



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 378 OF 1997

JEMIMA MORAA SOBU.....PLAINTIFF

-VERSUS-

TRANS-NATIONAL BANK LTD.....DEFENDANT

RULING

1. The plaintiff, **Jemima Moraa Sobu (pw1)**, in her oral testimony referred to several documents which have been marked **PMF1 1-12** and wished to have them produced as exhibits for purposes of fortifying her testimony and establishing her claim against the defendant, **Trans-National Bank (K) Ltd.** The documents are photocopies but she contends that the originals were produced in a previous trial and have not been released to her by the court despite several requests. She indicated that the information received from the court was that the originals could not be traced in the store where they had been kept.

2. The defendant objected to the production of the photocopies on the basic ground that there is no proof showing that the originals are missing. The issue is therefore whether the photocopies (**P.mf1 1-12**) should be admitted in place of the originals and be treated as the plaintiff's documentary evidence.

Basically, documentary evidence means all documents produced for the inspection of the court. Whatever evidence that comes to the court does so either as the statement of a witness or as statement of a document. It is obvious that the truthfulness of a transaction and in particular, a commercial transaction is best investigated by reference to documents.

3. The contents of a document may be proved either by primary or by secondary evidence (**see, Section 64 Evidence Act**). Primary evidence means the document itself produced for the inspection of the court (**see, Section 65 (1), Evidence Act**). Secondary evidence includes certified copies, 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 etc. (**see, Section 66, Evidence Act**).

4. 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.

5. The documents herein (**P.Mf1 1 to 12**) are not the originals. They are photocopies, thereby falling 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)**.

The plaintiff indicated that she is at the moment unable to produce the originals as they have not been released to her by the court despite several requests. She says that the court informed her that the originals could not be traced in the place where they were stored. In other words, the plaintiff is saying that due to reasons not of her own making she is unable to produce the originals. She implies that the court's failure to release the documents to her has contributed to her inability to produce them in evidence and that is why she intends to produce the photocopies of the originals.

6. However, the photocopies are themselves not certified as copies of the originals but that would not be prejudicial to the defendant as it has the knowledge of and indeed acknowledges the existence of the originals. This can be deduced from its acknowledgement of the previous trial in which the originals were allegedly produced.

Although the plaintiff blames the court, she has not produced anything tangible to show that the originals were indeed received by the court which kept them in its custody from where they went missing or could not be traced immediately when they were requested for.

Nonetheless, the present file is the original record right from the time this suit was first instituted in 1997. A perusal of the same by this court reveals that a total of thirteen (13) documents marked **P.Ex 1-13** were tendered in evidence by the plaintiff while a total of nine (9) documents marked **D.Ex 1-9** were tendered by the defendant in the initial trial which commenced in the year 2000 and ended in the year 2005.

7. Judgment was rendered in favour of the plaintiff on the **22nd February 2002**.

The defendant thereafter lodged an appeal at the Court of Appeal in Kisumu and on the **22nd June 2005**, a consent judgment was entered to the effect that two appeals arising from this matter be consolidated and be allowed with the results that the judgment of this court was set aside with an order that the case be heard afresh ("*de-novo*").

On the **28th June 2005**, the Deputy Registrar at Kisumu wrote to the Deputy Registrar at Kisii forwarding the original records including this file for safe-custody. The file is here together with a copy of the judgment of the Court of Appeal but without the original documents tendered in evidence by the plaintiff and perhaps the defendant.

8. This therefore indicates that most likely than not, the original documents or records are in the custody of the court and although the plaintiff says that they have since gone missing there is no confirmation to that effect from Deputy Registrar, Kisii. It would therefore be prudent for the Deputy Registrar to be directed and be given sufficient time to avail the subject documents for the purposes of this trial and if they cannot be traced and presumed missing, then an explanation or confirmation in that regard would be in order so that this court may then make a decision on whether or not to admit in evidence the copies of the originals (**P.mf1 1-12**).

In sum, the Deputy Registrar of this court is now directed to avail the original documents prior to the next hearing date and if the same cannot be traced and/or have gone missing a written explanation and confirmation be filed herein within the stated period.

Matter fixed for further hearing on a date to be fixed now.

J.R. KARANJA

JUDGE

[Delivered and signed this **17th** day of **March 2016**].