



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.898 OF 1985

AMOS KINUTHIA & ANOTHER ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

UNGA LIMITED ::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

After P.W.1 had been re-examined by his Counsel on 10th June 2004, the said Counsel applied that MFI 3 and MFI 4 be produced by this witness. This was procedurally unusual. However, as nothing hinges on this procedural lapse I will say no more. Counsel for the Defendant raised objection to the said production and extensive submissions were made by both sides.

Counsel for the Plaintiff urged me to allow P.W.1 to produce MFI 3 on the ground that the maker thereof a Mr. Kibue had migrated to the U.S.A. and his attendance cannot be procured without undue delay. As to the production of MFI 4, I was urged to allow P.W.1 to produce the same on the ground that the originals were in the Defendant's custody and in any event the Defendant would suffer no prejudice as its Counsel had cross-examined the witness on the said documents.

The gist of the objection of Counsel for the Defendant to the production of the said documents by P.W.1 was this: That sufficient basis had not been laid regarding the difficulty in procuring the attendance of the said Kibue; that the said Kibue was not the maker of the entire MFI 3 and no reasons had been advanced for the failure to procure the other makers; that the documents were photocopies and had not been signed or initialed by the alleged markers, that MFI 4 was not in the Defendant's custody and even this could not prevent the makers from being called as witnesses. These documents are also photocopies and are inadmissible.

In reply Counsel for the Plaintiff reiterated that the record showed that the said Kibue had migrated to the U.S.A. to a state p.w.1 did not know. His attendance would therefore not be procured without unreasonable delay and expense. As regards pages 101-107 of MFI 3 Counsel argued that, the same was an executed contract between the Plaintiff and Mea Ltd and P.W.1 is competent to produce the same.

Responding to the objection to MFI 4, Counsel for the Plaintiff submitted that P.W.1 could not trace the firms that he dealt with and therefore had, laid basis for production of these documents without calling the markers. Counsel was of the view that under Section 68 (c) of the Evidence Act MFI 4 should be produced by P.W.1 and that in the light of the age of the case the disputed documents should be produced to avoid further delay.

I have now considered the rival submissions made by both Counsel. Having done so I take the following view of the matter. All the documents objected to are photocopies. They constitute what the Evidence Act refers to as secondary evidence under Section 66 thereof.

Secondary evidence is admissible under Section 68 of the

Evidence Act. Subsection (1) (c) provides:

“Secondary evidence may be given of the existence condition or contents of a document

.....

(c) when the original has been destroyed or lost or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in a reasonable time”

It appears therefore that the witness can produce the photocopies. However, it is not every photocopy that may be produced. The requirements of Section 66 of the Evidence Act must first be complied with. The section provides:-

“66 Secondary evidence includes –

(a) certified copies given under the provisions hereinafter contained.

(b) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with copies;

(c) Counter parts of documents as against the parties w ho did not execute them ;

(d)

In my view copies would be admissible if they are certified. Photocopies made from copies would require two certificates. One that they have been made from copies and that the copies have been compared with the original. I have perused MFI 3 and MFI 4. They are photocopies that have not been certified. They are therefore not admissible. This alone is sufficient to reject production of MFI 3 and MFI 4 by P.W.1. However, Counsel for the Defendant has raised further objections that merit my consideration. Pages 81-100 of MFI 3 according to the testimony of P.W.1. was prepared by one called Njenga and pages 101 – 107 of the same document was prepared by one called Kina. No reason has been advanced for the failure to call these two. Indeed the record at page 50 shows that P.W.1 promised to call Mr. Njenga as a witness.

I have also seen and perused MFI 4. The Plaintiff has not been entirely honest that the originals were locked in the premises from which they were evicted. This is evident from the fact that some of the documents bear dates when the Plaintiff had already been allegedly evicted.

In the premises I sustain the Defendant’s objection to the production of MFI 3 and MFI 4 by P.W.1.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-