



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 240 OF 2016

VICTORIA MWIHAKI MUCHIRA.....1ST PLAINTIFF

CHARLES MUGO MUCHIRA.....2ND PLAINTIFF

CATHERINE NJERI MUCHIRA.....3RD PLAINTIFF

VERSUS

WANJIKU MWENJA MWANGI1ST DEFENDANT

TERESINA MWINGI2ND DEFENDANT

AND

CLIFFORD MWANGI MUCHIRA.....1ST INTERESTED PARTY

NANCY WANJIKU MWANGI.....2ND INTERESTED PARTY

RULING

1. Teresina Mwangi (DW2) has sought to produce the following documents:

- Photocopy of a judgment in HC Divorce Cause NBI No. 178/2001 (MFI 1)
- Photocopy of the *Decree Nisi* in High Court Divorce Cause Nbi No. 178/2001 (MFI 2)
- Photocopy of a letter dated 11th March, 2010 (MFI 3) written by Omondi Mbago & Co. Advocates
- Photocopy of title Deed No. LOC. 1/KIUNYU/126(MFI 4)
- Photocopy of burial permit dated 5th September, 2016 (MFI 5)
- Photocopy of receipt dated 5th September, 2016 (MFI 6)

- Photocopy of admission and acceptance form for bodies (MFI 7)
- Photocopy of the receipt dated 7th September, 2016 (MFI 8)
- Photocopies of receipts No. 14264 to 14290 (MFI 9)
- Photographs (MFI 10)

2. The production of the said documents has been objected to by the plaintiffs. Basically the reasons for the objection are that the documents are photocopies and not the originals. It has been submitted that one page of the judgment in question is missing. That the certification stamp in the *Decree Nisi* does not have a date when it was certified as a true copy of the original. It is further submitted that the said documents are suspected to be fabricated documents. That the witness (DW 2) was not a party in the divorce proceedings and neither is the letter in question addressed to her. That the maker of the letter ought to produce the same. It is stated that the letter has no reference number nor is there evidence that the letter was ever delivered to the plaintiff who it is addressed to.

3. Regarding the Title Deed, it is argued that in addition to the same being a photocopy, there's no recent certificate of official search to confirm if the land is still registered in the same name and that DW2 is not the proprietor of the said land. The plaintiff's counsel stated that there is no evidence that the witness (DW2) is the one who took the photographs or processed the same and that the provisions of the Evidence Act Cap 80 Laws of Kenya have not been complied with. It was further submitted that the receipts sought to be produced have no stamp duty fixed on them.

4. The court was referred to Section 64 & 65 of the Evidence Act Cap 80 Laws of Kenya regarding primary and secondary evidence, Section 79 of the Evidence Act Cap 80 Laws of Kenya in respect of public documents and Section 107 & 110 of the Evidence Act on the issue of the burden of proof.

5. The Defence has conceded that the judgment is not the original and that one page of the said judgment is missing. It was submitted that the judgment is a public document and any interested party can have access to it. It is the position of the Defence that if the objection is sustained, then the Deputy Registrar of the court can be summoned to produce the original file which contains the judgment and the decree. Section 64 and Section 65 of the Evidence Act Cap 80 Laws of Kenya was relied on. It was further submitted that the maker of the letter in question can be called to produce the same and that the issue of the stamp duty can be regularized and that no prejudice will be suffered by the plaintiffs if the photographs in question are produced as evidence in court.

6. I have considered the submissions made by the counsels for the respective parties. I have also considered the provisions of the law referred to.

7. The Evidence Act Cap 80 Laws of Kenya provides for the production of documentary evidence. The contents of a document can be proved by either primary or secondary evidence.

8. Section 65(1) Evidence Act provides as follows:-

“Primary evidence means the document itself produced for the inspection of the court.”

9. Under 66 of the Evidence Act, Secondary evidence includes certified copies, copies of the original, counterparts of documents and oral accounts of documents if they meet the criteria set out under Section 68 of the Evidence Act. The criteria set under Section 68 of the Evidence Act 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.

8. The case herein is a very contentious burial dispute where the 1st plaintiff and the 2nd defendant claim to be the wives of the deceased. The 1st plaintiff's contention is that the Divorce Cause Judgment and *Decree Nisi* are fabrications. Although under Section 79 (iii) of the Evidence Act judicial documents fall under the category of public documents and certified copies of the same can be produced, questions have arisen as to whether the documents in question are genuine. Section 80 (1) of the Evidence Act provides for the certificate of copies of documents in the following terms:-

(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.

9. In the case at hand, the original documents have not been inspected by any of the parties herein. The *Decree Nisi* has no date or name of the officer who certified the same nor does it bear the official title of the said officer. The *Decree Nisi* has also not been sealed. In the circumstances of this case, the best evidence rule must apply. The original records ought to be availed for inspection. He who alleges must prove. The burden of proving that the 1st plaintiff was divorced by the deceased falls on the Defendants.

10 The Title Deed (MFI 4) is also a public document within the meaning of Section 79 of the Evidence Act. The original ought to be availed or in its absence a certified copy which meets the conditions set out by the Evidence Act for the production of certified copies. Whether there is a certificate of official search or not depends on what the parties seeking to produce the same wish to prove. I will therefore leave the issue of the search certificate to the defence.

11. On the photocopy of the letter (MFI 3), the best evidence rule applies. Questions regarding the reference number and whether the letter was served on the 1st Plaintiff are questions regarding the weight that can be attached to the contents of the same and cannot bar production of the same. The maker of the letter and the person who took the photographs should be called to produce the same.

12. On the issue of the Stamp Duty, Section 19 of the Stamp Duty Act Cap 480 Laws of Kenya prohibits the production of unstamped instruments as evidence. The receipts in question can however be stamped out of time then they can be produced. (See Section 20 of the Stamp Duty Act)

13. For all the foregoing reasons, the objection is sustained.

Dated, signed and delivered at Nairobi this 11th day of Nov., 2016

B.THURANIRA JADEN

JUDGE