



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 232 OF 2011

LILIAN WANGUI MUHUYU.....1ST PLAINTIFF

ANTHONY MUHUYU GITAU.....2ND PLAINTIFF

VERSUS

SISTERS OF MERCY

(Sued as the registered trustees of the Mater Hospital).....DEFENDANT

RULING

1. This matter was listed for hearing on 05.04.2017. Mr. Njenga appeared for the 1st and 2nd Plaintiffs while Mr. Menge appeared for the Defendant. The 2nd Plaintiff herein who testified as PW3 sought to produce before the court as exhibits, a number of documents which included documents on pages 2-5, 88, 13, 14-38 in the plaintiffs' list of documents.
2. Mr. Menge raised an objection under section 35 of the Evidence Act to the production of the documents on pages 2-5 and 13-23 without calling the makers. The Counsel stated that the documents are from Real Aliko and the objection was on the ground that they wanted the makers to attend court for cross-examination with respect to authenticity of the said documents. The Counsel's contention was that the said documents did not emanate from a medical doctor and that from the documents, Real Aliko are based in Nairobi and no reason was given why they did not attend court. Further Mr. Menge stated that the Defendant had earlier raised the objection during pre-trial stage.
3. In response to the objection, Mr. Njenga stated that the documents sought to be produced by the witness are admissible under section 35 (1) (b) of the Evidence Act and he applied to recall Mr. Antony Muhuyu for examination- in - chief in order to clarify on the efforts he has made in contacting the makers of those documents.
4. This Court must now determine whether the documents in question which include medical prescription and payment receipts sought to be produced in Court by the 2nd Plaintiff who is not the maker are admissible in evidence. The 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.”

5. The Plaintiffs’ Counsel relies on the proviso to section 35 (1) (b) of the Evidence Act in opposing the application. 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 of ascertaining that Real Alike are aware of the documents is by having the maker called to testify in court. The record of court is quite clear that on 18.5.2015 the Defendant raised an objection to production of documents inclusive of pages 13-23 of the Plaintiffs’ bundle of documents during pre-trial stage.

6. Mr. Njenga applies to recall Mr. Antony Muhuyu again for examination in chief in order to clarify on the efforts he made in contacting the makers of documents in Plaintiff’s bundles of documents.

7. Having considered the arguments from both counsels, I find that the Plaintiff had the opportunity to address the court on the difficulties they faced in procuring the attendance of Real Alike, which they failed to utilize even after the court gave him an opportunity after the 2nd plaintiff was recalled. Parties are reminded that justice is two way and the defendant is also entitled to justice in equal measure.

8. In the premises, the defendant’s objection is hereby sustained. The makers of the documents to attend court and produce the disputed documents.

Dated, signed and delivered at Nairobi this 29th day of June, 2017

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the 1st Plaintiff**

..... **for the 2nd Plaintiff**

.....**for the Defendant**