



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**  
**ACEC NO. 4 OF 2016**  
**KENYA ANTI CORRUPTION COMMISSION.....PLAINTIFF**  
**VERSUS**  
**JOB KEITTANY.....1<sup>ST</sup> DEFENDANT**  
**MICHAEL CHESIKAW.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. By a Notice of Motion dated 30<sup>th</sup> January 2017, brought under **Section 1 A, 1B and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya, Section 68 (1) (c)** of the **Evidence Act** and **Article 159** of the **Constitution 2010** the Plaintiff sought the following orders:

- a. That the Plaintiff be allowed to present proof of documents by secondary evidence.
- b. That the Plaintiff be granted leave to produce copies of original documents as exhibits during the hearing of the suit and;
- c. That costs of the application be provided for.

2. The Application was grounded on the Affidavit of Grace Maina sworn on 27<sup>th</sup> January, 2017 and filed in support of the Notice of Motion. The deponent deposed that the plaintiff is the successor of the defunct Kenya Anti-Corruption Commission (hereafter referred to as “KACC”), who filed HCCC No. 897 of 2006 KACC vs Job Keittany and Michael Chesikaw, in a bid to recover funds alleged to belong to the public and said to have been fraudulently misappropriated by the defendants.

3. The Defendants were previously charged in Criminal Case No. 7157 of 2007, Kibera: R vs Job Kipsang Keittany & Michael Chesikaw, where original documents in relation to this matter were produced as exhibits during the hearing.

4. The Plaintiff further averred that this suit was listed for hearing on the 12<sup>th</sup> of May, 2006 before the court but the parties were not able to proceed. The 1<sup>st</sup> Defendant informed the court that he was unable to comply with **Order 11** of the **Civil Procedure Rules** for reasons that the Plaintiff confiscated his original documents during investigations which were produced as exhibits in the criminal trial. The Applicant’s advocate on record at the time undertook to obtain the said exhibits from the criminal court registry at Kibera and avail them to the Defendants.

5. The Plaintiff submitted that it obtained a court order on 20<sup>th</sup> July, 2015, directing the Executive Officer at the Kibera Court Registry to avail the Criminal Case file No. 7157 of 2007 to the High Court for extraction of the exhibits. That the Executive Officer came to court on 21<sup>st</sup> November, 2016 and explained that he could not avail the required exhibits because the physical criminal file did not contain any exhibits. He confirmed that the exhibits and/or any record produced in the said criminal case could not be traced at the court's registry.

6. The Plaintiff urged that failure to produce copies of the original documents will be fatal to the Plaintiff's suit, and that the Applicant had traced copies of the documents it intends to rely on during the hearing of the suit and it is therefore in the interest of substantial justice that this application be allowed. Further that no prejudice will be suffered by any party if copies of the documents are produced.

7. The Defendants opposed the application in their replying affidavit dated 16<sup>th</sup> February 2017 sworn by Michael Chesikaw, in which he deposed that from the onset of this case their advocates raised the matter of the Plaintiff's precursor KACC, having confiscated all the documents that they had concerning this matter. That some of the documents were produced in the Kibera Chief Magistrate's Criminal Case 7157 of 2007 in which they were acquitted.

8. The Defendant averred that earlier on when this matter was still in the Civil Division as HCCC 897 of 2006, their Counsels filed in court on 19<sup>th</sup> January, 2007 and served upon the Plaintiff a Notice dated 17<sup>th</sup> January, 2007 to produce documents. This was precisely because they knew they had no documents that they could use for their defence, as the KACC had confiscated all of them. They sought to cover themselves by at least obtaining the original documents to make copies thereof but the Plaintiff has not complied to date.

9. The Defendant argued that they have raised this issue on all occasions and have written to the Plaintiff (or its precursor) severally demanding the said documents because without the documents, they are unable to present their defence. They urge that it would be a great injustice for the Applicant who forcefully seized all their documents, including cheque books and receipts to seek to benefit from the situation, by asking to be allowed to produce copies of documents they have handpicked to their advantage, while the Defendants are left with nothing to defend themselves.

10. The Defendants also averred that if the Applicant is allowed to use secondary evidence, their position will be greatly prejudiced not only because of the absence of the original documents, but more so because on their part they have no documents at all that they can rely on for their defence. That the absence of their documents means that they cannot properly defend themselves due to no fault of their own.

11. The Defendant asserted that among the documents they have seen in the Plaintiff's bundle of documents served on their advocates whose copies they seek to use, are purported statements of several persons including that of the deponent that was apparently drafted by the Plaintiff's officers and which do not contain actual signatures. He contended that it would be a travesty of justice for the Plaintiff to be allowed to proceed with secondary evidence while the Defendants do not have their documents to defend themselves. He urged the court to dismiss the application.

12. The Defendant argued that while the Plaintiff has stated in its application that failure to produce the original documents would be fatal to its case, the Defendants have also been placed in the same position, since they are unable to produce any of their documents in their defence.

13. Upon consideration of the rival arguments the question that emerges for determination is whether or not the Plaintiff has demonstrated that it ought to be permitted to adduce secondary evidence. **Section 68 (1) of the Evidence Act Cap 80 (Laws of Kenya)** provides for circumstances in which secondary evidence may be adduced or used.

14. In the instant case there is no dispute that the documents in question were confiscated by the Plaintiff from the Defendants and that they were subsequently produced in evidence in Kibera Chief Magistrate's Court in criminal case No. 7157 of 2007. The Executive Officer at Kibera Law Courts did confirm to the

court on 21<sup>st</sup> November, 2016 that the documents produced as exhibits and/or any record thereof could not be traced at the court's registry. There is also no evidence that the loss of the documents was as a result of a deliberate act or negligence on the part of any of the parties herein.

15. Karanja J grappling with the same question in **Jemima Moraa Sobu v Trans-National Bank Ltd [2016] eKLR Civil Case 378 of (1997)** held *inter-alia* that;

***“Primary evidence is therefore the evidence which the law requires to be given first. This is what is referred to as the best evidence principle. Secondary evidence is evidence, which may be given in the absence of the better evidence which the law requires to be given first when a proper explanation is given of the absence of that better evidence. Under Section 68 (1) of the Evidence Act, secondary evidence may be given of the existence, condition or contents of a document in specified cases including when the original has been destroyed or lost, or when the party offering the evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time.*”**

16. Just like in the case before me the plaintiff in the foregoing case indicated that she was unable to produce the originals as they had not been released to her by the court despite several requests. The court informed her that the originals could not be traced in the place where they were stored. In other words, the plaintiff was saying that due to reasons not of her own making she was unable to produce the originals.

17. The photocopies herein have been certified as copies of the originals and their production would not be prejudicial to the defendants as they have knowledge of and have acknowledged the existence of the originals. This can be deduced from their acknowledgement of the previous trial in which the originals were said to have been produced and their letter to the plaintiff to produce them.

18. Similarly, Serگون J also dealt with the issue of secondary evidence in **Hans Mollin v Festus Oganda [2006] eKLR Civil Case No. 284 of 2000** and held *inter-alia* that:

***“The plaintiff has also sought to produce items Nos.13, 14, 15, 16, 17, 18, 19, 20A, 20B, 21, 22 and 23 as exhibits in evidence but the defendant has raised an objection on the ground that the originals should be produced. The plaintiff has said that it is not possible to get the originals because they got lost in his residence, which is also accessible to the defendant. The plaintiff ran short of blaming the defendant for being the culprit. The uncontested fact is that both the plaintiff and the defendant live in the house in dispute. The only reason advanced by the defendant to oppose the production of the above documents is that they are not in their original form. The defendant does not dispute the fact that the original are alleged to be lost. I have come to the conclusion that the objection should be dismissed. I admit the documents to be produced in evidence pursuant to Section 68(1) (c) of the Evidence Act. The same are produced and marked as plaintiff's Exhibits 13,14,15,16,17,18,19,20A,20B,21,22 and 23.”***

19. Production of secondary evidence is something that is expressly provided for in the law. **Section 68 of the Evidence Act** provides for proof of documents by secondary evidence as follows:

*“(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. (a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.

(b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.

(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.

(d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.

20. It is clear that the original documents cannot be traced. There are photocopies, which therefore fall within the meaning of secondary evidence which are admissible in evidence if they satisfy the requirements set out in **Section 68(1)** of the **Evidence Act**; particularly **Section 68 (1) (c)**.

21. Conversely, the Defendants have not demonstrated what prejudice they would suffer if the court was to allow the use of copies of the missing documents whose copies will be supplied to them too.

22. In sum the Plaintiff's Notice of Motion dated and filed on 20<sup>th</sup> January 2017 is merited and is hereby allowed. Both parties are hereby allowed to use certified copies of the documents in question in their respective cases.

Costs shall be in the cause.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of March, 2017**

**L. A. ACHODE**

**JUDGE**

**In the presence of:**