



**Ngotho Commercial Agencies v Rono & 2 others (Environment & Land
Case 164 of 2018) [2023] KEELC 377 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 164 OF 2018
FM NJOROGE, J
JANUARY 30, 2023**

BETWEEN

NGOTHO COMMERCIAL AGENCIES PLAINTIFF

AND

DENNIS RONO 1ST DEFENDANT

LAND REGISTRAR NAKURU 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The application before court is one dated September 10, 2022 in which the applicant seeks the following principal order:

“That the honourable court be pleased to adopt the sworn statement made by the late David Kiprono Sambai in Criminal Case No 1435 of 2018.”

2. David Kiprono Sambai happens to be the original 1st defendant in the present suit. Dennis Rono, the current plaintiff is the legal representative of David Kiprono Sambai’s estate, the latter having died some time ago and the former having been appropriately substituted in this suit for him. In the dispute between the plaintiff and the late David Kiprono Sambai over the suit land, it is acknowledged that the plaintiff was arraigned in court on a criminal charge or criminal charges in Criminal Case No 1435 Of 2018 upon the lodging of a complaint by David. David gave sworn evidence in the matter and later passed on and so he is not available to testify in the current suit. It is stated that the advocates representing the plaintiff in this case are the same advocates who represented it in the criminal case; that they cross examined David, and that the criminal case also involved the suit property herein. It is averred that the sworn statement of David in that criminal case will help this court settle the issues



in controversy in the present suit if it is produced and the plaintiff would not suffer any prejudice by such course of action.

3. The application is supported by the sworn affidavit of the applicant in which he reiterates the foregoing matters.
4. The application is opposed by the plaintiff through the sworn affidavit of the director of the plaintiff by the name of Thomas Njenga Ngotho filed on November 1, 2022. He deposes that the application is an afterthought and an attempt to deny him of the quiet use of the suit property and that the criminal case is not yet concluded. The rest of the averments in that affidavit are only fit for use as evidence in the main claim.
5. The applicant filed a further affidavit on November 23, 2022 and exhibited a copy of the certified proceedings in the criminal case containing the evidence given by the deceased.
6. The question that arises is whether this court can allow the application for adoption of that evidence.
7. First it must be noted that the applicant does not state the person who is expected to adopt the evidence. Secondly, the hearing of the main suit has not begun, it having been impeded by a number of hitches, one of which is the quest by the applicant for the evidence now proposed to be adopted.
8. I think that the applicant has put the cart before the horse. The application for adoption of that evidence, I think, should be made at the hearing with a witness in the stand who would be the person seeking, with justification, to adopt that evidence. Besides, what has been brought before court for adoption is not a statement written down by the deceased within the meaning section 35 (1) of the Evidence Act Cap 80, but a record of judicial proceedings and this court has power to take judicial notice of such at the appropriate time at the instance of an applicant under section 60(3) of Cap 80 and assign the proper weight to the evidence adduced in those proceedings. The assessment of how much weight it would carry would depend on various factors. Also, I must also consider that the averment by the plaintiff that the cited judicial proceedings are not yet concluded and or appealed against. Consequently, neither of the parties is capable of invoking section 47A of the Evidence Act as to the existence of a judgment that adds to the strength of the evidence recorded in that criminal case.
9. Having regard to the foregoing, I do not think that any of the parties would be prejudiced if I dismissed the present application as long as they are aware of their role at the hearing in these proceedings. I consider the application dated September 29, 2022 to be premature and I hereby dismiss it with costs to the respondent. The suit will be listed for hearing on January 31, 2023 as scheduled.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

