



**Mbithi v Mureithi & 2 others; Nairobi City County (Interested Party) (Environment & Land Case 346 of 2019) [2023] KEELC 20489 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20489 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 346 OF 2019  
MD MWANGI, J  
OCTOBER 4, 2023**

**BETWEEN**

**JONATHAN MBITHI ..... PLAINTIFF**

**AND**

**CAROLINE WANJIRU MUREITHI ..... 1<sup>ST</sup> DEFENDANT**

**ISAAC GITONGA RINGERA T/A VIEW LINE AUCTIONEERS .... 2<sup>ND</sup>  
DEFENDANT**

**FRANKLIN KIMATHI ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**NAIROBI CITY COUNTY ..... INTERESTED PARTY**

**RULING**

1. The Advocates for the Defendants in this matter jointly raised an objection to the Plaintiff producing various documents as exhibits on the basis that they were copies whilst he had not laid any basis to justify the production of copies of documents rather than the originals. In any event, the Defendants argued that the said copies were not certified. It was the Defendant's submissions that this was in violation of the provisions of sections 67 and 80 of the *Evidence Act*.
2. The Advocate for the Plaintiff in rejoinder argued that the Defendants were served early enough but they did not raise any objections or indicate that they wished the Plaintiff to produce the originals. Furthermore, most of the documents were documents that the Defendants too were relying on and were in their lists and bundle of documents. The Advocate pointed out that her counterparts for the Defendants were not specific. They needed to point out the particular documents that they were objecting to.
3. The documents objected to were identified as follows:



**a. On the Plaintiff's 1<sup>st</sup> bundle of documents,**

- i. Document listed as No 1
- ii. Document listed as No 5
- iii. Document listed as No 6
- iv. Document listed as No 7
- v. Document listed as No12 &
- vi. Document listed as No 14.

**b. On the Plaintiffs 2<sup>nd</sup> bundle,**

- i. Document listed as No 3
4. The Defendants' Advocates specified that for the photographs which were listed in the Plaintiff's bundles, the maker of the certificate of electronic evidence accompanying the photographs ought to be the one to produce them as exhibits.

**Determination**

5. Under section 67 of the *Evidence Act*, documents must be proved by primary evidence except in cases set out in section 68 of the Act, when secondary evidence may be given. The definition of primary evidence is at section 65 of the *Act*. Generally speaking, primary evidence is the document itself produced for the inspection of the court.
6. This brings me to what is referred to as the 'best evidence rule.' The best evidence rule is a principle in law which holds that the original of a document is superior evidence and so long as it is within the possession of a party, or may be reached by a party, no inferior proof should be allowed. Secondary evidence should therefore not be admitted essentially without non-production of the original being first explained in a manner to bring it within one or more of the exceptions under section 68 of the *Evidence Act*. In the case of *Re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased* (2016) eKLR, Mativo J (as he then was) held that the party who wishes to rely on secondary evidence has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced.
7. Section 80 of the *Evidence Act* on the other hand deals with public documents and requires that they be certified in the manner prescribed therein.
8. The Plaintiff is obligated to lay basis for the production of copies of documents in order to bring them within the exceptions provided for under section 68. For public documents, the copies need to be certified in accordance with the provisions of section 80 of the *Evidence Act*.
9. As regards the photographs and the accompanying certificate of the electronic evidence, I agree with the Defendant's advocates that the same should be produced by the maker of the certificate. He is the only one in a position to answer any questions that may arise in relation to the photographs.
10. The valuation report qualifies as an expert report. The maker should be the one to produce it unless it is agreed by the parties to have it produced without the need to call its maker. There has been no such agreement. The maker of it should be called to produce it in court as an exhibit.



11. Accordingly, I uphold the Defendants' Advocates objections to the production of the documents listed for the reasons explained above. The documents listed as number 1, 5, 6, 7, 8, 12 & 14 in the Plaintiff's 1<sup>st</sup> list and the documents marked number 3 in the Plaintiff's 2<sup>nd</sup> list shall be marked for identification. All the other documents that have not been objected to shall be marked appropriately as Plaintiff's exhibits.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4<sup>th</sup> DAY OF OCTOBER, 2023.**

**M. D. MWANGI**

**JUDGE**

