

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 222 of 1997

AZAD KARAPLAINTIFF

VERSUS

MWANGI MUTERODEFENDANT

R U L I N G

The Plaintiff herein, Azad Badmudin Habib Kara sought to produce an agreement entered between him and Mwangi Mutero the defendant herein, on 12.9.96 in evidence as an exhibit. Mr. Gikandi advocate for the defendant vehemently opposed that move on various fronts. First, is that the agreement sought to be produced was different from that annexed to the plaintiff's affidavit sworn on 13.11.97 in support of an application for summary judgment.

I have examined the two documents and it is clear that the one annexed to the affidavit of the plaintiff sworn on 13.11.97 was not signed by John Ndungu whereas the one now sought to be produced has been duly executed .

The second reason advanced is that the document does not have a stamp as required under the Stamp Duty Act. Thirdly, that the defendant is in possession of an affidavit in which John Ndungu has denied signing the agreement. Fourthly, that Mwangi Mutero has not signed the documents.

On her part Miss Osino advocate for the plaintiff urged this court to reject the objection on the ground that a similar objection was raised on 14.5.2002 and rejected hence the defendant should not relitigate over the same issues.

I have considered the rivaling submissions over the issue as to whether or not the agreement dated 12th September 1996 should be admitted in evidence. Three of the four grounds relate to the credibility of the document. It is said the same could have been doctored or forged. It is also said that one of the witnesses did not execute the document and there is affidavit evidence to prove that. In my view these arguments are sound but unfortunately they are not grounds which can be used to bar the production of such evidence. It is conceded by the defendant that he has evidence to destroy the credibility of the document. In any case the plaintiff may prove the execution of he document by other evidence even if the attesting witness denies witnessing execution under sections 70 and 74 of the Evidence Act.

The other objection is that the document has not been stamped under the Stamp Duty Act Cap. 480 Laws of Kenya, hence it should not be produced. On this account I agree with Mr. Gikandi advocate that it is mandatory under the Stamp Duty Act for the agreement to be stamped in order for it to be admissible in evidence. However, that does not make the document useless in evidence. Section 19 of the Stamp Duty Act bars such documents from being relied upon in evidenced unless they are duly stamped. Such a lapse is curable under Section 20 of he Stamp Duty Act in that the reason seeking to produce the documents in evidence is given a chance to comply with the requirement out of time. In the end the objection is sustained. The document shall not be produced until it is properly stamped under the Stamp Duty Act. The same may be marked but may later be produced after it has been duly stamped.

Dated and delivered at Mombasa this 16th day of June 2006.

J K. SERGON

J U D G E

In open court in the presence of Ambwere h/b Gikandi for the defendant.

Omollo h/b Osino.