



REPUBLIC OF KENYA



Njoroge v Archdiocese of Nairobi Kenya Registered Trustees (Environment & Land Case 263 of 2017) [2023] KEELC 16 (KLR) (12 January 2023) (Ruling)

Neutral citation: [2023] KEELC 16 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 263 OF 2017**

**JG KEMEI, J
JANUARY 12, 2023**

BETWEEN

JOAB KAMAU NJOROGE PLAINTIFF

AND

**ARCHDIOCESE OF NAIROBI KENYA REGISTERED
TRUSTEES DEFENDANT**

RULING

1. This suit is part-heard with the plaintiff having testified on February 15, 2022 and closed his case. On the same day, the defendant called DW1, James Kamwere Muriuki a land surveyor and DW2 Samwel Njuguna, a director of Thindigua Co Ltd. By consent of the parties, the matter was adjourned to May 3, 2022 for further defence hearing. Before the next hearing, the defendant's counsel Ms Beaco filed a notice of motion dated March 2, 2022 seeking to recall DW1 to produce a supplementary list of documents dated July 9, 2019 which was said to have been inadvertently omitted when DW1 took the stand. The application was not opposed and was thus allowed as prayed on March 22, 2022.
2. On September 27, 2022 DW1 was recalled to produce the aforesaid documents in the supplementary list of documents. However, the plaintiff's counsel Mr Kangata objected to the production of documents No 2 and 3 on grounds that DW1 was neither the custodian nor maker of those documents. In reply, the defendant's counsel pointed out that application dated March 2, 2022 was not opposed and urged the court to allow production of those documents as exhibits No 1-5 since the witness had already testified on the same. In a rejoinder Mr Kangata was emphatic that the application dated March 2, 2022 had not specified the nature of documents sought to be produced otherwise he would have objected to the same. He maintained that DW1 can only produce documents that he has capacity to so produce.
3. A glean of the supplementary list of documents dated July 9, 2019 contains the following documents;



- a. Copy of certificate of registration No 61741 for James Kamwere.
 - b. Copy of the letter dated November 26, 1991 by commissioner of lands to the chairman, Thindigua Co Ltd.
 - c. Copy of the letter dated May 27, 1994 by Commissioner of Lands to Thindigua Co Ltd.
 - d. Copy of survey plan for plots LR No 76/32/1-11, folio No 157, register No 43 authenticated on 29/05/82.
 - e. Copy of survey plan for plots LR No 76/32/1-11 with new entry at LR No 76/32/7.
4. The plaintiff objects to the production of documents Nos b and c highlighted above by DW1 on the grounds that he is neither the maker nor the custodian of the said documents. In addition, the plaintiff's argument is that the defendant's application served on March 2, 2022 did not state the particulars of the documents to be produced and that was the reason why he did not oppose the application in the first place. It was his view that the witness can only produce documents that he has capacity to do so.
 5. In his testimony, DW1 adopted his witness statement dated July 9, 2019 whereby page 2 alludes to the documents Nos b & c above. The documents are found at pages 28 - 29 of the defendant's bundle of documents filed on July 29, 2019.
 6. The gist of his evidence was the commissioner of lands *vide* those letters approved the subdivision and change of user for the subject land, LR No 76/32 upon which DW1 submitted the necessary deed plans for the director of survey's signature and registration.
 7. It is the plaintiffs case that at all material times he holds a title for the suit land. That the defendant has trespassed onto the land and brought building materials thereon and urged the court for orders of eviction interalia.
 8. The defendants case is that the suit land was public land set aside for use by the residents of Thindigua estate as a community centre and that the structures erected on the said land were done through the fundraising efforts of the residents in Thindigua estate for their use well before the plaintiffs purported ownership.
 9. It is trite that the law of evidence requires makers of documents to produce such documents as evidence when called to do so. However, there are exceptions recognized in law and in particular in relation to public documents as the impugned letters herein. Section 35 of the [Evidence Act](#) provides as follows in relation to production of documentary evidence;

“ 35 Admissibility of documentary evidence as to facts in issue

- (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - (a) if the maker of the statement either—
 - (i) had personal knowledge of the matters dealt with by the statement; or
 - (ii) where the document in question is or forms part of a record purporting to be a continuous record,



made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

- (b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or 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 the court unreasonable.

- (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) of this section 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.
- (3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.
- (4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.
- (5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.”

10. Further sections 38 and 39 of the [Evidence Act](#) provide for admission of evidence in special circumstances as follows;

38. Entries in public records



An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.

39. Statements, etc., in maps, charts and plans

Statements and representations of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of any government in the commonwealth, as to matters usually stated or represented in such maps, charts or plans, are themselves admissible.

11. From the record the court would like to agree with the plaintiff that the application dated the March 2, 2022 did not indicate the documents that DW1 was being recalled to produce and for that reason the issue raised by the defendant that the objection may perhaps have been determined is not tenable.
12. I have carefully perused the impugned copies of the letters dated November 26, 1991 and May 27, 1994 authored by the commissioner of lands and addressed to Thindigua Co Limited and it is clear that they were signed on behalf of the commissioner of lands. The letters are addressed to Thindigua Co Limited which is not a party to this suit.
13. The question is whether or not the witness, DW1 is a competent witness in as far as the production of the letters is concerned. The said letters were neither authored by DW1 nor addressed to him. Notwithstanding the explanation given by DW1 that he proceeded to carry out subdivision on the strength of the impugned letters, the pertinent question that needs determining is whether in the circumstances of this case, DW1 is a competent witness to produce the said documents. Going by the tenor of the provisions of the *Evidence Act* aforesaid, the court answers that in the negative. I say so because DW1 is neither the maker nor the custodian of the documents. Secondly there is no evidence laid before this court to show that the office of the commissioner of lands and/or its successor has ceased to exist, or cannot be found, or is incapable of giving evidence, or if its attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable. Save his evidence that he proceeded to act for a third party to prepare subdivision schemes, the witness, in my view, may find difficulty in answering questions with respect to the said documents.
14. In the end the court finds the objection merited and DW1 be and is hereby stepped down to allow the defendant to substitute and or avail the appropriate witness to so produce the documents.
15. Costs shall be in the cause.
16. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 12TH DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr. Kangata for Plaintiff

Beacco for Defendant

Court Assistant – Phyllis / Kevin

