



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 202 OF 1995**

**NTARANGWI M'IKIARA.....PLAINTIFF**

**VERSUS**

**JACKSON MUNYUA MUTUERA.....DEFENDANT**

**RULING**

1. This ruling is in respect of the objection raised by plaintiff's counsel regarding the production of some defence exhibits: Defence documents are in four lists, the one of 18.9.2015, the one of 18.3.2016, the one of 25.4.2016 and the one of 26/7/2016. All these documents have been availed in a green paginated bound bundle running from page 1 to page 60.

**List of 18/9/2015 (1<sup>st</sup> list)**

2. The advocate for the plaintiff objected to the production of item 1 in this list reasoning that the agreement was a photocopy which had been tampered with, added and subtracted. He also averred that it was written in Kimeru and translation was not done by anyone who knew Kimeru. He contends that item no. 2 was also a copy and that the caution had to be verified from the green card. He also told the court that if the green card was verified, he would not mind the production of item 2.

3. Item 6 was objected to on the basis that it was false. Counsel stated that this document should be produced by the town clerk. He also added that item 7 was a mutation which was a surveyor's document and claimed it was also fake. He requested the surveyor to come to state why the mutation was not registered in the land's office.

4. Item 12 was objected to apparently because the map was fake and was not signed and approved by the commissioner and that the same was drawn contrary to the original PDP.

5. Plaintiff's counsel did not object to the production of items 3, 4 & 5 as well as item 8,9,10 and 11 in that list of 18.9.2015 save some part of item 11, the letter of 24.2.1993. It was argued that Osodo's letter was dated 22.5.1995 while that of Saisi was dated 24.2.1993 (two years earlier) and that the two letters cannot be produced together. Counsel also added that the schedule attached to the letter of 24.2.1993 was fake.

**List of 18/3/2016 (2<sup>nd</sup> list)**

6. Plaintiff's counsel argued that the list of 18.3.2016 should not be produced because even the defendant didn't know of its existence and that there was no one to produce the documents.

**List of 25.4.2016 (3<sup>rd</sup> list)**

7. Concerning the list of 25.4.2016, plaintiff's counsel stated that "item 4 is not something one can know what it is". The rest of the documents item 1-3 were produced as exhibits

**List of 26/7/2016 (4<sup>th</sup> list)**

8. Plaintiff's counsel argued that item 1 has been tampered with and is not original. Item 5, 6, 7 8 and 9 are also objected on the basis that they are not original documents. Further, item 12 was objected to on the basis that it is a forged map containing insertions of A &B.

9. Plaintiff's counsel did not object to the production of item 11, 13 and 14.

**Response by Defence**

10. The response by the defence which is equally detailed was filed on 10.5.2018.

#### **1<sup>st</sup> list of 18.9.15**

11. On the issue that original documents should be produced, defence avers that some of the documents were drawn many years ago. The originals cannot be traced and cannot be availed within a reasonable time. For instance, item 1 in the first list, (page 3 of the green bundle), the document was drawn on 5.12.1967 which is over 49 years ago. The original document can't be traced on account of lapse of time. Further, the existence and contents of the document is admitted in documents no.s 3, 4 and 5 already produced as Dexh 1, 2 and 3 respectively. The translator was a court clerk serving at Meru Law Courts. He has since retired from the service.

12. As for the caution, defence exhibit 5 confirms that the same was registered.

13. On the issue that some documents are not genuine, defence avers that the documents are very old. For instance, item 6 in the first list is an approval for land sub division dated 16.2.74, 44 years ago. The originals of such documents cannot be availed within a reasonable time.

14. Other documents like the mutation forms and boundary identification certificates which are alleged to be false documents are public documents by dint of the provisions of section 79 (i) (iii) of the evidence act. No evidence has been presented to show that the documents are not genuine.

15. As regards the map alleged not be signed and not approved by the commissioner of lands, defence avers that this document is similar to the one produced by the plaintiff as P-exhibit 5. The document is clearly signed by the town clerk. There is no requirement for signing by the commissioner of lands. Section 89 (1) Evidence Act allows for production of plans and allows the court to presume their accuracy.

#### **2<sup>nd</sup> list of 18.3.2015**

16. On claims that documents in the 2<sup>nd</sup> list do not belong to the defendant, defence avers that original is available. Defendant has explained that he got the documents from one Francis M'Muraa before he died. The said Francis M'Muraa is long deceased and cannot be availed to produce these documents. The advocate who drew the documents cannot be availed to produce the same as he is senile, a fact confirmed by plaintiff's advocate. The documents ought to be admitted by dint of the provisions of section 68 (1) (b) of the evidence act.

#### **3<sup>rd</sup> list of 25.4.2015**

17. In the 3<sup>rd</sup> list, it is item 4 which was objected to on the grounds that the document is an official record, yet it is not signed and that it emanates from the Municipal Council and the officer who signed it was not in the Municipal Council. Defence avers that this is a public document which should be admitted by dint of the provisions of section 79 (1) (iii). Further defence states that there is no evidence presented to show that the document is not genuine. It is clearly signed and its source is the district land office Meru and not the municipal council of Meru as alleged.

#### **4<sup>th</sup> list of 26.7.2016**

18. In the 4<sup>th</sup> list the reasons for objection of item 1 was that it is not an original document. In response, defence stated that original was available.

19. As regards item 4 and 6, the objection was on the basis that the maker should be called to produce the same. The response was that the letters dated 24.2.1993 and 25/4/1995 respectively are over 25 years old. It is not possible to avail the makers of the same without unreasonable delay. The documents are a public ones which should be admitted by dint of the provisions of section 79 (1) (iii) of the Evidence Act. Item 7 too is a public document which should be admitted by dint of the aforementioned provisions of law.

20. For item 8, the objection was on the basis that the author was unknown and that the document was not authored in Meru. Defence responded that the document is clearly authored by D.T.A Owino for commissioner of lands. The document is a public document which should be admitted by dint of the provisions of section 79 (1) (iii) Evidence Act. There is no requirement that every document must be authored in Meru.

21. Finally, in respect of item 9, the objection was on the basis that the maker should be called to produce the same. The response of the defence is that the document is dated 26.5.1998. It is over 20 years old. It may not be possible to avail the maker without unreasonable delay. The document should be admitted by dint of the provisions of section 79 (1) (iii) Evidence Act.

#### **Determination**

22. I have keenly analyzed the dispute at hand. The first issue to consider is the relevance of the documents. The dispute herein is hinged on paper trail running for decades. The sequence of events can only be captured through this paper trail.

23. In the case of **Evangelina 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 appellants 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"*.

24. In the present case, the defence has clearly presented the nature and number of documents. Defendant had also given a detailed account of the relevance of these documents. It is therefore up to the opposing party to cross examine the witness on the veracity and legitimacy of the said documents.

25. The second issue the court has considered is the actual age of the dispute. D-Exhibit 1 is a plaint showing that parties herein had the disputed going on in **SRMCC no. 21 of 1973**. As rightly submitted by defence, the dispute is over **45 years old** and the possibility that the original documents can no longer be available is real. Documents falling under this category includes: Item 1, 2, 6 and 7 in list of 18.9.2015, Item 1 & 2 in second list of 18.3.2016, item 4 in 3<sup>rd</sup> list of 20.4.2016, item 5,6,7,8 and 9 in the list of 26.7.2016. I also note that item 1 in the first list, the document written in Kimeru has been translated into the English language.

26. Thirdly, it would be difficult to procure the attendance of the makers of these documents in view of the fact that there is no certainty of tracing these witnesses. It is not lost to this court that a new land regime came about after the promulgation of the new constitution. There was also a change in the structure of government. Some of the officers like that of commissioner of lands and town clerks no longer exist.

27. In the light of the forgoing, I find that the aforementioned documents can be produced pursuant to provisions of section 64 and 68 of the evidence act where it is stipulated that secondary evidence is admissible where the original has been destroyed or is lost or when such documents cannot be produced within a reasonable time.

28. Fourthly, the court has considered that most of the documents are public documents. The documents include item 2 in the 1<sup>st</sup> list of 18.9.2015 (which also happens to be captured in Defence Exhibit 5, item 7 in same list, item 4 in 3<sup>rd</sup> list of 20.4.2016. Item 5,6,7,8 and 9 in the 4<sup>th</sup> list of 26.7.2016. I am in agreement with defence submissions that these documents are admissible by dint of section 79 (1) (iii) of the evidence act where it is provided that: ***“The following documents are public documents— (a) documents forming the acts or records of the acts—of public officers ……….”***

29. The fifth and final issue the court has considered is the manner in which plaintiff's too had produced their documents. Plaintiff had produced photocopies of documents without a hitch. In particular, plaintiff produced mutation forms as Plaintiff exhibit 3 without calling the surveyor. On the same breadth defence mutation forms captured as item 7 in list of 18.9.2015 ought to be produced. Plaintiffs side has also objected to production of the map (item 12 in 4<sup>th</sup> list of 20.4.2016 of defendant) yet they produced their map as Plaintiff Exhibit 5.

30. Plaintiff is also insisting on calling makers of documents like the letters written by Osodo and Saisi, some containing lists, yet plaintiff's side has produced such similar letters like the ones authored by S.Z Mutwiri (P exhibit 10) and Kahuhu's letter, (P- Exhibit 9) containing lists without calling Mr. Kahuhu and Mr. Mutwiri as witnesses.

31. Plaintiff's side has also produced rate payment records as Plaintiff's exhibit 6 and on the same note, defence side also ought to have a chance to produce similar records like item 7 in defence list of 26.7.2016.

32. Article 50 (1) of the constitution stipulates 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”***.

33. This court cannot apply different standards for the parties. In the same manner that plaintiff's side was able to produce photocopies of documents relevant to their case then in like manner shall the defence also avail their documents.

34. The upshot of findings is that the objection raised by plaintiff's counsel is dismissed and DW 1 is hereby allowed to produce all the aforementioned documents in the 4 lists.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25<sup>TH</sup> DAY OF JULY, 2018 IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Miss Nyaga for defendant

Riungu holding brief for Kioga for plaintiff

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**