



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 26 of 2004**

ERIC JEAN DANIEL STOLZ.....1ST PLAINTIFF

GERICO FRANCE.....2ND PLAINTIFF

VERSUS

MOHAMED HUSEIN ABDULLA JAFFER.....DEFENDANT

R U L I N G

The plaintiffs did file a Notice of Motion dated 2nd July 2004, through which they sought judgement against the defendant, on the grounds that the defendant did not have a defence to the plaintiffs claim.

Upon being served with the application, the defendant filed a Notice of Preliminary Objection, in the following terms:

“TAKE NOTICE that the Defendant herein, MOHAMMED HUSSEIN JAFFER shall at the hearing of the application dated 2nd July 2004, raise a preliminary objection to the Application on the Ground that the Application and the affidavit in support thereof, of Eric Jean Daniel Stoltz DEPONED TO ON 23RD March 2004 is incurably defective.”

It was submitted that the supporting affidavit was defective because the undertaking annexed to the affidavit had NOT been stamped, pursuant to the Stamp Duty Act, having been executed outside Kenya. He went on to clarify that the **“Acknowledgement of Debt”** was executed in France.

For that reason, it was contended that the said document did not comply with the provisions of Section 23 of the Stamp Duty Act, which requires such instruments to be stamped before they could be used in Kenya.

It was said that as the document was not stamped pursuant to Section 19(1) of the Stamp Duty Act, it could not be received in evidence. For that reason, the defendant applied for the instrument to be expunged from the record.

Section 19(1) of the Stamp Duty Act reads as follows:

“Subject to the provisions of subsection (3) of this section and to the provisions of section 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”

As the “**Acknowledgement of Debt**” exhibited in this matter is not stamped, does it run foul of the statutory provisions? In other

words, should it be held to be inadmissible in evidence, as contended by the defendant?

By virtue of Section 23 of the Stamp Duty Act, it would appear that the document should have been stamped as it is said to have been executed outside Kenya. The said Section 23 provides as follows:

“Every instrument executed out of Kenya by any person, not being a bill of exchange or a promissory note, shall before being used, brought into force or registered, within Kenya, be stamped according to the rate of duty chargeable thereon in accordance with this Act, whatever the provision of the Schedule may be with regard to the time before which or the period within which such an instrument, if executed in the first instance within Kenya, should be stamped.”

Obviously, the “**Acknowledgement of Debt**” is neither a bill of exchange nor a promissory note. Therefore, if it was executed outside Kenya, it ought to be stamped before it can be admitted in evidence in this case. That legal position was recognised and restated in **GLENCORE GRAIN LTD V TSS GRAIN MILLERS LTD [2002] 1 KLR 606 at page 622**, whereat the Hon. Onyancha J., expressed himself thus:

“..... the arbitral award was completed in England although there was a suggestion also that it may have been written in South Africa. In either case it was arrived at outside Kenya and only brought to Kenya for enforcement.”

As the said award was not stamped in accordance with the mandatory provisions of Section 23 of the Stamp Duty Act, the court held that the award could not be used in any way, for any purpose, in Kenya.

I am in full agreement with my learned brother. Yet notwithstanding that legal position, the plaintiff still invited me to rule that the “**Acknowledgement of Debt**” herein is admissible in evidence. First, it was pointed out that an acknowledgement of debt was not one of the instruments cited in the Schedule to the Stamp Duty Act, as being liable to stamping.

In that regard, it is evident that an Acknowledgement of Debt is the first item on the list of “**General Exemptions**.” And, although the defendant submitted that an acknowledgement of debt would

only be exempted if it was executed in Kenya, the plaintiff did not give a direct response to that contention.

On my part, I hold the view that by virtue of the provisions of Section 23 of the Stamp Duty Act, every instrument executed outside Kenya is liable to stamping, before it can be brought into force or registered within Kenya, unless such a document was either a bill of exchange or a promissory note.

The question I must now address is whether or not the “**Acknowledgement of Debt**” herein was executed outside Kenya, as stated by the defendant. According to the plaintiff, the said document was not executed outside Kenya. The reason for that statement is derived from the fact that the defendant’s address, on the acknowledgment is given as being P. O. Box 80469, Mombasa, Kenya.

On the other hand, the defendant insists that the document was executed in France because the address endorsed thereon by a notary public was given as “**B. P. 2645 – 75026 PARIS Cedex 01.**”

Speaking for myself, I cannot appreciate why one would

assume that because of the address endorsed onto a document by a notary public, the document itself was executed at the place where the notary public endorsed his signature. In my understanding, the role of a

notary public or a Commissioner for oaths is to certify the authenticity of the document by comparing it to the original document. Or to put it in another way, by simply certifying a document, a notary public or a commissioner for oaths is not saying that the said document was executed before him.

In my considered view, it is only when a notary public or a commissioner for oaths states that an affidavit has been executed before him that the court can assume that to be a fact. Therefore, in this case, it would be right to safely assume that Mr. Eric Jean Daniel Stolz swore his affidavit in Paris, France.

However, the fact that the notary public certified the “**Acknowledgement of Debt**” as an exhibit marked “**EJDS1**”, did not imply that the said acknowledgement was also executed before the said notary public.

The defendant seemed to concede that point when, at the tail-end of his submissions, he said that the acknowledgement of debt was executed at a place which is not specified. That being the case, the very foundation of the preliminary objection could not be sustained because there was no consensus on the facts upon which it was founded. It must always be recalled that if the facts are in dispute, they could not form the foundation for a preliminary objection.

In the circumstances, I have no option but to overrule the preliminary objection, as I hereby do. The plaintiff is awarded the costs of the said preliminary objection.

Dated and Delivered at Nairobi this 25th day of May 2006.

FRED A. OCHIENG

JUDGE