



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NUMBER 729 OF 2011**

**MIRIAM WAIRIMU WAMBUGU (Suing on behalf of  
the Estate of the late JACOB JUMA).....1<sup>ST</sup> PLAINTIFF  
PARK HEALTH CENTRE LIMITED.....2<sup>ND</sup> PLAINTIFF  
NECTEK (K) LIMITED.....3<sup>RD</sup> PLAINTIFF  
VERSUS  
JANE WANJA NJIRU.....1<sup>ST</sup> DEFENDANT  
WANJIKU ITHONDEKA.....2<sup>ND</sup> DEFENDANT**

**RULING**

*(In respect of the objections by the Defendants to the production of some documents by the Plaintiff)*

**Background.**

1. On 23<sup>rd</sup> November 2021, the 1<sup>st</sup> Plaintiff who was then testifying in her case produced the documents in her 'Plaintiffs' list and bundle of documents' and 'Plaintiffs' supplementary list and bundle of documents' as exhibits in this case. The Defendants objected to the production of the documents in the manner listed herein below: -

**A. The 2<sup>nd</sup> Defendant, objected to the production of:-**

*i. Document No. 15 - being the sale agreement between Park Health Centre Ltd, Nectel (K) Ltd and Jane Wanja Njiru dated 27<sup>th</sup> July 2010.*

*ii. Document No. 23 - being the transfer of L.R No. 209/7842, I.R No.26052 by Jacob Juma to Jane Wanja Njiru dated 16<sup>th</sup> December 2010.*

**B. The 1<sup>st</sup> Defendant, objected to the production of:-**

*i. Document No. 7 - being the certificate of incorporation of Park Health Centre Ltd.*

*ii. Document No. 8 - being the memorandum and articles of association of park Health Centre Ltd.*

*iii. Document No. 9 - being the form CR 12, showing the shareholding of Park Health Centre Ltd.*

*iv. Document No. 15 - being the lease agreement between Park Health Centre Ltd, & Nectel (k) Ltd and Jane Wanja Njiru dated 27<sup>th</sup> July 2010.*

*v. Document No.17 - being the form CR 12 showing the shareholding of park Health Centre Ltd.*

*vi. Document No. 18 - being an acknowledgement letter by Jacob Juma dated 27<sup>th</sup> July 2010.*

*vii. Document No.19 - being a 2<sup>nd</sup> acknowledgement letter by Jacob Juma dated 25<sup>th</sup> August 2010.*

*viii. Document No. 20 - being a valuation report by Tysons Ltd of a residential property L.R Number 209/7842.*

*ix. In the Plaintiffs' supplementary list and bundle of documents, the 1<sup>st</sup> Defendant objected to all the documents but 2. The documents are pleadings and other court documents relating to a case Milimani CMCC 5718 of 2011 between Jane Wanja Njiru & Jacob Juma.*

2. The basis of the objection by the 2<sup>nd</sup> Defendant was that the witness (PW1) who was producing the documents was not a competent witness to answer questions relating to the documents, more specifically the 2<sup>nd</sup> document.

3. The basis of the objection by the 1<sup>st</sup> Defendant was that some of the documents, more particularly documents No. 18, 19 & 20 should be produced by their makers so that they may explain and lay the basis of their content.

4. In regard to the documents in the custody of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, the 1<sup>st</sup> Defendant states that the deceased was not the only director of the two Companies. In other words, the 1<sup>st</sup> Defendant states that the documents should be produced by the other directors of the two Companies.

5. The 1<sup>st</sup> Defendant's objection in regard to the documents prepared by experts, was that only the experts can testify in regard to the contents of those documents. The 1<sup>st</sup> Defendant gave the example of the valuation report in respect of the suit property which was part of the documents that PW1 sought to produce.

6. Concerning the official search, which I presume to be the CR 12 form, the 1<sup>st</sup> Defendant stated that only an official from the Companies' registry that issued it may testify on its contents. Finally and in regard to the court proceedings from another court, the 1<sup>st</sup> Defendant expressed the view that only the executive officer of that court may produce the proceedings.

#### **Response by the Plaintiffs.**

7. In his response, the Advocate for the Plaintiffs Mr. Havi submitted that the objections by the Defendants have no basis in law. He submitted that the Defendants had not laid a legal basis for their objections and their objections cannot therefore be sustained.

8. It was the Plaintiffs' contention that pre-trial proceedings had already been undertaken in this matter. The Defendants did not raise any of the objections they were now raising during the pre-trial conference.

9. The Plaintiffs were of the view that the objections by the Defendants were not in actual sense about the production of the documents rather on admissibility and probative value of the documents which is the responsibility of the court to determine at the conclusion of the case. The plaintiffs categorized the objection by the Defendants as hereunder:

***a) Documents made, executed or addressed to the late Jacob Juma. The objection by the Defendants is that the witness is not competent to produce the said documents.***

10. The Plaintiffs' response is that, part 4 of the Evidence Act, sections 33 and 34 thereof, allow the production of those documents. Statements by deceased persons are admissible if referred to or alluded to by a witness in court. Miriam Juma (PW1) is a competent witness to any matter Jacob Juma would have testified to and produce any document he may have produced.

***b) Category 2 of the objections according to the Plaintiffs, constitute court pleadings in the Plaintiffs' supplementary list and bundle of documents in respect of the case Milimani CMCC 5718/2011.***

11. The Plaintiffs' response in regard to the documents in this category is that Jacob Juma (now represented by his administrator in this case) was the Defendant in that case, CMCC 5718/2011. PART 5 of the Evidence Act (sections 35 & 36) is express that anybody can produce documents in previous civil proceedings and the court is to take judicial notice of the same.

***c) Category 3 of the objections is in regard to documents from other public offices or documents made by private individuals who are not witnesses in this case.***

12. The Response by the Plaintiffs was that, section 64 to 78 of the Evidence Act as well as sections 79 to 82 thereof, allow the production of those documents.

13. In summary, the Plaintiffs' submission was that objections by the Defendants were meant to usurp the role of the court – the documents should be allowed and the court left to make a decision as to the probative value of their content.

14. The 2<sup>nd</sup> Defendant's rejoinder was that a public document whose content was disputed would require strict proof. The 2<sup>nd</sup> Defendant particularly singled out document No. 23.

15. Secondly, the 2<sup>nd</sup> Defendant was of the view that the pre-trial conference under order 11 of the Civil Procedure Rules is not a forum where the Defendants are expected to indicate if they will be objecting to production of documents. It is meant for exchange of documents only.

16. The Advocate for the 1<sup>st</sup> Defendant Mr. Mwinzi on his part stated that law is science and science is method. He urged the court to be guided by the best evidence rule. While acknowledging that Jacob Juma is dead, the court must still stick to law of evidence.

17. The 1<sup>st</sup> Defendant's advocate in conclusion urged the court in considering the objections by the Defendants to ask itself the question whether the Deceased himself would have been a competent witness to produce the documents (objected to) if he were the one on the dock.

### **Analysis and Determination.**

18. I will first deal with the documents that have not been objected to and direct that they be marked as Plaintiffs' exhibits in the order in which they are listed on the Plaintiffs' list and bundle of documents.

19. Secondly, I wish to note that this is one of the very rare cases where all the advocates representing the various parties have agreed on and signed a statement of the issue in dispute in the case. The statement of contested issues is dated 25<sup>th</sup> November 2013, and appears on page 238-239 of the Plaintiffs' trial bundle.

20. In my short tenure as a Judge of the ELC, this is in fact the first file I have come across where there is agreement on the issues for determination. This is indeed one of the activities contemplated under order 11 during the pre-trial conference. Order 11 Rule 3 provides that a case conference shall be convened in which the court shall,

*“(b) Identify contested and uncontested issues; and*

*(c) Explore methods to resolve the contested issues”.*

21. The pre-trial case conference and the trial conference contemplated under order 11 of the Civil Procedure Rules do not in reality happen. The intentions are noble and I have no doubt in my mind that if they were to happen in the order and manner contemplated under Order 11, cases would be disposed of more expeditiously. It would enable Judges and judicial officers to go directly into the trial of the issues in dispute without spending time on all the incidental issues that the pre-trial conference is expected to thrash out.

### **22. I urge the Honourable Chief Justice to consider appointing Case Management Judges and Case Managers in accordance with the provisions of rule 9 of order 11 of the Civil Procedure Rules.**

23. By narrowing down on the contested issues, parties assist the court to remain focused. The court has no business spending time on uncontested issues. Section 1A, (3) of the Civil Procedure Act enjoins parties to civil proceedings advocates for such parties to assist the court to further the overriding objective of the Act; the just, expeditious, proportionate and affordable resolution of civil disputes.

24. I thank the Advocates representing the parties in this case.

25. That said, I will now proceed to make a decision on each of the documents objected to by the Defendants. As I do so, I will have my finger on the statement of contested issues for reasons that I will explain along the way.

26. The objections by the Defendants were that the 1<sup>st</sup> Plaintiff was not a competent witness to produce the documents they objected to. Their objections were not in regard to the admissibility of the documents.

27. I will start with the documents in the Plaintiff's supplementary list and bundle of documents dated 25<sup>th</sup> November 2013. All the documents relate to the Milimani CMCC 5718 of 2011 between Jane Wanja Njiru and Jacob Juma. The parties in that case are the same parties in this case (only that the late Jacob Juma is represented by the Administrator of his Estate). The subject matter of the case before the Magistrates court is the same subject matter in this court.

28. Mr. Mwinzi, advocate for the 1<sup>st</sup> Defendant who was the objector urged the court to ask itself the question whether Jacob Juma, (now deceased) would have been a competent witness to produce the document. My answer in regard to the documents relating to the civil case 5718 of 2011 is a big yes, Jacob Juma would have been a competent witness to produce the said documents. He was a party to that case as the Defendant. Accordingly, the court allows the production of the documents by the 1<sup>st</sup> Plaintiff who is the legal representative of the estate of Jacob Juma (deceased). She stands in the dock in place of Jacob Juma. Section 82 of the Law of Succession Act empowers her to enforce by suit or otherwise all causes of action which, by virtue of any law survive the deceased.

29. I now proceed to document No.15 that was objected to by both the Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This document is an agreement for sale between Park Health Centre Ltd, Nectel (k) Ltd and Jane Wanja Njiru dated 27<sup>th</sup> May 2010.

30. As I stated earlier, I have my finger on the statement of contested issues. One of the issues that has been identified by all the parties as a contested issue at number (4) is whether the agreement of sale dated 27<sup>th</sup> July 2010 varies the loan agreement dated 14<sup>th</sup> May 2010. Again at number (7), the parties identified another issue touching on the agreement of 27<sup>th</sup> July 2010. The issue is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants procured the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' execution of the loan agreement for sale dated 27<sup>th</sup> July 2010 respectively, by fraudulent

representation.

31. The production of the agreement of 14<sup>th</sup> May 2010 by the 1<sup>st</sup> plaintiff was not objected to. For the court to determine the issues number (4) and number (7), the agreement of 27<sup>th</sup> July 2010 must be considered. All the parties in this case must therefore be afforded an opportunity to ventilate on the said agreement at the earliest opportunity. Issue number 7 clearly implies that Jacob Juma, who was then the 1<sup>st</sup> Plaintiff executed the agreement for sale dated 27<sup>th</sup> July 2010.

32. For purposes of the determination of those issues identified as being in dispute, this court allows the production of the agreement for sale dated 27<sup>th</sup> July 2010.

33. I proceed to documents No. 7, 8, 9 and 17. These documents are the Certificate of Incorporation, Memorandum and Articles of Association, Form CR 12 issued on 10<sup>th</sup> August 2009 and form CR 12 issue on 28<sup>th</sup> July 2010, of Park Health Centre Ltd.

34. I do not agree with the submissions by the Advocate for the 1<sup>st</sup> Defendant that Form CR 12 which is an official search issued by the Registrar of Companies can only be produced by the Registrar of Companies. This is a document that originate from a public office. It is covered under the provisions of sections 79 and 80 of the Evidence Act. That applies to the certificate of incorporation of the company and the Memorandum and Articles of Association of the company. The court therefore allows the production of documents No. 7, 8, 9 and 17.

35. Documents No.18 and 19, are acknowledgements that were signed by Jacob Juma-(deceased). Would he have been a competent witness to produce the 2 documents? The answer is in the affirmative. The legal representative of the estate of Jacob Juma therefore is competent to produce the 2 documents. I therefore allow their production.

36. Document No. 20 is a valuation report by Tysons Ltd in respect of L.R No. 209/7842. A valuation report is an expert's report. In regard to this document the court upholds the objection by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that it must be produced by the valuer unless of course consented to by all the parties. It will therefore be marked for purposes of identification and production by the valuer who prepared it.

37. Document number 23 is a transfer of L.R No. 209/7842. The transferor is Jacob Juma while the transferee is Jane Wanja Njiru. This case revolves around this property L.R No. 209/7842. Would Jacob Juma have been a competent witness to produce this document? I say yes, he would have been a competent witness to produce it. I allow its production by the 1<sup>st</sup> Plaintiff.

38. I wish to conclude with a comment about the best evidence rule that was alluded to by the Advocate for the 1<sup>st</sup> Defendant, Mr. Mwinzi. The best evidence rule is a legal principle that holds an original document as superior evidence. It has its origins in the 18<sup>th</sup> Century case called **Omychund Vs Barker** where **Lord Harwicke** stated that no evidence was admissible unless it was "***the best that the nature of the case will allow***".

39. Justice Mativo in the case of Charles **Ndegwa Kiragu alias Ndegwa Kiragu – Deceased (2016) eKLR** while discussing the best evidence rule stated that in Kenya, Section 67 of the Evidence Act is the basis of what is called the best evidence rule. The said section provides that documents must be proved by the best evidence, meaning primary evidence. Section 68 of the Evidence Act provides for the exceptions to the best evidence rule.

40. However, as I stated at the beginning, at the risk of repeating myself, the objections by the Defendants in this case were on the production of documents not on their admissibility.

41. Accordingly, the documents produced shall be marked accordingly. The 1<sup>st</sup> Plaintiff who had been stood down shall proceed with her testimony on a date to be given by the court for further hearing of the Plaintiffs' case.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2022.**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

Ms. Esther Ang'awa for the Plaintiffs.

Mr. Mwinzi for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Court Assistant: Hilda

**M.D. MWANGI**

JUDGE