



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 105 OF 2016 (OS)

IN THE MATTER OF ORDER 37 RULE 1, 16, 17, 18 and 19 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF LAND TITLE NOS. KIANJAI/KIANJAI/4690, 8967, 8968, 8970, 8971, 807, 4120 and 5989

BETWEEN

GEORGE MUREGA IBUI1ST PLAINTIFF

ESTHER WAIRURI MUREBU.....2ND PLAINTIFF

VERSUS

TITUS KIREA IBUI1ST DEFENDANT

MUNGATHIA KIREA2ND DEFENDANT

STEPHEN KIREMA MBIRITHI3RD DEFENDANT

GEOFFREY KIRIANKI MBIRITHI4TH DEFENDANT

JOSEPH LIMUNGI5TH DEFENDANT

JOHN KARITHIA MBIRITHI6TH DEFENDANT

RULING

1. This suit was filed by way of originating summons dated 20/07/2016 which in the course of time has been amended severally. During the trial on 22/02/2021 when 2 witnesses testified for the plaintiff, Mr. Mwirigi advocate for the defendants made an oral application to have the maker of the documents filed by the plaintiff called to avail the originals. This ruling is in respect of the aforesaid application.

2. Mr.C.P. Mbaabu, advocate for the plaintiffs opposed the application averring that they had no intention of calling the adjudication officers for the following reasons. Firstly, that 1st defendant is the one who submitted the said documents to the adjudication officers and he is the maker of the said documents on the reverse side. Secondly, all the defendants admit that the suit land is registered in their respective names as pleaded by the plaintiffs. Thirdly, the defendants are also relying on a document purporting to originate from the adjudication office, and they want to take advantage such that if plaintiffs are directed to call the adjudication officer, then defendants will ask him questions relating to their document No. 9 dated 19/9/1085 in the defence bundle. That the defendants know that they cannot avail the adjudication officer to come and defend that document so they intend to take undue advantage by having the plaintiff bring the adjudication officer so they can cross examine him and introduce the said document and this will be prejudicial to the plaintiffs.

3. Finally, it was argued that no prejudice will be occasioned to the defence if the adjudication officer is not called. However, in the event that the court is inclined to allow the defence application, then the adjudication officer should appear as a witness of the plaintiff only and he should be restricted to the documents mentioned on pages 21-29 of plaintiffs bundle, such that during defence hearing, the defendant will also be required to avail the maker of their document No.9 in their bundle.

4. In rebuttal, Mr. Mwirigi stated that the plaintiffs ought to have filed a statement proving or stating that it is the 1st defendant who is the author of the documents in question so that the 1st defendant can have a chance to deny or agree. The said documents are said to be certified

true copies of the originals so the originals should be availed by the District Land Adjudication and Settlement Officer.

Determination

5. I believe the documents in question are the copies of Adjudication Records in respect of land parcels No. 4690, 807, 4120, 5989, 8967, 8968, 8969, 8970 & 8971, listed as items 1-9 in plaintiffs bundle filed on 18.2.2021, running from pages 20 to 29. The said documents being adjudication records, then they can be termed as public documents by dint of **Section 79 of the Evidence Act** which states;

Distinction between public and private documents

(1) The following documents are public documents—

(a) Documents forming the acts or records of the acts—

(i) of the sovereign authority; or

(ii) of official bodies and tribunals; or

(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;

(b) Public records kept in Kenya of private documents.

(2) All documents other than public documents are private.

6. What then is the procedure as to production of public documents;

“81. Proof by certified copies

Certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies.

PART V – PRESUMPTIONS AS TO DOCUMENTS

83. Certified documents

(1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is—

(a) declared by law to be admissible as evidence of any particular fact; and

(b) substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and

(c) purporting to be duly certified by a public officer.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document”.

7. In **Evangeline Nyegera (Suing as the Legal Representative of Felix M'Ikiugu alias M'Ikiugu Jeremia M'Raibuni (Deceased) v Godwin Gachagua Githui [2017]eKLR**, the Court of Appeal 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”.

8. Counsel for defendant did not lay a basis in his application. He simply stated that “we shall require the maker to avail the originals”. The defendants are not claiming that the said documents are not genuine, nor is their existence in dispute.

9. Further, the defendant’s objection has resulted in a delay in the hearing and determination of the matter herein, thereby negating the overriding objectives of the law as espoused in Sections 1A and 1B of the Civil Procedure Act, of the just proportionate and affordable and timely resolution of disputes.

10. In light of the foregoing analysis, I find no merits in the objection raised by the defence, for production of the plaintiffs’ documents without calling the makers thereof. Thus the application made by defence is hereby dismissed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

Mwirigi for defendant

C.P Mbaabu for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE