

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 635 of 1996

DOMINIC OMENYA t/a OMENYE AND ASSOCIATESPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITEDDEFENDANT

R U L I N G

Dominic Alois George Omenye, the plaintiff herein sought to produce the statements sent to his firm, Omenye & Associates by Kencem as exhibit number 23. Accompanying the statements, are the invoice, a summary of computation of loss of Business and actual tonnage purchased. An objection against the production was raised by Mr. Omondi, learned advocate for the defendant on the ground that the plaintiff was not the maker of the documents. Mr. Ouma, learned advocate for the plaintiff beseeched this court to reject the objection and proceed to permit the document to be produced as an exhibit in evidence. Mr. Ouma pointed out that the documents were sent to his client by Kencem and that Kencem being the maker cannot be available to present the same because it no longer exists.

I have considered the submissions of learned advocates from both sides. It is not in dispute that the statements marked as P.M.F.I. No. 23 originated from Kencem. It is also not in dispute that Kencem no longer exists. The documents are original documents and the invoices and the summaries accompanying the same arose out of the statements. The main objection against the production of P.M.F.I. 23 is the fact that P.W.1 is not the maker. It has been stated that Kencem the maker is no longer in existence. The proviso to section 35 of the Evidence Act is clear on that aspect. The law states inter alia that where the maker cannot be called to testify because he cannot be found the document can be produced and admitted. For the above reason I overrule the objection and admit P.M.F.I. 23 in evidence as plaintiff's exhibit No. 23. Costs of the objection to be met by the defendant.

Dated and delivered at Mombasa this 5th day of June 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Wachira h/b Omondi for the Defendant

N/A for the plaintiff.