



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

HCC. CASE. NO.110 F 2005

LUCAS A..O. N. OCHIENG.....PLAINITFF

VS.

JUDITH AATIENO OWITI.....1ST DEFENDANT

KISUMU MONICIPAL COUNCIL.....2ND DEFENDANT

RULING

1. This matter came for hearing on 15/12/2014 and we started taking the evidence of **DW3 - ONINO MUKOBE** – who introduced himself as Land Administrator, Kisumu County. At some point, **MUKOBE** sought to produce an exhibit, a document earlier marked as MF1- D 15. .

2. There were objections from the defence and it is these objections and the responses made that are the subject of this ruling. All along, a different witness, one **Mochoge**, was expected to come and produce the document. It seems to me that counsels on the plaintiff's side have tough questions to Mochoge concerning the document. Court records show that on 17/5/2012, the court directed that Mochoge should come and testify and summons were to issue to that effect.

3. But the defence counsel, Mwamu, has apparently decided that it is **Mukobe**, who should testify. He however has not offered any explanation why **Mochoge** is no longer his preferred witness.

4. The objections raised have much to do with the fact that Mukobe is not the author of the document he was seeking to produce. The document sought to be produced is said to be central to the suit and Mukobe is not deemed competent to comment on its contents. Mwamu was faulted for not bringing the document within the exemptions necessary to make a person other than the author to produce it.

5. Mwamu countered all this by saying that the objections have no basis in law. According to him, Mochoge is not the author of the document, he only signed it for the Commissioner of Lands. He said further that he had given notices to counsels for the plaintiff of intentions to rely on and produce the document. According to him too, anybody from the Lands Office can produce that document.

6. I have considered the arguments advanced. I note that there is already a directive by the court that Mochoge should come to testify. Mwamu is wrong to ignore or overlook the directive without giving any justifiable explanation. That would work against him.

7. I also agree with Njoga for the plaintiff that Mwamu has not brought the documents within the exemptions allowed by law for a person other than the author to produce a document. It is not true to say,

as Mwamu asserted, that anybody from Lands Office can produce the document.

8. Only competent people from that office can do so and competency in that sense has to do with good knowledge of the document to be produced. This is particularly so where contents of such document are crucial to the case at hand.

9. It is not enough for Mwamu to say he gave notices. It is not enough to say that the other counsel will have opportunity to cross-examine the witness. And it is not enough to seek relaxation of procedural law or rules of evidence in order to have the document produced. The court needed to be told why its directive on the issue was ignored or overlooked. Counsel on the other side needed explanation as to why Mukobe, not Machogu, was to produce the document. The provisions of evidence Act (Cap 80) needed to be complied with, and not ignored to serve the convenience of one side.

10. The objection herein is therefore upheld. Let Mochoge come and produce the document and if he can not, convincing reasons need to be given as to why he can't.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE.

7/5/2015

7/5/2015

A.K. Kaniaru J.

John Ogendo court clerk

No party present

Njoga o. for plaintiff

Omondi T for 3rd party

Court. Ruling on objection raised hereon on 15/12/2014 read and delivered in open court .

Right of appeal 30 days./

Another date to be taken at Registry.

A.K. KANIARU

ENVIRONMENT & LAND – JUDGE.

7/5/2015