



**Chelugot & 3 others v Ominde & another (Environment & Land Case
49 of 2018) [2024] KEELC 173 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 49 OF 2018**

**E ASATI, J
JANUARY 25, 2024**

BETWEEN

**RAEL CHEPKURGAT CHELUGOT 1ST PLAINTIFF
JOHNSTONE KIPKOECH LANGAT 2ND PLAINTIFF
LAURENCE KIMMUTAI LANGAT 3RD PLAINTIFF
KENNETH KIPYEGON LANGAT (SUING AS THE JOINT ADMINISTRATORS
OF THE ESTATE OF ISALAH KIPLANGAT ARAP CHELUGOT) 4TH PLAINTIFF**

AND

**WALTER EDWIN OMINDE 1ST DEFENDANT
THE LAND REGISTRAR, KISUMU COUNTY 2ND DEFENDANT**

RULING

1. On 18.1.2023, at the close of the testimony of PW1, Counsel for the Plaintiff requested that the Defendant avails original documents of the documents they intend to produce at the time of defence hearing. Counsel for the 1st Defendant objected to the request on the grounds that no Notice to Produce Documents had been served. The court gave directions that the plaintiff may serve Notice to Produce Documents specifying the documents required in original form.
2. The record shows that the Plaintiff, subsequently, served a Notice to Produce Documents dated 26/9/2023 for production of: -
 - a. Sale agreement dated 9th June 2006
 - b. Application forms for consent of the Land Control Board
 - c. Consent of the Land Control Board



- d. Transfer form duly executed
 - e. Order of court in Miscellaneous application number 40 of 2015
 - f. Hand written instructions of Isaya Cheluget and
 - g. Correspondence between the 1st Defendant and Isaya Cheluget.
3. The record further shows that in response, the 1st Defendant filed an objection contained in a letter dated 30th November 2023. The Defendant contended that:-
- a. the Notice to produce was misconceived for such notice under section 69 of the *Evidence Act* cap 80 laws of Kenya, is available only to the person proposing to produce secondary documents. It is therefore unavailable to the Plaintiffs who have already closed their case.
 - b. that he defendant shall rely upon proviso (ii) to section 69 of the *Evidence Act* Cap 80 to the effect that the plaintiffs have all along known these documents which he intends to use to prove his case. Moreover, notice of such production was given by the Further List and Further Bundle of Documents filed and served in advance which precludes the defendant from giving such notice.
 - c. the defendant also notes that section 68 (1) (a) (i) and (e) of the *Evidence Act* cap 80 applies to this case where the plaintiff has been in possession of the original of the documents the defendant intends to prove his case or they are public documents, and is thus precluded from producing primary documents.
 - d. Indeed the 1st Defendant intends to adduce the documents referred in the aforesaid Notice to Produce Documents as Ex D1, 2, 3, 4, 7, 8 and 9 as per the list of documents dated 8th October 2018 and reiterates as follows:
 - i. D1 the sale agreement dated 9th June 2006, the plaintiff equally has the original.
 - ii. D2, 3 and 4 being application forms for consent of the Land Control Board and Transfer Forms duly executed respectively; these are certified copies, originals being with the Land Registrar.
 - iii. D7 order of the court in Kisumu Miscellaneous Application number 240 of 2015, this is a certified copy of a court public document
 - iv. D8 and D9 hand written instructions by the deceased plaintiff and his correspondences with the 1st Defendant; the 1st Defendant only has copies and originals cannot be obtained without much inconvenience.
 - e. The misconceived Notice by the plaintiff is therefore intended to delay the hearing of this case all in violation of the overriding objectives under sections 1A and 1B of the *Civil Procedure Act* cap 21 which binds litigants and their advocates to facilitate the expeditious and efficient disposal of the business of the court.
4. Section 69 of the *Evidence Act* pursuant to which the notice to produce was made provides as follows:
- “Secondary evidence of the contents of the documents referred to in section 68 (1) (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is or to his advocate, such notice



to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case;

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases;

- i. when the document to be produced is itself a notice
- ii. when from the nature of the case, the adverse party must know that he will be required to produce it
- iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force
- iv. when the adverse party or his agent has the original in court
- v. when the adverse party or his agent has admitted the loss of the document
- vi. when the person in possession of the document is out of reach, is not subject to the process in court
- vii. in any other case in which the court thinks fit to dispense with the requirement."

5. The 2nd Defendant chose not to address the issue as it concerned the plaintiffs and the 1st Defendant.
6. I have considered the Notice to Produce Documents, the Objection and the relevant law. The purpose of the Notice to Produce under section 69 of the *Evidence Act* is to render secondary evidence of a document the original of which is held by the adverse party admissible. As at the time of filing the Notice to Produce Document, the Plaintiff had already produced all its documents and closed its case. The documents sought to be produced by the 1st Defendant were filed as listed in the 1st defendant's list of documents and bundle of documents. No objection was raised during pre-trials. Section 68 provides for proof of documents by secondary evidence. The documents sought to be produced by the 1st Defendant are admissible under the provisions of section 68 of the *Act*.
7. For this reason, the court finds that the Notice to Produce is not merited and allows production of the documents as listed in the list of documents introduced by DW1.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 25TH DAY OF JANUARY 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:-

Maureen: Court Assistant.

Otieno David for the Plaintiffs.

A. Ombwayo for the 1st Defendant.

No appearance for the 2nd Defendant.

