



**Julius Kanja Kimunya t/a Oracle Engineering Consultants & 2 others
v Board of Management Friends School Kaimosi Girls (Civil Appeal
29 of 2022) [2023] KEHC 26742 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 29 OF 2022
JN KAMAU, J
DECEMBER 18, 2023**

BETWEEN

**JULIUS KANJA KIMUNYA T/A ORACLE ENGINEERING
CONSULTANTS 1ST APPELLANT
GRACE NJERI WAIRIMU T/A GRAWA SUPPLIES 2ND APPELLANT
EPHANTUS THEURI KIMUNYA T/A JEP ENGINEERING
SERVICES 3RD APPELLANT**

AND

**THE BOARD OF MANAGEMENT FRIENDS SCHOOL KAIMOSI
GIRLS RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon M. Ochieng (PM) delivered at
Hamisi in Principal Magistrate's Court Case No 40 of 2021 on 27th October 2021)*

JUDGMENT

Introduction

1. In her decision of 27th October 2021, the Learned Trial Magistrate, Hon M. Ochieng, Principal ordered that an original document be availed during trial.
2. Being aggrieved by the said decision, on 25th November 2022, the Appellants filed a Memorandum of Appeal dated 24th November 2023. They relied on ten (10) grounds of appeal.
3. Their Written Submissions were dated and filed on 27th July 2023 while those of the Respondent were dated and filed on 17th October 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

4. As was held in the case of *Kamal Jam Mursal & Another v Evelyne Ntanagu Manese & Another* [2022] eKLR that the Appellant herein relied upon and in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123, the duty of the first appellate court is to reverse or affirm the decision of the trial court.
5. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Learned Trial Magistrate erred in law in having rejected secondary evidence that the Appellants' witness tendered in court. This court therefore addressed all the grounds of appeal together as the same were all related.
6. The Appellants submitted that the Learned Trial Magistrate erred in law and fact when she upheld the Respondent's objection for their witness to tender in evidence a copy of the delivery book that they averred was with the Respondent herein. They explained that whenever they delivered goods to the Respondent, it would retain the original delivery book while they retained the counterpart which is what they sought to produce during trial.
7. It was their assertion that the contents of a document could be proved either by primary or secondary evidence. In this regard, they relied on the provisions of Section 68 of the *Evidence Act* Cap 80 (Laws of Kenya) that stipulates that secondary evidence which constitutes certified copies, copies of the original, counterparts of documents and oral accounts of documents originals could be admitted as evidence in court.
8. They also relied on the case of *Jemima Moraa Sobu v Transnational Bank Ltd* [2016] eKLR and *Milton Mugambi v Job Naisho, Kenya Deposit Insurance Corporation & 6 Others* [2019] eKLR where the common thread was that secondary evidence was admissible to prove the contents of a document.
9. It was their argument that the explanation they provided for not having provided the original delivery books was plausible and fell within the parameters set out under Section 68 of the *Evidence Act*. They asserted that the Respondent had not demonstrated that it would suffer any prejudice if they produced the said document.
10. On its part, the Respondent admitted that secondary evidence was admissible during trial as provided in Section 66 of the *Evidence Act* but that the party who wished to rely on the same had to demonstrate that the original document was in possession of the opposing party.
11. In this regard, they referred this court to Sections 107 and 109 of the *Evidence Act* and the case of *Abmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR where it was held that the legal burden in a case lay with the claimant throughout the trial.
12. It was its submission that the onus was on the Appellants herein to prove that it had the original delivery books which they had failed to do as provided in Section 68(1) of the *Evidence Act*. It relied on the cases of *Re Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu (deceased)* [2016] eKLR and *John Muriithi v Charles Munga Kimita t/a Mwalimu Agencies Co Limited* [2021] eKLR where the common thread was that secondary evidence was only admissible in the absence of primary evidence and when a proper explanation of the evidence was given.
13. It added that the Appellants failed to give it notice to produce the original delivery book as was provided in Section 69 of the *Evidence Act* and hence they did not prove on a balance of probabilities that they



had met the threshold under Section 69 of the Evidence Act that would have exempted them from serving a notice.

14. It further argued that the copy of the delivery book that the Appellants produced was illegible as a result of which its genuineness, accuracy and its existence as was identified in the case of Rakesh Mobindra v Anita Beri & Others Supreme Court of India, Appeal No 13361 of 2015 could not be established.
15. Right at the outset, this court agreed with the Respondent that any copy that was adduced in court as secondary evidence had to be legible so as to ascertain its accuracy and genuineness with a view to avoiding admitting forgeries as copies of originals that could not be produced as set out in Section 69 of the Evidence Act.
16. Be that as it may, this court could not ascertain whether or not the copy the Appellants wanted to produce in court was legible or not as Julius Kanja Kimunya (hereinafter referred to as “PW 1”) was stood down. This court did not therefore find it necessary to say more on that issue.
17. Turning to the question as to whether the PW 1 could have adduced a copy of the delivery book, it was evident that both the Appellants and the Respondent were in agreement that the same could be adduced in evidence. Indeed, Section 64 of the Evidence Act states as follows:-

“The contents of documents may be proved either by primary or by secondary evidence.”

18. What the Appellants and the Respondent were not agreed upon was under what circumstances a copy of a document was admissible in evidence.
19. Notably, Section 68(1) and (2) of the Evidence Act stipulate that:-
 1. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-
 - a. when the original is shown or appears to be in the possession or power of—
 - i. the person against whom the document is sought to be proved; or
 - ii. a person out of reach of, or not subject to, the process of the court; or
 - iii. any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;
 - b. when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;
 - c. when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;
 - d. when the original is of such a nature as not to be easily movable;
 - e. when the original is a public document within the meaning of section 79 of this Act;
 - f. when the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;
 - g. when the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.



2. In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.
20. Having said so, there is a further consideration before secondary evidence can be tendered in evidence. A party who wishes to rely on secondary evidence has to issue a notice as provided in Section 69 of the [Evidence Act](#) which states that:-
- “Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this [Act](#) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:
21. A party wishing to rely on secondary evidence is exempted in giving a notice under Section 69 of the [Evidence Act](#) as stated in the proviso that stipulates that:-
- “Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases:-
- i. when the document to be proved is itself a notice;
 - ii. when from the nature of the case, the adverse party must know that he will be required to produce it;
 - iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
 - iv. when the adverse party or his agent has the original in court;
 - v. when the adverse party or his agent has admitted the loss of the document;
 - vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;
 - vii. in any other case in which the court thinks fit to dispense with the requirement.”
22. It was therefore evident from the aforesaid provisions of the law that whereas a party could rely on secondary evidence, he had to lay basis to demonstrate that any of the grounds in Section 68(1) of the [Evidence Act](#) obtained in its case and/or demonstrate that he was exempt from issuing such notice under Section 69 of the [Evidence Act](#).
23. A perusal of the proceedings shows that on 27th October 2022, PW 1 took to the stand and produced a copy of the delivery book. It was at that point that the Respondent’s counsel objected to the production of the same. The Learned Trial Magistrate directed that the original document be availed.
24. The Learned Trial Magistrate erred and ought not to have determined the nature of evidence the Appellants ought to have adduced. The Appellants’ counsel was actually right in having stated that the [Evidence Act](#) provided that both primary and secondary evidence was admissible. Indeed, the Appellants still had the option of laying basis to demonstrate why PW 1 was tendering secondary evidence.



25. Having said so, there was nothing on the court record to demonstrate that PW 1 sought to lay basis or laid basis as to why he was adducing in evidence a copy of the delivery book. This could have explained why the Appellants were not able to have adduced the original delivery book.
26. It was at this juncture that their advocate could also have led PW 1 to tender in evidence the notice under Section 69 of the *Evidence Act* to justify why they were producing a copy of the delivery book. It was also at this point that the said advocate could have led PW 1 to demonstrate if the Appellants were exempted from issuing a notice as was provided in the proviso to Section 69 of the *Evidence Act*.
27. In the absence of the basis for tendering in evidence a copy of the delivery book, the Learned Trial Magistrate did not misdirect herself when she upheld the Respondent's counsel's objection for PW 1 not to produce a copy of the delivery book. All was not lost as the Appellants could still proceed to present their case appropriately if they fully complied with the relevant provisions of the *Evidence Act*.
28. The above notwithstanding, this court took the firm view that the strict interpretation of Section 69 of the *Evidence Act* obtained in cases where trial was proceedings in a physical court. In virtual proceedings, it would be impossible to tender in evidence original documents. The procedure that was quickly gaining traction and/or acceptance was for parties to exchange bundles of documents they wished to rely upon, inspect them during the discovery and inspection stage and then proceed to cross-examine based on the copies. There is need for the Evidence Act to be amended to incorporate this procedure.
29. In the premises foregoing, this court came to the firm conclusion that Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (9) and (10) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.

Disposition

30. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was dated 24th November 2022 and filed on 25th November 2022 was not merited and the same be and is hereby dismissed.
31. As the Respondent was an entity that was being represented by the Attorney General, this court deviated from the general principle that costs follow the event and directs that there will be no order as to costs.
32. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF DECEMBER 2023.

J. KAMAU

JUDGE

