



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 1200 OF 2000

BETTIE ATEMU NANGA.....PLAINTIFF

- VERSUS -

MIDDLE EAST BANK KENYA LIMITED.....DEFENDANT

RULING

1. The defendant has sought the leave of the court to have the Affidavit of **S.S. DINAMANI** admitted in evidence. The said affidavit was sworn on 26th September 2000.
2. It is the defendant's position that the deponent left Kenya, over 14 years ago. That position is stated on oath, in the affidavit of **AKBER ESMAIL**, who is not only a Director of the defendant, **MIDDLE EAST BANK KENYA LIMITED**; but also its Chairman since the year 1991.
3. Prior to his migration to India, S.S. Dinamani used to be the Managing Director of the defendant.
4. The reason why the defendant wishes to have the affidavit of Dinamani received in evidence, is because the said Dinamani's exact location in India is unknown to the defendant. Therefore, the defendant submitted that it had no way of tracing Dinamani, so that he can thereafter come to testify at the trial of this case.
5. It was the defendant's understanding that Section 35 of the Evidence Act envisages the kind of scenario in which the defendant now finds itself.
6. However, the plaintiff submitted that the provisions of Section 35 of the Evidence Act actually requires witnesses to be present, so that the other parties to the case may have the opportunity to test their evidence.
7. The plaintiff's understanding was that it was in very limited situations that a witness could be excused from making himself available in court, to enable the other party cross-examine him.
8. It is a tenet of fair trial that a party should be provided with an opportunity to challenge the evidence tendered by a witness of his opponent.
9. The opportunity to challenge the evidence of a witness provides a useful mechanism to the court, for evaluating the propriety and strength or weakness of the testimony tendered by each witness. Many times, cases can succeed or fail depending on how reliable the court perceives a witness to have been.

10. In this case, the defendant says that its witness is no longer in Kenya. He had left the country about 14 years ago. Therefore, it is appreciated by the court that the defendant may find it difficult, if not impossible, to procure the attendance of the witness during the trial.
11. But the plaintiff's view was that the evidence contained in the affidavit of the defendant's former Managing Director was about matters which went on at the bank, during the material time. Therefore, the plaintiff expressed the view that there must be other officers of the defendant who could testify about those matters, if the former Managing Director was not available.
12. If an alternative witness testified, the plaintiff says that she will be accorded her constitutional right, to test the veracity of the evidence.
13. The main reason why the plaintiff would wish to test the veracity of the evidence is that the matters deponed to by Dinamani, go to the very root of the case. The plaintiff describes the evidence of that witness as being key, in this case.
14. In answer to that submission, the defendant said that pursuant to the proviso to Section 36 of the Evidence Act, there is no requirement that a party may only be permitted to rely on the affidavit sworn by a witness who did not testify in person, at a trial.
15. If the defendant's stated position was accepted, it would mean that even when a party had the opportunity to call alternative witnesses, he could still be granted leave to rely on affidavits and other documents executed by other persons who could not come to court to testify.
16. In principle, if the alternative witness could give evidence which covers the matters about which the absent witness would have covered, there would be no need to also have the affidavit or other document executed by the absent witness, admitted in evidence, without having him testify.
17. By seeking leave of the court to have the affidavit of Dinamani admitted in evidence, even though he cannot come to court to testify, the defendant must be deemed to consider the evidence of that person as critical to the defence case.
18. I have perused the affidavit of Dinamani. Out of the 24 paragraphs of the affidavit, it is only in paragraph 18 that Dinamani made reference to meetings between him and the plaintiff. And even in relation to those meetings, Dinamani said that the plaintiff held discussions with him, as well as other officers of the bank. In the circumstances, the affidavit of Dinamani does not disclose any matter about which only Dinamani had knowledge.
19. Dinamani also made it clear that the matters about which he had deponed, were either within his knowledge or were derived from the defendant's records.
20. To the extent that the matters deponed to were derived from the defendant's records, the defendant has not demonstrated why any other authorised officer of the defendant cannot give evidence about them.
21. But the court cannot compel the defendant to choose another officer from within its ranks, to come and give evidence. The choice of persons deemed to be the most appropriate witness for any party, is the responsibility of the party.
22. Section 35 (2) of the Evidence Act provides as follows;

“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) 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?.

23. In effect, even if the maker of a document was available, but was not called as a witness, the court has a discretion to admit his statement in evidence.

24. But, in order for the statement contained in the document to be admissible, the following conditions, set out in Section 35 (1) of the Evidence Act, must be met;

“a) if the maker of the statement either –

i) had personal knowledge of the matters dealt with by the statement;

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 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?.

25. In this case, the deponent stated that the matters in his affidavit were either within his personal knowledge or were obtained from the records of the defendant.

26. By dint of the provisions of Section 35 (1) (a) (i) of the Evidence Act, such part of the affidavit as was based on the personal knowledge of the deponent, may be admissible.

27. I hold the considered view that Dinamani cannot be deemed to have sworn the affidavit as a part of a continuous record. He expressly states that he made the affidavit after he had read the plaintiff’s affidavit sworn on 4th July 2000.

28. The bulk of the affidavit sworn by Dinamani was actually based on information which he obtained from the defendant’s records. Therefore, the affidavit does not meet the conditions for admissibility.

29. If the defendant can isolate the matters, within the affidavit, which were definitely within the personal knowledge of Dinamani, the court may consider granting leave to the defendant, to have such parts admitted in evidence.

30. In the result, the court declines the defendant’s request to have admitted in evidence, the Affidavit sworn by S.S. Dinamani on 26th September 2000.

31. The costs of the defendant’s application are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of December 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Gachuru for Miss Nyambura for the Plaintiff

Miss Ochoki for Onyambu for the Defendant

Collins Odhiambo – Court clerk