



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HCCC NO. 8 OF 2014

GILPHINE KALEJI MUCHINYI.....APPLICANT

VERSUS

PETER SHIKUKU MUCHINYI.....RESPONDENT

BEATRICE MUKHWANA LUTTA.....INTERESTED PARTY

RULING

The Applicant gave her evidence in examination- in- chief. Before commencement of cross-examination Respondent and Interested party through respective Counsel objected to production of the following documents as exhibits;

- a. Copies of Wells Fargo wire transfer forms and bank statements
- b. A copy of power of Attorney and Quitclaim deed
- c. Photographs of Karen property
- d. Photographs of property South Wanga Lureko 1495

The Applicant filed on 29th March 2016 documents at pages 17 - 20 of the list of documents. The grounds of objection are that the bank statements are not certified, signed by bank official and sealed by the bank. The wire transfers are similarly not certified, filled in by the bank official and signed and sealed by the bank that released the documents.

The bank statements housed from page 21-29 of the list of documents of 29th March 2016 are incomplete and not sequential. They form part of a continuous document and therefore lack foundation or whole evidence. It is not shown or clear how the digital evidence was extracted the documents on their own cannot assist the Court and parties to find out how these transactions took place and whether they took place or not. The bank statements and wire transfers do not conform to **Section 106B of the Evidence Act Cap 160** and therefore are not admissible as evidence in Court. **Section 106B** ought to be read in its entirety from Subsection 1-5 and not separately and this should be adhered to by the Court.

The documents if produced shall prejudice the Respondent and interested party as it will not be confirmed if the monies were paid or not to the deceased.

The photographs do not conform to the legal requirements of **Section 78 (4) of the Evidence Act** they are electronically produced and the need for a certificate cannot be overruled and they ought to be certified to be correct.

The Applicant through Counsel informed the Court that the original copies of wire transfers were produced to the opposing Counsel to peruse and confirm authenticity. There are bank stamps in the document at Page 19 & 20 and not 17 & 18. The wire transfer form is filled by the client in duplicate and is handed over with the money to the bank's teller who signs and stamps the original which is retained in the bank and a copy given to the Client. The transactions of wire transfer of funds by the Applicant to her former husband (deceased) are confirmed by her statements of accounts attached and shown to the Court.

The Applicant relies on **Section 78 (1) (2) & (3) and not (4) of the Evidence Act**

The documents are sequential and no basis has been shown of the legal requirement that they should be sequential.

Applicant's Counsel referred this Court to the case of;

CORNELIA ELAINE WAMBA VS SHETI ENT. KENYA LTD AND ANOTHER CIVIL CASE 754 OF 2005 2008 eKLR

The Court has considered the objection to production of documents and photographs as exhibits and states as follows;

1. The Photographs attached to the List of documents filed on 29th March 2016 are electronically and digitally produced. They ought to be in compliance with **Section 78 A 4 of the Evidence Act** and should be certified. They are not and are expunged from the Court record. However, the original photographs presented by Applicant's Counsel for verification by all parties and the Court are not electronically and digitally produced.
2. The Oxford Dictionary defines electronic as "using many small parts as microchips that control and direct an electric current".
3. Digitized is defined as "using a system of receiving and sending information".
4. The pictures herein in original form are by camera not electronic or digital means. Therefore these pictures/photographs are exempted from the requirements of **Section 78 A 4** and are admitted as exhibits under **Section 65 (5) and 33 (f) of the Evidence Act Cap 80**. The photographs are family portraits of the deceased with family members at home, his children, at the building sites of his properties and with his car.
5. The document of Power of attorney and Quitclaim deed did not have Attachment 'A' annexed to the document. The Interested party through Counsel was of the view that it would not confirm the deceased's contribution to the suit property therein. The quit claim deed relates to property in Palmsdale California which the deceased "relinquished his interest upon receipt of valuable consideration receipt of which is hereby acknowledged Sylvester Muchinyi spouse of the grantee hereby remise, release and forever quitclaim to Christine Muchinyi a married woman as her sole and separate property the following described property in the City of Palmsdale County of Los Angeles California"
6. The above document cannot be expunged from the Court record due to attachment **A** missing because the property is outside the jurisdiction of this Court. Therefore this Court cannot make any orders over the said property. Secondly, the document confirms the deceased was handsomely compensated to relinquish his right over the property. Exhibit **A** being attached will not confirm the deceased's contribution as we do not know what it entails and cannot speculate on how it would confirm his contribution. The document shall be produced and its probative value determined by cross examination.

7. The Wire transfers are in the Wells Fargo letterhead form and at the back are "Agreement for Transfer requests". On the front of the forms they are inscribed "Wire Transfer Services Outgoing Wire Transfer request" from Gilphine to Sylvester in Barclays Bank Market Branch account. At the bottom is typed Wells Fargo Bank. This Court finds that these documents are not electronically digitally processed but filled in by a customer and handed over to the bank to sign and stamp the copy. The documents are authentic and copies whose originals are left with the Wells Fargo bank in USA. The Wire transfers have no material alteration except in one form which is countersigned. The same are admitted as exhibits under **Section 68 (1) (ii) and (c) and 69 (iv) of the Evidence Act Cap 80.**

Section 68 (1) (ii) and (c) and 69 (iv) of the Evidence Act Cap 80 provides;

" (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases;

(ii) a person out of reach of, or not subject to, the process of the Court; or

(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;"

Section 69 (iv) provided such notice shall not be required in order to render secondary evidence admissible in any of the following cases-

"when the person in possession of the document is out of reach of, or not subject to, the process of the Court;"

8. The bank statements are electronically and digitally processed and ought to be produced under **Section 78 A 4 of the Evidence Act.** The bank statements are from Wells Fargo Bank in Portland USA. The documents contain dates names of the accountholder, the Applicant and her address, the contact numbers of the bank and hours of service and a list of credits and debits of the Applicant's account within a stated period. The statements reflect the wire transfers and monies sent with the deceased's name and account in Barclays bank. These documents relate to funds sent to the deceased. The documents are not certified signed and or stamped. There is no covering letter to confirm the authenticity and processing of these documents.

9. In reliance of the case of *Cornelia Elaine Wamba versus Jemes Matheka (supra)* the Court relied on tax returns filed by the deceased with the Income Tax department in the USA. The tax returns were in a computer printout and the covering letter was not signed by maker of Income Tax There was no way to confirm the entries and returns and it was not clear whether the figures were correct or not. The parties did not conform to requirements of **Section 65(5) of Evidence Act.**

Section 65(5) of Evidence Act.

" (5) Notwithstanding anything contained in any other law for the time being in force-

a. a micro-film of a document or the reproduction of the image or images embodied in such micro-film; or

b. a facsimile copy of a document or an image of a document derived or captured from the original document; or

c. a statement contained in a document and included in printed material produced by a computer (hereinafter referred to as a "computer print-out").

Shall, if the conditions stipulated in subsection (6) of this section are satisfied, be deemed to also be a document for the purposes of this Act and shall be admissible in any proceedings without

further proof of production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible”.

10. This Court’s assessment of competing views on the bank statements are that the Court is satisfied they are genuine documents. It would very expensive to avail the bank official to come from the USA to testify as to the contents of the bank statement. The bank statements shall be marked for identification at this stage pending certification by issuing bank or being notarized. Suffice is to state that the content shall be verified from Barclays Bank Market Branch as to the validity of the deceased’s account. There shall be no prejudice as the Applicant shall be cross examined to establish probative value of the bank statement.

The Deputy Registrar Family Division shall write to Barclays Bank Market branch to provide the details of the deceased’s account and the relevant transactions thereto.

The Respondent and 3rd party will not be prejudiced as verification of the document and its contents will be confirmed. The statements maybe subject to cross examination today or at a later date and the Counsel shall submit on their probative value in the submissions.

READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF APRIL, 2016

MARGARET W. MUIGAI

JUDGE

In the presence of;

Ms Thongori for the Applicant

Mr. Mukele for the Respondent