



**Ikiao & another v Kamencu (Environment & Land Case
E008 of 2022) [2024] KEELC 948 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 948 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2022
CK NZILI, J
FEBRUARY 21, 2024**

BETWEEN

DOUGLAS IKAMATI 1ST PLAINTIFF

JENNIFFER KANARIO IKIAO 2ND PLAINTIFF

AND

ZAKAYO KAMENCU DEFENDANT

RULING

1. At the close of the defense case, the defendant/applicant sought by an application dated 6.2.2024, to be allowed to avail the original copies of D. Exh No's. 2, 34, 5, 6, 7, 12, 27, 28 & 30 for inspection by the court so as to assist in the determination of the matter. The reason is that the documents relate to the history of the allocation of the land, approval of the building plans, and payment of the land rates by the applicant.
2. The application is supported by an affidavit sworn by Zakayo Kamencu on 6.2.2024. He says it is in the interest of justice for the court to inspect the documents for a fair and just determination of the matter and that there would be no prejudice to the respondent.
3. Mr. Mokuu, the plaintiffs'/respondent's counsel, opposed the application as an afterthought and brought too late after the pre-trial and conclusion of the matter. Counsel posed the question as to whether the applicant doubted the genuineness of the exhibits he had produced in his defense. Counsel urged the court to order the matter to proceed for judgment.
4. Mr. Kamencu learned counsel for the defendant/applicant, in a rejoinder, submitted that none of the documents had been objected to as exhibits and urged the court to be guided by Section 67 of the *Evidence Act*. Counsel further urged the court to find it was in the interest of justice to inspect the documents.



5. On 30.5.2023, this matter came for a case conference. Parties confirmed compliance with Order 11 of the *Civil Procedure Rules* and a hearing date was taken for 25.9.2023. Before the hearing date, the defendant filed an application dated 20.9.2023. The court rejected the application on the day of the hearing and directed that the defendant was at liberty to object to the documents and or demand the makers to avail them.
6. PW 1 took to the witness stand and resumed on 30.11.2023 for cross-examination and closed his case on 30.11.2023. An adjournment was granted to call PW 3.
7. On 14.12.2023, PW 3, a physical planner from the County Government of Meru, took to the witness stand and produced P. Exh No.21 (a), (b) & (c) initially marked for identification. He also tried to produce MFi D 1 35, which had been objected to earlier on by the defendant. Out of objection, the court rejected the documents for lack of a date. PW 3 was only able to produce a Google image of the area as P. Exh No. (36). He also produced D. Exh No. (1). Therefore, the matter was fixed for defense hearing on 1.2.2024 and 12.2.2024 when the defendant produced D. Exh No. 2 -37 with no objection from the plaintiff. He also called DW 2, 3, 4 & 5 to sustain his case.
8. The manner in which exhibits and evidence is tendered by parties is governed by Orders 14, 15, 16,17, and 18 of the Civil Procedure Rules. The only inspection a court is allowed at any stage of the suit for the property or the thing in issue under of Order 18 Rule 11 Civil Procedure Rules.
9. Production of documents under Orders 16 (5), (6), and 18 (2) *Civil Procedure Rules* is through the parties and their witnesses.
10. The manner and status of the production of documents of a case must be in line with Sections 66 – 70, 78 of the *Evidence Act* as read together with the Environment Land Court Practice Directions, pursuant to the Environment Land Court Act. It is not for the court to direct a party on how to produce its exhibits. As long as the procedural and substantive law is complied with, the parties are at liberty to avail exhibits.
11. Admissibility and the production of secondary evidence is governed by Sections 35 and 68 of the *Evidence Act*. Section 65 (1) of the *Evidence Act* stipulates that primary evidence is the document itself produced for inspection by the court, which is the best type of evidence. In this suit, the documents relied upon by the defendant were filed accompanying the defense and counterclaim. If the document was not an original at the time it was produced, the defendant was supposed to lay the basis for the production of the copy and not the original one. Once the basis is laid, a party would then comply with the rules of evidence as to relevance, admissibility and prove the contents, state, or physical appearance of the documents. Similarly, in Section 69 (iv) of the *Evidence Act*, it is the court that dispenses with the need for the production of the original document.
12. The defendant has availed the documents for inspection by the court. The plaintiffs term the availing of the documents as an afterthought yet they have not stated that the documents are foreign, new, or were not filed or availed before the plaintiffs testified and closed their case. The court, therefore, is satisfied that the defendant is justified in bringing original documents for inspection under Sections 65, 66, 67, and 68 of the *Evidence Act*. See *Ken Nyaga Mwige vs Austin Kiguta & others* (2015) eKLR.
13. The upshot is that the defendant is allowed to avail the original documents for comparison with the documents already produced. The plaintiff is at liberty to peruse them before filing written submissions, for all the parties to have a fair hearing in accordance with Articles 50 (1) & 159 & (d) of *the Constitution*. There will be no order as to costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU



ON THIS 21ST DAY OF FEBRUARY 2024

In presence of

C.A Kananu

Defendant

Mr. Kimathi Kamenchu for defendant

HON. CK NZILI

JUDGE

