



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 55 OF 2012

FATUMA MAITHA RIARA.....PLAINTIFF

VERSUS

SELU SULEIMA KIRUNYA.....1ST DEFENDANT

THE LAND ADJUDICATION OFFICER TIGANIA WEST 2ND DEFENDANT

THE ATTORNEY GENERAL..... 3RD DEFENDANT

KHALID FATERHDIN.....4TH DEFENDANT

RULING

1. This ruling is in respect of two issues.

(i) Whether the District Land Adjudication Officer (DLASO) should be called as a witness for the plaintiff.

(ii) Whether plaintiff's documents captured on pages 28-32 and pages 25-26 on plaintiffs' bundle should be admitted as exhibits.

Whether the DLASO should be called as a witness for the plaintiff

2. On 15.7.2019 Mr. Kaimenyi, counsel for the plaintiff applied for summons requiring attendance to the DLASO on the basis that the previous time that the matter was in court on 28.3.2019, such an application had been made and was allowed.

3. Mr. Kiongo, appearing for the Attorney General (2nd and 3rd defendants) objected to this application averring that he was not present on 28.3.2019, that he was at a loss as to why the DLASO should be called as a witness and that the said officer had not recorded any statement. He further argued that since plaintiff had sued the DLASO, then they should just cross examine him adding that the plaintiff cannot have his cake and eat it the same time. Mr. Kiongo further averred that the 2nd defendant is their witness hence he cannot be a witness for the plaintiff.

4. Mr. Muriuki for 1st defendant associated himself with the sentiments of Mr. Kiongo, adding that there are serious allegations of fraud and so he (DLASO) now cannot turn around to be a witness for the plaintiff.

5. Mr. Morogori for 4th defendant has averred that the witness should have been included in plaintiff's list of witnesses.

6. I have perused the record, I find that on 28.3.2019, the counsels herein made applications to call various witnesses who can be termed as expert witnesses. For the plaintiff, the application was made to call the sub-county land adjudication officer Tigania East, the actual holder of the office. For the 1st defendant an application was made to summon the land adjudication officer/demarcation officer of Antuamburi adjudication section, while for the 4th defendant, an application was made to summon a particular land Registrar known as no. 145 Kamwara.

7. No objections were raised at that stage. The coram of that day indicates that Mr. Kiongo was present for the 2nd and 3rd respondents. He cannot therefore turn around to state that he was absent.

8. It is apparent that the plaintiffs have sued the office of DLASO as a 2nd defendant. But again, the plaintiff may be relying on documents emanating from that office to support their case. How and who will produce such documents noting that already an objection has been raised in respect of some of the documents of the plaintiff.

9. I note that before the commencement of the plaintiff's case, it was agreed that some crucial expert witnesses needed to be called before this court to shed light on the dispute. These witnesses were the land Registrar Meru North, Land registrar Meru central and the District land adjudication officer Tigania East. Although these witnesses testified and were cross examined, they were in court as neutral expert witnesses and it cannot be said that they were on any particular side. Thus such witnesses could not have been in court to produce specific documents for the plaintiff.

10. Considering that an issue has been raised concerning the documents of the plaintiff, then I allow the application made by the plaintiff to call DLASO as a witness on the following terms:

1) That summons be issued to the sub-county DLASO of Tigania East but only for purposes of production of plaintiff's documents.

2) Since the office concerned (DLASOS) is a public and not private office, then the documents are to be produced in an official manner, hence it is the current holder of the office who is to produce the documents and NOT ANY other person.

3) Further, such an officer shall be summoned ONLY for the purposes of production of plaintiff's documents already in plaintiff's bundle of documents.

Production of documents

11. On 15.7.2019, the plaintiff was in the process of giving her testimony when she made reference to the list of her documents item 1-5 dated 9.10.2018, and she desired to produce the said documents as her exhibits. This is when an objection was raised by Mr. Muriuki, counsel for the 1st defendant who averred that some of the documents should not be produced as exhibits.

12. For the documents on pages 28-29 of the bundle, it was averred that the same is not in the court's language and that no certificate of interpretation has been availed. For the documents on page 30-31, it was argued that those are extracts of a map and hence the map should be availed. As for document on page 32, it was argued that the same is a purported record of consolidation hence the original is required as well as the maker. Finally, the letter on page 25-26 was objected to on the basis that defendant disputes the contents there in.

13. MR. Kiongo and Mr. Morigori also objected to the production of the aforementioned documents.

14. Mr. Kaimenyi for the plaintiff averred that the aforementioned documents were served upon the other party's way back on 12.10.2018 and no one has ever objected to the same.

15. I have considered all the arguments raised herein. For item No. 28, the same is not legible. It is also allegedly done in Gujarat language. However, the translation of the same is on page 29.

16. The document in Gujarat was confirmed as a true translation from Gujarat to English. The then court clerk also certified the document as a true copy of the original. All this occurred on **4.2.1939, 80 years ago!**. The objection with regard to documents on page 28-29 is anchored on the issue of translation and the lack of a certificate but the authenticity of the same has not been raised.

17. Article 159 2 (d) empowers this court to ***"administer justice without undue regard to procedural technicalities"***. The documents having been made over 80 years ago, it would be practically impossible to procure the attendance of the translator or the court clerk.

18. In the case of **Evangeline Nyegera (suing as the legal representative of Felix M'Ikiugu alias M'Ikiugu Jeremiah M'Raibuni (deceased) vs Godwin Gachagua Githui, Court of Appeal Civil Appeal No. 28 of 2016**, it was held that;

"The test for admission of evidence is relevancy..... There is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence. We hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross examine on veracity and legitimacy if it be necessary".

19. This court is keen to uphold and safeguard the ***"right to be heard"*** which is anchored on the Latin Maxim principle ***"Audi alteram partem"*** which basically entails that a party who comes before the court ought to be given an opportunity to tender his evidence in a fair and just manner.

20. Further **Article 50 (1) of the Constitution** provides that:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body".

21. Finally, I note that the document on page 27 of the bundle is the letters of administration for the estate of Alayar Mangakhan dated **4.2.1939** the same day the documents on page 28 was translated into the document on page 29 which appears to be the will. The letters of administration have not been challenged yet they seem to be intertwined with the alleged will.

22. In the circumstances the objection with regard to documents on page 28 and 29 is dismissed.

23. As for the documents on page 30-31, those are indeed extracts of maps. They are difficult to interpret particularly the one on page 31 which is faint. However, the documents appear to emanate from the adjudication office. It is this office of adjudication which can properly shed light on the documents. I note that the maps were apparently created in 2016, hence they are not old documents. They are also public documents. I therefore partially allow the objection and I proceed to give the following directions;

1) The original maps are to be availed before this court for purposes of comparison with the extracts. Once the comparison is made, the original shall be released back to the relevant office.

2) The said documents are to be produced by the current holder of the office where the maps are kept and not necessarily by the maker of the documents.

24. For item no. 32, the same is partially blurred. It has many cancellations. I am not able to tell when the data was generated or when the extract was made. However, again this is a document allegedly from the adjudication office. I again partially uphold the objection with regard to this document on the following terms;

1) The original document is to be availed for comparison with the copy. Once the exercise of comparison is conducted the original is to be released back to the relevant office.

2) The document is to be availed by the current holder of the office and not the maker.

25. For the document on page 25, again it also appears to emanate from the office of the sub-county land adjudication and settlement officer Tigania East Sub-county and is written in an official capacity. The holder of that office is the one the court has directed to appear as a witness for the plaintiff for purposes of production of documents. **I hence direct that the current holder of the office be the one to produce the letter but not necessarily in its original form since the document is but a letter.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 3RD DECEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Ashaba holding brief for Kaimenyi for plaintiff

Ms Mwiraria holding brief for Morigori for 4th defendant

Kiongo for 2nd and 3rd defendants

Kiongo holding brief for Muriuki for 1st defendant

HON. LUCY. N. MBUGUA

ELC JUDGE