



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 281 OF 2009**

**ZAKARIA MUIGAI GAKIBE ..... PLAINTIFF**

**VERSUS**

**1. JOHN MWENJA NGUMBA.....1<sup>ST</sup> DEFENDANT**

**(Sued as Administrator of the Estate of Andrew Kimani Ngumba)**

**2. KENYA COMMERCIAL BANK.....2<sup>ND</sup> DEFENDANT**

**3. ROYAL BUILDERS AND INVESTMENTS LIMITED.....3<sup>RD</sup> DEFENDANT**

**4. THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**(On behalf of the Commissioner of Lands)**

**5. EQUITY BANK LIMITED.....5<sup>TH</sup> DEFENDANT**

**RULING**

The suit herein is part-heard, and the Plaintiff’s last witness (PW6) gave his evidence-in-chief at the hearing held on 6<sup>th</sup> May 2015. The Plaintiff’s counsel sought to have admitted as part of the report by PW 6 and/or the Plaintiff’s exhibits two Gazette Notices being Gazette Notice Number 1617 dated 2<sup>nd</sup> April 1990 and Gazette Notice No. 3348 dated 23<sup>rd</sup> July 1991, and a copy of a letter of offer for a loan facility made by the 2<sup>nd</sup> Defendant to the Plaintiff dated 5<sup>th</sup> April 1991.

The Counsel for the 1<sup>st</sup> to 5<sup>th</sup> Defendants while not opposed to the production of the Gazette Notices, objected to production of the said letter of offer. Various grounds were given for the objections. The 1<sup>st</sup> Defendant’s counsel stated that he was hearing of the letter of offer for the first time and had not taken any instructions on it. The counsel for the 2<sup>nd</sup> Defendant submitted that PW6 is not the maker of the document and could not therefore produce it. The counsel for the 3<sup>rd</sup> Defendant on his part stated that the document being produced was a photocopy and not the original document, while the counsel for the 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted respectively that they had no previous knowledge of the document and the Defendants were being ambushed by the Plaintiff.

The Plaintiff’s Counsel in reply submitted that this dispute dates back to 1991, and that there were many documents that the Plaintiff has had to make great effort to obtain, including the said letter of offer. Further that the facility is a matter of record, as the Plaintiff’s property was sold by the 2<sup>nd</sup> Defendant on account of the said facility, and the alternative is to serve the 2<sup>nd</sup> Defendant with a Notice to Produce the said letter of offer. Lastly, that any prejudice caused to the Defendants can be cured by giving them time

to peruse the said document.

I have considered the arguments made, and will firstly address the ground raised that the delay in producing the said letter of offer has caught the Defendants by surprise and will prejudice them. The Court notes in this regard that the letter of offer was the first document listed in the 2<sup>nd</sup> Defendant's List of Documents dated 24<sup>th</sup> April 2012 and filed in Court on 25<sup>th</sup> April 2012, although he said letter was not included in the accompanying bundle.

In addition, the 2<sup>nd</sup> Defendant filed a witness statement by one Anthony Nzioka Kyalo, its Credit Administrator at its University Way Branch dated 24<sup>th</sup> April 2012 and filed in Court on 25<sup>th</sup> April 2012. In paragraph 4 of the said statement it is averred that the 2<sup>nd</sup> Defendant granted a loan facility of Ksh 1 million to the Plaintiff whose terms are set out in the letter of offer and instrument of mortgage. The existence of the letter of offer as therefore been on record, and cannot be denied by the Defendants, and particularly by the 2<sup>nd</sup> Defendant.

On the issue of admissibility of the said letter of offer, this court is given the discretion under section 35(2) of the Evidence Act to admit documents without the maker being called as a witness, even if he or she is available, and it is provided therein as follows:

**(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible or may, without any such order having been made, admit such a statement in evidence—**

**(a) notwithstanding that the maker of the statement is available but is not called as a witness;**

**(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.**

In addition under section 68 (1) (a) and (b) of the Evidence Act, it is provided as follows as regards the production of secondary documents including photocopies:

**(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases—**

**(a) when the original is shown or appears to be in the possession or power of—**

**(i) the person against whom the document is sought to be proved; or**

**(ii) a person out of reach of, or not subject to, the process of the court; or**

**(iii) any person legally bound to produce it,**

**and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;**

**(b) when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;**

Section 69 of the Evidence Act provides in this respect that a notice to produce shall not be required in order to render secondary evidence admissible when from the nature of the case, the adverse party must know that he will be required to produce it and in any other case in which the court thinks fit to dispense with the requirement.

In the present case and objection, it is my opinion that locating the original letter of offer from the 2<sup>nd</sup> Defendant would involve unreasonable delay and expense given the stage of hearing of this suit, and also given that the 2<sup>nd</sup> Defendant which was the maker of, and should have in its possession the original letter of offer has not only admitted to its existence and its evidential value, but is either unable or unwilling to produce it. If for any reason the 2<sup>nd</sup> Defendant disputes the authenticity or content of the said letter of offer, they shall be at liberty to produce their version of the same.

This court accordingly hereby admits as evidence the photocopy of the letter of offer dated 5<sup>th</sup> April 1991 that is in the Plaintiff's possession pursuant to sections 35(2), 68 1(a) and (b), and 69 of Evidence Act, and for the reasons given in the foregoing.

There shall be no order as to costs.

Orders accordingly.

Dated signed and delivered in open court at Nairobi this \_\_\_\_7<sup>th</sup>\_\_\_\_ day of \_\_\_\_May\_\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**