In re Estate of Simeon Kipkilel Kirui (Deceased) (Probate & Administration 34 of 2006) [2025] KEHC 4318 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4318 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 34 OF 2006

JRA WANANDA, J

APRIL 4, 2025

IN THE MATTER OF THE ESTATE OF SIMEON KIPKILEL KIRUI (DECEASED)

BETWEEN

PHILIP CHEPKWONY ..... PETITIONER

AND

JOHN KIPKEMBOI KILEL ..... 1ST BENEFICIARY

ANDREW KIPSANG KILEL ..... 2ND BENEFICIARY

CORNELIUS KIPNG'ENO KILEL ..... 3RD BENEFICIARY

PHILIP KIPLAGAT KILEL ..... 4TH BENEFICIARY

GODFREY KIPROP MATNA ..... 5TH BENEFICIARY

AND

PETER CHERUIYOT KILEL ..... 1ST RESPONDENT

PAUL KIPRONO KILEL ..... 2ND RESPONDENT

RULING

1. The Objection filed in this matter is partly heard under a viva voce trial, and before Court for determination is the Application filed by the beneficiaries named above. The Application is the Summons dated 22/07/2024, is filed through Messrs Martim & Co. Advocates, and seeks orders as follows

    i. That a certified copy of the last Will of Simion Kipkilel Kirui dated 7th November 1997 be admitted in evidence.

    ii. That the costs of this Application be in the Cause.

2. The background of the matter is that the deceased herein, Simion Kipkilel Arap Kirui, died on 17/10/1999 aged 88 years. From what I can decipher, upon his death, a Petition for Probate of a Will was filed in this Cause on 27/02/2006 by the Petitioner, Philip Chepkwony, as the executor of the Will. It does not appear that any Grant has been issued to date as I have not come across any in the Court file.

3. On 19/10/2007, the 2 Objectors, as sons of the deceased, filed a challenge against the Petition and subsequently, also filed a Cross-Petition for the Grant, as well as an Answer to the Petition. I also note that the main challenge raised in the Objection was on the authenticity of the Will alleged by the Petitioner and also on the Will's clarity. It is also apparent that the main dispute in this Cause is the inheritance and/or distribution of the parcel of land known as Nandi/Kaboi/977 amongst the survivors of the deceased, and which property was owned by the deceased. All the 5 Applicants and the 2 Objectors are children of the deceased and thus siblings.

4. There is indication that another Succession Cause for the estate of the same deceased was subsequently filed, namely Eldoret High Court P&A No. 261 of 210, and which appears to have been consolidated with this instant Cause.

5. Be that as it may, by the orders made on 16/07/2018 by Sewe J, it was directed that the Objection be heard by way of a viva voce trial. The trial then commenced on 25/03/2019 when the 1st Objector testified. However, upon the parties' agreement, further hearing was deferred and the matter referred to Court annexed Mediation which however was not successful. The parties therefore returned to Court and the trial resumed on 9/10/2019 when the 2nd Objector and his 2 sisters testified as PW1, PW2 and PW3, respectively, and the Objectors' case closed. Upon the transfer of Sewe J from this station, the matter was taken over by Ogola J who on 25/04/2022 heard the testimony of the Applicant's 1st witness who testified as DW1. He is the 3rd beneficiary named above, Cornelius Kipngeno Kilel. Again, upon the transfer of Ogola J, I took over the case and the Applicants' 2nd witness, Advocate Jones Nyachiro, who was said to have been one of the 2 Advocates who witnessed the Will, began giving his evidence-in-chief testimony as DW2.

6. In the course of the testimony of Mr. Nyachiro (DW2), led by Mr. Martim, Counsel for the Applicants, it transpired that the alleged original Will sought to be relied on by the Applicants could not be traced and that what was on record was a photocopy. While responding to a question touching on a discrepancy on the description of the suit property as stated in the said copy, Mr. Nyachiro sought to make comparisons with the alleged original Will. At that juncture, Ms. Odwa, Counsel for the Objectors raised an objection. The record captures that portion of the proceedings as follows:

Ms Odwa	"I object to the reference to the original Will alleged – the one alleged to be referring to the plot as No. 977. I have never seen it, not even the copy."
Martim	"The said original Will is in a brown envelope. It was to be in the strong room since this file is a strong room file."
Court	"i) The alleged original Will is not before the Court. If the same is the strong room, then it has not been brought. ii) For the said reason, the witness DW2 will be stood down to enable Mr. Martim to confirm the whereabouts of the said original Will. …….

7. Mr. Nyachiro then resumed his testimony on 23/11/2023. On that date, the 1st Objector who was in Court, also withdrew his Objection. I also note that he had by his earlier letter dated 5/05/2022, also indicated such withdrawal of his Objection against the Will and an indication that he had now recognized the same as legitimate.

8. An attempt by Mr. Nyachiro, in the course of his testimony, to produce a certified copy of the Will was again objected to Ms. Odwa. The record reflects the proceedings as follows:

Ms Odwa	"I still object to the production of the original Will by Mr. Nyachiro – the witness – because the original that he says he corrected or amended has not been supplied. I need to see that one too. The one he seeks to produce is the certified copy whose original has not been supplied."
Martim	"Wills (both) including the Affidavits of Mr. Lilan and Mr. Nyachiro contain the error. Although Mr. Kalya himself was summoned to come and produce the Will he successfully argued that the specific Advocate who prepared the Will do come and produce the Will. When we made the inquiry, we were informed that the Will cannot be found"
Court	"i) The objection raised on the production means that Mr. Nyachiro – witness – cannot conclude his evidence today. He will again be stood down until the issue of production of the Will is dealt with. ii) I direct that Mr. Martim file a formal Application within 14 days seeking that the Court admit secondary evidence – certified copy of the Will. "iii) The witness is again stood down. .....

9. It is therefore against this background that the instant Application was filed 8, albeit months later, obviously grossly outside the 14 days window granted by the Court. The Application is supported by the Affidavit sworn by the said Advocate Jones Nyachiro.

10. In the Affidavit, Mr. Nyachiro deponed that he witnessed the execution of the Will, and that the deceased died testate having left a valid Will. He urged that Section 14 of the *Law of Succession Act* provides that "no person by reason of his being an executor of a Will, shall be disqualified as a witness to prove the execution of the Will to prove the validity or invalidity thereof", and that it is in the interest of justice and in respecting the wishes of the deceased that a certified copy of the Will ought to be admitted in evidence.

Replying Affidavit

11. The 2nd Objector opposed the Application by filing the Replying Affidavit sworn on 26/07/24 through the firm of Messrs Nyairo & Co. Advocates. He deponed that the Application was made too late in the day as the Applicants have all along known that they were not in possession of the original purported Will and did nothing to move the Court sooner, and in any event, within the 14 days limited by the Court to do so as per the directions issued on 23/11/2024. He deponed that no explanation has been tendered as to why the Applicants are seeking to rely on the certified copy of the Will, that a certified

copy of the Will implies that the one verifying it had the original at the time of certification but in the instant case, no explanation has been offered as to where the original is. He added that the purported Will which the beneficiaries intend to produce is not what is the subject of contention in this matter as the genesis of the objection filed stems from the Petition filed by the then executor Philip Chepkwony in which he applied for Grant of Probate on the basis of a Will dated 7/11/1997 whose original was submitted and forms part of this Court's record, and that no other Petition was filed bringing in the purported Will which the beneficiaries want to now produce.

12. According to him, it thus follows that the purported Will has no relevance in resolving the dispute in these proceedings, that this is fortified by the fact that the executor, the Applicants and the said Jones Nyachiro and Simon C. Lilan who both attested to the Will have, in various Affidavits filed in these proceedings, confirmed that the Will submitted by the executor while petitioning for the Grant of Probate was the Will which the deceased executed. He urged that at no time was the alleged Will, which is now being paraded as the original, ever presented before this Court. He deponed further that it is therefore suspect and mischievous for the Applicants to now create another Will whose authenticity is questionable midway into the proceedings and use the Court to have a certified copy thereof admitted as evidence when no such Will ever existed, and that it is merely a creation by the Applicants. He stated that his suspicion was heightened by the fact that in the original Will submitted to Court while petitioning for the Grant, the property indicated therein is Nandi/Kaboi/477 which the 2nd Objector challenged as not belonging to the deceased, hence his argument that the estate should be administered as being intestate and that however, the Will which the Applicants are now seeking to introduce is seeking to rectify the anomaly by introducing the correct property description, Nandi /Kaboi/977 which is the one that belongs to the deceased, and that this is only after he had raised the issue of the discrepancy in his Objection.

13. He also observed that no Affidavit has been sworn by any representative from Ms Kalya and Co. Advocates who drew the Will and filed the Petition, recanting the Will they submitted to Court, and clarifying the existence of another Will and the whereabouts of the original. In conclusion, he deponed that he would be greatly prejudiced if the Application were to be allowed when he has already testified and closed his case on 9/10/2019 and especially when the purported Will is not the subject of these proceedings.

Hearing of the Application

14. The Application was canvassed by way of written Submissions. The Applicants filed their Submissions dated 23/09/2024 while the 2nd Objector's is dated 19/08/2024.

Applicants' Submissions

15. Mr. Martim, Counsel for the Applicants, submitted that Jones Nyachiro Advocate witnessed and executed the Will, that the admissibility of certified copies of documents has not been provided for in the *Law of Succession Act* but is found in the *Evidence Act* at Section 83, that Section 66 of the *Evidence Act* defines "secondary evidence" and that proof of "secondary evidence" is found in Section 68 of the *Evidence Act*. He urged that Mr. Nyachiro attested the Will referred to, a certified copy whereof he intends to produce, that it should be noted that at the time of attesting the Will, Mr. Nyachiro was then employed at the firm of Kalya & Co. Advocates as an Associate Advocate which law firm he no longer works for. He submitted further that the proprietor of the said law firm appeared in Court under Summons and informed the Court that the witnesses to the Will be allowed to produce it, that he confirmed that indeed the Will was prepared by his law firm but the attending Advocates were Simon

Lilan and Mr. Nyachiro, , and that the 2 Advocates were in a position to authenticate the veracity of the contents of the version referred to.

16. He submitted further that Mr. Nyachiro is not in a position to produce to original version not on his default, as captured in Section 68(1)(c) by reason of having ceased being an employee of the law firm that drew the Will, that the certified copy meets the threshold set out in the *Evidence Act* as per Sections 68(1)(a)(2) thereof, and that Section 14 of the *Law of Succession Act* is instructive that it shall not disqualify the deponent to prove the execution of the Will in its certified form to prove the validity or invalidity thereof. According to him, no prejudice shall be occasioned to the Objectors if the version of the Will is admitted in a certified copy form as the Objector will have the right to cross-examine the witness. He also cited Section 32 of the *Evidence Act* and urged that it is in the interest of justice that the Application be allowed so as to avoid delay in the disposal of this matter.

2 nd Objectors' Submissions

17. Ms. Odwa, Counsel for the 2nd Objector, on her part, reiterated the contents of her client's Replying Affidavit and urged that the Application has been made too late in the day as the Objectors have already testified and closed their case, that the Applicants have all along known that they are not in possession of the original purported version of the Will cited but they did nothing to move the Court sooner, that in any event they did not move the Court within the 14 days granted on 23/11/2024. She reiterated that no explanation has been offered to explain the delay and that therefore, the Applicants are not deserving of the discretionary orders sought as a reward for their indolence. She further reiterated that no explanation has been tendered as to why the beneficiaries are seeking to rely on the certified copy, where the original Will is and the circumstances, if any, for its unavailability, that the purported version which the Applicants intend to produce is not what is the subject of contention in this matter and that the genesis of the Objection is the Petition filed by the then executor in which he applied for the Grant on the basis of a Will dated 7/11/1997 whose original was submitted and forms part of this Court's record.

18. She reiterated that no other Petition was filed to introduce the version which the Applicants now want to now produce so that it can fall within the ambit of Section 51(1)(3) of the Law of Succession. She reiterated that the version cited has no relevance in resolving the dispute herein, that the production thereof was suspicious as the version submitted to Court while petitioning for the Grant indicated a different property description and what the version cited seeks to introduce is now to rectify the anomaly by introducing a different description, and that this is only after the 2nd Objector had raised the issue of discrepancy in his objection. She also reiterated that no Affidavit has been sworn by any representative from Ms Kalya and Co. Advocates who drew the Will and filed the Petition, recanting the version of the Will they submitted to Court and clarifying the existence of another version. She further reiterated that the 2nd Objector stands to be greatly prejudiced if the Application were to be allowed as he already testified and closed his case way back on 9/10/2019.

Determination

19. The issue that arises for determination herein is "whether a certified copy of the alleged Will made by the deceased should be admitted in evidence, the original having been said to be untraceable."

20. The definition of what amounts to "secondary evidence" is found at Section 66 of the *Evidence Act* which provides as follows:

    66. Secondary evidence includes—

        a. certified copies given under the provisions hereinafter contained;

b. copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

c. copies made from or compared with the original;

d. counterparts of documents as against the parties who did not execute them;

e. oral accounts of the contents of a document given by some person who has himself seen it.

21. Regarding instances when "secondary evidence" may be permitted to be produced in evidence, Section 68 of the *Evidence Act* provides as follows;

1. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

a. when the original is shown or appears to be in the possession or power of –

i. the person against whom the document is sought to be proved; or

ii. a person out of reach of, or not subject to, the process of the court; or

iii. any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;

b. when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;

c. when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;

22. The Courts have interpreted the above provisions of law in many cases and the instances when secondary evidence may be produced, and the conditions that must be met are now well settled. For instance, Karanja J, in the case of Jemima Moraa Sobu vs Trans National Bank Ltd 2016 eKLR, stated that:

> " Primary evidence is therefore the evidence which the law required to be given first. This is what is referred to as the best evidence principle. Secondary evidence is evidence, which may be given in absence of the better evidence which the law requires to be given first when a proper explanation is given of the absence of that better evidence. Under Section 68 (1) of the *Evidence Act*, secondary evidence may be given of the existence, condition or contents of a document in specified cases including when the original has been destroyed or lost, or when the party offering the evidence of its contents cannot, or any other reason not arising from his own default or neglect, produce it in a reasonable time."

23. On his part, Waweru J, in the case of Jane Wambui V Stephen Mutembei & Another [2006] eKLR, stated as follows:

> "..... Under section 67 of the *Evidence Act*, Cap. 80, documents must be proved by primary evidence except in the cases set out in section 68 of the Act where secondary evidence may be given of the existence, condition or contents of a document. The definition of primary evidence is to be found in section 65 of the same Act. Generally speaking, primary evidence means the document itself produced for the inspection of the court. There is

no dispute that the typed copy of minutes sought to be introduced in evidence by PW4 constitutes secondary evidence. None of the exceptions set out in section 68 aforesaid have been invoked, and none of them have been established, either by the testimony of PW4 or by any other circumstance placed before the court. I therefore find that the document in question cannot in law be produced in evidence. I so hold. The Petitioners' objection is thus upheld with costs .....".

24. Mativo J (as he then was), in the case of In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR, in his usual elaborate and detailed style, also stated as follows:

> " Section 67 of the *Evidence Act* provides that documents must be proved by primary evidence except in the cases hereinafter mentioned. Section 67 is the basis of what is called the best evidence rule, which provides that documents must be proved by the best evidence. The allowance of secondary evidence is a concession by the law to allow the second best. The optimal will be the document itself or whatever would comprise the primary evidence. It is rarely the case that secondary evidence will be allowed where a party could have produced the original.
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> Secondary evidence, as a general rule is admissible only in the absence of primary evidence. Essentially, secondary evidence is evidence which may be given in the absence of that which the law requires to be given first, when a proper explanation of its absence is given.
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> The best evidence rule is a legal principle that holds an original copy of a document as superior evidence. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, means that so long as the higher or superior evidence is within the possession of a party, or may be reached by the party, no inferior proof will be allowed. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the exceptions provided under Section 68 of the *Evidence Act*. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. The rule specifies that secondary evidence, such as a copy will not admissible if an original document exists and can be obtained.
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> .....
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> The Indian *Evidence Act*, 1872 lays down the law on pre-conditions for leading secondary evidence; these are original document could not be produced by the party relying upon the documents in spite of best efforts, that inability to produce the document must be beyond his control, that either the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used. This position was restated in the case of Rakesh Mohindra vs Anita Beri & others.
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> Further, in the said case the court held that where a party wishes to lead secondary evidence, the court is obliged to examine the probative value of the document produced in the court or its contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally settled that mere admission of secondary evidence, does not amount to its proof. The genuineness, correctness and the existence of the document shall have to be established during the trial and the trial court shall record the reasons before relying on the secondary evidence.

.....

> My interpretation of the above provisions of the *Evidence Act* is that secondary evidence as a general rule is admissible only in the absence of primary evidence and when a proper explanation of its absence is given. Such secondary evidence cannot be admitted without the non-production of the original being first accounted for in a permissible manner and only after satisfying the conditions provided for under Section 68 of the Act.
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> In other words, there must be proper justification to allow a party to adduce secondary evidence. In the present case I am not satisfied that non production of the original was satisfactorily accounted for.
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> In Lee vs Tambag it was held that before a party is allowed to adduce secondary evidence to prove contents of the original, the party must prove the following:- (i) the existence or due execution of the original; (ii) the loss and destruction of the original or the reason for its non-production in court; and (iii) on the part of the party, the absence of bad faith to which unavailability of the original can be attributed. The correct order of proof is as follows; existence, execution, loss, and contents. A photocopy may not be produced without accounting for the original."

25. Having set out the above judicial pronouncements, which I fully associate with, the question to be answered is therefore whether in seeking to produce the copy of the alleged Will, the Applicant has sufficiently brought himself within the exceptions recognized and set out at Section 68 of the *Evidence Act*.

26. In answering the above question, I may restate that there are two versions of the alleged Will said by the Applicants to be dated 7/11/1999. The Applicants insist that it is one and the same Will, and not two. True, the two versions are identical save for the description of one of the two properties mentioned therein. Both versions indicate that they were drawn by the law firm of Kalya & Co. Advocates and were witnessed by two Advocates who were then associates in the law firm, namely, Mr. Jones Nyachiro and Mr. Simon Lilan. It is also important to recall that it is the same law firm of Kalya & Co. that filed the Petition herein before ceasing to act for the Petitioner. The first version of the Will is the one which was used to file this Cause in the year 2006. In that first version, one of the two properties mentioned therein is described as Nandi/Kaboi/477. The original of this version is available and is on record. The second version, on its part, refers to a property described as Nandi/Kaboi/977. This version of the Will was introduced into this matter subsequently in terms of a photocopy as the Applicants claim that the original thereof is untraceable.

27. Comparing the two versions, it is clear that they are identical, word-for-word, and the only difference is in the description of the property intended to be bequeathed. The parties agree that the correct property which was owned by the deceased is Nandi/Kaboi/977. This, indeed, is the property whose inheritance is in contestation in this Cause. According to the Applicants, which narrative was given by Advocate Jones Nyachiro, who appeared as a witness before he was stood down, this second version of the Will is the final and correct version, that it was made when the first version was amended by the deceased to correct the typographical error in the description of the property and that this correction was made in his presence. According to Ms. Odwa however, this Cause having been commenced on the basis of the first version of the Will, the second version cannot be admitted. My understanding of Counsel's submission is that reliance on this second version of the Will would nullify the entire Petition and a fresh Petition may have to be filed.

28. Counsel also doubted the authenticity of the second version and alluded that it was created with the intention of clandestinely amending the initial version. My understanding of her submission is that the second version was "manufactured" after the realization that the property mentioned in the Will was different, and which realization was brought to light by the Objector.

29. In light of the above background, in my view, the easiest way to have laid the above confusion to rest would have been for the Applicants to call a representative from the makers of the Will(s), namely, the law firm of Kalya & Co. Advocates to come and shed light on the issue or at least swear an Affidavit thereon. It is the said law firm that would be competent and capable of explaining whether indeed a correction was made on the initial Will, the circumstances under which such correction was made, the time when it was made and such other relevant matters. It is the said law firm which would also confirm that the Will is indeed lost or untraceable, and if so, the circumstances surrounding such loss. What disturbs me however is that there is no word whatsoever from the said law firm, which has not been alleged to have ceased operating or is unwilling to testify or to swear an Affidavit. Although Mr. Nyachiro stated that he witnessed the Will(s), he did not state that he was the maker or participated in the drafting thereof. Drawing a Will and witnessing it are clearly two separate roles and unless an Advocate claims to have drafted it and also witnessed it, no assumption can be made that mere witnessing of a Will by an Advocate would also mean that the Advocate participated in its drawing.

30. Indeed, I note from the record that on 25/04/2022 after the Petitioner's witness, Cornelius Kipngeno Kilel concluded his testimony, Mr. Martim successfully applied for Summons to be issued requiring Mr. Wilson Kalya, the proprietor of the law firm of Kalya & Co. Advocates to attend Court to shed light. Similar Summons were also issued in respect to Advocates Jones Nyachiro and Simon Lilan, respectively. Strangely, on 20/06/2022, when Mr. Kalya presented himself to Court, the record captures Mr. Martim to have submitted as follows:

> " I am inclined to seek adjournment herein. I have just realized that the witness I need is not Mr. Wilson Kalya who is actually in Court. I seek another date to get proper witness, Messrs Simon Lilan and Jones Nyachiro."

31. In light of the above, Mr. Kalya was discharged without testifying. It is not clear why, after initially finding it necessary to summon Mr. Kalya, Mr. Martim changed his mind about putting him in the dock. With this about-turn, a golden opportunity was lost insofar as an explanation on the two versions of the Will is concerned.

32. I also note that the issue of the discrepancy in the description of the property cited in the Will used to file this Cause was raised when the Objectors filed the challenge herein in the year 2007. That issue is therefore not an ambush on the Applicants who however did nothing to address that issue even when the viva voce trial commenced in 2019. Indeed, the Objector has now closed his case. It is clear that the Objector's witnesses strongly testified at length on the issue of the said discrepancy in the description of the property. For the Applicants to now suddenly "spring up" when the Objector has already closed his case and in the course of the testimony of their first witness, to now seek to address the issue of the discrepancy by seeking leave to introduce a certified copy of the Willis, in my view, bad practice and will seriously prejudice the Objector's case. There is no explanation why since the year 2007 when the issue of the discrepancy in the two versions of the Wills was raised, the Applicants never saw it fit to make the Application that they are now belatedly making.

33. Most damning to the Applications however is the fact that on 23/11/2023, upon standing down Mr. Nyachiro as a result of the objection raised against production of the certified copy of the Will, I gave them leave to file the instant Application within 14 days. As aforesaid, that timeline was ignored

and was never observed as the Application was filed on 22/07/2024, about 8 months later. The Petitioners have said nothing about this obviously inordinate delay at all. To imagine that the Court will simply "look the other way" and fail to interrogate such delay would be either abject naivety or in the alternative, a blatant case of imagined entitlement. This, the Court will not accept.

34. Further, as correctly pointed out by Ms. Odwa, the very act of certifying a document as a true copy of the original presupposes that the "certifier" has had sight of the original. In this case, the identity of the person who would carry out such "certifying" has not even been disclosed to the Court and neither has the Court been even informed whether that person has seen the original, and whether he even has the authority of the makers of the Will to certify it.

35. In respect to the failure to establish a basis for production of secondary evidence, I again cite the decision of Mativo J (as he then was), in the case of In re the Estate of Charles Ndegwa Kiragu (supra), in which he found as follows:

> " Counsel for the protestor opposed the production of the copy and submitted that the so called certified copy falls within the exceptions of the provisions of the Section 68 of the *Evidence Act*. Counsel submitted that the copy is purported to be certified by the assistant chief who is not identified nor is he the maker or custodian of the original document. Counsel further submitted that certification requires comparison with the original and it's not clear who has custody of the original. Counsel also submitted that no explanation was offered as to why the chief could not attend court and that no notice was issued under Section 69 of the *Evidence Act*. Counsel also submitted that he requires to cross-examine the maker of the documents on for its contents.
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> .....
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> The document sought to be produced in this case is a copy. It's not clear who has the custody, power or control of the original. It's not clear whether the document allegedly held by the chief is an original because the copy which the applicant sought to introduce is a copy of a certified copy. It's not clear whether the chief is holding the original or a copy. The reason offered for the inability to avail the original is that the chief had failed to attend court.He was only served once and there was no application or effort to make a second attempt. It was not shown that the inability to produce the original fell under any of the above exceptions. Above all, no notice was served upon the said chief as provided for under the above section.
>
> I find no reason to dispense with the best evidence rule which requires the production of an original document. The application to dispense with the production of the original as sought and allow a copy of the document in question to be produced in this case is hereby refused.

36. In light of my findings above, coupled with the principles enunciated in the various authorities cited, my conclusion is that the Applicant has woefully failed to give a proper explanation for the alleged unavailability or, of the whereabouts of the original of the copy of the alleged Will that is now sought to be produced. The "integrity" of the copy sought to be produced having been put into question and the maker thereof having not been called upon to say anything regarding the alleged "missing" of the original, there being inordinate delay in bringing the Application, and the Application coming long after the Objector had already his case, I am not persuaded that there would be any justification to permit the Applicant to produce a copy of the alleged Will in place of the original.

37. It is right law that "secondary evidence" on a document cannot be admitted without the whereabouts of the original first being sufficiently accounted for. Without such accounting and proper explanation,

it cannot be said that an Applicant seeking to produce a copy in evidence, in place of the original, has satisfied the conditions, or met the threshold, required to bring oneself within the exceptions recognized under Section 68 of the *Evidence Act*. The conditions set must be fulfilled before secondary evidence can be admitted. I am afraid in this case, the conditions have not been met or fulfilled as no sufficient factual foundation has been laid to establish the justification to adduce secondary evidence.

Final orders

38. In the premises, the Summons dated 22/07/2024 is dismissed with costs to the 2nd Objector.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4 TH DAY OF APRIL 2025

....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Martim and Kemboi for the Beneficiaries

Ms. Kemboi for Ms. Odwa for the Objectors

Court Assistant: Brian Kimathi