



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO 527 OF 2006.**

**TRANS-NATIONAL BANK LIMITED.....PLAINTIFF**

**VERSUS**

**EQUITY RECOVERY SERVICES LIMITED.....1<sup>ST</sup> DEFENDANT**

**NGUNJIRU KARANJA.....2<sup>ND</sup> DEFENDANT**

**THERESA M. NGUNJIRI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion dated and filed on 19<sup>th</sup> March 2012 was brought pursuant to the provisions of Section 68 (1) (c) and (2) of the Evidence Act, Cap 80 Laws of Kenya, Order 50 Rule 15(1) Civil Procedure Rules, Section 1 (A & B), 3 and 3A of the Civil Procedure Act and all enabling provisions of the Law and Powers of the Court. It sought the following orders:-
  1. **THAT this Honourable Court be pleased to grant leave to the Plaintiff/Applicant herein to give Secondary Evidence of the Charge dated 1<sup>st</sup> August 1997 and the Guarantee dated 31<sup>st</sup> August 2000 during the hearing of this matter as sufficient proof of the existence, condition and contents of the respective documents.**
  2. **THAT Cost of the Application be in the Cause.**

**THE PLAINTIFF'S CASE**

2. Both the Plaintiff and the Defendants had agreed on a common bundle of documents. However, during the hearing of the case, the Defendants insisted on the Plaintiff's witness producing the originals the aforesaid documents. She was therefore stood down to enable the Plaintiff avail the said documents in court. However, the Plaintiff had not only been unable to locate the whereabouts of the said documents but the same could not be produced within a reasonable time to enable parties proceed with the matter that was now partly heard.
3. The Plaintiff prayed that the copies of the aforesaid documents be allowed in the interests of justice as they were core to its case and could therefore not be dispensed with. It furnished the court with copies of documents from the Lands Registry as proof that indeed the said documents did really exist.
4. Its application was supported by the Affidavit of Wanda Atsiaya that was sworn on 19<sup>th</sup> March 2012 and a Further Affidavit that was sworn by Jacqueline Onsando, its Company Secretary and Head of Legal Services on 20<sup>th</sup> November 2013. The same was filed on 22<sup>nd</sup> November 2013. Its

written submissions were dated 30<sup>th</sup> November 2012 and filed on 3<sup>rd</sup> December 2012.

### **THE DEFENDANTS' CASE**

5. In opposition to the Plaintiff's application, on 10<sup>th</sup> April 2012 and 9<sup>th</sup> April 2014, Charles Ngunjiri Karara swore Replying and Supplementary Affidavits, respectively, on his own behalf and that of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein. The Defendants' written submissions were dated and filed on 10<sup>th</sup> April 2013.
6. Their case was that the Plaintiff had not laid any basis for it being allowed to produce secondary evidence. They contended that the Plaintiff had failed to name the officers who were looking for the said documents. Further, they stated that the aforesaid Wanda Atsiaya could not depone to the facts in the Plaintiff's Supporting Affidavit as she had not disclosed the years she was working for the Plaintiff, whether she personally saw or was involved in the preparation of the said documents or whether she was present when the said documents were being put in the safe or if she had ever seen the original documents.
7. They averred that they had denied the existence of the said documents in their Defence and copies of searches conducted on the subject property did not in themselves amount to the existence of a legal and valid charge hence the need for the Plaintiff to produce the original of the same.

### **LEGAL ANALYSIS**

8. Right at the outset, the court found it necessary to consider whether or not the Plaintiff's application should fail on the ground that it was supported by an affidavit that was fatally defective. The Defendants had argued that the Supporting Affidavit of Wanda Atsiaya had to be based on her own knowledge, which they averred was not the case, as she was not an employee of the Plaintiff at the time the documents were being prepared.
9. The Plaintiff did not appear to have addressed itself to this argument although it did state that Jacqueline Onsando was working with the Plaintiff at all material times. The court did look at the averments in the said Affidavits by the Plaintiff and found that the deponents were clear that they were deponing to matters within their own knowledge.
10. The Defendants did not furnish any evidence to the contrary or to suggest that the deponents were not relying on their own information and belief and to this extent, the Defendants failed to discharge the burden of proof of their assertion in this regard.
11. The court was therefore satisfied that the affidavits relied upon by the Plaintiff were proper for all purposes and intents of supporting the Plaintiff's case and the Defendants' submissions in respect of Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 were irrelevant and immaterial.
12. The Defendants submitted that the Plaintiff had not laid basis for producing secondary evidence. They stated that it was not possible that the whole bank could have been looking for the said documents as the aforesaid Wanda Atsiaya had contended and that in any event, none of the officers who were looking for the said documents were named in the affidavits.
13. It is, however, the opinion of the court that it was not necessary to name all the parties who were looking for the said documents. Indeed, it would have been impractical to have taken down names of any person who had looked for the documents as this is not something that persons who are looking for lost items would ordinarily do. The court therefore rejected the Defendants' arguments in this regard.
14. The fact that the Defendants denied the existence of the documents in its Defence would not be sufficient reason to deny that the said documents existed. In fact, it would not have been feasible for the Defendants to have created a possibility of a Legal Charge existing in any manner or form if there was no such document if indeed they had never executed the documents. Additionally, the Defendants could not be heard to complain about failure on the part of the Plaintiff to issue a Statutory Notice under Section 74 of the Registered Land Act Cap 300 (Laws of Kenya) (now repealed) if indeed there had been no obligations on the part of the Plaintiff to have issued the same. Further, the questions of re-scheduling of the debt and the levying of illegal penalties all point to there having been a relationship between the Plaintiff and the Defendants.
15. The questions of whether or not the said documents were executed as had been contended by the

- Plaintiff or whether or not there was any facility that was advanced to the 1<sup>st</sup> Defendant or whether there illegal debits from the 2<sup>nd</sup> Defendants' accounts amongst many other issues that had been raised by the Defendants were all matters that would ideally be canvassed during trial. These were not issues that would dissuade the court to grant the Plaintiff the orders it had sought.
16. What is of concern to this court is whether or not the Plaintiff was able to demonstrate that it ought to be permitted to adduce secondary evidence. It argued that Section 68 (1) of the Evidence Act Cap 80 (Laws of Kenya) provided that a party could prove the existence, condition or contents of a document where the original is lost, destroyed or cannot be found.
  17. It referred the court to its Supporting and Further Affidavits in which it had explained the circumstances of the missing documents and contended that the loss was not as a result of deliberate negligence on its part.
  18. It also argued that the said Jacqueline Onsando was at all material times present when the documents were prepared and executed by the 2<sup>nd</sup> Defendant whose Identity Card Number was given as 4144843.
  19. The Defendants did not deny that Identity Card Numbers 4144843 and 5482895 in the Charge and Guarantee belonged to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively or that they never executed the said documentation as had been contended by the Plaintiff or that the Charge was never registered. Indeed in Paragraph 11 of their Defence dated and filed on 14<sup>th</sup> November 2006, the Defendants alluded to the 1<sup>st</sup> Defendant executing a Legal Charge. They stated as follows:-

**“11. IN FURTHER answer to paragraph 6, and without prejudice to the foregoing, if, which is denied (sic) the 1<sup>st</sup> Defendant executed a legal charge over the stated property in favour of the Plaintiff, the aforesaid charge was not for the sum of Kshs. 2,500,000 as alleged or at all and the Plaintiff is put to strict proof thereof.”**

20. Accordingly, having carefully considered the affidavit evidence and the written submissions in respect of the parties' cases, it did appear to the court that as the original documents had not been traced since the time the Plaintiff's witness was stood down and it had given a plausible explanation of why it had been unable to avail the said originals, the same could not be produced in a reasonable time to proceed with the matter which is now part heard. The Defendants did not in fact demonstrate any prejudice that they would suffer if the court was to allow the Plaintiff's request so that the matter could be determined on merit.
21. Indeed, production of secondary evidence is something that is expressly provided for under Section 68 (1) of the Evidence Act to enable the court attain the overriding objections set out in Section 1A and 1B of the Civil Procedure Act Cap 21 (Laws of Kenya) which are to ensure the expeditious disposal of disputes. Further, the practise of the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division is for parties to rely on copies of documents as original documents are no longer tendered in evidence as parties are expected to have inspected the original documents at the discovery and inspection stages.

## **DISPOSITION**

22. The upshot of this court's ruling is that the Plaintiff's Notice of Motion dated and filed on 19<sup>th</sup> March 2012 was merited and same is hereby allowed. Costs shall be in the cause.
23. Parties are hereby reminded to ensure that their Witness Statements and Bundle of Documents are cross-referenced in line with the current Practise Directions for the Division before they fix the matter for further hearing.
24. It is so ordered.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of January 2015**

**J. KAMAU**

**JUDGE**