



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 440 OF 2013

DAVID NJAGI WAMBU.....PLAINTIFF

VERSUS

GRACE MUTHONI GITUTO.....1ST DEFENDANT

LAND REGISTRAR KIRINYAGA COUNTY.....2ND DEFENDANT

RULING

In the course of the trial, the defence called as a witness **MR. MUNENE NYAGA** a former Police officer attached to the Criminal Investigations Department in Kerugoya to produce an exhibit Memo form and the report of a document examiner which had been prepared by **MR. KENGA** a document examiner in a criminal case that had earlier been preferred against the plaintiff in this case and which the witness was the Investigating officer. He told the Court that Mr. Kenga had since left the services of the Kenya Police and it would be difficult to avail him.

Counsel for the plaintiff **MR. KAGIO** objected to the production of the Exhibit Memo form and the document examiner's report on the following grounds. Firstly, that **MR. NYAGA** was not the maker and had never worked with **MR. KENGA** and so he is not conversant with his handwriting and signature. Secondly, that there was no evidence that Mr. Kenga could not be traced for cross-examination.

MR. MUNENE counsel for the 1st defendant responded that *Section 6 of the Evidence Act* was applicable since the two documents were part of the same transaction. Counsel also cited *Section 35 of the Evidence Act* saying it would result in un-reasonable delay trying to get **MR. KENGA** to testify in this case. Reliance was also placed on *Section 77 of the Evidence Act*.

MR. KAGIO however replied that *Section 6 of the Evidence Act* was inapplicable since the documents were not a series of the same transaction since one was prepared by the witness and the other by the document examiner. And with regard to *Section 35 of the Evidence Act*, counsel submitted that there must be cogent evidence that the document examiner cannot be found and even then, the witness had to confirm that he is familiar with the handwriting of the document examiner.

I have considered the objection raised against the production of the Exhibit Memo form and, the report by **MR. KENGA**.

With regard to the Exhibit Memo form, it is clear from the evidence of **MR. MUNENE NYAGA** (DW3) that as the Investigating officer, he prepared the documents in a criminal case where the plaintiff was accused of forging documents relating to sale of land. As the Investigating officer, he then forwarded the documents to the document examiner at the Criminal Investigations Department in Nairobi. He later

received the report from the document examiner. Clearly therefore, with regard to the Exhibit Memo form, **MR. MUNENE NYAGA** is the maker thereof and no objection can properly be sustained about his production of the same.

With regard to the document examiner's report, this Court has been informed that **MR. KENGA** is no longer in the Police service and it is not known where he is. There would therefore be un-reasonable delay even if witness summons were sought for his attendance. With regard to the availability of **MR. KENGA**, I think this Court can properly invoke the provisions of **Section 60 (1) (O) of the Evidence Act** and take judicial notice of all facts of general or local notoriety. One such fact is that for a long time in this country, there were only two documents examiners both of whom have long gone into retirement from public service. One was **MR. KENGA** the maker of the report sought to be produced. The other was **MR. MAWEU**. In such circumstances, **Section 35 (1) of the Evidence Act** comes into aid because it provides that such a document is admissible in Evidence if the maker

“..... cannot be found or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to be unreasonable”.

The fact that **MR. KENGA** is a document examiner and therefore an expert in terms of **Section 48 of the Evidence Act** cannot really be belaboured. It is also clear in my mind that even if witness summons for his attendance are sought and issued, the amount of delay and expense that will be incurred would be un-reasonable in the circumstances.

I therefore overrule the objection by **MR. KAGIO** and order that the document examiner's report and the Exhibit Memo form may be produced by the defence as evidence.

It is so ordered.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017

Ruling dated, delivered and signed in open Court this 8th day of December 2017 at Kerugoya

Mr. Kagio for Plaintiff present

Mr. Munene for Defendants present

Plaintiff present

1st Defendant present

Mr. Gichia Court clerk present

B.N. OLAO

JUDGE

8TH DECEMBER, 2017

Mr. Kagio for Plaintiff present

Mr. Munene for Defendants present

COURT: By consent, further hearing on 15th February 2018.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017