Kiragu & another v Njoka (Sued as the Administrator of the Estate of Njoka wa Kioriah) (Environment & Land Case 568 of 2013) [2023] KEELC 17827 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17827 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 568 OF 2013

FM NJOROGE, J

JUNE 8, 2023

BETWEEN

TITUS KIRAGU ..... 1ST PLAINTIFF

SUSAN KIRAGU ..... 2ND PLAINTIFF

AND

KIORIAH NJOKA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF NJOKA WA KIORIAH) ..... DEFENDANT

RULING

1. This ruling is in respect of the plaintiffs' two applications dated April 24, 2023 and May 9, 2023
2. The Notice of Motion application dated April 24, 2023 which is expressed to be brought under Section 1A, 1B and 3A of the *Civil Procedure Act* and Section 66 and 68 of the *Evidence Act* which sought the following prayers:
    a. Spent
    b. This honorable court be pleased to admit into evidence the copy of the agreement of sale dated May 8, 2000 as secondary evidence without production of its original.
    c. This honorable court be pleased to grant any other orders it may deem fit, just and fair in the circumstances.
    d. The costs of this application be provided for.
3. The grounds on the face of the application and the supporting affidavit are that on or about 3/10/1989 the plaintiffs entered into a land sale agreement with the late Njoka Wakioriah for the purchase of 50 acres of LR No 10317/14 at a consideration of Kshs 1,000,000/=; that on 8/05/2000 the plaintiffs entered into another sale agreement with the deceased which confirmed the full payment of the

purchase price of Kshs 1,000,000/=; that they were issued with one original of the sale agreement, the late Njoka Wakioriah was also issued with another original sale agreement while Advocate Kayai Benson Njau who was a sole practitioner retained the other original; that he made a copy of his original copy but he later realized that he had misplaced it; that his efforts to trace the said agreement have proved futile; that he has also failed to get the other original copy that was kept by Advocate Kayai Benson Njai because he disappeared and he is still missing to date; that it is for the said reasons that he is seeking to rely on the copy and for the court to admit it as good secondary evidence; that he will suffer much prejudice if the copy already filed will not be admitted as evidence in this matter and that it is in the interest of justice that the application be allowed as prayed.

4. In response to the said application, the defendant filed a replying affidavit sworn on May 2, 2023 and filed on May 3, 2023. He deposed that the plaintiffs seek to produce a copy of a sale agreement that is not certified as a true copy of the original and so its validity and authenticity was in question; that the plaintiffs have not provided any police abstract to show the reported loss; that Section 67 of the *Evidence Act* sets out the legal principle that an original copy of a document is superior evidence; that the plaintiffs' case has already been closed and therefore consideration of the same would be prejudicial and defeat the ends of justice as each party had sufficient time to adduce evidence; that during the hearing, the alleged claim by the plaintiff's advocate did not arise and so it does not form part of the plaintiffs' case; that he denies any knowledge of the alleged sale agreement dated May 8, 2000 as an administrator of the estate of the deceased; that if the alleged sale agreement is allowed into evidence, the estate of the deceased stands to suffer prejudice and irreparable loss.

Submissions

5. The plaintiffs filed their submissions on May 22, 2023 while the defendant filed his submissions on May 30, 2023.

6. The plaintiffs in their submissions reiterated the grounds on the face of the application, the contents of their replying affidavit and submitted that the agreement of sale dated 8/05/2000 that was entered into by the plaintiffs and the deceased indicated that they had purchased 50 acres at Kshs 1,000,000/=. They also submitted that one of the terms of the said agreement was that any extra amounts of money paid by the plaintiffs would entitle them to extra acreage. They further submitted that the issue of the first 50 acres was settled in favour of the plaintiffs in succession cause No 3270 of 2013 while in this case they are seeking the extra acreage proportionate to the extra amounts of money that they had paid to the deceased.

7. The plaintiffs also submitted that the defendant in his witness statement dated November 21, 2013 acknowledged the filing of the agreement for sale and talked about the various aspects of it while one of his witnesses mentioned it in her witness statement. The plaintiffs further submitted that the defendant's pleadings make reference to the said agreement and contended that it was void as there was no land control board consent. The plaintiffs submit that in contrast to his averments in his pleadings, the defendant is now denying the existence of the said agreement. The plaintiffs then submitted that they initially thought that they had produced the original sale agreement when the suit was heard ex-parte but upon perusal of the file they could not trace it and upon searching for it at home it could not be found. When the plaintiffs tried to get in touch with the advocate who drafted it, they could not find him as he was reported missing in the year 2021. The plaintiffs relied on the cases of *Paul Nduati Mwangi v Stephen Ngotho Mwangi & 9 others* [2022] eKLR, Lee v Tambag (citation not given) and submitted that the plaintiffs produced a very clear copy of the said agreement in court. They also submitted that they were desirous to produce the original document which could not be traced and since the law provides for admission of secondary evidence, it would be in the interest of justice that

they be allowed to produce the copy. The plaintiffs further submitted that the defendant would not be prejudiced in any way if the court allows it to produce a copy of the agreement.

8. The plaintiffs relied on Sections 66, 68(1)(c) & (2)(a) of the law of *Evidence Act* and the case of *Jemima Moraa Sobu v Trans National Bank Limited* [2016] eKLR among other cases in support of its arguments.

9. The defendant in his submissions opposed the production of the copy of the sale agreement dated May 8, 2000 as secondary evidence and relied on Section 67 and 68 of the *Evidence Act*, the cases of *Cannon Assurance (K) Ltd v Ali Hamadi Mwagude & 4 Others* [2017] eKLR, Re Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu (deceased) citation not given. The defendant reiterated the contents of his replying affidavit and submitted that under Section 68(1) of the *Evidence Act*, a party has to give notice of their intention to rely on secondary evidence which notice was not given and that the admission of the sale agreement will be prejudicial to the defendant as they are questioning the validity of the said agreement. The defendant then sought that the application be dismissed with costs.

10. With respect to the plaintiff's Notice of Motion application dated May 9, 2023 which is expressed to be brought under Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 18 Rule 10, Order 51 Rule 1 of the *Civil Procedure Rules* and Section 146(4) of the *Evidence Act* the plaintiff/applicant sought the following prayers:

    a. Spent

    b. That this honorable court be pleased to order that the plaintiff's case be re-opened and heard for purposes limited only to the production of the copy of the sale agreement dated May 8, 2000, which was marked for identification and therefore as evidence in this matter.

    c. That this honorable court be pleased to recall the 1st plaintiff Titus Kiragu for examination in chief, cross examination and re-examination limited only to the production of the copy of the sale agreement dated 8th May 2000 as secondary evidence in support of his case, in lieu of the lost, misplaced original agreement of sale.

    d. That costs of the application be in the cause.

11. The application is supported by the supporting affidavit of Rose Mbanya, counsel for the plaintiffs. The grounds on the face of the application and the supporting affidavit are that counsel discovered that in the application dated April 14, 2023, she had left out a crucial prayer seeking to re-open the plaintiff's case and recalling the 1st plaintiff to produce a copy of the sale agreement; that the plaintiff's case was closed on January 30, 2023 and that the defendant is yet to commence the hearing of its case; that without the prayer to re-open the plaintiff's case and recall the 1st plaintiff, the application dated April 24, 2023 will be rendered incapable of being implemented; that at the hearing of the 1st plaintiff's testimony, the said sale agreement was marked for identification; that this was because counsel was under the mistaken belief that the original sale agreement had been tendered in evidence when the matter was previously heard ex parte and that it was in the court file; that counsel did not therefore make an application for admission of secondary evidence at that juncture; that the prayers sought in the said application will not prejudice the defendant as they will have the opportunity to cross-examine the witness on the said document and that it is in the interest of justice that the application be allowed as prayed.

12. In response to the application, the defendant filed a replying affidavit on May 12, 2023 that is sworn on the same date. He deposed that the plaintiffs application to reopen their case is an afterthought; that when the matter was heard on January 30, 2023 the plaintiff gave his sworn testimony that was

tested on cross-examination and he was later re-examined by counsel on record; that the said cross-examination poked holes in the plaintiff's case and so the sole reason for the plaintiffs application is to plug in the gaps created during cross-examination; that the decision of whether or not to recall a witness for further examination-in-chief or cross-examination is left to the court to exercise it judiciously and in the interest of justice; that at the hearing of the plaintiff's case, the plaintiff produced a copy of the agreement dated May 8, 2000 whose authenticity was in question; that the plaintiffs allege that the said agreement was lost and yet they have not produced a police abstract to showcase the said loss; that the court in exercising the discretion to re-open the case, should ensure that the re-opening does not prejudice the opposite party and it should not be intended to fill gaps in evidence; that the application should not have been filed after an inordinate delay between the time of institution and hearing of the case and that the plaintiffs application should be dismissed as it lacks merit.

Submissions

13. The plaintiffs filed their submissions on May 22, 2023 while the defendant filed his submissions on May 30, 2023.

14. The plaintiffs in their submissions sought that the plaintiffs' case be reopened so that the 1st plaintiff can be recalled to produce the subject agreement as secondary evidence. The plaintiffs relied on Section 146 (4) of the *Evidence Act*, Order 18 Rule 10 of the *Civil Procedure Rules*, the case of *Samuel Kiti Lewa v Housing Finance Co of Kenya Ltd & another* [2015] eKLR and submitted that their application was brought. The plaintiffs then reiterated that they have been unable to procure the original agreement and the re-opening of their case is not to seal any gaps but to produce the said sale agreement as secondary evidence. The plaintiffs also relied on Section 1A, 1B and 3A of the *Civil Procedure Act* and the case of *Patel EA Cargo Handling Services Limited* [1974] EA 75 among other cases in support of their arguments. The plaintiffs then relied on the case of *Andrew Mugandi Nuri & 2 others v China Dalian International Group* [2020] eKLR and sought that their application be allowed as prayed.

15. On whether the plaintiffs' suit should be reopened, the defendant relied on Section 146(4) of the *Evidence Act*, Order 18 Rule 10 of the *Civil Procedure Rules* and submitted that the plaintiffs' application was an afterthought and that they have not given a sufficient explanation as to why they did not produce the original sale agreement. The defendant reiterated the contents of his replying affidavit and relied on the case of *Raindrops Limited v Country Government of Kilifi* [2020] eKLR in support of its arguments.

Analysis and Determination

16. After considering the applications, the replying affidavit and the submissions, this court finds that they are so interrelated that they must be dealt with together hence the present single ruling. The only issue that arises for determination is whether orders reopening the plaintiff's case to enable him to produce as secondary evidence the sale agreement dated May 8, 2000 ought to be granted.

17. While considering the first application, for leave to produce as secondary evidence the sale agreement dated May 8, 2000 on the grounds that the original could not be traced it is noteworthy that the plaintiffs argue that they had earlier thought that it had been produced when the matter was heard ex parte but then they realized that it had been misplaced. When they tried to get it from the advocate who drafted the said agreement, they found out that he had gone missing in the year 2021.

18. The defendant on the other hand opposed the production of the copy of the sale agreement on the grounds that the plaintiffs were seeking to seal the loopholes in their case that were raised during cross-examination. The defendant also argued that the plaintiffs did not produce any evidence to show that the said sale agreement was missing.

19. Section 35 of the *Evidence Act* 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..."

20. Section 66 of the *Evidence Act* provides as follows:

> " Secondary evidence includes—
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> (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;
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> (d) counterparts of documents as against the parties who did not execute them;
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> (e) oral accounts of the contents of a document given by some person who has himself seen it."

21. Section 67 of the *Evidence Act* provides as follows:

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

22. Section 68 of the *Evidence Act* provides as follows:

> "(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—
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> (a) when the original is shown or appears to be in the possession or power of—
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> (i) the person against whom the document is sought to be proved; or
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> (ii) a person out of reach of, or not subject to, the process of the court; or
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> (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;
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> (b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;
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> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 79 of this Act;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) (a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible. (c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents."

23. The court in the case of *Lwangu v Ndote* (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) held as follows:

> " 13. Section 67 of the Act is couched in such a manner as to make it mandatory for documentary evidence to be produced in its primary form unless the secondary evidence thereof it falls among the exceptions provided in the Act. It states "Documents must be produced by primary evidence except in the cases hereinafter mentioned." This forms the basis of the best evidence rule. Thus, by virtue of the provision, a party has no option but to either avail the document itself or bring himself within the exceptions given in the law...
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> 15. The mischief section 67 of the Act sought to remove is the maze of situations where, for instance, a party approaches to court with a document other than the original but which appears to be a replica of it, only for it to turn out to be a 'clone' and therefore a "fraud" in the court process. Even where there are exceptions to the production of primary evidence, the law has put in place safeguards against the sneaking into evidence of 'clones' and documents that may be referred to as frauds...
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> 17. Section 68 of the *Evidence Act* is to the effect that secondary evidence may be given of the existence, condition or contents of a document in situations where the original document is in possession of the adverse party or a person out of the reach of the court or any person legally bound to produce it but fails

to produce, where the contents are admitted in writing by the adverse party, where the original is lost or destroyed or cannot be produced within reasonable time, the original is not easily movable, the original is a public document, the original is a certified copy and where the original consists of numerous accounts of other documents if the conditions set out herein have been met."

24. The Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR held as follows:

> " 18. 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."

25. A perusal of the said sale agreement that the plaintiffs are seeking to have admitted as secondary evidence is dated May 8, 2000 and entered into between the plaintiffs and Njoka Wakioriah. The said sale agreement has various stamps affixed on it including an annexure stamp. The plaintiffs allege they could not trace the original sale agreement that was in their possession and that it was drafted by Ben Njau Kayai who is alleged to have disappeared in the year 2021. Annexed to the agreement is a newspaper report that indicated that an advocate known as Ben Njau Kayai had been allegedly abducted and his whereabouts were unknown.

26. It is evident from the record that the document intended to be produced was marked for identification on the first day of the hearing and the plaintiff never addressed it again. It is also clear that where a basis has been laid for the production of secondary evidence the court normally admits the same. the defendant's concern is that the plaintiffs are seeking to seal the loopholes in their case that were raised during cross-examination. The defendant also argued that the plaintiffs did not produce any evidence to show that the said sale agreement was missing.

27. As long ago as December 16, 2004 the court in a ruling in Nakuru HCCC 156 of 2003 Titus Kirago & Another V Kioriah Njoka & Another observed that the suit is based on an agreement made on 8/5/2000. In that ruling at page 4 the court observed as follows:

> " It is not in dispute that [Njoka wa Kioriah, deceased] had entered into a sale agreement with the plaintiffs for sale of a portion [of LR No 10317/14]."

28. The present suit was filed on October 23, 2013 and at paragraph 10 it is claimed that the land was subdivided into several portions, including portions identified as F and C which the plaintiff claims. The plaint also states that a land control board consent was obtained. The present matter had also proceeded to judgment before that judgment dated 15/7/2021 was set aside and the matter set down for a re-hearing. The agreement subject matter of the present application featured in that judgment. What this court is saying is that the document proposed is not new and has been the backbone of the present case all along. The only omission was that after the plaintiff had it marked for identification, he never revisited it for production or through any other witness hence the present application.

29. I have examined the proceedings in the case record and I do not find that there was not taken any objection to the production of the agreement or a decision made by this court on such objection. Had there been such a record then the issues that the plaintiff raises regarding plugging of loopholes would have been pertinent. No attempt is apparent on the record of the plaintiff's attempt to explain the document or produce it which was declined by this court. As long as a document is still marked for identification it can be produced by evidence that would follow that of the witness at the instance of whose it was marked, provided such production is not prejudicial to the other party by reason of the stage at which the hearing has reached. In the present case the defence is yet to call evidence. The applications seek that the plaintiffs' case be re-opened for the production of that PMFI3. This court is not concerned with the explanations given in the applications for the proposed production of the agreement; those ought to be reserved for the hearing if the applications succeed. The court in the case of *Lwangu v Ndote* (Environment & Land Case 79 of 2010) (supra) held as follows on what a party must prove in order for a document to be produced as secondary evidence and I do not think that this court or the parties delved into those at the past hearing when the document was marked.

30. I am also of the view that the re-opening of the plaintiffs' case while the defendant has not yet called his evidence would not be prejudicial to him. on the contrary, the plaintiff would stand to suffer great prejudice if it were to ever transpire after dismissal of such applications that the agreement, after all, was capable of being produced. In any event, as has already been pointed out by the case law above, admission is not necessarily proof, and proof is dependent on many factors at the end when the court is considering the case at judgment. The grant of the applications would not in any way absolve the parties from exploiting the rules of evidence at the further hearing of the plaintiff's case. In addition, the defendant would still have an opportunity to cross-examine the witness on the said document. For these reasons I am inclined to grant the plaintiffs a day in court but since the defendant is faultless in the entire scenario the costs of both applications shall be borne by the plaintiffs.

31. The application dated April 24, 2023 is futile for the reason that the court can not without any evidence being called make such an order to admit the agreement without the mutual consent of all parties and that application is therefore dismissed.

32. The plaintiffs' application dated May 9, 2023 however has merit and it is hereby allowed and I hereby make the following orders:

    a. The plaintiffs' case is hereby re-opened for purposes limited only to the production as evidence in this matter of the copy of the sale agreement dated May 8, 2000, which was marked for identification.

    b. The 1st plaintiff, Titus Kiragu, shall be recalled for examination-in-chief, cross-examination and re-examination in connection with and limited only to the production of the copy of the sale agreement dated May 8, 2000.

    c. The costs of both applications shall be borne by the plaintiffs.

d. The suit shall be mentioned on 14/6/2023 for directions.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8TH DAY OF JUNE 2023.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU.