



**REPUBLIC OF KENYA**

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

**ELC CASE NO 224 OF 2017**

**MUHOTETU FARMERS CO. LTD.....PLAINTIFF**

**VERSUS**

**JOHN MAINA NDERITU.....1<sup>ST</sup> DEFENDANT**

**CHARLES WARUGONGO KIERU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This suit was commenced by way of a Plaint dated the 2<sup>nd</sup> November 2006 and filed in court on the 3<sup>rd</sup> November 2006 wherein after, the parties had complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was certified ready for hearing and proceeded for hearing where the Plaintiff called two (2) witnesses and closed its case on the 9<sup>th</sup> April 2018.

2. Thereafter the 1<sup>st</sup> Defendant proceeded with its case whereby by the time I retired to my chambers to write this ruling, they had called a total of eight (8) witnesses.

3. The 1<sup>st</sup> Defendant testified as DW1 wherein he was cross examined and re-examined and also produced the documents that the law allowed him to produce. Thereafter six (6) other defence witnesses testified wherein the 8<sup>th</sup> witness was stood down for reason that he had not carried with him the documents that were required of him to produce as exhibits. He gave the reason for his predicament as having not been informed by Senior Counsel of the documents he needed to have brought with him to court.

4. Despite this predicament, the 1<sup>st</sup> Defendant had marked for identification 36 documents in his list of documents out of which he had produced 21 documents as exhibits. Senior Counsel then sought to have the 1<sup>st</sup> Defendant re-called, pursuant to the provisions of Section 146(4) of the Evidence Act to produce all the documents he had with him as exhibits, stating that they were public documents.

5. This application was vehemently opposed by both the Plaintiff and the 2<sup>nd</sup> Defendant's Counsel to the effect that the office that had approved the building plans was a successive office. The holders of the office in the year 2001 were still available and one had just testified as DW7, officers who were better placed to produce the building plans.

6. That indeed although the 1<sup>st</sup> Defendant was a member of the public with vested interests to this matter, yet he was not a qualified and proper person to produce the public documents. That they did not understand why Counsel had opted not to have DW7 produce the said document which was similar to Df exhibit No. 14 and 17 which then raises a lot of questions as to the authenticity of the maps which had been marked as DFMI 10 and 16.

7. In addition, Counsel for the 1<sup>st</sup> Defendant had not demonstrated to the court that the government officers that he intended to call to produce the documents were not available. That the court was alive to the fact that it had allowed Counsel for the 1<sup>st</sup> Defendant several adjournments to enable him have the said officers to come and testify. That it had been as a result of this leniency that DW7 had appeared and testified. That before the witness testified, Counsel had not informed the court that he had challenges in bringing the witnesses to court.

**Determination**

8. As earlier stated, out of the 36 documents marked for identification by the 1<sup>st</sup> Defendant, he had produced 21 documents as his exhibits, the remainder which he sought to have the 1<sup>st</sup> Defendant produce since they were public documents. The court has painstakingly gone through the 1<sup>st</sup> Defendants list of documents that had been marked for Identification and wishes to list them down for ease of reference as follows:

- i. A letter dated the 8<sup>th</sup> November 2001 from the Ministry of Lands and Settlement addressed to the plaintiff touching on the change

of user herein marked as DMFI 2

ii. Valuation report dated the 6<sup>th</sup> December 2010 marked as DMFI 7

iii. Approval of Change of user marked as DMFI 11

iv. Certificate of compliance of 5<sup>th</sup> September 2001 marked as DMFI 12

v. Letter dated the 12<sup>th</sup> September 2001 from the ministry of lands and settlement addressed to the town clerk Nyahururu Municipal Council marked as DMFI 13

vi. Letter dated 22<sup>nd</sup> October 2001 by 1<sup>st</sup> Defendant to the town clerk Nyahururu Municipal Council marked as DMFI 15

vii. Letter dated 23<sup>rd</sup> October 2001 addressed to the 1<sup>st</sup> Defendant by Nyahururu Municipal Council marked as DMFI 16

viii. Letter dated 8<sup>th</sup> November 2001 from the Ministry of Lands and Settlement addressed to the Plaintiff touching on the change of user marked as DMFI 18

ix. Building plan approved on 20<sup>th</sup> November 2001 marked as DMFI 19

x. Letter dated 14<sup>th</sup> December 2001 from the ministry of Roads and Public works and addressed to the Plaintiff marked as DMFI 20

xi. Approval of deceleration lane and acceleration lane dated 8<sup>th</sup> January 2002 marked as DMFI 21

xii. Letter dated 22<sup>nd</sup> January 2002 from the ministry of roads and addressed to the Chief Engineer and copied to the Plaintiff marked as DMFI 22

xiii. Letter dated the 30<sup>th</sup> January 2002 from the Ministry of Roads and addressed to the District Works Officer marked as DMFI 23

xiv. Building plan of the Plaintiff approved on the 6<sup>th</sup> February 2002 marked as DMFI 24

xv. Approval of deceleration and acceleration lane dated the 7<sup>th</sup> February 2002 marked as DMFI 25

xvi. Letter dated 11<sup>th</sup> March 2002 from Nyahururu Municipal Council to the 1<sup>st</sup> Defendant marked as DMFI 28

xvii. Letter dated 13<sup>th</sup> the August 2003 from the Ministry of Energy address to the District Commissioner Nyandarua marked as DMFI 30

9. I have considered the application both for and against the re-calling of the 1<sup>st</sup> Defendant to produce documents that were purported to be public documents and which had been marked for defence identification;

10. The term “public document” is defined in **Section 79** of the **Evidence Act** as follows:

*(1). The following documents are public documents–*

*(a) documents forming the acts or records of the acts–*

*(i) of the sovereign authority; or*

*(ii) of official bodies and tribunals; or*

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

*(b) public records kept in Kenya of private documents.*

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

11. I have looked at the documents in issue, and save for the letters which are private documents, all the other documents fall under the category of public documents to which the objection is premised on the general requirements for production of public documents. The law provides that public documents should be produced by the makers in which case the person producing the same should have the copies properly certified and or/sealed. This is the law as per **Section 80 of the Evidence Act**. I note that the said documents are copies of public documents which have not been certified as required by the provisions of **Sections 68 (2) (c) and 80 of the Evidence Act**. **Section 80** provides for the manner in which public documents are to be certified as follows:

*(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.*

12. Section 82 (1) (e) of the said Act further provides the manner in which the said documents should be produced in that

*“proceedings of any local authority, or of any corporate body created by Act or Ordinance, by a copy of the proceedings certified by the person having the lawful custody of the original thereof, or by a public document purporting to be printed or published by or by the authority of such authority or corporate body;”*

13. These documents do not bear certification that they are true copies of the said documents, they have no certification stamp or seal at all. The documents do not satisfy the provisions of **Section 80** of the Act. Further, Section 67 of the Evidence Act which deals with proving documentary evidence and not production of documentary evidence in court provides that authors of documents are required to verify the authenticity of documents but that this can be done away with if both parties have no issue with the authenticity of the documents and consent in having the documents produced without calling the authors. This is not the case in the present circumstance. I find that the objection is merited and the same is herein upheld.

**Dated and delivered at Nyahururu this 16<sup>th</sup> day of January 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**