REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 79 0F 2010

SOFIE FEIS CAROLINE LWANGU.....PLAINTIFF

VERSUS

BENSON WAFULA NDOTE.....DEFENDANT

RULING

(On objection of production of primary documentary evidence where a copy had been abandoned in examination in-chief)

1. This suit appears to be developing a long and winding history as time goes by. It was filed on **23/9/2010**. It was heard for the first time on **26/7/2011** when the Plaintiff testified. It again came up for further hearing on **28/9/2021**. On that date the Plaintiffs' second witness **PW2**, was stood down in the middle of his testimony because learned counsel for the defence raised an objection regarding the production in evidence of a copy of a two-page letter known as an agreement of sale, dated **14/2/1982**. The Court reserved the Ruling on the objection for delivery on **10/11/2021**. By the ruling the objection was upheld hence the document was to be marked for identification if the original was unavailable.

2. On **25/01/2022** the witness was attended Court to proceed with his testimony in-chief. On this occasion he had the original. Upon seeking to produce it, learned counsel for the Defendant once again objected to the production of the document. This time, the thrust of learned counsel's argument was that on **10/11/2021** this Court made a ruling concerning the document. She contended that based on the proceedings of **26/7/2011** the Plaintiff (PW1) attempted to produce a copy of the document but learned counsel objected to it for the reason of it being secondary evidence and not falling within the exceptions the rules of evidence provide for not served with it. Upon the objection being raised, the witness "abandoned" it.

3. Her contention was in form of a question: when a party abandons part of the evidence does it form part of the evidence again? She stated that the person who wished to rely on that document was not the Plaintiff and that the document had not been identified by the Plaintiff, that is to say, it was not marked for identification. She stated further that it was not possible that the document is produced by the witness when the "owner" had abandoned it. Her argument on that was the witness was supposed to corroborate the evidence of the Plaintiff hence cannot produce a document abandoned by the Plaintiff.

4. Learned counsel argued further that on **28/9/2021, PW2** never informed the court where the original (of the document) was and that even on this second occasion he did not state where he obtained the original from. She contested that the copy of the document which was filed and which **PW2** purported to produce on **28/9/2021** was at variance with the original that was in Court. She pointed out that the handwriting and size on pages **1** and **2** of the copy of the document were different, and that the handwriting in the original were similar. She stated that if the plaintiff was dissatisfied with the ruling that declined her reliance on the copy, she ought to have appealed against it or sought for a review of thereof.

5. Lastly, she submitted that the Plaintiff had abandoned the document but did not make an application for its recall. She urged the court to disallow the production of that document.

6. In response, Mr. Odhiambo learned counsel for the plaintiff urged this Court to reject the objection. He stated this is an adversarial system and if the objection is allowed, his client would be disadvantaged. He stated that to bar the Plaintiff from producing the document would lead to miscarriage of justice.

7. Referring to the events of **26/7/2011**, he explained that the reason why the document was abandoned was that the defense argued that it had not been served with the document hence it viewed it as an ambush for the Plaintiff to rely on it. For that it was reasons the Plaintiffs' counsel decided to abandon it. He submitted that after the document was abandoned, the Plaintiffs' case was dismissed or want of prosecution and an application seeking for its reinstatement was filed and it was allowed. At that point the plaintiff made a further Application for the case to be re-opened. It was allowed as well. Thereafter, the Plaintiff prepared, filed and served a further list of

documents which included the impugned document and the defense did not object to, on the ground that it had been abandoned, it being on the list.

8. In response to the ruling made on **10/11/2021** learned counsel emphasized that the objection was in regard to production of secondary evidence. On that, the court found that **the plaintiff had not laid a basis for its production**. He was particular that the plaintiff had traced the original document which was authored on **14|2|1982.** His argument was that the Court did not bar the witness from producing the original.

9. He stated further that the Defendant had not shown any prejudice he would stand to suffer if the document was relied on. He submitted further that the Defence had not cited any legal provision barring the Plaintiff from seeking the leave of the court to produce the document. He then relied on **Article 159(2) (d)** of the **Constitution** and urged the Court to reject any technicalities that would embarrass the trial.

10. Learned counsel submitted further that the defendant had not been ambushed since he was aware of the document and nothing had changed on it. He submitted further that any objection which went to the character of the document was extraneous issues because the document was produced by hand through the process of writing and the copy alleged to be different was made by machine from the same document that was in Court.

11. His contention was that the Defence had not challenged document on account of its contents being different but that the size of the handwritings on the pages of the copy were of a different from the ones on the original. He stated that a scrutiny of the documents in question revealed that it was the process of production of the copy that changed the font size but not the content or handwriting. He challenged the plaintiffs' counsel's view as not being of a handwriting expert so as to give opinion on differences in handwriting that the documents have been produced by different people.

12. Finally, he submitted on the Plaintiffs witness capacity to produce the document. He stated that there was no legal requirement limiting the type of documents that can be produced by the Plaintiff and his witnesses, yet the witness was the maker. His view was that the test to apply was whether the witness was present and saw the document being made or he executed it or not and that the issue of corroboration is to be determined by the Court and not the parties. While urging the court to allow the document to be produced, learned counsel insisted that the objection was based on a technicality which does not go to the core of the matter.

13. In a rejoinder, learned counsel for the Defendant responded that the law of evidence provides that a witness cannot produce a document which has not been identified by the Plaintiff. She submitted that during the hearing the Plaintiff never identified the document. To her therefore, the witness could not produce it. She submitted that the objection could not be cured by **Article 159(2) (d)** of the Constitution. She also pointed out that the Defendant did not object to the plaintiff being granted leave to file further list of documents because he did not know what documents he wished to file hence that would not bar the Plaintiff from seeking leave to file the impugned document.

Directions

14. After the submissions, the parties were given opportunity to furnish he court with authorities in support of their submissions. Both parties filed them.

Analysis, Issues and Determination.

15. I have carefully considered the rival submission of parties in respect to the objection as well as the authorities filed and found that the issues that commend for determination are:

a) Whether an abandoned document ceases to form part of and cannot be re-introduced in evidence;

b) Whether a party is precluded subsequently from relying on the original of a document whose production is refused on account of it being a copy;

c) Whether a maker of a document is precluded from producing in evidence a document not identified by the party calling him as witness;

d) What orders to issue and who to bear the cost of the application?

16. Below, I analyze the issues one after the other.

a) Whether an abandoned document ceases to form part of and cannot be re-introduced in evidence

17. At paragraphs **1** and **2** above I summarized the history of testimonial evidence in this suit. It is not in doubt that on **26/7/2011**, the Plaintiff abandoned the document dated **14/2/1982** (referred to herein as **"the Agreement")**. The reason for the Plaintiff abandoning the marking and production of the Agreement was because it had not been served upon the defendants. This was after she testified about the Agreement and indicated that the secretary of a meeting wherein it was resolved to purchase half of the parcel of land wrote the agreement. She also testified about who the signatories of the agreement were. She attempted to produce the agreement but it was objected to on the ground that it was not served on the defendant and its production was an ambush. It was at that stage that her learned counsel stated "I wish to abandon the document."

18. The matter remained dormant afterwards until the **23/7/2018** when the plaintiffs' case was dismissed for want of prosecution. The

defendant would proceed with the defence and counterclaim but before then the plaintiff applied to reinstate the suit. Upon the reinstatement her case was re-opened and parties agreed that the plaintiffs' evidence on record was to be adopted as part of the proceedings. The plaintiff was to testify from that juncture onward.

19. The matter came for hearing on **28/9/2021** when the defendant' counsel objected to the Plaintiff relying on documents that were contained in the further list of documents dated **22/9/2021** for the reason that they had been filed without the leave of the court. By its ruling made on **28/9/2021,** this Court exercised its discretion and deemed the Plaintiff's list of documents filed on **22/09/2021** duly filed and properly served on the Defendants. The **only copy of the document** given in **the further list of documents** dated **21/09/2021** and filed on **22/09/2021** was **the letter dated 14/2/1982 (the Agreement)** (Emphasis mine).

20. The matter then proceeded for hearing on that date when **PW2** began testifying. In the course of his testimony, he wished to rely on a copy of the Agreement but the defendants' counsel objected to its production for the reason that it was a copy but not the original. This Court upheld the objection by its ruling delivered on **10/11/2021**. The suit was then fixed for further plaintiffs' hearing on **25/1/2022**. On that day that PW2 availed the original of the Agreement and on trying to produce it, the objection that gave rise to this ruling was raised.

21. I have set out the brief background to the objection herein so that it is easier to understand the immediate outstanding issue. It is clear that the Agreement dated **14/02/1982** sought to be produced but objected to was, by the ruling of this Court made on **28/09/2021**, duly deemed filed and served on the Defendant. Thus, the position was obtained on **26/07/2011** when the defendant claimed that it was not served hence reliance on it was an ambush changed. The defendant had due notice of the document as **28/09/2021**. Furthermore, after the Court ruled on **28/09/2021** on the validity of the document forming part of the record, the Defendant did not challenge the ruling by way of appeal or review. After that, **PW2** testified on it and learned counsel for the Defence only objected to its production on the basis of noncompliance with the provisions of the Evidence Act, **Chapter 80** of the Laws of Kenya, for reason of it (then) having been a photocopy.

22. By the Court upholding the objection regarding the production of the copy offending the rules of primary and secondary evidence, that did not preclude the production of the original in Court if it would be found. In the ruling delivered on **10/11/2021** regarding the production of the copy of the Agreement, this Court explained in detail the four stages of production and proof of documentary evidence. In summary it stated that first, the document is filed in court (according to the rules or legal requirements. Second, if the document is not the original, the party wanting to produce it will lay the basis for the production of the copy and not the original. Once the Court is satisfied with that basis, then third, the party will lay a further basis for production of the document. Fourth, the party will then prove the contents, state or physical appearance of the document. In this regard, I refer to the ruling in ***Lwangu v Ndote (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) (Ruling).***

23. From the above steps, the first one was determined by the Court on **28/09/2021**. A leap to the second one was met with the objection herein. This time around, learned counsel insisted that the document had been abandoned by the plaintiff and therefore could not be relied on by it being produced by her witness. The question this court seeks to answer is: can an abandoned document be redeemed by filing a further list of documents with the leave of the court? The answer is to the affirmative. From the proceedings of **28/9/2021,** when this Court exercised its discretion to deem the list of documents containing the Agreement duly filed and served, it formed part of the record, and the Plaintiff was at liberty to adduce evidence on it provided she did so within the rules of evidence.

24. Moreover, when one analyses the record of **26/07/2011** which I reproduced above, the term "abandon" did not mean that the document was rejected by the Plaintiff. What her learned counsel did was to leave the production of the document along the way. Again, it is clear that the Plaintiff did not abandon the oral evidence she had adduced on the document even though she did not have the document marked for date identification. The oral testimony remained intact to. Nothing could preclude her witnesses subsequent to her testimony or prior to it testifying on the document.

25. Additionally, the Defendant has not shown any prejudice he would suffer by the maker of the document being permitted to produce it in evidence before he (the Defendant) testifies. This is because he would have opportunity to cross-examine the maker of the document and also testify on or against it when his chance comes. The opposite situation would have arisen if the document was sought to be produced after the Defendant testified and did not have opportunity to challenge the validity and truthfulness of the document. In any event, on **28/09/2021** when the further list of Plaintiff's documents was under consideration before the Court, the Defendant did not object to further adduction of evidence on the document save as has been explained before. As it stands, the defendant is guilty of laches as he was acquiesced to intent by the Plaintiff, through her witness, of the document forming part of her evidence.

26. This court is of the respectful view that the earlier "abandonment" of the document was redeemed by the subsequent filing and serving of the list of documents. In any event, where it is the Plaintiff's case, or as long as a party has not closed his case, and all the adverse parties have opportunity to challenge a piece of evidence a party wishes to rely on, the Court has discretion as long as it is in the interest of justice to permit a party to adduce evidence even though he/she had abandoned it. On this point, I would use the analogy the meaning of the term "Abandon" as used in evidence in relation to pleadings. In Brian A. Garner, Black's Law Dictionary, **11th Edition, Thompson Reuters, 2019, P. 1** states that the term "abandon" has many meanings. One of them is to "to dessert or go away from permanently." The other is "to stop (an activity) because there are too many problems and it is impractical or impossible to continue." Then at page 2 he give the meaning that is relevant to evidence by defining the phrase "abandoned-pleadings doctrine" which he says means that "the rule that a party may introduce into evidence abandoned pleadings as evidentiary admissions against an opposing party." He stated further that in "…some jurisdictions require the party to have an opportunity to explain why the pleadings were abandoned." As much as this doctrine relates to pleadings, in my view it could by analogy and comparison apply to documentary evidence. Further, it means that in terms of evidence, abandonment does not bar a party from visiting the same piece of evidence. Therefore, it is this Court's humble view that the document the Plaintiff did "abandon" on **26/07/2011** was properly reintroduced in evidence subsequent to the abandonment.

b) Whether a party is precluded subsequently from relying on the original of a document whose production is refused on account of it being a copy

27. It is not disputed herein that **PW2** sought to produce a copy of the Agreement on **28/9/2021** when it was objected to as offending rules of evidence and the objection was upheld on **10/11/2021**. Now, the Defendant objects to the production of the original on account of the said

ruling. He argues that the finding of the Court barred the Plaintiff from producing the document subsequently unless he appealed the ruling or applied to review it first.

28. The law of evidence requires that, unless one brings' himself within the exceptions the said law gives, statements in documents must be produced in evidence by the maker. The exceptions to the general rule are given in **Section 35** of the **Evidence Act** and include such instances include where the maker of the statement is dead or could not be traced; provided the one producing proved that he or she was acquainted to the hand writing and the signature of the maker or was present when or saw the document being made or signed the document or was the author of the document.

29. A number of arguments were put forth by the Defence to counter the production of the original Agreement by the Plaintiff's witness. One, learned counsel for the defendant contested that the plaintiff's witness lacked capacity to produce the document as he was not the maker. In my view the Defence was blowing hot air on this issue. Contrary to that argument, the witness **(PW2)** informed the court in his evidence that he was the one who authored the document, that is to say that the document is in his own handwriting. There can be no better witness to produce such as document than him.

30. Two, learned counsel also contended that the witness did not explain where the original document was as at the time he testified on it first, on **28/09/2021** and that for that reason he cannot produce it even if he finds it later. With due respect this is a misplaced argument. The law as I understand it is that documents can only be produced by the persons who had made them or who had received the same, irrespective as to where the originals were at the time of the objection which leads to a subsequent production of the original. Supposing the witness had forgotten where he had kept the document but on getting home or elsewhere he traces it, will he be precluded from adducing it in Court? Perhaps of the original is different in character and content from the copy sought earlier to be produced that would make a difference. Thus, a party can base his testimony on a document that he is competent to produce.

31. Three, the Defendants objected strongly to the production of the Agreement on the basis that the original sought to be produced differs with the copy that was filed and served on them at the second page and that the second page of the copy was copied on a separate paper compared with the first page. His argument was that the second page of the copy had a larger size of the handwriting than that of the first page of the copy and the original. The Plaintiff argued that the original was a later forgery or reproduction of the photocopy that was filed earlier. The Plaintiff countered the argument by indicating that the difference was only in the size of the copy which was increased by the photocopier but the content and everything else remained the same. She invited the Court to compare the original with the copy sought to be produced and find that they were the same.

32. The Court had occasion to compare the original sought to be produced with the photocopy. It did so in the presence of both counsel and also later when it retired to the Chambers to write this ruling. It noted first that the original is a handwritten document made on two pages of a single paper, or what is commonly known as back to back. It also noted that the pen colour used to reproduce the writing is the same and the handwriting is the same throughout the document. When it compared that with the copy filed earlier, it noted that whilst the copy was produced in black and white, it was similar in ALL respects to the original sought to be produced. Right from the first letter starting the name of the person to whom it was addressed to the last signature at the back or second page thereof, the writing, the shape of the letters, their positioning on the paper vis-à-vis the edges and even the lines thereon are a replica of the other. Even the place or position of dots representing full stops and other items such as small vowel or letter **"i"** is exactly the same together with commas. Similarly, where the copy showed perforations by supposedly a punching machine having cut through the original is the same and exact position as is on the original. In the Court's view, the document is so similar that even that it does not require a handwriting expert to be the only one to tell that the copy was produced from the original in Court. For an individual to forge and reproduce an original from a photocopy and bring out the same features as these that I have before me, that individual can only be Divine: he must be one of the angels that are hovering around this sinful would without a purpose than only to reproduce replicas of documents. The only difference between the copy and the original is the size of the writing on page two of the document as compared to page one of the copy. It is not in dispute that the copy was produced by way of a photocopy machine which is contemplated under **Section 64(5)** and **(6)** of the **Evidence Act**. However, the documents are similar in all respects as I have described immediately hereinbefore. This Court takes judicial notice of the fact that photocopy machines can be adjusted to produce bigger size copies of documents than the document itself or other pages depending on the import and purpose of the production. It is my finding therefore that the Defendant's argument on this aspect fails completely and is worth of nothing.

33. Four, in objecting to the production of the original document, the defendants' counsel also relied on the ground that the document had not been marked for identification by the Plaintiff therefore was incapable of being produced. Learned counsel's argument was based on the fact that a witness called by a party is only supposed to corroborate the party's evidence. First, nothing can be farther than the truth in regard to learned counsel's submission on corroboration. It is worth noting that corroboration is either a requirement of a rule of law or practice. **Section 36(2)** of the **Evidence Act** provides as much. In criminal law, corroboration is a legal requirement in a number of crimes: it is a legal unction. But even where that is laid down as an obligation there is no provision therein requiring a specific sequence of adduction of evidence by the prosecution. ***Keanne and McKewon***, The **Modern Law of Evidence, p. 222** observe as follows:-

> ***"In civil, as well as criminal cases, it would not be unreasonable to expect a general rule requiring a party who seeks to prove certain facts by the testimony of a single witness, to adduce additional independent evidence, by way of confirmation or support, so that the tribunal of fact is double-sure before it makes a particular finding, or gives judgment, in that party's favour".***

34. The learned authors do not guide that there be a specific order of adduction of evidence. Any party wishing to prove a fact may call a witness to confirm or support a fact. But that is not in any specific order, so much so that it be assumed that the party MUST first testify. While it is orderly for a party to start off by testifying on his/her case, indeed there are numerous cases where parties have called witnesses to testify before they give evidence. In such circumstances, if the witness who testifies before the party does is a maker of a document, such a document would not have been identified first by the party before the witness produces and proves it in evidence.

35. Indeed, the taking of evidence of a witness, in anticipation, by a Court under special circumstances even before a party wishing to call him testifies is provided under **Order 18 Rule 9** of the **Civil Procedure Rules**. Such evidence is known as *de bene esse* evidence. Given that it is possible to do that, supposing the witness has documents to produce and proof, shall he be precluded from doing so merely because a party has not identified them before or that there is evidence of the party to be corroborated? Certainly not! Therefore, it is my humble view

that a witness can produce a document not marked for identification by the Plaintiff or Defendant.

36. This question can be answered best by the holding in the case of **Hagos Birikti Tewoldebrehen & Another v Evans Ihura & Another [2020] eKLR** where the court held as follows:

> ***"...it is not mandatory for a plaintiff to attend court to testify in support of his or her case. What is important is that a plaintiff can use the evidence of any other competent witness to bolster his or her case.***
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> ***16) In the case of Julianne Ulrike Stamm -vs-Tiwi Beach Hotel Ltd (1998) eKLR: the Court of Appeal held inter alia as follows:***
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> ***There is no reference in this rule to the plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1) a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel."***

37. The law does not require that a Plaintiff or Defendant must testify in a matter. Where they choose to testify there is no prescribed order of calling witnesses or producing the documents or marking them before the witness produces them. The parties may call witnesses in any order to produce the documents they are entitled by law to produce provide the rules of evidence are followed. Thus, even where a plaintiff or defendant is to testify there is no law requiring the Plaintiff or Defendant to testify first or give evidence solely or even mark the documents they intend to rely on in trial. It follows that it is not the law that production of a document in evidence must be preceded by marking it by a Plaintiff or the Defendant for identification. In any event, there is no provision in the Evidence Act on marking of documents for identification. Marking is not a statutory requirement, although it is good practice. Marking of a document is solely for the purpose of identification.

38. In **Kenneth Nyaga Mwige v Austin Kiguta& 2 others [2015] eKLR** the Court of Appeal expressed itself a 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.**
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> **19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.**
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> **20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an** unauthenticated account.
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> **21**. In **Des Raj Sharma -v- Reginam (1953) 19 EACA 310**, it was held that there is a distinction between **exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144,** it **was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence."**

39. Relying on the above cited case law, in my view, a document to be relied in trial may either have been filed or marked for identification for it to be subjected to test of whether it would form part of the evidence or not. In the instant case, the document having been found to have been properly filed and served, was to be subjected to the test of whether it would form part of the Plaintiff's evidence. Having been filed and served, it was not mandatory to be marked for identification by the Plaintiff herself before her witness (**PW2**) would produce it. The marking of a document, being for the sole purpose of identification, cannot affect the admissibility thereof through the process of production by a competent witness whether before or after the plaintiff or defendant has testified.

c) Whether a maker of a document is precluded from producing in evidence a document not identified by the party calling him as witness

40. The next issue this court interrogates is whether a party can be precluded from availing a maker of a document to produce its original in a subsequent hearing after an objection to production of a copy is upheld on account of it being secondary evidence. Again, the attendant issue

thereto is whether failure to explain where the original was at the time of the objection obliterates the opportunity to produce such original. The straight answer to these two is, I think not. At the risk of repeating myself (I stated this above), the focus should be on doing substantive justice to the parties. If there is no prejudice to be suffered by the opposing party, lack of explanation of alone as to its absence is not sufficient for the court to disallow a witness who has satisfied the requirements of the rules of evidence about a document the original of which he has in his possession from producing it. The court is called to look into the probative value of the evidence and whether it meets the criteria of putting it to test of whether it could form part of the evidence or not.

41. Alongside the question above, the court also interrogates on the question as to whether the maker, executor, author or an acquaintance of a document may be barred from producing it in evidence just because he is not the Plaintiff or the Defendant even if the party who called him to testify does not know the document. I have already discussed the competence of such a person as a maker or recipient of the document to testify.

42. In the persuasive authority of **Republic v FME [2020] eKLR**, the Court expressed itself as follows;

> **"9. Section 125 of the Evidence Act concerns competence of witnesses. The starting point is that all witnesses are competent to testify unless the court considers they cannot be competent for the following reasons…"**

43. The Court then gave a number of instances where competence of a witness is brought into question. The contention by the Defendant is not in any one of the categories and I cannot think it can be part thereof by any stretch of imagination. In the instant case, the witness testified that he was present when the document was made and that he authored it. Therefore, besides knowing the document well, he was acquainted with its content and circumstances of its authorship. It is my considered view that the plaintiff's witness having been able to secure the original of the Agreement after the production of its copy was objected to have the basis to produce it, and the production thereof has met the threshold of the best evidence rule.

d) *What orders to issue and who bears the cost of the application?*

44. This court having found that the witness is competent to produce the document as well as that the document is in its original form and has met the threshold required by the rules of evidence, I am inclined to order that the witness be and is hereby allowed to produce the document in evidence. The matter shall proceed for further hearing forthwith from where **PW2** had reached in his testimony.

45. Costs follow the event. Thus, the defendants shall bear the cost of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 2ND DAY OF MARCH, 2022.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE