



**Mubea v Waudo & 2 others (Environment & Land Case
2012 of 1999) [2023] KEELC 18675 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2012 OF 1999**

LN MBUGUA, J

JULY 4, 2023

BETWEEN

SIMON KIMONDO MUBEA PLAINTIFF

AND

RITA S WAUDO 1ST DEFENDANT

NAIROBI CITY COUNTY 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

RULING

1. This ruling relates to an objection raised by counsel for the 1st Defendant concerning production of item no 17 at page 32 of the Plaintiff's bundle of documents by Plaintiff's 1st witness, PW1. The document in question is a letter dated September 3, 1992 addressed to the Minister for Local Government by the Town Clerk of Nairobi City Commission. The objection is raised on the basis that the said letter was not copied to the Plaintiff and it is not prepared by him either. Counsel for the 1st Defendant also argues that PW1 has not given any basis of how he came to be in possession of the said document. He points out that the witness has never been an employee of the 2nd Defendant so under the *Evidence Act*, Item No 17 is not his document.
2. The application is opposed by counsel for the Plaintiff who argues that the objection is unmerited as there is no law which says that a document can only be produced by the maker, that the issue is whether there was such a document and whether the contents therein have been challenged. It was argued that it is common ground that the dispute raises an issue as to whether the 2nd Defendant had authority to issue a letter of allotment to Plaintiff which resulted in issuance of a grant under provisions of the RTA.
3. He argues that item No 17 demonstrates that the 2nd Defendant had authority to dispose off some of its property. He adds that the document is not marked 'personal and confidential' thus it can be produced by anyone affected by the transaction arising from this authority. He contends that the issue as far as



the document is concerned is its relevance, and therefore urges the court to find that the document is not only admissible but is relevant.

4. Counsel for the 3rd Defendant aligned himself with submissions of counsel for the 1st Defendant.
5. In rejoinder, counsel for the 1st Defendant argues that documents must be produced by the maker or one must explain where they got the documents from and in this case, PW1 only mentions the resolution, yet he was not a clerk/minister at City Council of Nairobi. He added that there is also a law on production of copies of documents, so the document in contention is inadmissible.
6. I have considered the rival arguments. The provisions of Section 35 of the *Evidence Act* requires that documents must be produced by the maker. PW1 is not the maker of the document he intends to produce which is the letter dated September 3, 1992 and is item No 17 on the Plaintiff's bundle of documents.
7. However, Section 33 of the *Evidence Act* gives provisions for admissibility of statements whether oral or written made by persons who cannot be called as witnesses. The exception provides as follows;

' 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.'
8. I find that it would be unreasonable to call the Town Clerk of Nairobi City Council to produce the letter in contention noting that the said entity was succeeded by the 2nd Defendant. In *High Chem East Africa Limited v David Njau Wambugu & 4 others [2020] eKLR*, while allowing a letter produced by a witness who was not the maker, the Court stated that;

' There is no doubt that the letters were made in the course of business of KRA and to insist that it is only the writer of those letters, the KRA officer, who can produce them in evidence would be too odious and unreasonable. The very reason Section 33 was enacted was to ensure that where the calling of witnesses would entail expenses and delay, their presence would be dispensed with. Having that in mind the letters of KRA are admissible in evidence. To insist that KRA officer be called to testify would in my view be unreasonable.'
9. The provisions of Order 11 of the Civil Procedure Rules, 2010 provides for pre-trial conferences which are meant to inter-alia aid in expeditious disposal of suits. To this end, courts are mandated to uphold the objectives set out under Article 159 (2) (b) and (d) as well as Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* by exploring expeditious ways of introducing evidence upfront, hence the trial bundle is usually availed well in advance of the date of the trial. This means that courts are called upon to actively manage cases so as to shepherd the trial in a harmonious and speedy manner. I find that there is no party who issued a notice to produce any particular document during the pretrial exercise.
10. The provisions of Article 50 (4) Constitution stipulates that courts have discretion to determine whether the admission of documents would be detrimental to the administration of justice in the following words:

' Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice'.



11. In the case of *Ntarangwi M'Ikiara v Jackson Munyua Mutuera [2018] eKLR*, I cited the case of *Evangeline Nyegera (suing as the legal representative of Felix M'Ikiugu alias M'Ikiugu Jeremiah M'Raibuni (deceased) vs Godwin Gachagua Gitui, where the Court of Appeal Civil Appeal No 28 of 2016* 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'.

12. From the foregoing analysis, I find that no evidence has been advanced by the 1st defendant to indicate that the document in question was procured in a manner which violates the constitutional principles, the authenticity of the contents in the said document have not been challenged, and finally, the defence will have a chance to cross examine the witness on their veracity and legitimacy of the said document.

13. In the end, the objection is hereby dismissed and the document in question shall be produced in evidence by the witness on the stand.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

G.P Machira for Plaintiff

Mwenesi for 1st Defendant

Kemunto holding brief for Mr. Nyakwaro for 2nd Defendant

Nadi Mohamed for 3rd Defendant (National Land Commission)

Court Assistant: Peninah

