



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**SUCCESSION CAUSE NO. 15 OF 2014**

*In the matter of the Estate of PETER NYAGA MBOGO (Deceased)*

**SUSAN NJOKI MWANGI.....ADMINISTRATOR/APPLICANT**

**VERSUS**

**LYDIA THAARA GEREVASI.....1ST PROTESTER**

**MARY NJOKI.....2ND PROTESTER**

**LUCY MURUGI.....3RD PROTESTER**

**R U L I N G**

1. This is a ruling on the objection raised by the counsel for the protesters against producing three documents by DW2 one Geoffrey Mwangi Ashford. The documents are:-

- (i) *Land sale agreement for a portion of land out of LR. Gaturi/Weru/8708;*
- (ii) *An application for Land Control Board consent; and*
- (iii) *Letter of consent.*

2. The objection was based on the grounds that the maker or the persons who attested to documents should be called to produce them.

3. The counsel relied on Section 71 of the Evidence Act and Section 3(3) of the Law of Contract Act. Section 71 relates to proof of execution of document required by the law to be attested. It provides:-

*If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence:*

*Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document which has been registered in accordance with the provisions of any written law, unless its execution by the person by whom it purports to have been executed is specifically denied.*

4. Section 3(3) relates to certain contracts which are required to be in writing. It provides:-

*No suit shall be brought upon a contract for disposition of an interest in land unless -*

*(a) the contract upon which the suit is founded -*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

5. As concerns the agreement, the witness testified that it was signed by him and the deceased. It was of course in writing and witnessed by one Fatuma advocate.

6. The word “attest” is defined in Black's Law Dictionary as:-

*To bear witness, to affirm to be true and genuine, to authenticate by signing as a witness.*

7. To my understanding, there are documents which require to be attested to, for example, a will which must be attested by two witnesses. The proviso to Section 71 refers to documents which are required by law to be registered. The registered documents are exempted from the provisions of Section 71(1).

8. The issue which arises is whether an agreement executed before an advocate or before a legal agent should be subjected to the provisions of the section. From the wording of the section, it is my considered opinion that it should not.

9. However, if the parties to the agreement wish to call the advocate as a witness, they are at liberty to do so. I do not find the argument of the counsel of the respondent plausible that the agreement should not be produced by the party but only by the maker.

10. As for the application for the Land Board Consent, this is not an attestable document, it is required to be signed by only the vendor and the purchaser. Section 71 is not applicable to this document.

11. The Land Board Consent is issued by the Land Board and signed by the Board Chairman. When it is given to the parties who applied for it, it becomes their document and any of them can produce it in court as evidence. I reiterate that the party is at liberty to call the maker of the document to support his case but he/she cannot be shut out from producing it on grounds that the maker must testify.

12. The counsel told the court that the other reason for objecting to the documents being tendered in evidence is because, the protesters have reason to believe that the documents are not genuine. This is not a valid reason for objection because the opposing party is at liberty to adduce evidence to challenge the documents. The documents can be challenged during cross-examination and in the submissions of the parties.

13. Furthermore, admitting documents in evidence does not mean that they will be taken as gospel truth by the court especially where there is evidence to the contrary.

14. I find the objection not merited and I dismiss it accordingly. The documents are accordingly admitted in evidence.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF SEPTEMBER, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Mr. Mungai for protesters**

**Ms. Ndorongo for petitioners**

**The parties**