



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISCELLANEOUS CIVIL APPLICATION NO. P&A 4 OF 2019

IN THE MATTER OF THE ESTATE THE LATE ALICE

NYAMBURA WAINANA *alias* NYAMBURA WAINAINA NJAU (DECEASED)

CHARLES WANGARA NYAGA.....1ST APPLICANT/INTERESTED PARTY

JAMES KARIUKI GITHUI.....2ND APPLICANT/INTERESTED PARTY

-VERSUS-

JOHN WABORO WAINAINA.....1ST RESPONDENT/ ADMINISTRATOR

JONAH NDICHU WAINAINA.....2ND RESPONDENT/ADMINISTRATOR

RULING

1. By a Notice of Motion dated 11th March 2019 under *Sections 1a, 1b and 3a of the Civil Procedure Act, CAP 21, Laws of Kenya, Section 68 (1) (c) of the Evidence Act, CAP 80 Laws of Kenya, Order 51 of the Civil Procedure Rules 2010 and the Constitution of Kenya, 2010*, the Applicants herein sought the following orders:

i. That the honorable court do allow the Applicants to produce certified copies of the search, transfer, land control board consent, green card, mutation form, valuation report, and title deed which documents they intend to rely on during trial.

ii. That the certified copies of documents be admitted into evidence.

iii. That cost of the application be in the cause.

2. Which application is supported by the annexed affidavit of Charles Wangara Nyaga on grounds that:

i. The Applicants cannot retrieve the original documents in which they intend to rely on during trial as they got misplaced and/or lost.

ii. That the Applicants had made copies of the original documents before the later was misplaced and/or lost.

iii. The Applicants have made attempts to attain original documents so far even filing a notice to produce dated 05.02.2018 and filed on 2.03.2018 but their efforts have been futile.

3. The Applicants humbly pray that the certified copies of documents intended to be relied upon during trial, be allowed in the interests of justice as they are core to the Applicants' case and could therefore not be dispensed with.

4. Unless the certified copies of the search, transfer, land control board consent, green card, mutation form, valuation report and title deed are not produced as they will not be in a position to prove their case.

5. The Respondents shall not be prejudiced if this application is allowed.

6. It is only fair and just that the orders herein be granted.

7. On the other hand, Respondents vide the Replying Affidavit dated 11th April 2019 deponed by Jonnah Ndichu Wainaina, the 2nd Respondent herein averred that the aforesaid application has no basis in law. The Respondents submitted that the purported certified copies of the documents are not annexed to the application and that the Applicants merely annexed uncertified copies of pleadings in **Nairobi HCCC No. 2197 of 2007** which the Respondents are not within their knowledge.
8. The Respondents submitted that the documents annexed to the application have never been admitted by them in the instant proceedings and that their initial objection to production of uncertified copies of the documents by their advocate was upheld by the honorable court.
9. It was their submission that there is no police abstract to confirm loss of documents by the 1st Applicant.
10. The Respondents alluded to the fact that there is no explanation why the Deputy Registrar of the Environment and Land Court, Nairobi cannot testify and produce the original file in respect to **ELC Cause of. 2197 of 2007** in the instant proceedings.
11. The Respondents averred that there is no basis laid by the Applicants for production of secondary evidence of documents relied on and that the 1st Applicant alleges that certified copies of the documents are in the custody of his advocates and it is therefore not clear why they have not been exhibited so that the court can make an informed decision.
12. Lastly, they submitted that they stand to be highly prejudiced if the application is allowed in the foregoing circumstances.

ANALYSIS AND DETERMINATION:

13. I have considered the submissions made by the counsels for the respective parties, the main issues of determination herein are whether the Applicants should be allowed to admit certified copies of the search, transfer, land control board consent, green card, mutation form, valuation report, and title deed as secondary evidence.

14. Admissibility of documentary evidence is explicitly provided for under the **Evidence Act Cap 80 Laws of Kenya**. The contents of a document can be proved by either primary or secondary evidence. Secondary evidence is elaborated on under **Section 66 of the Act** to include certified copies, copies of the original, counterparts of documents and oral accounts of documents provided they meet the criteria set out under **Section 68 of the Evidence Act**. The aforementioned criteria includes 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, 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 moveable, 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 condition set out therein have been met.

15. Furthermore, **Section 80 of the Act** states that:

“80. (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.”

16. **Section 81 of the Act** goes on to state that:

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

17. The documents in question listed by the Applicants i.e. search, transfer, land control board consent, green card, mutation form, valuation report, and title deed are public documents within the meaning of **Section 79 of the Evidence Act**. Ordinarily, the originals ought to be availed in court but in the absence of the same, certified copies which meet the conditions set out by the Evidence Act for the production of certified copies specifically **Section 68 of the Act**.

18. In tackling the issue of production of secondary evidence, the court in the case of **Jemima Moraa Sobu vs Trans National Bank Ltd 2016 eKLR**, held 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 arising from his own default or neglect, produce it in a reasonable time.”

19. In the present case, the Applicants indicated that they were unable to produce the original documents as they were misplaced and/or lost when the 1st Applicant was moving house. It is clear that the original documents cannot be traced. I have considered the rival arguments and

I find that the Respondents' objections to the production of certified copies of the documents in question are unmerited and they have not demonstrated what prejudice they would suffer if the court was to allow the admission into evidence of the certified copies of the documents in question.

20. In the premises therefore, and for the interest of justice and fairness, I allow the application, the Applicants are hereby allowed to adduce certified copies of copies of the search, transfer, land control board consent, green card, mutation form, valuation report and title deed as evidence. Thus the court makes the orders;

i. Applicants is allowed to produce certified copies of the search, transfer, land control board consent, green card, mutation form, valuation report, and title deed which documents they intend to rely on during trial.

ii. That the certified copies of documents will be admitted into evidence once produced vide para (i) above.

iii. That cost of the application in the cause.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 6TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE