



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**Civil Suit 27 of 2003**

**JOAO FRANCIS QUADROS .....PLAINTIFF**

**VERSUS**

**SDV TRANSAMI KENYA LTD.....DEENDANT**

**RULING**

While being led in examination in chief the plaintiff sought to produce certain documents copies of which he has filed along with his list of documents and served counsel for the defendants. Mr. Mogaka, counsel for the defendant, objected to the production of those documents on the ground that the Plaintiff is not the maker. By dint of Section 35 of the Evidence Act he is not a competent witness to produce them. Mr. Mogaka further argued that the maker is not dead and it has not been alleged that he cannot be traced or that the cost of bringing him to court is exorbitant. He argued that the defendants' other and main objection to the production of the documents by the Plaintiff is because they are fabricated. That is why the author should produce them and be cross-examined on them.

Mr. Mogaka further argued that the notice to produce, served upon him only that morning, requires the defendant to produce the original documents which are in the possession of the Plaintiff. There is therefore no way the defendant can be able to comply with that. It should therefore be ignored as being of no consequence, he concluded.

In response Dr. Khaminwa for the Plaintiff submitted that the objection is baseless and should be overruled. The argument that the documents are not with the defendant is no basis for objecting to their admissibility. He said Mr. Mogaka has had copies of the documents for over a year and has therefore had ample opportunity and should have objected earlier. Having not done so it is now too late in the day and the objection should be overruled. He said the documents are not secondary but primary evidence. To bar the plaintiff from producing them will shut out vital evidence. Dr. Khaminwa concluded that the plaintiff should be allowed to produce the documents and Mr. Mogaka can cross-examine him as long as he wants to show, if he can, that the documents are not authentic.

The plaintiff seeks to produce documents in support of his claim for commission. It is common ground that he is not the maker of those documents. He said the documents were made by one Murumba a former employee of the defendant. The authenticity of the documents is highly questioned by the defendant.

Section 35(1) of the Evidence Act Cap 80 of the Laws of Kenya is quite clear. Documents have to be produced by the maker except where the maker is:-

**“...dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”**

The Plaintiff has not come under any of these exceptions. He has not given any reason why the maker of those documents cannot be called. In the circumstances I find no basis for allowing the plaintiff to produce them. The documents shall be produced by the maker. I therefore sustain the objection with costs to the defendant.

DATED and delivered this 2<sup>nd</sup> day of December, 2005

**D. K. MARAGA**

**JUDGE**