

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ELC CASE NO. E003 OF 2025**

**EVALINE ADONGO OTSIENO .....**  
**PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF SIAYA.....1<sup>ST</sup>**  
**DEFENDANT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

1. This matter came up for hearing on 4/12/2025 when counsel on record for the 1<sup>st</sup> Defendant raised an objection to the production of items 4 - 10 of the Plaintiffs List of Documents dated 5/12/2025 comprising Plot Rent Receipts ostensibly issued by Siaya County Council on diverse dates in 2009,2012 and 2013.
2. According to counsel for the 1<sup>st</sup> defendant, the documents it was difficult to substantiate the said receipts and urged that if the same were allowed it would be an admission and insisted the maker who issued the receipts and received the cash be called to produce the same in court. That an original receipt was not enough. The court adjourned the matter to allow Mr. Counsel holding brief for

Mr. Kasamani to obtain instructions on the documents and to apply if they found it necessary.

3. The Plaintiff then filed a Notice to Produce the following documents.

1. SIAYA COUNTY COUNCIL PLOT RENT RECEIPT OF KSHS 6000/= DATED 19/3/09.
2. SIAYA COUNTY COUNCIL PLOT RENT RECEIPT OF KSHS 5,000/=DATED 16/10/2012.
3. SIAYA COUNTY COUNCIL PLOT RENT RECEIPT OF 3,000/= DATED 25/10/2012.
4. SIAYA COUNTY COUNCIL PLOT RENT RECEIPT OF KSHS 1,500/= DATED 13/5/2013.
5. SIAYA COUNTY COUNCIL PLOT TRANSFER FEES OF KSHS 10,500/= DATED 13/5/2013.
6. SIAYA COUNTY COUNCIL PLOT RENT RECEIPT OF KSHS 1500/= DATED 29/8/2013.
7. LETTER FROM BAR OBER MARKET MANAGEMENT COMMITTEE DATED 16TH FEBRUARY 2024 TO EVARLINE ADONGO OTSIENO.

4. On 9/2/2026 Mr Osala termed the above notice funny noting that they do not know the documents yet they were expected to produce them and sought directions from the court.

### **SUBMISSIONS**

5. The court then directed the parties to file and exchange submissions on the issue. The Plaintiff filed submissions dated 10<sup>th</sup> February 2026 and I reserved the ruling for

10/3/2026. The 1<sup>st</sup> Defendant did not file submissions as at 11/03/2026 when I sat to prepare this ruling which I deferred to 16/03/2026.

6. The plaintiff submitted that: -

The documents undisputedly originated from the 1<sup>st</sup> Defendant and remain in its custody, rendering the objection not only belated but also inequitable. That having complied with procedure by serving a Notice to Produce, the 1st Defendant has obstinately refused production, necessitating this Court's intervention. The court is invited to compel production of the originals or admit secondary evidence in fidelity to overriding objective under Order 1 Rule 1A of the Civil Procedure Rules, 2010 expeditious, and proportionate resolution of disputes and Article 159(2)(d) of the Constitution of Kenya, 2010, which abhors procedural technicalities that obstruct substantive justice. That the 1st Defendant should not be allowed to weaponize its control over evidence and subvert the rule of law.

7. Order 16 Rule 6 of the CPR unequivocally empowers the Court to summon any person, including a party, to produce documents without mandating oral evidence to ensure relevant evidence is not withheld by adverse parties. Reliance is placed in Republic v Registrar of Societies ex parte Joseph Wambua Mutiso [2013] eKLR,

emphasizing courts must exercise this power where documents are material and in another's possession, to avert undue prejudice and promote transparency in litigation.

8. That Orders 3 Rule 2, 11, and 16 Rules 6 and 7 CPR govern discovery and production, mandating early disclosure to prevent trial by ambush. That sections 64 - 66 of the Evidence Act (Cap 80) prioritize primary evidence (originals), but Sections 65 and 68 carve out exceptions for secondary evidence-such as copies-where the original is held by an opponent who, post-notice, refuses production (Section 68(1)(b)). The court is referred to the case of Kenya **Commercial Bank Ltd v Samuel Kamau Ndung'u [2006] eKLR**, where the Court of Appeal held that compliance with a notice to produce unequivocally justifies secondary evidence, provided relevance and particularity are established. That the Act's intent is to facilitate, not frustrate, proof.
9. It is contended that the impugned documents were meticulously specified in the Plaintiff's List-detailing nature, dates, and 1st Defendant origin-and filed with the Plaintiff. That at pre-trial before the Deputy Registrar on 3 July 2025 and the Judge on 23 September 2025, the Defendant conspicuously failed to object or seek expungement. The omission is termed a waiver or estoppel, precluding belated challenges as seen in **Joseph Njagi Njoka v Charles Njiru Njagi [2015] eKLR** and **Inclusive Agencies (Msa) Limited v Co-operative**

**Bank of Kenya Limited [2022] KEHC 12296 (21 April 2022)** and **Leiyagu v Gichohi & another [2025] KEHC 13700 (2 October 2025)**

10. That silence until trial evinces implied admission of authenticity and relevance, per W. E **Tiley (Muthiga) Ltd v Devji Megji & Brothers Limited & another [2023] KEHC 25720 (20 November 2023)**, where the Court rejected objections and admitted bundles en masse.
11. That under Order 14 Rule 1 CPR, the Court wields broad discretion to order production at any stage, prioritizing justice over rigidity. Judicial precedents, including **Diamond Trust Bank Kenya Ltd v Peter Ndiritu Gitukw [2014] eKLR** and **Republic v Ochieng [2025] KEHC 3215 (28 January 2025)**, emphasize liberal exercise of this discretion where withholding evidence would derail a fair trial, especially for documents originating from the objector. Moreover, business records like the receipts herein qualify under Section 35 of the Evidence Act for admissibility without calling makers, avoiding needless burdensomeness. That compelling individual witnesses would protract proceedings unnecessarily contravening expeditious justice.
12. Non-production post-notice triggers Section 68 admissibility, while pre-trial inaction seals waiver. Equity and the Constitution compel this outcome, ensuring the 1<sup>st</sup> Defendant cannot profit from its recalcitrance.

13. The court is invited to overrule the objection with costs on an indemnity basis, reflecting its unreasonableness;

**DETERMINATION**

14. I have considered the objection raised by the 1<sup>st</sup> defendant and the submissions hereinabove. The main issue for determination is whether the objection should be sustained.

15. I have noted the submission that the 1<sup>st</sup> defendant did not raise any issue on the production of the documents during pretrial conference. Based on the record this is true. Though I agree that it avoids trial by ambush, it is my considered view that the proposition that failure by a party to indicate they will be objecting to the production of a certain document should be basis upon which such document should not be admitted into evidence. Firstly, I must state that admissibility of documentary evidence is an issue of law governed by the Evidence Act and not the regime of the Civil Procedure Rules (Order 11).

16. The above is further elaborated by the question whether estoppel can operate against the law as a follow up to the proposition that one should be estopped since they did not raise the matter during pretrial conference. Estoppel cannot operate against the law.

17. The 1<sup>st</sup> defendant contends that accepting the admission of the document without the maker would be

to admit liability. The court respectfully disagrees with counsel in this regard. It is not an admission of liability. It is not proof of the contents of the document either. I say so because at this stage it is only an exhibit and its probative value is for another forum within the proceedings being when the court retires to write its judgement. This is elucidated in the below dictum of the Court of Appeal.

18. The Court of Appeal in **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** pronounced itself thus;-

*18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or*

disproved when the court applies its judicial mind to determine the relevance and veracity of the contents - this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record. Emphasis is mine.

20. The regime of admission of documents is the Evidence Act Cap 80 of the Laws of Kenya. The provisions of Section 68 and 69 are pertinent. Section 68 is on proof of documents by secondary evidence as follows; -

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases— (a) when the original is shown or appears to be in the possession or power of— (i) the person against whom the document is sought to be proved; or (ii) a person out of reach of, or not subject to, the process of the court; or (iii) any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;

21. It is noteworthy that upon the objection being raised, the plaintiffs proceeded to serve a Notice to Produce as

required under section 69. I must say that a Notice to Produce does not compel production. It is a precursor and lays a basis for the production of copies of the document.

22.A look at the receipts reveals that they are issued to Petronila Juma & Everline Otsieno ; John Oketch Otsieno. Limited grant adlitem has been produced granted to the plaintiff for purposes of filing this suit for the estate of Petronila Auma. Having been addressed to the alleged tenants I see no bar to their production because they are being produced by the people it was issued to or addressed to. This is in view of the fact that a document can be produced by the author, the person to whom it was given/issued, to whom it was copied and who would by law have custody of the same.

23.The upshot of the above is that the objection is overruled. I decline the invitation to make orders on costs.

Orders accordingly.

Dated at Siaya this 16<sup>th</sup> day of March 2026

**HON. JUSTICE A. E. DENA**

**JUDGE**

**16/3/2026**

**Ruling delivered virtually through Microsoft Teams  
Video Conferencing Platform in the Presence of:**

Mr. Kasamani/Mukoya for the Plaintiff

Dick Osala for the 1<sup>st</sup> Defendant

ORIGINAL