



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 627 OF 2009

ANTHONY M. NYAMU & 12 OTHERS.....PLAINTIFFS

VERSUS

THE ATTORNEY GENERAL & 3 OTHERS.....DEFENDANTS

RULING

The hearing of this suit commenced on 13th July, 2016. The plaintiffs' case is yet to be closed. The plaintiffs have so far called 10 witnesses and there are more to go. The plaintiffs' sixth witness was Elizabeth Wangui Mbugua (PW6). Elizabeth Wambui Mbugua (PW6), Morris Njuguna Mwirigi (PW10) and Joseph Mwangi Munyua t/a Elimojos Enterprises are the 9th plaintiff. In her evidence, PW6 testified that she was giving evidence on behalf of Elimojos Enterprises. PW6 told the court that Elimojos Enterprises (hereinafter referred to only as "the 9th plaintiff") was a partnership comprising of 3 partners. PW6 stated that the 9th plaintiff's claim was in respect of L.R No. 21725 (hereinafter referred to only as "the suit property"). She stated that the suit property was allocated to Rurago Ltd. on 10th May, 1996 and that Rurago Ltd. was owned by one of the 9th plaintiff's partners, Morris Njuguna Mwirigi (PW10). A photocopy of the letter of allotment dated 10th May, 1996 was marked as PMFI 17. PW6 stated that PW10 kept the original letter of allotment for the suit property in his office along Tom Mboya Street. She stated that the said office caught fire and a number of documents in the office including the original letter of allotment for the suit property got burnt.

PW6 told the court that PMFI 17 was a photocopy of the original letter of allotment for the suit property dated 10th May, 1996 that got burnt in PW10's office. PW6 stated that the 9th plaintiff requested the Commissioner of Lands to issue another letter of allotment for the suit property in the name of the 9th plaintiff. She stated that the request was accepted and a new letter of allotment dated 18th February, 2000 was issued in the name of the 9th plaintiff. A photocopy of the letter of allotment dated 18th February, 2000 was marked as PMFI 16. PW6 told the court that the original of this new letter of allotment was kept by one of the 9th plaintiff's partners, Joseph Mwangi Munyua who was out of the country as at the time she was giving evidence. PW6 stated that the 9th plaintiff was not issued with a title for the suit property because the Registrar of Titles issued a notice dated 21st December, 2010 in the Kenya Gazette revoking among others the title for the suit property.

PW10, Morris Njuguna Mwirigi who was PW6's partner in the 9th plaintiff gave evidence on 7th December, 2018. PW10 confirmed that he had in his possession the original letter of allotment dated 10th May, 1996 that was issued to Rurago Ltd. in respect of the suit property (PMFI 17). He stated that he kept the letter of allotment in his office. PW10 stated that his office got burnt on 23rd July, 2001 and several documents relating to the suit property and others also got burnt in the process. He stated that he did not recover the original letter of allotment save for a burnt out portion thereof. PW10 stated that the Commissioner of Lands issued a new letter of allotment in respect of the suit property on 18th February, 2000 in the name of the 9th plaintiff (PMFI 16) when he joined PW6 and Joseph Mwangi Munyua to form the 9th plaintiff. PW10 stated that the original of this new letter of allotment was also kept in his office which got burnt as stated earlier. He stated that this letter of allotment like the first one that was issued in the name of Rurago Ltd. also got burnt. He stated that the 9th plaintiff was only left with a photocopy of the said letter of allotment (PMFI 16). PW10 stated that he reported the fire and loss of the said documents to the police and obtained an abstract but the same was limited only to the documents that he could remember. PW10 sought to produce in evidence as exhibits, photocopies of the letter of allotment dated 18th February, 2000 (PMFI 16) and the letter of allotment dated 10th May, 1996 (PMFI 17) on the ground that the originals were destroyed by fire as aforesaid.

The advocates for the defendants objected to the production of these documents in evidence on various grounds. This ruling is in respect of the said objection. Mr. Motari, counsel for the 1st defendant objected to the production of a photocopy of the letter of allotment dated 10th May, 1996 (PMFI 17) on the ground that PW10 had told the court that he had a partly burnt original letter of allotment dated 10th May, 1996 and that the said partly burnt original letter of allotment was different from PMFI 17 which the witness wished to produce in evidence in several material respects. Mr. Kairaria advocate for the 2nd and 3rd defendants associated himself with the submissions by Mr. Motari on the production of PMFI 17. He added that no basis had been laid for the production of a photocopy of the letter of allotment dated 18th February, 2000 (PMFI 16). He submitted that PW10 was not sure whether the original letter of allotment was burnt or not during the fire incident in his office. Mr. Kairaria submitted further that the Police Abstract that PW10 relied on to support his claim that the original letter of allotment was burnt did not indicate that the said letter of allotment was one of the documents that was destroyed by fire and that reference to the

subject letter of allotment was a superimposition on the said abstract.

Mr. Wahome for the 4th defendant associated himself with the submissions by Mr. Motari and Mr. Kairaria. He submitted that during her evidence, Ms. Elizabeth Wangui Mbugua (PW6) had stated that the original letter of allotment dated 18th February, 2009 was in the possession of her partner in Elimojos Enterprises, Morris Njuguna Mwirigi who was out of the country. Mr. Wahome submitted that the evidence of PW6 on the whereabouts of the original letter of allotment dated 18th February, 2000 created the impression that the same was in existence. He submitted that in the circumstances, the plaintiffs had not laid a proper basis for producing secondary evidence.

In his submissions in reply to the objection, the plaintiffs' advocate, Mr. Litoro submitted that the 9th plaintiff had laid a basis for the production of photocopies of the letters of allotment dated 10th May, 1996 and 18th February, 2000. He submitted that the witness (PW10) testified that the originals of the said letters of allotment were burnt and as such could not be produced as evidence before court.

Determination:

I have considered the objection by the defendants to the production in evidence of photocopies of the letters of allotment dated 10th May, 1996 and 18th February, 2000 by PW10 and the response thereto by the plaintiffs' advocate. What I need to determine is whether the 9th plaintiff has laid a proper basis for the production in evidence of the said photocopies of the letters of allotment dated 10th May, 1996 and 18th February, 2000. Section 65(1) to (4) of the Evidence Act, Chapter 80 Laws of Kenya provides as follows:

“65(1) Primary evidence means the document itself produced for the inspection of the court.

(2) Where a document is executed in several parts, each part is primary evidence of the document.

(3) Where a document is executed in counterpart each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

(4) Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original they are not primary evidence of the contents of the original.”

Sections 66, 67 and 68 of the Evidence Act provides as follows:

“66. Secondary evidence

Secondary evidence includes—

(a) certified copies given under the provisions hereinafter contained;

(b) copies made from the original by mechanical processes which in

1. themselves ensure the accuracy of the copy, and copies compared

2. with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person

3. who has himself seen it.

67. Proof of documents by primary evidence

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

68. Proof of documents by secondary evidence

(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;

(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 79 of this Act;

(f) when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2) (a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.

(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents”.

I am satisfied that the 9th plaintiff has laid a proper basis for the production in evidence of a photocopy of the letter of allotment dated 10th May, 1996 that was marked as PMFI 17. PW6 told the court that original of the said letter of allotment was kept by PW10 and that it was among the documents that were burnt in PW10's office when the old Nation House where the office was situated caught fire. PW10 testified that he had an office at the old Nation House and that he kept original letter of allotment dated 10th May, 1996 in the said office. He corroborated the evidence of PW6 that the said letter of allotment got burnt in his office on 23rd July, 2001 when fire broke out at old Nation House building. He said that he was left only with a photocopy of the said letter of allotment. Section 68(1) (c) of the Evidence Act that I have reproduced above allows production of secondary evidence of a document when the original is lost or destroyed. In this case, I am satisfied from the evidence on record that the original letter of allotment dated 10th May, 1996 was destroyed by fire and cannot be produced in court. In the circumstances, I am in agreement with the plaintiffs' advocate that a proper basis has been laid for the production of a photocopy of the letter of allotment dated 10th May, 1996 in evidence.

With regard to the letter of allotment dated 18th February, 2000, I am in agreement with the advocates for the defendants that a basis has not been laid for the production of secondary evidence in relation thereto. PW6 and PW10 both partners in Elimojos Enterprises gave conflicting evidence as to the whereabouts of the original letter of allotment dated 18th February, 2000. Whereas, PW6 claimed that the original letter of allotment was kept by one of their partners, Joseph Mwangi Munyua who was out of the country, PW10 claimed that the said letter of allotment got burnt in his office together with the earlier one dated 10th May, 1996. In the circumstances, I am in agreement with the advocate for the 4th defendant that it is not certain whether the said letter of allotment got burnt in the office of PW10 or the same is in the custody of Joseph Mwangi Munyua. Due to lack of clarity on the issue, the court is unable to allow production of secondary evidence in respect of the document as there is no basis for doing so.

Due to the foregoing, I find no merit in the objection by the defendants to the production in evidence of a photocopy of the letter of allotment dated 10th May, 1996. The objection is dismissed. The defendants' objection in relation to a photocopy of the letter of allotment dated 18th February, 2000 is however upheld. The costs of the objection to be in the cause.

Delivered and Dated at Nairobi this 9th day of December 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Lusi for the 2nd to 13th Plaintiffs

N/A for the 1st Plaintiff

Mr. Motari for 1st Defendant

Mr. Kairaria for the 2nd and 3rd Defendants

Mr. Wahome for the 4th Defendant

Catherine-Court Assistant