



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 560 OF 2015

MUGO MUNGAI1ST PETITIONER

ASSOCIATED REGISTRARS LIMITED.....2ND PETITIONER

MERCANTILE & AGRICULTURAL LIMITED.....3RD PETITIONER

CAPITAL FINANCE LIMITED (IN LIQUIDATION).....4TH PETITIONER

PIONEER BUILDING SOCIETY (IN LIQUIDATION).....5TH PETITIONER

AND

THE OFFICIAL RECEIVER & PROVISIONAL LIQUIDATOR

(Capital Finance Limited and Pioneer)1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

THE REGISTRAR GENERAL3RD RESPONDENT

RULING

1. This ruling relates to an objection raised by the petitioner's advocate during the defence hearing when Dw2 Daniel Njunge Mugwema attempted to produce a document attached to the supplementary affidavit dated 5th June 2018, being an inspection report dated 3rd October 1986, as part of the respondent's exhibits in support of their case. The petitioner's counsel Mr. Regeru objected to the production of the said report on two main grounds namely:

a) That the issue of admissibility of the said report was res judicata its production having been declined by the late Onguto J. on 6th November 2017.

b) That DW2 was not the maker of the said report.

c) That the said document is unsigned and its author is unknown.

2. In support of the objection on the ground that the issue is res judicata, Mr. Regeru submitted that the grounds on which Justice Onguto had declined to admit the document still exist as the impugned document still remains unsigned by its purported makers and does not amount to a credible report that is worthy of admission. Counsel argued that a report that is not owned by anybody and whose authorship is not disclosed is, in law, a nullity. Counsel maintained that an invalid document does not acquire validity on account of certification as a true copy of the original.

3. It was further submitted that even assuming that a duly signed report was available, DW2 could still not be the right person to produce it as he is not the officer who certified the impugned document as a true copy of the original. For this argument, counsel relied on the provisions of section 35 of the Evidence Act which espouses the Best Evidence Rule that requires that documents be produced by their maker except in exceptional cases.

4. Mr. Kuria, learned counsel for the 2nd respondent did not oppose the production of the impugned report by DW2 and argued that the objection raised before Onguto J. was on a completely different issue. He also submitted that the plaintiff's counsel was precluded by the doctrine of estoppel, from objecting to the production of the report having agreed to the application to file a further affidavit in order to adduce additional evidence.

5. Miss Mumo, learned counsel for the 1st and 3rd respondents opposed the plaintiff's objection while arguing that the document that they sought to introduce was a public document that is available for any member of the public through an application to the Central Bank of Kenya (CBK). Counsel argued that a certified copy of a document is presumed to be genuine as provided for under sections 73, 80 and 81 of the Evidence Act.

6. Counsel urged the court to take cognizance of the fact that the document in question was made in 1986 in which case, its authors may have retired from their employment with CBK.

7. In response to the submission on the issue of estoppel on admission of the further affidavit Mr. Regeru submitted that it was not correct that the plaintiffs waived their right to object to the report as in their affidavit filed in response to the said further raised the issue of admissibility of the report.

8. I have considered the objection raised by the petitioners' counsel, the response made by the respondents' advocates and the law that they cited. The main issue that falls for determination is whether DW2 should be allowed to produce the impugned report. It was not disputed that DW2 is neither the maker nor the CBK officer who certified the said document as a true copy of the original. It was further not disputed that the makers of the document are unknown and that they did not sign it. The question which this court has to grapple with is whether a document that is unsigned by its maker and whose author is unknown can be admitted in evidence upon certification as a true copy of the original.

9. Section 35(1) of the Evidence Act reads;-

“(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.

(3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.

10. The 2nd respondent raised the issue of estoppel on account of the petitioners' consent to the filing of a further affidavit by the respondent in order to adduce further evidence. My take is that consenting to the filing of a further affidavit does not preclude the petitioners' from challenging the evidence contained in the said affidavit which is what the petitioners' counsel was doing when cross examining DW2. An opportunity to challenge the evidence of a witness is useful to the court for purposes of evaluating the strength or weakness of a case.

11. The undisputed fact is that the maker of the impugned document is unknown. My finding is that certification of a document as an original cannot be deemed to be a substitute for its authorship. In other words, the maker of the document must be identifiable before the document can be certified. I find that the respondents' contention that the impugned document is a public document for which certification alone is sufficient authentication is not the correct legal position. In the case of **Hezekiah Oira v Patrick Quarcoo [2017] eKLR** the court stated that;

“The law provides that public documents should be produced by the makers in which case the person producing the same should have the copies properly certified and or/sealed. This is the law as per section 80 of the evidence Act which provides that “. (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.”

12. In **John Elego & 103 others v Pressmaster Limited [2018] eKLR** the court stated as follows on documents whose authors are unknown:

“The two documents in the court’s view do not have any substance of genuineness or authority since names of the persons who issued them is not disclosed on the face of the documents. The person to whom they purport to have been copied have not acknowledged receipt. Such serious notice as one dated 1st October, 2012 cannot simply purport to be written by an unnamed person in Human Resource Department whereas the one dated 2nd October, 2012 purports to be signed by undisclosed person from Managing Director Press Master Limited.

52. It is the court’s considered view and finding that the two notices are not credible and the court cannot rely on them on the matters they purport to convey to the “striking staff.”

13. Taking a cue from the holding in the above cited decisions I find that the law is clear that documents without a maker are not admissible in evidence before the court. Section 66 of the Evidence Act provides inter alia that secondary evidence includes certified copies given under the provisions contained in the Act, copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies; copies made from or compared with the original; counterparts of documents as against the parties who did not execute them; oral accounts of the contents of a document given by some person who has himself seen it.

14. In conclusion I find that an unsigned document has no probative value as the contents genuineness cannot be proved. It is worth noting that documents do not prove themselves; a witness must be examined to prove the documents. The evidence of the contents of the document is hearsay evidence unless the author thereof is known or identifies himself as owning the document. For the above reasons, I uphold the petitioners' objection to the production of the impugned report.

Dated, signed and delivered in open court at Nairobi this 26th day of June 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Githungo for Mumo for 1st and 3rd respondent

Mr. Kuria for the 2nd respondent.

Miss Soweto for petitioners and holding brief for Regeru

Court Assistant - Ali