



**Mayfair Establishment Limited v Athman & another (Environment & Land
Case E041 of 2022) [2025] KEELC 38 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 38 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E041 OF 2022
LL NAIKUNI, J
JANUARY 17, 2025**

BETWEEN

MAYFAIR ESTABLISHMENT LIMITED PLAINTIFF

AND

ZUBEIDAH OMAR ATHMAN 1ST DEFENDANT

**ALI HASHIM ALI SALIM JENEBY & KHALAD HASHIM ALI SALIM JENEBY
(SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE HASHIM ALI
SALIM JENNEBY) 2ND DEFENDANT**

RULING

I. Introduction

1. This Honorable Court is tasked to make a determination on an issue raised by Mayfair Establishment Limited, the Plaintiff herein. Specifically, during the pendency of the hearing of this suit, the Applicant sought for the adoption of the letter dated 13th April, 2010 by Fourways Accommodation Bureau. The said letter stated in verbatim:-

“To Whom It May Concern

This is to confirm that Mombasa/ Block X/ 9, 96 & 97 (Tudor) has been sold to M/s Mayfair Establishment Ltd of PO BOX 8440 – 80100, Mombasa by owner or above Plots Late Rukiyabai Dar Care of Fourways Accommodation Bureau, Mombasa.”

2. The Plaintiff sought for the same to be adopted as evidence as there will be no prejudice to the Defendants based on Sections 33 and 35 of the [Evidence Act](#), Cap 80 Laws of Kenya.
3. While opposing this application, the Defendants on the other hand through their Learned Counsel Mr. Mwakisha Advocate contended that if the same was not based on the certificate of death and that



the marker was deceased. As far as the Learned Counsel was concerned, they proposed that the matter be held in abeyance until the hearing date.

4. In a quick rebuttal, the Learned Counsel for the Plaintiff Mr. Kilonzo Advocate holding brief for Mr. Oluga Advocate informed the Honourable Court that he was in possession of the copies of the Certificate of death for the deceased. That, indeed he had filed a supplementary list of documents and served them to the Defendants the morning of the submissions. They were compliant to take court directions.

II. The directions of the Court

5. The Honourable Court directed on 19th September, 2024 that based on the submissions made by the Plaintiff's counsel, it would deliver a short ruling on the matter prior to the hearing date and the ruling date was fixed for 17th January, 2025 on 4th December, 2024.

III. Analysis & Determination.

6. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
7. In order to arrive at an informed, just, equitable and reasonable decision, the Honourable Court has framed two (2) issues for its determination. These are:-
 - a. Whether or not the Plaintiff have made out a case for the adoption of the letter dated 13th April, 2010 by Fourways Accommodation Bureau.
 - b. Who bears the costs.

ISSUE No. a). Whether or not the Plaintiff have made out a case for the adoption of the letter dated 13th April, 2010 by Fourways Accommodation Bureau.

8. Under this sub title the Honourable Court shall examine the merits of the application by the Plaintiff. In determining such an application, the court has to consider the principles and or conditions set under Section 33 of the Evidence Act. Under the aforesaid provision a statement made by a person who is dead like in this case is admissible where the statement made against the pecuniary or proprietary interest of the person making it or where if true, it would have exposed him to a criminal prosecution or to a suit for damages or when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware and when such statement was made before any controversy as to such right, custom or matter had arisen.
9. The general rule is that documents can be produced by their makers. However, there is an exception as provided for in the provisions of sections 33 and 35 of Evidence Act, Cap. 80 where documents can be produced without the maker if he was dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable. Sections 33 and 35 have provisos which create exceptions to the general rule in the said sections. The rationale for having the exceptions to the hearsay rule is explained in Sarkar on Evidence (1990, Reprint) at p. 370, quoting from Wigmore on Evidence (ss 1420-1422) as follows:

‘The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light



and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous: it may be sufficiently clear, in that instance, that the statement offered is free from the risk, of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment -for example, by reason of the death of the declarant, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.’

10. In a picturesque speech, the Supreme Court of India in the case of:- “[Arjun Panditrao Khotkar v Kailash Kushanrao](#), (2020) 3 SCC 216” observed as under:

‘2. Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as-

- i. Admissibility;
- ii. Relevancy and
- iii. Proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section 136 of the [Evidence Act](#), relevancy must be established before admissibility can be dealt with.’

11. I have considered the circumstances of this case and the submissions by the counsels. Undeniably, while direct evidence is always considered to be more reliable than hearsay evidence, there are some exceptional circumstances in which the courts could allow hearsay evidence under the [Evidence Act](#). For example, under Part IV of the [Evidence Act](#), statements made by persons who cannot be called as witnesses are admissible in evidence. This is an exception to the hearsay rule. Specifically, Section 33 lays out what those statements might be. The section lists 8 examples of such statements which are all, in their own right, exceptions to the hearsay rule. Significantly, the opening paragraph of Section 33 gives the context within which the exceptions covered at that section apply. It reads:

‘Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases.’

12. The provision of Section 35 of [the Act](#) provides for admissibility of documentary evidence as to facts in issue. It reads:

1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - a. If the maker of the statement either—
 - i. Had personal knowledge of the matters dealt with by the statement; or



ii. Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

b. If the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection

1. Of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

a. Notwithstanding that the maker of the statement is available but is not called as a witness

b. Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

13. Admissibility of a document is tested first. This position was clarified by the Supreme Court of India in “[Anvar PV v PK Basbeer](#), AIR 2015 SC 180: (2014)10 SCC 473”, it is held as under:

‘Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility.’

14. Essentially, a document will be admissible if the person making it is dead, cannot be found, has become incapable of giving evidence, their attendance cannot be procured, or even if it can be procured but that would actually occasion expense and delay which in view of the court is unreasonable. In the case of:- “*R v Ndolo* (1926) 10 KLR 11” the High Court considered the meaning of the words ‘cannot be found’ under the provision of Section 33 and held that it refers to the time when the witness is sought to attend trial, and it does not refer to the state of affairs at some earlier period. The Court also held that the words appear to imply that a diligent search should be required before the condition is held to have been fulfilled.

15. The Court also has the discretion to consider whether the delay and or expense in procuring the attendance of the makers is unreasonable or otherwise, as conferred in the provision of Section 35 of the [Evidence Act](#). I take notice that the Plaintiff in their supplementary list of documents filed on 19th September, 2024 attached the Certificate of death of Rukiyabai Dar. In the circumstances, it would therefore be appropriate to allow the plaintiff to produce and adopt the documents although the weight to be attached to such documents may not be as much or may even be nil as opposed to when they are produced by the maker.



16. Since the Defendants have also not called their evidence; and will have their day in court and are able to be interrogated on the said document they shall not suffer any prejudice by the adoption of said letter at all because they will have an opportunity to puncture the said letter in their testimonies and during the submissions stage. As provided by Section 3A of the *Civil Procedure Act*, Cap. 21 the necessary order herein is to allow the adoption of the letter dated 13th April, 2010 by Fourways Accommodation Bureau who's marker is deceased in accordance to Section 33 of the *Evidence Act*, Cap. 80.

Issue No. b). Who bears the costs.

17. The issue of costs is at the discretion of the Court. Based on the surrounding facts and the inference of this matter, the Honourable Court has decided that each party bears its own cost.

IV. Conclusion & Disposition

18. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-

- a. That the Letter dated 13th April, 2010 by Fourways Accommodation Bureau written care of Rukiyabai Dar be and is hereby adopted as evidence in this suit.
- b. That the matter to be mentioned on 22nd January, 2025 for further direction.
- c. That each party bears its own costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF JANUARY 2025.

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HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Kilonzo Advocate holding brief for Mr. Oluga Advocate for the Plaintiff/Applicant.
- c. Mr. Mwakisha Advocate for the 1st and 2nd Defendants/Respondents.

