



IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. OLE KANTAL, JJA)

CIVIL APPEAL NO. 28 OF 2016

BETWEEN

**EVANGELINE NYEGERA (Suing as the Legal Representative of Felix M'Ikiugu
alias M'ikiugu Jeremia M'Raibuni (Deceased)).....APPELLANT**

AND

GODWIN GACHAGUA GITHUI.....RESPONDENT

(Being an interlocutory appeal from the Ruling or Order of the High Court of Kenya at Meru (Njoroge, J.) dated 9th July, 2014

in

H. C. C. No. 95 of 2010)

JUDGMENT OF THE COURT

1. This is a judgment in an interlocutory appeal. Before the High Court at Meru, there is pending Civil Suit No. 95 of 2010 which, the appellant **Evangeline Nyegera** (qua legal representative of Felix M'Ikiugu alias M'ikiugu Jeremia M'Raibuni, deceased) brought against **Godwin Gachagua Githui**, the respondent in this appeal seeking a declaration that **Land Title No. Ontulili/Ontulili Block 1 (Katheri) 1229** "was fraudulently and illegally acquired and as such it is null and void" (sic); and a further declaration that "Plot No. 862 (Katheri) – Timau is solely and rightly held by Felix M'Ikiugu and a Title of Plot NO. 862 (Katheri) – Timau registered (sic) in the name of Felix M'Ikiugu (deceased) to issue (sic). The respondent filed defence to the suit on 15th September 2010 denying the allegations that the appellant qua plaintiff was entitled to the land referred to.

2. On 9th July 2014, the High Court sitting in Meru (**P. M. Njoroge, J.**) dismissed the application dated 10th April 2014 filed by the appellant seeking orders that the Court be pleased "to admit all copies made from the original documents by xerography as secondary evidence". The appellant averred that she was "unable to trace the original documents issued by Katheri Farmers Co. Ltd for allocation, sub-division, and registration of the subject matter, however she has copies made from the original through xerography." The appellant further averred that she "cannot get the said copies certified by Katheri Farmers Co. Ltd as is no longer in existence". The respondent opposed the application and his affidavit sworn on 23rd April 2014 averred that he would be prejudiced if the order sought was granted as fraud and forgery were alleged and that it must not be presumed that the original documents are lost and further that there is no provision in the Evidence Act for the production of secondary evidence save as provided under Section 69 of the Act. The respondent further submitted that there is no evidence that the copies sought to be admitted as secondary evidence were from the original documents.

3. In his ruling dated 9th July 2014, the learned Judge examined the provision of Sections 64 and 68 of the Evidence Act and found that secondary evidence is admissible in proper circumstances where the original has been destroyed or is lost when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect produce it in reasonable time. The learned Judge observed that the documents the appellant sought to produce were not disclosed, nor did the appellant indicate what she sought to prove through production of such documents. Moreover, the learned Judge observed that the appellant did not state whether she had seen the original documents nor whether the original documents had been relied on by her late husband in the suit said to have abated upon his death. The learned Judge proceeded to dismiss the application with costs. This is the decision that provoked this appeal.

4. In the 4 grounds of appeal proffered in the Memorandum of Appeal, the appellant submits that the learned Judge erred in his ruling by misinterpreting Section 68 of the Evidence Act. In counsel's view, the learned Judge misapprehended the said Section and arrived at the

wrong conclusion. The appellant stated in paragraph 1 (a to g), 2, 3 and 4 of the Memorandum of Appeal:

“1) The Learned Judge of the High Court erred in law in mis-interpreting the provisions of S. 68 (1) (c) of the Evidence Act by holding that the application under that provision is subject to any or all of the following conditions:

(a) That the “particular documents sought to be produced must have been disclosed prior to their production.” These documents could have been disclosed if the parties had complied with order 11. The Judge was in a hurry to force hearing without compliance.

(b) That the litigant must disclose what Appellant/Plaintiff intended to prove before production of the documents.

(c) That the Plaintiff must have seen the originals before being allowed to tender copies for production.

(d) That the litigant must indicate whether these documents must have been used in a previous suit or previous litigation.

(e) That a credible nexus should be established between the copies and the originals.

(f) The Plaintiff must establish by what method copies had been produced.

(g) That the documents of 1980 could be produced in 2014. That is not “Reasonable Time”.

2) The Learned Judge became like a prophet of doom when he speculated all the negative consequences that likely to result if Plaintiff/Appellant were allowed leave to produce documents. “It was like giving the litigant “Carte blanche” to manufacture evidence”.

3) The Learned Judge intentionally departed from the trend of the law by manufacturing irrelevant excuses against the Plaintiff/Appellant in order to divert from the trend of the logic of law. (see last page (p4) of the Judgment)). All the 8 requirements were irrelevancies manufactured by the Learned Judge – thus confirming has bias against the Plaintiff/Appellant.

4) Appellant will pray that this appeal be upheld and the court do set aside the judgment and orders of the lower court and direct that the Plaintiff/Appellant be allowed to produce his evidence as per the requirement of the law – with costs to Appellant.”

5. We have perused the record of appeal and have given due consideration to the submissions of counsel on behalf of the parties. The test for admission of evidence is relevancy. The appellant avers that the original documents are either lost or cannot be found. Implicitly, this relates to the subject land in the suit in the lower court. The Evidence Act allows secondary evidence by way of copies of documents made from the original by mechanical process which in themselves ensure the accuracy of the copy, and copies compared with such copies. We think the appellant ought to have specified the nature of the documents and their relevance. As the suit is still pending, and as 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 appellant 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. Accordingly and in terms of Rule 31 of the Rules of this Court, we reverse the decision of the learned Judge and direct that the application dated 10th April 2014 is allowed and the matter is referred back to the High Court for hearing and the appellant shall state the nature and number of the documents, the relevance of each and how the copies were made by the appellant from the original documents. The costs of the application shall be in the suit.

Dated and delivered at Nairobi, this 20th day of December, 2017

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR