Be Energy Limited v Dorine Emily Akinyi Okeno t/a Regold Etipet Enterprises (Civil Appeal E213 of 2023) [2024] KEHC 7616 (KLR) (25 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7616 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E213 OF 2023

RE ABURILI, J

JUNE 25, 2024

BETWEEN

BE ENERGY LIMITED ..... APPELLANT

AND

DORINE EMILY AKINYI OKENO T/A REGOLD ETIPET ENTERPRISES ..... RESPONDENT

(An appeal arising out of the Judgment of the Honourable J. Wambiliyanga in the Chief Magistrate's Court at Kisumu delivered on the 18th July 2022 in Kisumu CMCC No. E022 of 2021)

JUDGMENT

Introduction

1. This appeal was filed out of time with leave of court granted on 21/12/2023 in Kisumu HC Misc Civil Application No E 180 of 2023. The appellant Be Energy Limitedvide a plaint dated 28th January 2021 sued the respondent for special damages of Kshs. 7,961,887.05 as well as general damages for breach of contract, loss of business, costs of the suit and interest at court rates.

2. It was the appellant's case that on the 16th December 2020, the respondent approached it and the parties entered into a contract for supply for 80M^3 of fuel commonly known as Premium Motor Spirit (PMS) for export purposes at a unit price of 380USD/M^3.

3. It was the appellant's case that the first order of 34,636 litres was made and payment of USD 13,300 was paid into its account and after the respondent sent her appointed transporter, the procedure required that the ferrying agent surrender the requisite KRA documents as proof of exiting the country.

4. The appellant averred that the second order was made on the 4th January 2021 of 34,596 litres valued at USD 13146.48 which was loaded on 8th January 2021 but the agent failed to reach the border a fact

confirmed after investigations. It was averred that a demand was made by Kenya Revenue Authority for them to pay taxes over the said goods which did not leave Kenya and as their operations were suspended, they had no option but to pay. It was their case that they later wrote a demand for Kshs. 7,961,887.05 from the respondent

5. The respondent on her part filed a statement of defence dated 3rd March 2021 denying the allegations made by the appellant and proceeded to pray that the suit be dismissed with costs.

6. The trial magistrate held that from the evidence of both parties there was a contract between the parties herein but due to the fact that the appellant's witnesses failed to produce any of their supporting documents referred to in court, including the contract which is alleged to have been breached, the court could not confirm breach of contract and further could not establish the particulars of special damages sought. The trial magistrate held that this failure to produce documents by the appellants which documents were not even referred to in evidence by the witnesses for the appellant plaintiff amounted to its failure to prove its case against the defendant. The trial magistrate proceeded to dismiss the appellant's suit with costs.

7. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 28th December 2023 raising fourteen grounds of appeal that are summarised below:

    1. That the learned trial magistrate erred in law and fact by holding that the appellant failed to produce any documents in support of the appellant's case.

    2. That the learned trial magistrate erred in law and fact by holding that the appellant failed to produce any documents while at the same time acknowledging in the judgement that the parties contract was not disputed.

    3. That the learned trial magistrate erred in fact and in law in dismissing the appellant's case on grounds that breach of contract was not proved even after the respondent had confirmed in her testimony that indeed she entered into a contract with the appellant for purchase of fuel for export, which fuel was never exported but rather sold at the local market.

    4. That the learned trial magistrate erred in fact and in law in dismissing the appellant's case on grounds that breach of contract was not proved even after the respondent had confirmed in her statement of defence and her testimony in court that indeed her dollar account was used to purchase the fuel from the appellant.

    5. That the learned trial magistrate erred in fact and in law in failing to evaluate the duties of parties in the agreement signed between parties as regards transportation of the fuel.

    6. That the learned trial magistrate erred in fact and in law in dismissing the appellant's case in the absence of any evidence from the respondent exonerating herself from the contract breach.

    7. That the learned trial magistrate erred in fact and in law in failing to find that the burden of proof shifted from the appellant to the respondent had acknowledged the existence of the contract between herself and the appellant.

    8. That the learned trial magistrate erred in fact and in law in disregarding the appellant's submissions and judicial authorities on breach of contract with the resultant miscarriage of justice to the appellant.

    9. That the learned trial magistrate erred in law and in fact in failing to appreciate that the plaintiff proved his case on a balance of probabilities.

8. The parties filed written submissions to canvass the appeal.

The Appellants' Submissions

9. The appellant's counsel submitted that during the hearing in the lower court, both witnesses for the appellant and for the defense adopted their statements as filed and produced the documents contained in the Plaintiff's List of documents and also Defendant's list of documents but the Trial Court failed to capture the same. It was submitted that during the entire trial process, at no point was the issue of reliance and/or production of documents by the Plaintiff raised and or challenged and further that all the witnesses were cross examined on the documents filed and produced by both parties and no objection was ever raised by either party.

10. The appellant queried that if indeed the documents were not produced, then why would the Court have Plaintiff exhibits clearly captured in its proceedings and Judgment? Further why would the Respondent's counsel cross examine the witnesses on the said documents and also allow the Appellant's Counsel to cross examine the Respondent on documents which did not form part of court proceedings?

11. The appellant relied in the case of *Mutua t/a Dream Life Products Enterprises & another v Jones (Civil Appeal E01 of 2020)* [2023] KEHC 1216 (KLR) (16 February 2023) (Judgment) where the Court held that:

> "Therefore, if as alleged by the Appellant that the Trial Court relied on documents that were not produced as exhibits, the Appellant had the opportunity to cross examine the Respondents on the documents and/or raise objections to reliance on the documents filed."

12. The appellant further submitted that it was trite that one cannot cross examine a witness on contents of a document not on the court record. Reliance was placed on the case of Nuh Nassir Abdi v Ali Wario & 2 others [2013] eKLR.

13. It was submitted that the Respondent did cross examine the Appellant witnesses on the said documents, which it is alleged, were not produced, and further, that at no point did the Respondent raise any objection when being crossed examined on the said documents, which she alleges were not produced in Court and thus the Respondent witnesses produced the documents in support of the Plaintiff's case.

14. It was submitted that the Plaintiff produced documents in support of a transaction subject to an agreement as between the parties supported by invoices, deposit slips, letters confirming contractual relationship, which documents the Appellant was unable to deny save for alleging that the same were not produced.

15. The appellant submitted that the issue of whether the Appellant and the Respondent entered into a contract for the purchase of petroleum product destined for Congo was not in dispute as even the Trial Court in its judgment confirmed. It was thus submitted that once the Respondent acknowledged the contract and the terms therein, and confirmed payment and receipt of the product, the Appellant discharged the legal burden of proof, and the same then shifted to the Respondent to adduce evidence against the Appellant's claims. Reliance was placed on the case of CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978]eKLR, where it was held interalia that the pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence.

The Respondent's Submissions

16. On behalf of the respondent, it was submitted that the appellant did not produce the documents as evidence at any point when the case was being heard and determined as when the appellant called his witness on the stand there was no evidence that was shown to the court to prove to the court that indeed a breach occurred but rather that the appellant was only relying on the list of documents that was filed in court. Reliance was placed on the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR where it was held inter alia that:

> " The marking of a document for identification has no relation to its proof; a document is not proved merely because it had been marked for identification. Once a document had been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. "

17. It was further submitted that the appellant made allegations in the plaint hence it was under an obligation to support the allegations and that it failed to prove the same on a balance of probabilities.

18. On the failure to prove special damages, it was submitted that the same must be specifically pleaded and proven as was held in the case of Okul Gondi v South Nyanza Sugar Co. Ltd [2018] eKLR.

Analysis and Determination

19. This being a first appeal, this court's role is to revisit the evidence on record, evaluate it and reach its own independent conclusion in the matter, in line with section 78 of the *Civil Procedure Act* on the powers of this court on appeal. (See the case of Selle & Anor. v Associated Motor Boat Co. Ltd [1968] EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni v Kenya Bus Service Ltd. [1982-88] 1 KAR 278 and Kiruga v Kiruga & Another 1988] KLR 348).

20. I have considered the grounds of appeal and submissions by the respective parties' counsel on record. In my view, this case turns on the issue of whether the appellant proved its case on a balance of probabilities to warrant judgment to be entered in its favour.

21. As earlier herein stated, the appellant pleaded that it had entered into a contract with the respondent for the supply of fuel which fuel the appellant alleged was for export. The respondent herself admitted as much in cross-examination stating that she entered into an agreement concerning the transactions.

22. The appellant's witnesses testified by adopting their witness statements as filed upon which they were cross examined by the defence counsel. that after supplying the respondent with the said fuel for the first time and the same being paid for, the respondent's agents picked the second batch of fuel that was for export but failed to export the same resulting in a bill from KRA who were of the view that the said fuel had been sold locally and thus the appellant had to pay the necessary tax. It was the appellant's case that this resultant in a bill of Kshs. 7,961,887.05 which they in turn demanded from the respondent.

23. It is clear from the proceedings in the lower court that PW1 took oath and after introducing himself by name, he was asked about his witness statement which he adopted as his evidence in chief and that was all. The defence counsel then cross examined him. PW2 and PW3 all did the same. In the cross examination of PW1 and PW2, there was no document referred to while in the cross examination of

PW3, there was reference to a PEX 2 being Export Invoice. Apart from reference to that document in cross examination, there was reference to any of the documents filed by the plaintiff/appellant's witnesses and even in reexamination, the appellant's counsel did not realize that the documents were not produced so that he could seek for their production at that stage which is acceptable. The appellant and his counsel assumed everything, more so, that since they had filed the documents, then they were produced.

24. Thus, other than filing the documents with their plaint as required under Order 11 of the Civil procedure Rules, the appellant's witnesses never produced any of the said documents in court. The appellant's counsel has submitted that since the witnesses were cross examined on the said documents, then the trial court cannot claim that the documents were not produced. Further, that she failed to capture the evidence on production of the documents as exhibits. Reference has been made to some cases on cross examination based on documents which were not on record. However, in the Nuh Case cited above, the matter was an election petition polling Diaries which were not properly before the court and having read that decision, the issue at hand was well captured in paragraph 1 thereof as follows:

> " 1. The subject of this ruling is an objection raised by Mr. Nyamodi, learned counsel for the 2nd and 3rd respondents and Mr Balala learned counsel for the 1st respondent. In his submissions Mr. Balala contended that cross examination ought not to be carried out on the Polling Day Diaries since the same are not properly before the court. On behalf of the 2nd and 3rd respondents, Mr. Nyamodi similarly opposed the cross examination based on the same documents. According to Mr. Nyamodi the said material is beyond the scope of the strict provisions governing the manner in which the Petitioner should adduce the evidence in an election petition and in particular rule 12(2) of the Election Petitions Rules. According to Mr. Nyamodi, what the Petitioner seeks to do is to adduce evidence yet the document counsel for the petitioner wishes to rely on is not a document before this Court as any of the parties' evidence and hence not available for cross examination or for any other purpose.

25. The learned Judge then concluded at paragraphs *14* and *15* as follows:

> " 14....If I understood the respondents' objection correctly, the direction taken in cross-examination is not objected to on the ground that the said documents can never be the subject of the cross examination rather that the same are not properly before this Court. In other words the procedural rules relating to election petitions have not been complied with in order for the same to properly form part of the record of this court. No prejudice has been alluded to at all.
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> 15. In the result subject to the rules relating to pleadings, I will allow cross-examination on the said Polling Day Diaries."

26. The court in the above case did allow cross examination on documents which were polling Diaries which were not properly on record, holding that no prejudice was demonstrated if cross examination was allowed. Therefore, the appellant's citing of the decision is misplaced.

27. The appellant's counsel also cited the case of CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) [1978]eKLR where Madan JA stated that:

28. " the pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence.

29. I have taken the liberty to read the above decision which is very precise and this is wwhat led to the above statement by Madan JA:

> " The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of "evidence" in Cassell's English Dictionary, p 394:
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> Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.
>
> The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.
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> In the Australian case, Re Williams Bros Ltd [1928] 29 SRNSW 248, Harvey CJ said: "To give evidence in my opinion means to make statements on oath before a person duly authorized to administer an oath".

30. The above decision as captured verbatim is clear that pleadings only become evidence if they are admitted and once admitted by the adverse party, then they become evidence which need not be proven by other evidence.

31. In the instant case, the appellant was not relying on any admission. It called witnesses to prove its case and also filed documents which it intended to rely on at the trial to prove its case. There is no evidence that those documents were admitted in evidence or that the oral testimony by the respondent witnesses admitted the claim by the appellant such that even if the appellant's documents were not produced, it would make no difference.

32. In their submissions before the trial court, it is clear that the respondent did poke holes in the appellant's case and stated that the appellant had not produced any documents to prove its case The trial magistrate did observe that the plaintiff/ appellant's counsel submitted at paragraph 24 of its submissions that the defendant breached the contract by failing to abide by the terms of the said contract to wit, the Export Documentation Clause, the risk and entitlement Clause and the bond clause and that the plaintiff/ appellant referred to it as Exhibit 1. The trial court observed that all the plaintiff's witnesses adopted their witness statements but no documents which were referred to by the plaintiff in the submissions were marked or produced and that for the court to confirm that there was breach of a contract and its terms, it must refer to those terms of the contract, which contract was not produced. I can't agree more with the learned trial magistrate.

33. I reiterate that the trial court record is crystal clear that no document was produced as an exhibit 1, 2,3 etc etc. Although the appellant's counsel laments that the trial court did not capture the production,

there is absolutely nothing to suggest that the trial magistrate either inadvertently or deliberately failed to capture the production of the appellant's documents filed, as exhibits.

34. albeit there was no denial that there was a contract for supply of fuel, but that the documentary evidence which the appellant respondent

35. "The *Evidence Act* provides that documentary evidence can be either primary or secondary. Primary evidence has been defined as the "document itself". Section 65 (1) provides that: "Primary evidence means the document itself produced for the inspection of the court."

36. Therefore, one needs to understand what a document means in the law of evidence.

37. Section 65(1) of the *Evidence Act* stipulates that primary evidence is the document itself produced for inspection by the court. This is the best type of evidence. It is called the best evidence rule. Therefore, a party in any proceedings should endeavor, at all times, to rely on primary evidence. But in cases where it is not possible to avail primary evidence in court, for example, where the evidence is of immovable nature then the Court is permitted to admit secondary evidence, as discussed below.

38. Section 67 of the Act is couched in such a manner as to make it mandatory for documentary evidence to be produced in its primary form unless the secondary evidence thereof it falls among the exceptions provided in the Act. It states "Documents must be produced by primary evidence except in the cases hereinafter mentioned." This forms the basis of the best evidence rule. Thus, by virtue of the provision, a party has no option but to either avail the document itself or bring himself within the exceptions given in the law.

39. The plain grammatical meaning of the word "must" is that it is "mandatory" to produce primary evidence except as provided. There is no room for maneuver. That mandatory requirement then attaches to placing oneself within the exceptions if there could be an 'escape'. It therefore follows that where a party fails to produce primary evidence, the document, however crucial it to his case, any other form thereof should neither be accepted in evidence nor relied on by the court. In arriving at that conclusion, I bear in mind the constant reminder that rules (of evidence and procedure) are not made in vain: they are to be followed.

40. Order 11 of the Civil procedure Rules requires that parties when filing suits, they should also file witness statements and the documents that they intend to rely on at the hearing. More often than not, parties file only copies of the original documents so that at the actual hearing, they produce original documents. Where there is no objection to the production of the file copies, then the court will admit them as exhibits. However, where there is objection, then parties must produce the originals or justify the production of the copies. It is for this reason that the law widely acknowledges that in some instances, the originals may be in the possession of the adverse party hence the need to issue Notice to produce under Section 69 of the *Evidence Act* or to demand that the maker of the document be called upon to produce the same. As required under Section 35 of the *Evidence Act*. It follows that parties should never file copies of documents in court and go to slumber, assuming that the filed documents are deemed to be evidence adduced.

41. In Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR, where documents had been referred to by a witness and marked for identification but were never produced as exhibits, the Court of Appeal stated thus:

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document

filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved.

First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case.

When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

42. The above position is binding on this court and on the trial court. It is therefore not the mere filing or marking of documents. The party wishing the court to admit their documents as exhibits has a duty to say so in clear terms and not for the court to assume the production of the documents a s was the case here. As earlier stated, the appellant's counsel could still have re-examined the witnesses and sought leave of court at that stage to have the documents produced as exhibits. Nothing of the sort happened. That being the case, the trial court cannot be blamed for failure to capture what was not stated before it. Courts cannot presume that the filed documents are deemed produced as exhibits.

43. Additionally, this court is surprised that even after discovery that the documents filed were never produced by the witnesses who testified, as exhibits, the appellant never applied for review of the judgment, upon which the trial court could have pronounced itself on the issue.

44. Further, the appellant still had an opportunity on appeal to seek leave of court pursuant to section 78 of the *Civil procedure Act* to adduce evidence on appeal. See my own decision in Siaya High Court in Civil Appeal 43 "B" of 2019, EO v COO [2020] eKLR where I cited several other decisions and stated as follows:

> "The instant application is basically grounded on Section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides for Powers of appellate Court in appeals from the subordinate Court to the High Court, and is similar to Rule 29(1) (b) of the Court of Appeals Rules. The Section provides:1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power: -
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> a) To determine a case finally;
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> b) To remand a case;
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> c) To frame issues and refer them for trial;
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> d) To take additional evidence or to require the evidence to be taken;
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> e) To Order a new trial.
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> (2) Subject as aforesaid, the appellate Court shall have the same Powers and shall perform as nearly as may be the same duties as are charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.

20. In Civil Appeal (Application) 84/2012 Attorney General v Torino Enterprises Limited [2019] eKLR which is one of the latest decisions from the Court of Appeal on the question of whether or not an appellate Court should allow an application for adduction of new evidence, the superior Court cited Rule 29(1)(b) of its Rules and many other decisions and stated:

"13. In Dorothy Nelima Wafula v Hellen Nekesa Nielsen and Paul Fredrick Nelson [2017] eKLR, It was expressed that under that Under Rule 29(1) (a), additional evidence will be introduced on appeal in the discretion of the Court, "for sufficient reason." The Court further stated that:

"Though what constitutes "Sufficient reason" is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a Party seeking to present additional evidence on appeal. Before this Court can permit additional evidence Under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible."

21. From the above guidelines set by the Court of Appeal, the duty of this Court in the instant Notice of Motion is to determine:

    a. Whether there is additional new evidence;

    b. Whether that evidence could have been obtained by the Applicant after reasonable diligence before and during the hearing;

    c. If there is a probability that the additional evidence would have an important influence on the result of the case and

    d. Based on the foregoing, is there sufficient reason to admit the additional evidence?"

45. In the end, and having been properly guided by the law and facts of that case, I granted the applicant leave to adduce evidence which was never adduced in the trial court although it was annexed to an already filed affidavit.

46. On the basis of the above position in law, the question is whether the appellant proved its case on a balance of probabilities. The prayers sought in the lower court were based on alleged breach of contract and consequently, the appellant sought orders for :

    a. Special damages Kshs 7,961,887.05

    b. General damages for breach of contract

    c. Loss of business

    d. Costs of the suit

    e. Interest on a to c above at prevailing court rate

f. Any such and further relief as this honorable court may deem appropriate

47. For the trial court and even this court to grant those prayers sought, there must have been a contract document produced and the court perusing and appreciating its terms and how the breach as set out in paragraph 23 of the plaint dated 28th January, 2021 was occasioned. Even the claim for loss of business must be based on documents guiding the court in calculating the loss. No such evidence was adduced.

48. t is trite law that he who alleges must prove. Thus, the appellant ought to have followed the above steps in producing documents in support of its case. It bore the burden to discharge the obligation.

49. I reiterate the Court of Appeal's holding in the Kenneth Nyaga Mwige's case that:

> " 20. 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.
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> 21. In Des Raj Sharma v Reginam [1953] 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa v The State [1994] 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
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> 22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.
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> 23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondents' case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa v The State [1994] 7-8 SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on "MFI 2" which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.

25. We have considered the persuasive decision and reasoning in the case of *Timsales Limited v Harun Thuo Ndungu, Civil Appeal No. 102 of 2005*. In this case, there was additional evidence through the testimony of the medical doctor; in the present case, the respondents having opted not to call any witness, there was no evidence on record in support of the respondents' defence. A significant distinction with the Timsales case (supra) is that the High Court observed that

"such evidence could only be doubted if there was some material evidence demonstrating differences..." In the present case, there are material differences in the typed proceedings of the court and the alleged handwritten photocopy of proceedings of the court marked as "MFI 2." These differences needed a witness to explain the authenticity of the handwritten photocopy, this could only be done if the document marked for identification as "MFI 2" were produced in evidence as an exhibit by the maker or any other competent witness. Failure to produce amounted to non-reception and legal exclusion of the document.

50. I have no reason to differ with the above holding of a court superior to this court, relying on Des Raj Sharma v Reginam cited above, where it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence; and in the Nigerian case of Michael Hausa v The State cited above where it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

51. This court is bound by the decision of the superior court. Guided by the decisions cited above, I am of the view that the failure or omission by the appellant to formally produce the documents in support of its case was fatal to the appellant's case. The documents did not become exhibits before the trial court.

52. Accordingly, it is my finding and holding that the instant appeal lacks merit. I dismiss it. Each party to bear their own costs for reasons that this is one of such cases where the appellant's counsel did not guide the appellant client well in the prosecution of the suit and if this court was to order for payment of costs, then the appellant's counsel would take that responsibility. The appellant's case in the lower court was casually conducted at the hearing and counsel shifted blame on the trial court which I find was not justified. The client relied on the skill and technical legal advice and guidance of its counsel and the court was and remains an umpire, not prosecuting claims on behalf of the parties. I do not find that the client was to blame to be penalised.

53. This file is closed.

Dated, Signed and Delivered at Kisumu this 25th Day of June, 2024

R.E ABURILI

JUDGE