



**Kibogo (Suing as the administrator of the Estate of Scholastica Wamuhu Mwangi) v Waweru & another (Civil Suit 242 of 2013) [2022] KEHC 16351 (KLR) (Civ) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16351 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 242 OF 2013**

**JK SERGON, J**

**DECEMBER 16, 2022**

**BETWEEN**

**DAVID MWANGI KIBOGO (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF SCHOLASTICA WAMUHU MWANGI) ..... PLAINTIFF**

**AND**

**BN WAWERU ..... 1<sup>ST</sup> DEFENDANT**

**MARURA NURSING HOME LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This matter was listed for hearing on July 22, 2022. Mr Mideva appeared for the plaintiff while Mr Njari, Mr Omuga and Mr Kofuna appeared for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively. The plaintiff herein who testified as PW1 sought to produce before the court as exhibits, a number of documents which include documents No 17 in the plaintiff's list of documents dated June 26, 2013.
2. Mr Omuga raised an objection an objection under section 35 of the *Evidence Act* to the production of the documents No 17 marked as PMF17 being a financial statement without calling the maker. The counsel stated that there is no evidence showing that the plaintiff had failed to secure the attendance of the maker.
3. The counsel further stated that most financial statements of accounts constitute expert evidence and such form of evidence forms the basis of financial to claim for special damages and that the plaintiff was unable to answer any questions on account because he did not understand therefore it will be extremely prejudicial to the 2<sup>nd</sup> defendant.
4. Mr Njari for the 1<sup>st</sup> defendant opposed also the production of the said document because it is contrary to section 35 of the *evidence Act* and the fact that there was no evidence that the maker cannot be traced.



5. Mr Kofuna for the 3<sup>rd</sup> defendant associated himself and adopted to the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
6. In response to the objection, Mr Mideva stated that his prayers are that the document marked PMF17 be produced without calling the maker as the maker cannot be traced.
7. This court must now determine whether the documents in question which is a financial statement sought to be produced in court by the plaintiff who is not the maker are admissible in evidence. The 1<sup>st</sup> defendant's objection is premised on section 35 of the *Evidence Act*. Section 35 (1) provides that:-

“35. (1)(a) 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-

- i. if the maker of the statement either-
  - ii. had personal knowledge of the matters dealt with by the statement; or
  - iii. 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.”

8. One of the key tenets of section 35 of the *Evidence Act* in considering whether a document is to be admissible as evidence in court is that the makers had personal knowledge of the matters dealt with by the statement, and the only way to ascertaining that T/S Scolanda Fashions are aware of the documents is by having the maker called to testify in court. The record of the court is quite clear that on July 22, 2022 the 2<sup>nd</sup> defendant raised an objection to production of documents inclusive of pages 13-23 of the plaintiff's bundle of documents during pre-trial stage.
9. Having considered the arguments from the counsels, I find that the plaintiff had an opportunity to address the court on the difficulties they faced in procuring the attendance of the maker, which they failed to utilize. parties are reminded that justice is two way and the defendants are also entitled to justice in equal measure.
10. In the premises, the 2<sup>nd</sup> defendant's objection is hereby sustained. The maker of the document to attend court and produce the disputed documents. In the absence of the maker the document cannot be admissible.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

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**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

