Lwangu v Ndote (Environment & Land Case 79 of 2010)
[2021] KEELC 2 (KLR) (10 November 2021) (Ruling)

Sofie Feis Caroline Lwangu v Benson Wafula Ndote [2021] eKLR

Neutral citation: [2021] KEELC 2 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 79 OF 2010

FO NYAGAKA, J

NOVEMBER 10, 2021

BETWEEN

SOFIE FEIS CAROLINE LWANGU ..... PLAINTIFF

AND

BENSON WAFULA NDOTE ..... DEFENDANT

Circumstances in which the court exempt the best evidence rule and allow for the presentation of secondary evidence.

Reported by Ribia John

Law of Evidence *– documentary evidence – scope of documentary evidence – definition of a document - what was the meaning of a document/documentary evidence under evidence law.*

Law of Evidence *– documentary evidence – production of documentary evidence – procedure – requirement for documentary evidence to be produced physically in court by the maker of the document - what was the procedure of producing documentary evidence – under what circumstances would a court allow the presentation of documentary evidence by a person who was not the maker of the document? - Evidence Act (cap 80) section 35(1) (b).*

Law of Evidence *– documentary evidence – production of documentary evidence - requirement to produce documentary evidence physically – application of the requirement in virtual/electronic hearings - whether courts that were engaged in virtual hearings or any use of technology to conduct hearings in which there was need to rely on documentary evidence could exchange the requirement of producing the document physically for inspection by court to allow the presentation of the document electronically - Civil Procedure Rules order 3 rule 2, order 7 rule 5 and order 16 rules 6 and 7; Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (Mutunga Rules), rule 28.*

Law of Evidence *– primary evidence vis-à-vis secondary evidence – best evidence rule – exceptions to the best evidence rule - under what circumstances would the court exempt the best evidence rule and allow for the presentation of secondary evidence – Evidence Act sections 66, 67, 68, 69 and 70; Civil Procedure Rules, order 3*

rule 2, order 7 rule 5 and order 16 rules 6 and 7; Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (Mutunga Rules), rule 28.

***Statutes** – interpretation of statutes – interpretation of rule 28 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (Mutunga Rules) - whether rule 28 of the Mutunga Rules that dealt with objections to documents at the pre-trial conference if a notice had been issued to a party only applied to filing of suits and not to the filing of documents that would go together with defences and counter-claims.*

Brief facts

In the course of the instant suit's hearing, the plaintiff's witness (PW2) produced a photocopy of consent. The defendant raised an objection to the production of the consent on account of the fact that it was a photocopy and that the witness was not the maker. The instant court upheld the objection. The consent was marked as PMFI 1 (later to be changed in the record to PMF 6).

The witness then proceeded with his testimony. He sought again to produce a photocopy of another document, this time, a two-page letter dated 12/2/1982. Once more, the defendant raised an objection to the production of the letter as an exhibit. The second objection was the subject of the instant ruling.

Issues

i. What was the meaning of a document/documentary evidence under evidence law?
ii. What was the procedure of producing documentary evidence?
iii. Whether rule 28 of the Practice Directions on Proceedings in the Environment and Land Courts and on Proceedings Relating to the Environment and the Use and Occupation of and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (Mutunga Rules) that dealt with objections to documents at the pre-trial conference if a notice had been issued to a party only applied to filing of suits and not to the filing of documents that would go together with defences and counter-claims.
iv. Whether the marking of a document for identification dispensed with the requirement to prove a document.
v. Under what circumstances would the court exempt the best evidence rule and allow for the presentation of secondary evidence?
vi. Under what circumstances would a court allow the presentation of documentary evidence by a person who was not the maker of the document?

Relevant provisions of the Law

Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (Mutunga Rules)

Rule 28.

28. In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules, 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference:

(a) The issuance of appropriate Orders and directions to ensure parties comply and take pre-trial conferences seriously as they constitute a vital stage in the overall case management and the efficient administration of justice.

(b) The issuance of an Order striking out pleadings or imposing costs or similar sanctions due to non-compliance with pre-trial directions and other timelines.

(c) The issuance of Directions on the number of conferences to be held before trial.

(d) The issuance of summons for witnesses to attend court to testify and/or produce documents, and for the filing of Witness Statements in respect of such witnesses.

(e) The issuance of an Order requiring the filing of more comprehensive Witnesses Statements;

(f) The issuance of an Order that the parties agree and narrow down issues for trial.

(g) Taking of all objections to the production of specific documents, where notice has been issued to the other party ,thereafter, objections on the production of any document shall not be entertained at the main hearing;

(h) The issuance of Directions that a matter shall be determined through filed witness statement(s) and bundle of documents;

(i) Alternatively, the issuance of Directions to determine and fix the number of witnesses to testify at the trial;

(j) The issuance of an Order that the matter to be referred for arbitration or make such other orders for meditation and negotiation (as may be appropriate in the circumstances of the case) to ensure the expeditious disposal of the matter.

(k) Where appropriate, the issuance of conservatory orders or maintenance of status quo until a matter is fully and finally determined.

(l) The Judge shall have the discretion to give any further orders and/or directions as the ends of justice may require.

Evidence Act (cap 80)

Section 35 - Admissibility of documentary evidence as to facts in issue

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say

(b) if the maker of the statement is called as a witness in the proceedings:

Section 68 - Proof of documents by secondary evidence

(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;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 79 of this Act;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1),

(a) any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.

(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.

Held

1. Production of documentary evidence, if sought by parties, was a crucial aspect in any trial just like oral testimony. It was governed by the Evidence Act (cap 80) and the procedure which was to be followed by parties beefed up by order 3 rule 2, order 7 rule 5 and order 16 rules 6 and 7 of the Civil Procedure Rules. Those provisions related to the filing of documents which should accompany the plaint, defence, and counterclaim (if any) respectively and persons either or not summoned by court to produce documents and requiring persons in court to produce there and then documents in their possession. Then, the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (Mutunga Rules) especially rule 28. The sub-rule gave further directions to those of order 11 and order 3 rule 2 of the Civil Procedure Rules. It dealt with objections to documents at the pre-trial conference if a notice had been issued to a party.
2. Rule 28 of the Mutunga Rules referred to only order 3 rule 2 of the Civil Procedure Rules. Order 3 rule 2 applied to only the filing of suits. It was titled, documents to accompany suit. It then listed the documents as an affidavit verifying the correctness of the averments in the plaint, a list of witnesses, written statements signed by the witnesses except expert witnesses, and copies of documents to be relied on at the trial. It did not apply to the filing of documents that would go together with defences and counter-claims. The relevant provision which applied to documents which accompanied the defences and counter-claims was order 7 rule 5. It was titled documents to accompany defence or counter-claim. It then listed an affidavit verifying a counterclaim where there was one, a list of witnesses, written statements signed by the witnesses except expert witnesses, and copies of documents to be relied on at the trial. Rule 28 (g) then obligated parties to notify the others of any objections to documents before the pre-trial conference. If the rule would be read holistically, it applied to both the plaintiff(s) and defendant(s) and any other parties in regard to the filing of documents to accompany their pleadings. However, since it omitted the order parties and referred to order 3 rule 2 only, it may be taken to mean that only plaintiffs were required to comply with the rule (28). That would be an anomaly. There was need for the Rules Committee to amend the rule to include reference to all parties.
3. The Evidence Act provided that documentary evidence could be either primary or secondary. Primary evidence had been defined as the document itself. Section 65 (1) provided that primary evidence meant the document itself produced for the inspection of the court.
4. Technology had made it easy for hearings of matters to move from the conventional physical court sittings to virtual ones. The Covid-19 Pandemic revolutionized the manner in which, in Kenya and many other parts of the world, court sessions and filing of documents were done. Where then courts use technology to conduct hearings in which there was need to rely on documentary evidence, the procedure of producing the document itself for inspection by court could not be the only way of doing things. In some cases, the evidence could be presented electronically, by a simultaneous display to all parties *via* courtroom monitors, thereby ensuring that all involved were looking at the same item of evidence at the same time. Thus, even where the document was not produced physically in court for inspection, the original document should have been displayed by monitors to the court for it to appreciate its state. Where it required that documents were to be filed online in court it was advisable that a colour scan be used for the documents.
5. A document was anything that had an inscription which the court could rely on in evidence. Here, an inscription meant a thing that was inscribed. The synonyms included writing, engraving, wording, epitaph, legend, among others. It emanated from the verb inscribe which meant to write or curve on something especially with the intent that it be a formal or permanent record.
6. It could be anything produced for inspection by the court as long as it was that thing itself and it happened to have an inscription on it. Anything physical or tangible would suffice. It could include a computer, book, desk, stone, wall, tree, cloth, vehicle, signboard, any part of a human being as long

as his or her part of the body had an inscription, for instance, a tattoo or writing on it for whatever purpose relevant to the evidence sought to prove a fact, or cow with an inscription onto its skin to identify the animal. The point was that that animal body contained the information sought to be relied on in court. In modern times, a document included not only documents in writing, but also maps, plans, graphs, drawings, photographs, discs, tapes, videotapes, films, and negatives. A document was anything capable of being evidenced.

7. Section 65(1) of the Evidence Act stipulated that primary evidence was the document itself produced for inspection by the court. That was the best type of evidence. It was the best evidence rule. Therefore, a party in any proceedings should endeavour, at all times, to rely on primary evidence. But in cases where it was not possible to avail primary evidence in court, for example, where the evidence was of immovable nature then the court was permitted to admit secondary evidence.

8. The document which the plaintiffs' witness sought to produce was a photocopy of a letter which he alleged that he was the maker. The court did not think that the case was one that should dispense with the requirement that the plaintiff needed to issue a notice to produce the document. The plaintiff did not issue the notice. Pursuant to section 69 of the Evidence Act, the plaintiff was still obligated to rely on primary evidence. That was not what she sought to do.

9. Before a document was produced to show its contents, its existence or state/physical appearance (whichever was relevant to the proceedings before the court), it passed through three stages if it was the original or four if it was the secondary that was available.

    1. First, the document was filed in court (according to the rules or legal requirements). If the party had not complied with the rules of filing the documents, he had to seek leave of the court to be permitted to file them out of time. The court had to be satisfied with the reasons why the party failed to comply with the rules. It was not a walk in the park for a party who failed to comply with the timelines set by law or an order of the court. Even article 159(2)(d) of the Constitution that parties often relied on did not come to the aid of all parties in all situations. Each case had to be treated on its own merits. Even so, the bar for convincing the court to exercise its discretion to permit documents to be filed out of time was higher than the usual standard.
    2. Second, if the document was not the original, that was to say, it was secondary evidence, the party had to show the copy to the other parties and the court first. Then he would proceed to lay the basis for the production of the copy and not the original. That had to fall within the usual standard of satisfaction of the requirements of reliance on secondary evidence.
    3. Third, once the court was satisfied that the party had laid a proper basis for producing secondary evidence of the document, it then permitted the party to lay further basis for the production of the document. That had to be in according with the rules of relevance and admissibility in the law of evidence.
    4. Once, the above was complete, then the party had to prove the contents, state or physical appearance of the document.

10. The party that sought to rely on a document to prove the issue in court would not succeed to do so unless the court exercised its discretion under section 69(iv) of the Evidence Act to dispense with the need for the production of the document. The mere marking of a document for identification did not dispense with formal proof. When called upon to form a judicial opinion on whether a document had been proved or disproved or not proved, the court would look not at the document alone but would take into consideration all facts and evidence on record.

11. He who alleged had to prove. The plaintiff ought to have followed the above steps when purporting to produce PMF 1 (PMF 6). She bore the burden to discharge the obligation. The maker of the document had to produce the document. That was provided for in section 35(1)(b) of the Evidence Act. The maker needed not to be called if it was shown to the satisfaction of the court that either the maker was dead, or could not be found, or incapable of giving evidence; or his attendance could only be

procured with an amount of delay or expense which in the court's view would be unreasonable in the circumstances of the case.

12. The document which the plaintiffs' witness (PW2) sought to produce was a photocopy of a letter dated February 14, 1982. The document was handwritten, with a number of persons having signed it at the bottom of the second page as witnesses. PW2 alleged that was the maker. Besides, a close look at the letter which was touted to be an agreement of sale showed that the witness (PW2) was a mere witness, who appended his signature to it. He, however, alleged in his testimony, and PW1 in her testimony also purported that he (PW2) was the maker by virtue of being the secretary who allegedly drafted the letter. There was no indication in the letter that he was the secretary. Moreover, there were no minutes of a meeting held on that date or thereabout to authenticate that fact and also point out that by such minutes he was authorized to and did write the letter.

13. If the witness was to be taken as the maker of that document, nowhere did the document state so, in the face of it. Also, nowhere did the person said to be the seller, one Zebedayo Ndote, who in essence was the originator of the ideas being stated and witnessed to or proved by the witness and other people, had attested to it being so. One Mr. Zebedayo Ndote was the one who, it was shown from the face of the document, originated the document; he signed it; and it thus became difficult for the court to be convinced otherwise without further evidence in support of the witnesses' testimony that he was the one who authored the document. Granted that he did, he should at the very least call for a handwriting expert to confirm that he actually was the one who authored it. He did not do this either. For those reasons, the court could not permit the witness to produce the document in evidence.

14. Primary evidence was the best evidence and ought to be produced unless one came into the exceptions of the law permitting the production of secondary evidence. Section 68 of the Act was clear on the exceptions. The witness did not explain where the original letter was. If indeed he was the maker, it was expected that he should have retained one of the originals of the document. In the absence of the original document therefore, the witness was duty-bound to lay down the basis for the production of the copy to satisfaction of the court. He should have, if it was lost or destroyed, proved that he reported the loss at a police station. He should have probably produced a Police Abstract to prove that and also produced the findings of the police investigation about the loss or destruction. It was not enough to produce a Police Abstract or Occurrence Book (OB) record about the report of loss or destruction. The findings of the investigation arising from the report were crucial because they would show whether or not the loss or destruction was either deliberate or accidental in which case the court could absolve the person so reporting from willful destruction or concealment of evidence. Alternatively, he should have explained that the person who had the original, for example, if that was the case, could not avail it after due diligence to have him do so. The witness had not even demonstrated to the instant court that he had made efforts to trace the original document but his efforts yielded no fruit. All the witness did when in the dock was to attempt to produce a photocopy of the document in evidence without a basis for it.

15. An examination of the two photocopies showed a difference in the sizes of the writings. Page two had bigger handwriting than page one. Even assuming that the handwriting was the same, there was no explanation as to why the author would write using two different sizes of handwriting. How possible would that be? That was the more reason why it needed the original to be produced so that the writings thereon could be compared. Even if it would be taken that the change of the sizes of the writings was made at the time of photocopying, there was no explanation offered by PW2 to that effect and why it would be necessary to enlarge one page and not the other. Production of an original would resolve the doubts.

16. During his testimony, the witness stated that he wished to produce the document because he was the author and that he was present at the time when it was made. Were it that the witness had discharged

the burden laid upon above, the court could have given him the benefit of leverage of the basis relied on as being relevant to facts in issue and admitted the document.

17. It was true that PW1 was examined and cross-examined on the document dated February 14, 1982. Further perusal of the record showed that when an objection was raised at to its production, counsel for the plaintiff who conducted the matter at the time abandoned the document. Once that document was abandoned, anything the witness testified regarding it remained nothing but hearsay evidence which was inadmissible unless it passed the test of exceptions to the rule Against hearsay. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.
18. It was recommended and advised that the Rules Committee amend Rule 28 of the Mutunga Rules (Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts) to include reference to or apply to all parties, in the instant case the defendants and any other parties who could be enjoined in a suit before the re-trial directions were taken.
19. The instant case was a case where the best evidence rule had to be applied. The witness, PW2, had failed to satisfy the conditions for the production of secondary evidence as set out in section 68 of the Evidence Act and had not brought himself within the circumstances set out in sections 69 and 70 of the Act. He had failed to satisfy the provisions of sections 48(1) and 50(1) of the Act.

Objection upheld.

Citations

Cases

1. In Mansukhalal Jesang Maru V Frank Wafula ([2021] EKLR) — Followed
2. In re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased (Succession Cause 420 of 2013 [2016] eKLR) — Explained
3. Kenneth Nyaga Mwige v Austin Kiguta & 2 others ([2015] eKLR) — Followed
4. R. v. Daye ([1908] 2 KB 333 at 340) — Explained

Statutes

1. Civil Procedure Rules, 2010 (cap 21 Sub-Leg) — Order 3, 7,16; Rule 2,5,6,7
2. Evidence Act (Cap 80) — section 35(1) (b) , Section 48(1) , 65 (1), 66, 67, 68,69, 69(iv), 70 — Interpreted
3. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Consitution of Kenya,2010 Sub Leg) — Rule 28 — Interpreted

Texts

1. Keanne, A. & Mckeown, P., Modern Law of Evidence (9th Ed. Oxford U. P., p. 10)

Advocates

None mentioned

RULING

1. This suit was filed on 23/9/2010. It proceeded for hearing for the first time on 26/7/2011 when the plaintiff testified. For a span of ten years thereafter not much seems to have taken place. It then came up for hearing of further plaintiffs' case 28/9/2021. On that date the plaintiffs' witness PW2, one John Lwangu Misoga, was called to testify. The proceedings of that date gave rise to the need to write this ruling.

2. In the course of his testimony, PW2 sought to produce a copy of a consent dated 6/5/2000, signed by her three brothers namely, John Lwangu Misoga, Benson Wafula Ndote and Kennedy Amadi Ndote, for the transfer of land parcel LR No Sinyerere/715 to the plaintiff. Ms Munialo, counsel for the defendant, raised an objection to the production of the consent on account of the fact that it was a photocopy and that the witness was not the maker. Upon hearing the arguments on the objection by both counsel, this court upheld the objection. The consent was marked as PMFI 1 (later to be changed in the record to PMF 6 for proper sequencing of the plaintiff's Exhibits following the proceedings of 27/6/2011 in case it is admitted as one).

3. The witness then proceeded with his testimony. He sought again to produce a photocopy of another document, this time, a two-page letter dated 12/2/1982. Once more, counsel for the defendant raised an objection to the production of the letter as an Exhibit. The objection was fairly similar to the first one but had more ingredients to it. The objection was vehemently opposed. The court wished to deliver its ruling later that afternoon and continue with the further hearing but both counsel intimated to court their unavailability at the scheduled time. Thus, the ruling had to be delivered on another date hence the date today.

Submissions in Support of Objection

4. In support of the objection, Ms. Munialo, made wide oral submissions. She began by arguing that the witness had no capacity to, produce the document; that he was claiming to be the maker of the letter yet he was not; that the maker of the letter was one Zebedayo Ndote and the addressee, one Wijnand L. Feis, and that the two individuals were not PW2; that the witness could not be the therefore be the maker; and that the document sought to be produced was a photocopy. Counsel argued further that the witness had not laid down two bases: one, of producing the document and two, of seeking to produce the photocopy of it; and that the he had not indicated that the whereabouts of the original document is unknown. Counsel emphasized that the court had not been informed the whereabouts of Zebedayo Ndote the writer/author of the letter as she believed it to be his; and neither had the court been informed where the addressee of the letter was to produce it. It was the defendant's counsel's argument that the two pages of the document contained two different handwritings and that there was no indication on the document that the witness, one John Lwangu Misoga, was the secretary to the proceedings that gave rise to the authoring of the document whereas he purported to be the one who wrote it. Further, it was submitted that PW2 was not a party to the suit but only a witness hence not competent to introduce and produce the document. Counsel submitted further that the document was never referred to by the plaintiff in her testimony on the 26/7/2011; that it was not marked for identification and therefore it could not be produced by PW2. Counsel urged the court to allow the objection.

The Response

5. In opposing the objection, Mr Odhiambo, counsel for the plaintiff, relied on section 70 of the Evidence Act, chapter 80 of the Laws of Kenya. He argued that the said section deals with all the raised objections; that the document was referred to by the plaintiff on 26/7/2011 and urged the court to refer to Page 6 of the typed proceedings at the last paragraph; that she (PW 1) referred to it by stating that on the 14/2/1982 they made an agreement to purchase land; that the plaintiff also mentioned that it was the witness who was the secretary to the meeting wherein the document was authored and he was the one who wrote the agreement; that the plaintiffconfirmed that the witness signed it. Counsel argued further that it was the step-father of the witness, one Zebedayo Ndote, who was then selling land and that he signed the document; that the witness confirmed having written the document and that he signed it; that the witness confirmed that the handwriting in the document was his; that by virtue of section 70

the witness had capacity to produce the document for the reasons that he authored it and appended his signature thereon; and that that was the basis of tendering the secondary evidence thereof, and that since the Defence' counsel is not a handwriting expert she could not be heard to state otherwise about the content of the document yet she had not produced evidence discounting it.

Issues, Analysis and Determination

6. I have considered the clashing arguments by counsel for the respective parties. I have also considered the provisions of the law referred to and the oral submissions by both counsel. I have also taken note of the fact that the document sought to be produced is a photocopy. Further, I am alive to the fact that the document is one of those that were filed in court only a week before the date of the objection hence was not available to both the court and the defence earlier, but the court had exercised its discretion to deem it properly filed and served.

7. Production of documentary evidence, if sought by parties, is a crucial aspect in any trial just like oral testimony. It is governed by the *Evidence Act*, Chapter 80 Laws of Kenya and the procedure thereof or which is to be followed by parties beefed up by order 3 rule 2, order 7 rule 5 and order 16 rules 6 and 7 of the *Civil Procedure Rules*. These provisions relate to the filing of documents which should accompany the plaint, defence and Counterclaim (if any) respectively and persons either or not summoned by court to produce documents and requiring persons in Court to produce there and then documents in their possession. Then, the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Legal Notice No. 5178) (herein referred to as the "Mutunga Rules") especially rule 28 thereof. The Sub-Rule gives further directions to those of order 11 and order 3 rule 2 of the Civil Procedure Rules. It deals with objections to documents at the Pre-trial conference if a notice thereof has been issued to a party.

8. It is worthy of note here that rule 28 of the *Mutunga Rules* refers to only order 3 rule 2 of the Civil Procedure Rules. order 3 rule 2 applies to only the filing of suits. It is titled, "Documents to accompany suit." It then lists the documents as an affidavit verifying the correctness of the averments in the plaint, a list of witnesses, written statements signed by the witnesses except expert witnesses, and copies of documents to be relied on at the trial. It does not apply to the filing of documents that would go together with defences and Counter-Claims. The relevant provision which applies to documents which accompany the Defences and Counter-claims is order 7 rule 5. It is titled "Documents to accompany defence or counter-claim." It then lists an affidavit verifying a counterclaim where there is one, a list of witnesses, written statements signed by the witnesses except expert witnesses, and copies of documents to be relied on at the trial. Rule 28 (g) then obligates parties to notify the others of any objections to documents before the Pre-trial conference. If the rule would be read holistically, it applies to both the plaintiff(s) and defendant(s) and any other parties in regard to the filing of documents to accompany their pleadings. However, since it omits the order parties and refers to order 3 rule 2 only, it may be taken to mean that only Plaintiffs are required to comply with the rule (28). That would be an anomaly. There is need to for the Rules Committee to amend the rule to include reference to all parties.

9. The Evidence Act provides that documentary evidence can be either primary or secondary. Primary evidence has been defined as the "document itself". Section 65 (1) provides that:

> " Primary evidence means the document itself produced for the inspection of the court."

Therefore, one needs to understand what a document means in the law of evidence. But before going into the discussion of what a document is, sight should not be lost of the fact that we live in an era where technology has made it easy for hearings of matters to move from the conventional physical

court sittings to virtual ones. The Covid-19 Pandemic revolutionized the manner in which, in Kenya and many other parts of the world, court sessions and filing of documents are done. Where then courts use technology to conduct hearings in which there is need to rely on documentary evidence, the procedure of producing the document itself for inspection by court may not be the only way of doing things. In such a case, the observation by Keanne, A & Mckeown, P. (2012). *The Modern Law of Evidence*, 9th Ed Oxford UP., p 10, becomes pivotal. They write that, "...in some cases the evidence may be presented electronically, by a simultaneous display to all parties via courtroom monitors, thereby ensuring that all involved are looking at the same item of evidence at the same time." Thus, even where the document is not produced physically in court for inspection, the original document should be displayed by monitors to the court for it to appreciate its state. For instance, in the case of poaching, it would do no harm in a video of an elephant that has been killed being shown to the court rather than relying on still or motionless photos which may not only be small but also not appealing to the sense of the court. Again, where it requires that documents are to be filed online in court it is advisable that a colour scan thereof be used for the document/s. That said, understanding the meaning of a document is important.

10. A document is anything that has an inscription thereon which the court can rely on in evidence. Here, an inscription means a thing that is inscribed. The synonyms thereto include a "writing", "engraving", "wording", "epitaph", "legend", among others. It emanates from the verb "inscribe" which means to write or curve on something especially with the intent that it be a formal or permanent record.

11. It can be anything produced for inspection by the court as long as it is that thing itself and it happens to have an inscription on it. Anything physical or tangible will suffice. It might include a computer, book, desk, stone, wall (e.g. the Berlin Wall), tree, cloth, vehicle, sign board, any part of a human being as long as his or her part of the body has an inscription thereon, for instance, a tattoo or a writing on it for whatever purpose relevant to the evidence sought to prove a fact, or cow with an inscription onto its skin to identify the animal. The point is that that animal body contains information sought to be relied on it court. In modern times, a document includes "...not only documents in writing, but also maps, plans, graphs, drawings, photographs, discs, tapes, videotapes, films, and negatives" (See Keanne & Mckeown, p 255). In *R v Daye* [1908] 2 KB 333 at 340, Darling J defined a document to be 'anything capable of being evidence'. This, according to Keanne and McKeown, p 255, may include "...paper, parchment, stone, marble, or metal."

12. The meaning of a document being understood as discussed above, the relevant section of the Evidence Act, 65(1), then stipulates that primary evidence is the document itself produced for inspection by the court. This is the best type of evidence. It is called the best evidence rule. Therefore, a party in any proceedings should endeavor, at all times, to rely on primary evidence. But in cases where it is not possible to avail primary evidence in court, for example, where the evidence is of immovable nature then the Court is permitted to admit secondary evidence, as discussed below.

13. Section 67 of the Act is couched in such a manner as to make it mandatory for documentary evidence to be produced in its primary form unless the secondary evidence thereof it falls among the exceptions provided in the Act. It states "Documents must be produced by primary evidence except in the cases hereinafter mentioned." This forms the basis of the best evidence rule. Thus, by virtue of the provision, a party has no option but to either avail the document itself or bring himself within the exceptions given in the law.

14. The plain grammatical meaning of the word "must" is that it is "mandatory" to produce primary evidence except as provided. There is no room for maneuver. That mandatory requirement then attaches to placing oneself within the exceptions if there could be an 'escape'. It therefore follows that where a party fails to produce primary evidence, the document, however crucial it to his case, any other

form thereof should neither be accepted in evidence nor relied on by the court. In arriving at that conclusion, I bear in mind the constant reminder that rules (of evidence and procedure) are not made in vain: they are to be followed.

15. The mischief section 67 of the Act sought to remove is the maze of situations where, for instance, a party approaches to court with a document other than the original but which appears to be a replica of it, only for it to turn out to be a 'clone' and therefore a "fraud" in the court process. Even where there are exceptions to the production of primary evidence, the law has put in place safeguards against the sneaking into evidence of 'clones' and documents that may be referred to as frauds.

16. Under section 66 of the Evidence Act, secondary evidence includes certified copies produced as per the provisions of the Act. These include copies made from the original by mechanical processes which in themselves ensure accuracy of the copy; copies compared with such copies; copies made from or compared with the original; counterparts of documents as against the parties who did not execute them; and oral accounts of the contents of a document given by some person who has himself seen it.

17. Section 68 of the Evidence Act is to the effect that secondary evidence may be given of the existence, condition or contents of a document in situations where the original document is in possession of the adverse party or a person out of the reach of the court or any person legally bound to produce it but fails to produce, where the contents are admitted in writing by the adverse party, where the original is lost or destroyed or cannot be produced within reasonable time, the original is not easily movable, the original is a public document, the original is a certified copy and where the original consists of numerous accounts of other documents if the conditions set out herein have been met.

18. Section 69 of the Evidence Act provided instances in which the secondary evidence may be admitted as evidence in court. It provides as follows:

> "Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:
>
> Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases-
>
> (i) When the document to be proved is in itself a notice;
>
> (ii) When from the nature of a case, the adverse party must know that he will be required to produce it;
>
> (iii) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
>
> (iv) When the adverse party or his agent has the original in court;
>
> (v) When the adverse party or his agent has admitted the loss of the document;
>
> (vi) When the person in possession of the document is out of reach of, or not subject to, the process of the court;

(vii) In any other case in which the court thinks fit to dispense with the requirement."

19. In the instant case, the document which the plaintiffs' witness sought to produce is a photocopy of a letter dated 14/2/1982 which he alleges that he is the maker. The Court did not think that the case is one that it should dispense with the requirement that the plaintiff needed to issue a notice to produce the document. The plaintiff did not issue the Notice. It therefore means that pursuant to section 69, the plaintiff is still obligated to rely on primary evidence. This is not what she sought to do.

20. It is worth explaining here the four stages of the production of secondary evidence (for example the photocopy in this case). Before a document is produced to show its contents, its existence or state/ physical appearance (whichever is relevant to the proceedings before the court), it passes through three stages if it is the original or four if it is the secondary thereof that is available.

(i) First, the document is filed in court (according to the rules or legal requirements. In civil cases, refer to order 3 rule 2 and order 11 of the Civil Procedure Rules and rule 28 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (herein referred to as the "Mutunga Rules"). Worth noting here is that if the party has not complied with the rules of filing the documents, he has to seek leave of the court to be permitted to file them out of time. The court has to be satisfied on the reasons why the party failed to comply with the rules In *Mansukhalal Jesang Maru v Frank Wafula* [2021] EKLR, this court held as follows

"Essentially, I am saying here that the bar at which the court gets convinced that there is need of filing and relying on an additional document or witness statement should be very high, higher than the fifty-fifty chance. This is because by the time the parties are having the pre-trial conference, they shall have weighed their case and become satisfied that all is ready for the ship of trial to unhook from the anchor and sail."

This means that it is not a walk in the park for a party who fails to comply with the timelines set by law or an order of the Court. Even Article 159(2) (d) that parties often rely to does not come to the aid of all parties in all situations. Each case has to be treated on its own merits. Even so, the bar for convincing the court to exercise its discretion to permit documents to be filed out of time is higher than the usual standard.

(ii) Second, if the document is not the original, that is to say, it is secondary evidence, the party has to show the copy to the other parties and the court first. Then he will proceed to lay the basis for the production of the copy and not the original. This has to fall within the usual standard of satisfaction of the requirements of reliance on secondary evidence.

(iii) Third, one the Court is satisfied that the party has laid a proper basis for producing secondary evidence of the document, it then permits the party to lay further basis for production of the document. This has to be in according with the rules of relevance and admissibility in the law of evidence.

(iv) Once, the above is complete, then the party has to prove the contents, state or physical appearance of the document.

21. Short of following the above steps, the party seeking to rely on a document to prove the issue in court will not succeed to do so unless the court exercises its discretion under section 69(iv) of the Evidence Act to dispense with the need for production of the document. In *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR the Court of Appeal gave a summary of the three stages. At paragraph 18, their Lordships stated thus:

> " 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."

22. On the basis of the above position in law, this court proceeds to analyze the issues before it. It is trite law that he who alleges must prove. Thus, the plaintiff ought to have followed the above steps when purporting to produce PMF 1 (PMF 6). She bore the burden to discharge the obligation. Having noted above that documentary evidence must be produced in primary form unless it falls within the exceptions that the law provides for, the next issue is: who is to produce the document? The law is that the maker of the document of it should do so. This is provided for in section 35(1) (b) of the *Evidence Act*. The exceptions thereto are given in the proviso to the Sub-section. It provides that the maker need not be called if it is shown to the satisfaction of the Court that either the maker is dead, or cannot be found, or incapable of giving evidence; or his attendance can only be procured with an amount of delay or expense which in the court's view would be unreasonable in the circumstances of the case.

23. There are four main issues that arise from the objection as compared to the applicable law:

(a) Whether the witness has proved that he is the author of the document sought to be produced

(b) Whether the Plaintiff has laid the basis for the witness to produce a photocopy of the document

(c) Whether the witness has laid the production of the document in evidence

(d) Whether the marking or non-marking of the document avails anything in the proof of the document.

24. The court will consider each of them separately, starting with the first one.

(a) Whether the witness has proved that he is the author of the document sought to be produced

25. In the instant case, the document which the plaintiffs' witness (PW2) sought to produce is a photocopy of a letter dated 14/2/1982. The document was handwritten, with a number of persons having signed it at the bottom of the second page as witnesses. PW2 alleges that was the maker thereof. That fact was fiercely disputed. This then called for the operation of section 70 of Evidence Act. It provides that "If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting." Laying aside for later consideration the fact of it being a photocopy, how should the witness have shown that he is the maker of the document? Proof of handwriting is provided for in section 48(1) of the Act. It provides for the use of experts in handwritings. The witness did not produce any evidence of this nature. In the alternative section 50(1) of the Act which permits the use of the opinion of the opinion of any person acquainted with the handwriting of the witness was not called to his aid. And lastly, section 90 which could have been of avail to the witness by virtue of the document having been more than 20 years old was not complied with by way of evidence.

26. Besides, a close look at the letter which is touted to be an agreement of sale shows that the witness herein (PW2) was a mere witness, who appended his signature on it. He, however, alleges in his testimony, and PW1 in her testimony also purports that he (PW2) was maker by virtue of being the secretary who allegedly drafted the letter. There is no indication on the letter that he was the secretary. Moreover, there are no minutes of a meeting held on that date or thereabout to authenticate that fact and also point out that by such minutes he was authorized to and did write the letter.

27. Additionally, if the witness was to be taken as the maker of that document, nowhere does the document state so, in the face of it. Also, nowhere does the person said to be the seller, one Zebedayo Ndote, who in essence is the originator of the ideas being stated and witnessed to or proved by the witness and other people, has attested to it being so. One Mr Zebedayo Ndote is the one who, it is shown from the face of the document, originated the document; he signed it; and it thus becomes difficult for the court to be convinced otherwise without further evidence in support of the witnesses' testimony that he was the one who authored the document. Granted that he did, he should at the very least call for a handwriting expert to confirm that he actually was the one who authored it. He did not do this either. For those reasons, the Court cannot permit the witness to produce the document in evidence.

(b) Whether the plaintiff has laid the basis for the witness to produce a photocopy of the document

28. As discussed above, primary evidence is the best evidence and ought to be produced unless one comes into the exceptions of the law permitting the production of secondary evidence. Section 68 of the Act is clear on the exceptions. The witness did not explain where the original letter is. If indeed he was the maker thereof, it is expected that he should have retained one of the originals of the document. In the absence of the original document therefore, the witness was duty bound to lay down the basis for the production of the copy to satisfaction of the court. He should have, if it was lost or destroyed, proved that he reported about the loss at a police station. He should have probably produced a Police Abstract to prove that and also produced the findings of the police investigation about the loss or destruction. It is worthy of note that it is not enough to produce a Police Abstract or Occurrence Book (OB) record about the report of loss or destruction. The findings of the investigation arising from the report are crucial because they will show whether or not the loss or destruction was either deliberate or accidental in which case the court can absolve the person so reporting from willful destruction or concealment of evidence.

29. Alternatively, he should have explained that the person who had the original, for example, if that was the case, could not avail it after due diligence to have him do so. The witness has not even demonstrated to this court that he has made efforts to trace the original document but his efforts yielded no fruit. All the witness did when in the dock was to attempt to produce a photocopy the document in evidence without a basis for it.

30. Further, an examination of the two photocopies shows a difference in sizes of the writings. Page two has bigger handwriting than page one. Even assuming that the handwriting was the same, there is no explanation as to why the author would write using two different sizes of hand writing. How possible would that be? This is the more reason why it needed the original to be produced so that the writings thereon could be compared. Even if it would be taken that the change of the sizes of the writings was made at the time of photocopying, there is no explanation offered by PW2 to that effect and why it would be necessary to enlarge one page and not the other. Production of an original would resolve these doubts.

31. This point is best illustrated in the case of *Re Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu* [2016] eKLR which cited with approval the case of Lee v Tambag. It held:

> " ..... 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."

(c) Whether the witness has laid the production of the document in evidence

32. During his testimony, the witness stated that he wished to produce the document because he was the author and that he was present at the time when it was made. Were it that the witness had discharged the burden laid upon his as explained in issues A and B above, the Court could have given him the benefit of leverage of the basis relied on as being relevant to facts in issue and admitted the document.

(d) Whether the marking or non-marking of the document avails anything in the proof of the document.

33. Counsel for the plaintiff argued vehemently that one reason why the document should have been produced was the reason that PW1 was examined and cross-examined on the contents of the document. This point needs a bit of discussion here. From the record, it is true that PW1 was examined and cross-examined on the document dated 14/2/1982. Further perusal of the record shows that when an objection was raised at to its production, counsel for the plaintiff who conducted the matter at the time stated, "... I abandon the document". Once that document was abandoned, it goes without saying that anything the witness testified regarding it remained nothing but hearsay evidence which is inadmissible unless it passed the test of exceptions to the rule Against Hearsay. Refer to the Court of Appeal case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR where it stated as follows: "If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."

Conclusion

34. As discussed in paragraph 9 above, it is recommended and advised that the Rules Committee does amend rule 28 of the Mutunga Rules (ie Practice Directions on Proceedings in the Environment and

Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts) to include reference to or apply to all parties, in this case the defendants and any other parties who may be enjoined in a suit before the Pre-trial directions are taken.

35. The totality of the discussion and analysis herein is that this is a case where the best evidence rule must apply. The witness, PW2, has failed to satisfy the conditions for the production of secondary evidence as set out in section 68 of the Evidence Act and has not brought himself within the circumstances set out in sections 69 and 70 of the Act. Again, he has failed to satisfy the provisions of sections 48(1) and 50(1) of the Act. Resultantly, the objection is hereby upheld.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 10TH DAY OF NOVEMBER, 2021.

HON. DR. *IUR* NYAGAKA

JUDGE, ELC KITALE