



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. 350 OF 2014**

**YASMIN ANWAR YUSUF.....PLAINTIFF**

**=VERSUS=**

**SAMUEL GATUGI KIMANI & 2 OTHERS.....DEFENDANT**

**RULING**

1. On 15<sup>th</sup> March 2018, when this case came up for further hearing of the Plaintiffs case, Mr Mbigi Njuguna for the Plaintiff indicated to Court that his last witness had died. He applied that the statement which had been recorded by the deceased witness be admitted in evidence under Section 33 of the Evidence Act.

2. Mr Kuria for the third defendant who was also holding brief for Mr Nyaga for the first and second defendants opposed the admission of the statement by the deceased on the ground that it will be prejudicial to his client's case in that he will not have opportunity to cross – examine and that the best option for the plaintiff would have been substitution of the deceased witness with another witness.

3. In response, Mr Mbigi Njuguna stated that the deceased witness was a land broker who is the one who was involved in the sale property to the plaintiff and that when the plaintiff was away, the deceased acted as a caretaker of the plot on behalf of the plaintiff. The deceased statement was very short and the contents of the same are confirmed by Enid Nyambura Nyanja who sold the suit property.

4. I have considered the application by Mr Mbigi Njuguna and the opposition to the same by Mr Kuria. There is no contention that the plaintiff's last witness died on 27<sup>th</sup> July 2017. The deceased David Kagiri Muhia recorded a statement on 30<sup>th</sup> October 2015. Section 33 (b) of the Evidence Act provides that a statement made by a deceased person in the ordinary course of business is admissible. In the instant case, the deceased recorded the statement in the ordinary course of business. The deceased was a land broker who was involved in the sale of the suit property to the plaintiff.

5. The deceased recorded the statement as a broker who had been mandated to do so by the owner of the suit property. The owner of the suit property which was sold to the plaintiff has recorded a statement which confirms what the deceased said. I therefore find that the deceased's statement can be allowed under Section 33 (b) of the Evidence Act. The statement is accordingly admitted as part of the evidence of the plaintiff.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this *11<sup>th</sup>* day of *April 2018*.

**E.O .OBAGA**

**JUDGE**

In the presence of ;-

Mr Mwaura for Mr Mbigi for Plaintiff

Court Assistant: Hilda

**E.O .OBAGA**

**JUDGE**