



**Onyonyi v Alfa Motors Limited (Civil Case 916 of 2009)
[2023] KEHC 24738 (KLR) (Commercial and Tax) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 916 OF 2009
JWW MONG'ARE, J
OCTOBER 30, 2023**

BETWEEN

ATIENO OUKO ONYONYI PLAINTIFF

AND

ALFA MOTORS LIMITED DEFENDANT

RULING

1. On 13th of August 2021 the Applicant, by a Notice of Motion filed under Sections 35(1 & 2) of the *Evidence Act* and Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Articles 50(1) and 159 of the *Constitution* of Kenya 2010, moved this Honourable Court seeking to have the Report titled Alfa Motors Mazda Swaraj Bus Inspection Report December 2008 prepared by Mr. Clive Lowe on behalf of the Kenya Bureau Of Standards and forming part of her documentary bundle of evidence, be admitted in evidence without calling the maker of the said statement thereof.
2. In the affidavit supporting this application, the Plaintiff argues that all attempts to procure the personal attendance of Mr. Clive Lowe have proved futile and the matter before the court is held in abeyance since 2019, when during the hearing of the testimony of a witness procured by Kenya Bureau of Standards Mr. Raymond Michuki, was stood down to allow the production of the above report by the maker, Mr. Clive Lowe. The Applicant urges the court to allow the adoption of the said statement without the maker as provided for under Section 35(1) & (2) of the *Evidence Act* and in the interest of justice, since it has proved impossible to procure the attendance of the said witness.
3. The Defendant has opposed the application and argues that the Plaintiff, in order to benefit from Section 35(1) & (2) of the *Evidence Act*, must demonstrate the admissibility of the said documentary evidence as set out in the *Evidence Act* thereto. The Defendant further argues that no evidence has been put forward by the Plaintiff to confirm that the make of the statement is dead or that he is incapable of producing his own statement. Further, the Defendant argues, in light of the new technological



advancement adopted by the courts, the witness may be called from whatever corner of the world he may be resident to produce his testimony and will not necessary be required to travel and be present physically in court in Kenya.

4. The Defendant further argues that the said production of the documentary evidence will greatly prejudice the Defendant as it will be denied opportunity to test the accuracy and the veracity of the said evidence by cross examining the maker. The Defendant further argues that admitting the said evidence will amount to hearsay evidence which is in itself admissible in law.

Analysis and Determination

5. I have considered the application and the affidavits in support and the response by the Defendants in opposition thereto. I note that it is only in very rare circumstances where the law provides a window for documentary evidence to be produced by a party who is not the maker. Indeed Section 35 (2) of the Evidence Act grants the court power to allow such evidence to be produced in the absence of the maker where it has been demonstrated that to call that witness will lead to an unreasonable delay in the case. The said Section 35(1) & (2) of the Evidence Act provides as follows:-

- (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.



6. In addition to the above provisions of the evidence Act, Article 159(2)(d) of the constitution commands the courts as follows; “In exercising judicial authority, the courts and tribunals shall be guided by the following principles; - (d) justice shall be administered without undue regard to procedural technicalities;” From a perusal of the court record, I note that the Plaintiff’s witness was stood down in 2021 to allow time to call the maker of the report to produce the same in evidence. To date the said witness has not been reached by the plaintiffs or the Kenya Bureau of Standards to attend court and produce his report.
7. Despite the lapse of time, to date, the Plaintiff does not appear to have made any headway in tracing the said witness. I am alive to the fact that this case was filed in 2009 and the cause of action arose way before that. A perusal of the court file reveals that even some witnesses to whom summons had been issued are now deceased. Any further delay to allow the Plaintiff’s time to procure this witness will lead to injustice because by the time the case is concluded, other key witnesses may not be traced or traceable. I also note that this being a test case it means several other cases have been stayed and await the outcome of the matter herein, hence prolonged delay in concluding this matter is contributing to backlog in the courts. I am therefore satisfied it is in the interest of justice and in light Article 50 of the Constitution of Kenya that guarantees a party before a court of law access to justice, in my view, the same should be done without undue delay for it to be meaningful. A delay of a case for close to 15 years is a fetter to the said constitutional guarantee.
8. To my mind, it is in the interest of the Plaintiff in this case and in all the other matters related to this matter that the report is produced to assist this court and other courts where the other matters have been stayed to arrive at a just determination of the cases, taking into consideration all other factors and the rights of the Defendant to defend the suit against it as well. I am therefore satisfied that no unfair prejudice will be occasioned to the Defendants who are yet to put forward their defence in the matter. Where necessary the Defendant may with leave of the court produce a report by its own expert for consideration by the court as well and to counter the said report.
9. In conclusion therefore I allow the application by the plaintiff seeking leave to introduce the documentary evidence in form of the Report titled Alfa Motors Mazda Swaraj Bus Inspection Report December 2008 prepared by Mr. Clive Lowe on behalf of the Kenya Bureau Of Standards in evidence without the necessity to call Mr. Clive Lowe, the maker of the said report, to produce the same.
10. Each party shall bear their own costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF OCTOBER 2023

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J. W. W. MONG’ARE
JUDGE

In the Presence of:-

This ruling applies to the following suits:-

1. HCCCOM 914 of 2009 - Daniel Githae Githinji vs. Alfa Motors limited.
- 2.HCCCOM 155 of 2010 - Charles K. Maina Momo vs. Uni-truck World Limited t/a Truck World.
3. HCCOMM 613 of 2012 - Sospeter Asande Turungi vs. Uni-Truck World Limited t/a Truck World.
- 4.HCCOMM 387 of 2013 - Joseph Kirichu Gikera vs. Alfa Motors Limited.



5.HCCOMM 353 of 2013 - Michael Wamutitu Mwangi vs. Alfa Motors Limited.

6. HCCOMM 384 of 2014 - Peter Mureithi Karuria and George Kinoti Nkonge vs. Alfa Motors Limited.

