintiff contested the production of the four documents, arguing that the witness was not the maker, and the law requires that documents be produced by the maker unless they have been agreed upon for production by the parties. He added further that documents could only be produced by somebody else than the maker if the latter cannot be found or is dead. His contention was that the Land Control Board was not dead hence the two consents listed as document No. 3 and 6 should not be produced by the witness.

10. Regarding the fourth document in the List of Documents filed by the 1st Defendant, the Plaintiff's learned counsel argued that the maker was Lord Justice Yano (currently serving in the Judiciary) then an Advocate, and that of the 10th in the List was purportedly one Mr. Njuguna Advocate. He submitted that the documents were doubtful.

11. On his part, learned counsel for the 1st Defendant submitted that the consents of the Land Control Board were issued to the Plaintiff pursuant to his client's or witness' application to the Board hence she could produce the same. Also, the 1st and 5th Defendants had applied for consent to the Board and were issued the same. Regarding the 4th and 10th documents he submitted that the witness was a party to the same. Further, it was not the person who had attested a document to produce it who is the maker.

12. His further argument was that authenticity of a document only affected the weight to be attached to it in evidence hence should not impede the production thereof. Lastly, he argued that learned counsel for the 1st Defendant had the copy of the document and if he doubted its authenticity he had all the time to confirm the same from the offices of learned counsel who drew it and ask them to disown it if need be.

13. Learned counsel for the 2nd Defendant submitted that the information in the said documents related directly to the witness, she had the knowledge of it and could be cross-examined on them. Thus, that would deal with the weight to be placed on the documents.

14. On his part, learned counsel for the 3rd Defendant opposed the objection arguing that Part III of the *Evidence Act* deals with two aspects of documentary evidence. One, it provides for primary evidence under Section 65 and secondary evidence under Section 66. He argued that Section 65 defines a primary document. Further, of particular importance to consider is that such a document is the original. Those not in the original form constitute secondary evidence. Therefore, in terms of admissibility, the test for the Court to apply was whether or not the Applicant had the original or secondary document.

15. He submitted further that Section 66 provides that all documents which are primary are admissible. The ones not primary evidence were not admissible except if they lay among the exceptions Act provides for. He submitted further that the document listed as No. 4 and 10 were two Agreements, and the court only needed to apply the test whether they were originals or not, and if the witness seeking to produce them was a party thereto or mentioned in them. If the witness was mentioned, then the Court obligated to admit the documents in evidence.

16. Regarding the second category of documents, which were listed as number 3 and 6 he submitted that they were dealt with under Part IV of the Act which provided for whether the documents were public or private. He submitted that Section 79 of the Act defines public and private documents. Further, Section 79(1)(8)(ii) provides that documents from any official body or tribunal were public documents. Regarding production of such documents, he submitted, Sections 80 to 82 of the *Evidence*

*Act* provides for the rules on production of public documents. The test was whether they were in the original form or certified copies thereof. He proceeded to submit that if the two documents in question were original or certified copies, then notwithstanding that the maker thereof was the one in the dock or not, the documents were admissible. He argued that a document may be admissible, but its value in evidence be diminished by the court's assessment of it. And if a party has an issue on the value of the veracity of the document it is not a ground to decline admissibility of the document: it ought to be admitted but be impeached in cross-examination.

17. Learned counsel for the Plaintiff responded to all the submissions by the opposing learned counsel arguing that the fact that a party had the opportunity to know of the existence of a document did not preclude the requirement in evidence that the maker be called to testify on them. The maker should be called to testify for other parties to test the veracity thereof. He submitted that the 1st Defendant had not indicated the challenge she had regarding calling the makers of the documents. Therefore, arguing that the documents be produced and the witness be cross-examined on them would be unfair. He stated that if, for instance, the lawyer came to court and argued that he was not the maker of the document it would not be admissible. Regarding the need to distinguish between admissibility and the probative value of a document, he agreed with the submissions by learned counsel for the 3rd Defendant that cross-examination did not affect the admissibility of a document, but the value. However, if the maker was allowed to produce the document which is not admissible, it would be against Article 50 of *the Constitution* of Kenya. He concluded by stating that nothing had been placed before the court to show that the makers of the documents could not attend court.

**Issue, Analysis and Determination**

18. The only two issues that commend themselves for determination by this Court are whether the objection to the admissibility of the four documents is merited, and who to bear the costs of the objection.

19. Learned counsel for the Plaintiff argued that the documents may ultimately turn out not to be authentic. Bryan A. Garner (2019). Blacks Law Dictionary, 11th edn. Thompson Reuter, St. Paul MN, p. 163 defines authentication as follows:-

> " 1. Broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence; the condition of being so proved (authentication of the handwriting). 2. Specif., the assent to or adoption of a writing as one's own."
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> > "The concept of authentication, although continually used by the courts without apparent difficulty, seems almost to defy precise definition. Some writers have construed the term very broadly as does Wigmore when he states that 'when a claim or offer involves impliedly or expressly any element of personal connection with a corporeal object, that connection must be made to appear.....' So defined, 'authentication' is not only a necessary preliminary to the introduction of most writings in evidence, but also to the introduction of various other sorts of tangibles." John W. Strong et al. McCormick on Evidence § 218, at 350 (5th ed. 1999) (italics in original)."

20. Further, Bryan A. Garner in the same Dictionary, at p. 163, defines "Authenticity" as:

> " The quality, state or condition of being genuine so that the origin of authorship is reliable as claimed. 2. The quality, state or condition of being true or in accordance with the fact. 3. The quality, state or condition of being authoritative or entitled to acceptance."

21. Learned counsel raised the objection to the admissibility of the two agreements on the grounds that the two documents indicate on their face that they were drawn by C. K. Yano and Company Advocates and J. N. Njuguna and Company Advocates respectively hence the witness was not the maker and also that the learned counsel shown then as drawers were alive and ought to be called to produce them instead.

22. The court wishes to underscore an important point at this stage. The question of proving the authenticity of a document has to do with a demonstration that a person executed or made the document. One process of making a document, especially one drawn by another party, is the giving of instructions as to how the document is to be drawn and its contents. Once the person giving instructions has done so and is satisfied that they have been given effect by reduction into writing by the person drawing the document, the process or step or act of voluntary or due execution of the drafted document by the giver of instructions is part of the making it. Brayan A. Garner (supra) at p. 623 when making a comparison between a "maker" and "drawer" defines a drawer as, 1. Someone who directs a person or entity, usually a bank, to pay a sum of money stated in an instrument - for example, a person who writes a check. Under the UCC, a person who signs or is identified in a draft as a person ordering payment." As for the meaning of "Maker", at p. 1144 he defines "make" to mean "To cause (something) to exist (to make a record) and at p. 1145 "maker" to mean "1. Someone who frames, promulgates or ordains. 2. Someone who signs a promissory note."

23. It means a person who actually gives instructions in writing and this he does by affixing any mark of signification to such instructions. For instance, when a person on a deathbed gives instructions on what is to be included in his/her will and he/she executes the same before dying, they cannot be said not to have made the will. The will is valid if the appending or execution of the signature is witnessed as provided by the law. It does not vitiate it because the maker is dead. Peradventure that the maker of the will survives and revokes it and then the issue of revocation is raised subsequently. Will it be successfully argued that since the person who executed the will and the revocation was not the one who drew them is not the maker? No. He is the maker thereof. Can he produce, as evidence, the two documents to prove the fact of execution? Indeed, he can.

24. The test about whether a person is or is not a maker of a document is whether the alleged maker can be legally held responsible for the existence of and contents therein. Thus, one needs to settle the question whether if an issue, for instance, criminal in nature, arose, the alleged maker can answer by being held to account about the criminal element sought thereto. Production of a document in evidence has to do with his/her connection of the same by the person who so wishes to do. This now turns me to two concepts often confused: relevance and admissibility of evidence. For a party who is not keen, the two concepts became nightmarish in understanding their meaning and application.

25. dmissibility is not anything different from what the grammatical meaning renders it to be. It is the act of the judge accepting the piece of evidence as that which can be used to prove the existence or non-existence of a fact in issue. Evidence is admissible if it passes a two-tier test. One is, if it is sufficiently relevant to the fact sought to be proved or disproved, and two, if it is not excluded by any rule of the law of evidence, or by the exercise of judicial discretion but which must be exercised judiciously. About

admissibility of evidence, the learned authors Adrian and McKeown (2014.mnnre). Modern Law of Evidence, 9th edn. Oxford University Press, Oxford, P. 20 state as follows:

> " Such evidence as a court will receive for the purpose of determining the existence or non-existence of facts in issue is referred to as admissible evidence. The admissibility of evidence is a matter of law for the judge... all evidence which is sufficiently relevant to prove or disprove a fact in issue and which is not excluded by the judge, either by reason of an exclusionary rule of evidence or in the exercise of her discretion, is admissible."

26. The question that remains for this Court to answer is whether, if the documents sought to be produced are relevant but excluded by the law of evidence from reception by this Court. I will come to answer that question soon after the analysis below of what constitutes relevance. Suffice it to say that in a more strict or higher standard sense as to be admissible, relevance is defined in Article 1 of Stephen's Digest of the Law of Evidence, 12th edn.as:

> " ...any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other."

27. But the clearer and applied definition was given by Lord Simon of Glaisdale in DPP v Kilbourne [1973] AC 729 at 756, HL.

> " Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in 'logical probativeness' except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable."

28. Further, the learned authors explain at page 31 that:

> " For a variety of different purposes, the judge must also form a view as to the weight of evidence. In determining admissibility, he must consider whether evidence is sufficiently relevant and this will depend, to some extent, on his assessment of its weight."

29. The Plaintiff herein seems to have misunderstood two legal points: one, that the process of admissibility of (relevant) documentary evidence is not the same as the process of admissibility of statements made by makers who have not been called by a party. The Court of Appeal in *Parkar & Another v NQ & 2 Others (Civil Appeal 139 of 2020)* [2023] KECA 908 (KLR) (24 July 2023) (Judgment) stated as follows:-

> " ...under Part IV of the *Evidence Act*, statements made by persons who cannot be called as witnesses are admissible in evidence. This is an exception to the hearsay rule. Specifically, section 33 lays out what those statements might be. The section lists 8 examples of such statements which are all, in their own right, exceptions to the hearsay rule. Significantly, the opening paragraph of section 33 gives the context within which the exceptions covered at that section apply. It reads:
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> > 'Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable

of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases.'"

30. A clear reading of Section 33 of the *Evidence Act* together with its exceptions renders the meaning that it has to do with statements only. These are not in documentary form by the time they 'left' the maker. Thus, the interpretation of the provision leads this Court to find that the relevant provision to the instant objection is Section 35 which is titled, "Admissibility of documentary evidence as to facts in issue." It provides 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-
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> 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
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> 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.
>
> 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 subsection1.Of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence-
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> 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."

31. Thus, for documentary evidence in civil proceedings, as long as the judge is of the opinion that there is a statement made by a person in the document, the document would be admissible if when sought to be produced, in cases where it is not part of a record purporting to be a continuous one, the document is the original as long as the maker of the statement had personal knowledge of the matters dealt with by the statement and he (the maker) is called as a witness in the proceedings. As for private documents the simple test to be applied at the very first step is whether it is a primary or secondary document, as envisaged under Section 65 and 66 of the Act because Section 64 provides that the contents of documents may be proved by either primary or secondary evidence. This court agrees with the submissions by learned counsel for the 3rd Defendant that in terms of Section 65 (1) of the Act, in case a document is produced as one, as is regarding the agreements sought to be produced herein, primary evidence is the document itself. Secondary evidence, as provided for under Section 66, would include-

> "(a) certified copies given under the provisions hereinafter contained;
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> (b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
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> (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."

32. Further, Section 67 provides that documents must be proved by way of primary evidence unless one brings himself within the exceptions given under Sections 68 and 69 of the Act.

33. Regarding public documents, similarly, in terms of Section 65(1) primary evidence is the document itself or certified copies of the same pursuant to Section 81 of the Act. But for such documents, secondary evidence as provided for in Section 66 may still be adduced if one falls within the exceptions of the Act.

34. Therefore, once the document passes the relevance test, it goes though the admissibility test (as summarized above about Section 35) and if successful it then is subjected to the third test which is proof of the contents thereof. One clear step in admissibility is that it is in the original and the maker is the one intending to produce it. If the witness is not the maker, then the court proceeds to satisfy itself that the production satisfies one or more of the exceptions to the law (the provision provides), which are summarized at paragraph ***44*** below.

35. The Supreme Court of India in Arjun Panditrao Khotkar v Kailash Kushanrao, (2020) 3 SCC 216 spoke to the three steps as this Court has alluded to above. It stated:

> "2. Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as-
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> 1. Admissibility;
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> 2. Relevancy and

3. Proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section 136 of the *Evidence Act*, relevancy must be established before admissibility can be dealt with."

36. This Court has had occasion to hold about how production and proof of documentary evidence, in our modern times (in Kenya) ought to done. In Lwangu v Ndote (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10th November 2021) (Ruling), it held as follows:-

> " 20. It is worth explaining here the four stages of the production of secondary evidence (for example the photocopy in this case). Before a document is produced to show its contents, its existence or state/physical appearance (whichever is relevant to the proceedings before the court), it passes through three stages if it is the original or four if it is the secondary thereof that is available.
>
> 1. First, the document is filed in court (according to the rules or legal requirements. In civil cases, refer to order 3 rule 2 and order 11 of the Civil Procedure Rules and rule 28 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (herein referred to as the "Mutunga Rules"). Worth noting here is that if the party has not complied with the rules of filing the documents, he has to seek leave of the court to be permitted to file them out of time. The court has to be satisfied on the reasons why the party failed to comply with the rules. In Mansukhalal Jesang Maru v Frank Wafula [2021] EKLR, this court held as follows "Essentially, I am saying here that the bar at which the court gets convinced that there is need of filing and relying on an additional document or witness statement should be very high, higher than the fifty-fifty chance. This is because by the time the parties are having the pre-trial conference, they shall have weighed their case and become satisfied that all is ready for the ship of trial to unhook from the anchor and sail. "This means that it is not a walk in the park for a party who fails to comply with the timelines set by law or an order of the Court. Even Article 159(2) (d) that parties often rely to does not come to the aid of all parties in all situations. Each case has to be treated on its own merits. Even so, the bar for convincing the court to exercise its discretion to permit documents to be filed out of time is higher than the usual standard.
>
> 2. Second, if the document is not the original, that is to say, it is secondary evidence, the party has to show the copy to the other

parties and the court first. Then he will proceed to lay the basis for the production of the copy and not the original. This has to fall within the usual standard of satisfaction of the requirements of reliance on secondary evidence.

3. Third, one the Court is satisfied that the party has laid a proper basis for producing secondary evidence of the document, it then permits the party to lay further basis for production of the document. This has to be in according with the rules of relevance and admissibility in the law of evidence.

4. Once, the above is complete, then the party has to prove the contents, state or physical appearance of the document.

21. Short of following the above steps, the party seeking to rely on a document to prove the issue in court will not succeed to do so unless the court exercises its discretion under section 69(iv) of the *Evidence Act* to dispense with the need for production of the document. In Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR the Court of Appeal gave a summary of the three stages. At paragraph 18, their Lordships stated thus:

> "The mere marking of a document for identification does not dispense with the formal proof thereof. 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 proved 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.""

37. With the above analysis now clear, this Court proceeds to determine whether the documents in issue should be admitted. To begin the analysis this Court summarizes the parties' arguments. The 1st Defendant prayed that the four documents in issue be admitted in evidence. The prayer is opposed. To analyze the objection better I classify the four documents objected to into two categories. The first set is those which the witness alleges she executed (the two agreements). The other set is those documents she alleges to have received from the LCB.

38. This court has sufficiently discussed authentication of documents. Thus, with the said analysis as given in paragraphs *19*, *20*, and 22-24 then above the authentication of the first set, being the agreements of sale she alleges she executed is simple because the question is whether the witness was a party to either or both of them. From the witness' written witness statement and her oral testimony so far given is that she executed the agreements, one as a purchaser on 17/04/2007 and other as the vendor on 15/03/2020. She was a party to both and therefore has a direct connection to both. If they are original, then under Section 35(1) of the *Evidence Act*, they are admissible because the maker is the one seeking to produce them.

39. Regarding the second set of documents, being the consents from the LCB, what this Court understands the 1st Defendant to mean is that she prays that it admits in evidence the four documents in order for the Court to rely on them, upon admission, to prove certain facts. The facts are that, if I understand her correctly further from her written statement already adopted as evidence in-chief and the oral testimony so far given, in regard to the first Consent of the Land Control Board, upon the witness and the 4th Defendant (who has already testified) completing the agreement of sale of the suit land they applied to the Board for transfer of the same and upon the Board considering the Application, it issued her the consent. For ease of reference the Land Control Board is hereinafter abbreviated as LCB. Further, what I understand the witness to be saying, is that she received and used it for transfer of the suit land to herself. She now wants to have it admitted as proof of those facts. As I will explain in my analysis below, admissibility of a document and its proof, and even the weight of such evidence are totally different issues and concepts. But before then is this Court's understanding of the reason why the witness wishes the other consent and two other documents to be admitted.

40. Thus, similarly or by the same token, about the other consent to the LCB, the witness, if understood correctly, wishes to show her connection with the said document in this manner. She and the 5th Defendant entered into a sale agreement. Upon doing so, the two applied to the LCB for transfer of the land to the purchaser. She and the buyer attended the LCB and were issued with the consent for the land to be transferred to him. I have not forgotten the importance point that admissibility, proof and weight of documentary evidence are different concepts though closely interrelated. What the understanding of the witness as given above in relation to the objection raised imports is whether the witness has any connection with the documents. In essence the objection is about the authenticity of the two documents.

41. It is this Court's view that the understanding of the connection of the witness with the documents (consents) settles the question as to the authenticity because of what the law is regarding authenticity or authentication, if the documents are original, as defined and explained in paragraphs *19*, *20*, and *22* to *24* above.

42. Permit me to take my analysis of the second set of documents in the objection herein through an elementary process for the parties who are lay people and were in attendance (though represented by learned counsel through the reasoning the court makes during the process of considering whether or not to admit a document in evidence. I will use the conventional method of analysis accepted world over by bright legal scholars and others generally. This is the four-step process of Issue, Rule, Analysis/ Application and Conclusion method (IRAC).

43. Thus, in the instant case and objection before me, what is the fact in issue here? They are two. The first one is that the witness attended the LCB. The second one is that she was issued with a consent to transfer the suit land, following the success of the application. So, is the consent, being the product of the application to and attendance at the Board relevant? Yes. Thus, the document passes the very first test: relevance. The next test is whether the document is admissible. As for the second set of documents,

if the originals are in court, the only question left for the court to determine is whether the witness who is not the maker thereof can be allowed to produce them in evidence.

44. The issue before me is whether the witness has brought herself to the exceptions given under Section 35(1) of the *Evidence Act*. These are if the maker of the document 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.

45. The circumstances of the instant objection to the second set of documents are that the witness is not the maker of the documents, she filed copies of the documents in her List of Documents dated 31/05/2021 and 12/09/2024 notifying the parties that she would be relying on them, the suit was fixed for hearing the first time at the insistence of the Plaintiff, all along the Plaintiff never notified the 1st Defendant that she would be objecting to the admissibility and production thereof, the Plaintiff raised the objection at the time the 1st Defendant took the witness stand and sought to rely on the documents. It is not that the makers of the consents are dead, cannot be traced or incapable of giving evidence. The question is whether they cannot, in the circumstances of the case, be procured without any amount of delay or expense, which would be unreasonable.

46. This Court has conducted hearings of this matter a number of times as the record bears it out. The learned trial judge, who is now on transfer from the current station within the next two months, had purposed to and informed the parties that he would complete this matter not only during this Term but also on the date the objection was raised. What is the effect of the objection which was without prior notice to parties in the circumstances? Will it cause undue delay? In my humble view this is the classic case of an intention by a party to cause undue delay in hearing of this matter. I say so for a number of reasons.

47. First is the intention of the law of procedure regarding preparation for trials. The purpose of the requirement, under Order 3 Rule 5 and Order 7 Rule 5 of the Civil Procedure Rules, for parties to suits to file their Lists of Documents and copies thereof together with their pleadings, and even Rule 28(g) of the Mutunga Rules, 2013 (supra, Lwangu case), that is to say, the mischief intended to be cured by the Rule(s), is two-fold. One, it is to give the adverse party an opportunity to know in advance the case they will confront, thereby avoiding trial by ambush and hence respect the right to fair trial. Secondly, it is to call on the adverse party to the attention of the documents or statements in possession of the other party and thereby give the adverse party an opportunity to investigate the veracity or authenticity of the documents and raise in advance any issue they may have with the document(s) with the party who intends to rely on them. By so doing it does away with the trial by ambush by the adverse party and realizes the concept of equality of parties before the law, enhance the overriding objective of procedure and realization of justice.

48. Rule 28 (g) of the Mutunga Rules (supra, Lwangu case) provides that:

> " Taking of all objections to the production of specific documents, where notice has been issued to the other party, thereafter, objections on the production of any document shall not be entertained at the main hearing..."

49. Compliance with Order 11 of the Civil Procedure Rules has been a practice in Kenya since 2010 when the Civil Procedure Rules were substantially amended. Its provisions are clear regarding the steps each party in a suit, claim or petition is required to take prior to the fixing a hearing. For the ELC and the courts subordinate to it which are clothed with jurisdiction over environmental and land matters. The Mutunga Rules (supra, refer to the Lwangu case) were enacted to breathe more life into the provisions of Order 11 Rule 3. Thus, in the instant case, the Plaintiff just as the Defendants failed to file a pre-

trial questionnaire as required by Order 11 Rule 2 of the Civil Procedure Rules. Additionally, she did not draw to the attention of the other parties her intention to object to any documents. This was particularly important to do when the Court indicated to all the parties that it intended not to give any parties an adjournment. It behooved the parties to, at that moment, in good faith, prudence and under the overriding objectives of the *Civil Procedure Act* and the *Environment and Land Court Act* as stipulated in Sections 1A and 3 respectively, to draw to the attention of the others her intention to raise objections to production of documents they would specify. It is not open for a party to waylay another with an objection to certain documents when the other has taken the witness stand.

50. It is not open for a party to 'hide' cards under the table and 'waylay' the adverse one in court with an objection to production of documents. For a Court to permit a party to do so is to try or hear a matter by ambush. Both the law and practice of Courts in Kenya and many jurisdictions in the modern world have moved away from such modus operandi. The practice today, the 21st century, is not one under the laws of the jungle. To live in the old era is refusing to develop mentally and professionally and reside in the uncivilized world. That certainly is not where the legal system and practice in Kenya is.

51. The upshot is that the Objection raised by the Plaintiff to the production of the four documents listed as No. 3, 4, 6 and 10 in the 1st Defendant's List of documents dated 12/09/2024, fails in so far as the same are originals as regards No. 4 and 10 and either originals or certified copies of No. 3 and 6. The costs of the Objection for the parties who opposed the objection, to the exclusion of the 4th Defendant who was absent, shall be borne by the Plaintiff.

52. The suit to proceed from where it reached.

53. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM THIS 6TH DAY OF NOVEMBER, 2024.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

**In the Presence of:**

Kiarie Advocate holding brief for Kenei for Plaintiff

Momanyi Advocate for 1st and 5th Defendant

Mainga Advocate for 2nd Defendant

Odongo Senior State Counsel for 3rd Defendant

Keter N. K. Advocate for 4th Defendant