

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Case 284 of 2000

HANS MOLLINPLAINTIFF

VERSUS

FESTUS OGANDA.....DEFENDANT

RULING

The upshot of this ruling is the objection by the defendant to the plaintiff producing in evidence the 33 documents listed in his list of documents. I will deal with the objection in respect of each of these documents.

The documents listed as Nos.1,2a,2b and 3 are building plans the plaintiff said he instructed a German architect to prepare. It is the argument of Mr.Ouma advocate for the plaintiff that it would be extremely expensive to secure the attendance of the aforesaid architect to come to Kenya to produce the building plans. It is the submission of Mr. Otieno for the defendant that the documents should not be produced in evidence unless the maker and the original are available. I have considered the objection raised by the defendant's counsel. In my mind, the defendant does not deny the fact that it would be extremely difficult and expensive to secure the maker i.e. the architect of the building plans from Germany. The defendant has not also denied that he will suffer no prejudice. After a careful consideration I am convinced that the documents should be admitted pursuant to the proviso to Section 35 of the Evidence Act. In any case there is no evidence that the building plans were specifically drawn for purposes of this suit as anticipated under S.89 (2) of the Evidence Act. Consequently the defendant's objection is overruled and the documents are admitted as plaintiff's exhibits 1, 2a, 2b and 3.

The defendant has also objected to the production of items Nos. 4, 25 and 27 which are schedules of money disbursed prepared by the plaintiff, a letter by the Defendant and an agreement respectively on the ground that the same needed to be proved by the production of receipts. After anxiously considering this objection, I have come to the conclusion that the same has no merit. The makers of the documents are known. The credibility and weight of the document in evidence can be dealt with during final submissions. Consequently I do not think the objection has merit. The documents are admitted as the plaintiff's exhibit Nos. 4,25 and 27 respectively.

The defendant also objected to the production of items Nos, 5,6,7, 8 and 11 being a bank statement, withdrawal slip and a bank book and statement of accounts between 1994 and 1995 respectively on the ground that the original should be produced by the bank representative. I do not understand the nature of this objection. The law does not bar the plaintiff from producing such statements. In any case Section 37 of the Evidence Act allows the production of such documents. It is also uncontested that the bank official will be difficult to attend court. The objection is hereby overruled and consequently items nos.5 6,7, 8 and 11 are admitted as plaintiff exhibits No 5,6,7,8 and 11.

The defendant had pointed that the objection regarding the production of photographs was dealt with by Justice (Rtd) Hayanga on 28.11.2001. I have perused the record and I agree that the matter was dealt with on 28.11.2001. There was no appeal and this court can not attempt to act as one. Consequently the objection in respect of the production of the photographs is sustained in terms of the orders of Justice (Rtd) Hayanga of 28.11.01.

The plaintiff has also sought to produce items Nos.13,14,15,16,17,18,19,20A,20B, 21,22 and 23 as exhibits in evidence but the defendant has raised an objection on the ground that the originals should be

produced. The plaintiff has said that it is not possible to get the originals because they got lost in his residence, which is also accessible to the defendant. The plaintiff ran short of blaming the defendant for being the culprit. The uncontested fact is that both the plaintiff and the defendant live in the house in dispute. The only reason advanced by the defendant to oppose the production of the above documents is that they are not in their original form. The defendant does not dispute the fact that the original are alleged to be lost. I have come to the conclusion that the objection should be dismissed. I admit the documents to be produced in evidence pursuant to Section 68(1) (c) of the Evidence Act. The same are produced and marked as plaintiff's Exhibits 13,14,15,16,17,18,19,20A,20B,21,22 and 23.

The defendant has further opposed the production of a copy of item No. 24 on the ground that he has the original. In my mind I see no merit in this objection. The objection is overruled and item no. 24 is ordered produced as Plaintiff's Exhibit No 24 pursuant to section 69 (iv) of the Evidence Act.

The defendant has further raised an objection against the production of items 26,28 and 29 which objection is similar to that raised against the production items No. 4,25 and 27. My view remains the same, that the credibility and weight put on a document produced cannot be used to halt the production of such evidence. The veracity of such evidence can be tested upon cross-examination and at the final submissions. The objection is dismissed with a directive that items Nos. 26,28 and 29 are hereby admitted in evidence as plaintiff's exhibits No. 26,28 and 29. The remaining documents are largely uncontested or they are objected on flimsy grounds hence they are admitted as Plaintiff's Exhibits Nos. 12, 30, 31, 32 and 33.

The final result is that the objection is sustained in respect of items No. 10 but dismissed in respect of the other items.

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 Mr. Otieno for the Defendant and Mr. Ouma for the plaintiff.