



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 38 OF 2015**

**SILVANA KARIMI CHABARI**

**DOMINICA MUTHONI M'IBARI**

**MAGDALENE MWARI MWANJA**

**MWOROMO MUGIRA M'MUGAMBI.....PLAINTIFFS**

**VERSUS**

**JOHN MUTHURI (Administrator of**

**the Estate of M'ANANUA M'ITERE)**

**FABIAN KITHINJI M'ANANUA the Legal Representative**

**of the Estate of M'ANANUA M'ITERE.....DEFENDANTS**

**RULING**

1. On 21/04/2021, DW4 had just concluded his testimony when Mr. Thangicia counsel for defendant made an application for the statement of a witness by the name Murungi Mwamba dated 12/09/2012 be produced as evidence as the said witness had passed on. It was averred that the statement relates to the relationship of the parties herein and the subject matter. That the Evidence Act makes provisions for this scenario where in case of a death, the statement of the deceased relating to the relationship of parties, can be produced in court as evidence.

2. Mr. Mwanzia, counsel for the plaintiffs objected to the application averring that these were civil proceedings and it was imperative that the veracity of a witness statement is tested in cross examination. The plaintiffs' side would not be able to test the truthfulness or otherwise of the said statement if it is produced as evidence. Further, that the defence had ample time to substitute and to bring another witness who could testify in relation to the evidence. Counsel for the plaintiff posed the questions; who will produce the said statement, who will testify on it, and who would be cross examined? Thus the court was urged to dismiss the application.

3. In rebuttal, Mr. Thangicia made reference to Section 2 of the Evidence Act, stating that the same applies to all court proceedings save arbitration. That Section 33 of the Evidence Act is self-explanatory on how the court should adopt the statement. Finally, counsel for defence stated that the court will appreciate that the parties are very elderly.

4. I have considered all the arguments advanced by both sides of litigation. **Section 33 of the Evidence Act** provides that:

*“Statements of deceased persons, etc.....when*

*Statements written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases.....*

*(e) relating to existence of relationship*

*when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the*

*statement was made before the question in dispute was raised;”*

5. I have gone through the statement in question which is to be found on page 15 of the defence bundle. True, the statement does make reference to the issue of relationship, but as a marginal point. The core content in that statement relates to how the disputed land came to be in the hands of the M’ANANUA’S family. It follows that the statement does not fall in the ambit of the above mentioned proviso of the Evidence Act.

6. I however note that the said statement is eerily similar to that of DW3 Francis Muthuri M’Ituamwari. Thus much of whatever the deceased could have stated has been captured in the evidence of a witness who has not only testified, but has been cross examined.

7. All in all, I disallow the application made by defence counsel.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12<sup>TH</sup> DAY OF MAY, 2021**

**IN PRESENCE OF:**

C/A: Kananu

Thangicia for defendant

Defendant

Plaintiffs

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**