



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 29 OF 2016**

**MILTON MUGAMBI.....PLAINTIFF**

**-VERSUS-**

**JOB NAISHO.....1<sup>ST</sup> DEFENDANT**

**KENYA DEPOSIT INSURANCE CORPORATION.....2<sup>ND</sup> DEFENDANT**

**ADAM M. BORU.....3<sup>RD</sup> DEFENDANT**

**GEORGE ORARO T/A ORARO & CO. ADVOCATES.....4<sup>TH</sup> DEFENDANT**

**CHACHA ODERA T/A ORARO & CO. ADVOCATES.....5<sup>TH</sup> DEFENDANT**

**JOHN MBALUTO T/A ORARO & CO. ADVOCATES.....6<sup>TH</sup> DEFENDANT**

**ORARO & CO. ADVOCATES.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling was precipitated by the objection raised in the course of the plaintiff's evidence in chief. The plaintiff was in the process of producing the documents contained in his list and bundle of documents filed on 3<sup>rd</sup> February, 2016 and the supplementary list and bundle of documents filed on 15<sup>th</sup> April, 2019 when *Mr. Amoko* counsel for the defendants objected to the production of the letter dated 27<sup>th</sup> March, 2003 constituted in the original list and bundle of documents.

2. The advocate pointed out that whereas he is not opposed to the production of the remaining documents in form of copies, he is challenging the production of a copy of the abovementioned letter.

3. *Mr. Gitonga* counsel for the plaintiff responded by stating that the objection raised is only intended to delay the suit, adding that it is the defendants who have the original document as well as the original file comprising HCCC NO. 442 of 2001 which his client forwarded to the Deposit Protection Fund Board.

4. He went on to argue that the letter in question was previously produced as it is before the Disciplinary Tribunal and no objection was raised at the time. It was the advocate's view that the defendants' sole intention is to deny the plaintiff the benefit of the letter and also deny this court the chance of looking at all the relevant documents.

5. *Mr. Amoko* in turn rejoined by asserting that the letter in question forms the gist of the cause of action presently before this court and that pursuant to the provisions of Section 67 of the Evidence Act (“*the Act*”), documents being relied upon as primary evidence ought to be produced in original form, unless the party producing such document comes under Section 68 of the Act.

6. I have considered the rival positions brought forth by the parties’ respective counsels. The reading of *Section 67 of the Act* clarifies the position that documents must be proved by way of primary evidence save in the circumstances laid out under *Section 68* where the production of secondary evidence would be permissible. As the Honourable Justice J. Mativo correctly put it ***In the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR***, secondary evidence generally applies where for one reason or another, the equivalent primary evidence cannot be obtained.

7. *Section 68(1) of the Act* expresses thus:

***“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.”***

8. In addition, *sub-section 2* of the above section stipulates that secondary evidence is deemed admissible where either of the above-laid circumstances apply, while *Section 69* goes on to prescribe that notice ought to be given by a party intending to produce secondary evidence, with the exception of the instances hereinbelow:

***(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.*

9. It therefore follows that for secondary evidence to be deemed admissible, a party intending to rely on such evidence must reasonably show that the original cannot be obtained or is unavailable.

10. In the present instance, it is apparent that the plaintiff did not give any notice regarding the production of the letter in question dated 27<sup>th</sup> March, 2003. Be that as it may, his explanation for seeking to produce a copy of the same is that he forwarded the original file including the original copy to the defendants, more specifically the 2<sup>nd</sup> defendant. I have looked at the forwarding letter dated 25<sup>th</sup> November, 2005 forming page 105 of the plaintiff's list and bundle of documents. The same appears to support the plaintiff's averments though I note that the letter does not bear either of the defendants' receiving stamps to ascertain whether and when it was delivered.

11. That notwithstanding, I observed that the defendants' counsel did not deny the averments made as concerns the forwarding of the original file and/or the original letter.

12. Drawing from the above, I am satisfied that the plaintiff has satisfied the circumstances laid out under *Section 68(1) (a) (i)* of the Evidence Act.

13. Accordingly, the objection is hereby dismissed and the production of a copy of the letter dated 27<sup>th</sup> March, 2003 by the plaintiff deemed admissible.

Dated, Signed and Delivered at Nairobi this 28<sup>th</sup> day of November, 2019.

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants