



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. 241 OF 2017**

**PAULINE RIGIRI MUTHIORA.....PLAINTIFF**

**VERSUS**

**ZACHARY MURIKI JOSEPH.....DEFENDANT**

**RULING**

1. When this matter came up for hearing on 22.2.2022 Mr. Thangicia advocate for the defendant prayed under Section 33 of the Evidence Act to have an affidavit sworn on 16.9.2020 filed by Ruffas Mutua now deceased who was a former chief taken as evidence.
2. He took the view the affidavit related to official business where he had handled a dispute between the parties herein and that there would be no prejudice to the parties if the said evidence was taken into account by the court.
3. Mr. Kiogora advocate for the plaintiff opposed the application sought on the basis that a similar application had been made and a ruling delivered on 10.2.2021, no death certificate had been availed that the defendant had not met the threshold under Section 33 Evidence Act, it would be prejudicial to the plaintiff who would not have occasion to cross examine the deponent and that there was no arrangement for the witness to be heard de bene esse while he was ailing.
4. In a rejoinder, Mr. Thangicia also stated human beings were not in charge of their lives in so far predicting health and death, he was unable to procure the death certificate from the deceased family the plaintiff was aware of the death and that it was in the interest of justice that the affidavit be admitted as evidence since the law allowed for such eventualities.
5. Section 33 of the Evidence Act provides that statements written oral or electronically recorded of admissible facts made by a person who is dead are themselves admissible in the following instances;- if it relates to death, is made in cause of business or in discharge of professional duty, is an opinion as to public judgment or relates to family affairs.
6. In the list of witnesses dated 14.12.2017 the assistant chief Mulathankari was listed by the plaintiff as witness no. 3.
7. In the witness statement of M'Mboroki M'Mukoba it is stated the dispute herein was handled before the chief Mulathankari in 2001 and the respondent ordered out of the land. The same is repeated in the statement by Nicholas Mutethia Kaumbuthu.
8. All these statements were made and filed on 9.10.2017. At paragraph 15 of the replying affidavit to the originating summons by Zachary Muriki Joseph it was indicated a report was made before the area assistant chief and also the police.

9. The presence of the area assistant chief was also noted in the scene visit report dated 24.10.2017. This court also issued summons dated 17.5.2018 against the chief Mulathankari as well as the assistant chief.

10. With leave of court, the plaintiff filed a supplementary list of documents dated 28.9.2020 and listed a letter dated 29.1.2015 by Rufus Mutua. This came up slightly after the affidavit evidence sworn on 17.9.2020 by the said chief who confirmed that he had arbitrated over the matter in 2001.

11. The record indicates the plaintiff called PW 5 the assistant chief for the area who confirmed that she had found the witness serving as the area chief. She told the court she had come to testify as an assistant chief of the area.

12. Given the foregoing, it is clear the chief's statement was made in course of business and falls within the exceptions under Section 33 of the Evidence Act. In the ruling delivered on 10.2.2021 the court was not dealing with this witness statement of Rufus Mutua but someone else. The defendant had not laid a basis unlike the instant case.

13. Further the issue is an affidavit sworn under Order 19 Rule 1 & 3 Civil Procedure Rules confined to facts which came to the knowledge of the deceased in the course of his duties then as the area chief and which parties herein confirmed that there was an intervention in 2001. It cannot therefore be true the plaintiff would stand prejudiced if the evidence was produced herein.

14. I proceed to allow the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/ OPEN COURT THIS 27<sup>TH</sup> DAY OF APRIL, 2022**

**In presence of:**

Mukaburu for plaintiff

Thangicia for defendant

**HON. C.K. NZILI**

**ELC JUDGE**



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