



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**HIGH COURT CIVIL CASE NO. 2277 OF 1998**

**AL-WAKIL TRANSFERENCE AND**

**GENERAL TRADING COMPANY..... PLAINTIFF**

**VERSUS**

**SOS KINDERDORF INTERNATIONAL..... DEFENDANT**

**RULING**

1. This partly heard matter has been pending for a long time.

2. I make this Ruling on the heels of a Ruling by Njagi J made on 8<sup>th</sup> November 2010 as follows:-

“Learned Senior Counsel for the Defendant has objected to the Production of MFI 22 by PW2, on the ground that it is a copy, the original of which is alleged to have been left in Somalia. Counsel for the Plaintiff on the other hand, says that the document is admissible since the witness (PW2) was one of the executors thereof. He also contends that the Plaintiff has given the Defendant’s Advocate notice to produce the original.

There is a conflict as to the place where the original document is currently located. Whereas counsel for the Plaintiff says that the Defendant’s Advocate have been served with notice to produce the original, PW2 says that the original remained with the SOS people with whom the Plaintiffs were dealing. He, however, further stated that he was one of the signatories.

Since the Senior Counsel for the Defendant intimated that he was going to cross-examine the witness on that document, I direct that he proceeds with that cross-examination after which the Court can conclusively rule on the admissibility and the production by PW2 of MFI 22 as the Plaintiff’s exhibit.”

3. The controversial agreement is that dated 16<sup>th</sup> June 1998 apparently made between SOS Children’s Villages in Somalia and Al-Wakil Transference (although the Plaintiff is named as Al-Wakil Transference General Trading Company). The attempt by PW2 to produce a copy of the agreement has been resisted by counsel for SOS Kinderdorf International (the Defendant).

4. This Court has given regard to the arguments for and against the production of the agreement made before Judge Njagi and takes the following view.

5. It is not contested that Counsel for the Plaintiff served Counsel for the Defendant with a Notice to produce dated 26<sup>th</sup> September 2003, a copy of which was filed in Court on the same day. One of the documents which the Defendant required the Plaintiff to produce is the said agreement. The Notice was served pursuant to Section 69 of The Evidence Act and Order XII Rule 8 of the repealed Civil Procedure Rules, Cap 21.

6. Section 69 of The Evidence Act reads:-

S. 69. Notice to produce a document Secondary evidence of the contents of the documents referred to in section 68(1) (a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the

circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- (i) when the document to be proved is itself a notice;
- (ii) when from the nature of the case, the adverse party must know that he will be required to produce it;
- (iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (iv) when the adverse party or his agent has the original in court;
- (v) when the adverse party or his agent has admitted the loss of the document;
- (vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court;
- (vii) in any other case in which the court thinks fit to dispense with the requirement.

7. While Order XII Rule 8 of the past version of the Civil Procedure Rules read:-

[O.XII.r. 8] Notice to produce documents shall be in Form No. 12 of Appendix B, with such variations as circumstances may require; and an affidavit or return of the advocate or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

8. From statute law, one instance when secondary evidence will be admitted is where the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved.

9. The evidence of Abshir Mohamed Ulusow (PW2) is that although he signed the Agreement on 25<sup>th</sup> June 1998 at offices of SOS Children's Village Somalia, the original was retained by SOS Somalia. This is his evidence;

*“The original is with SOS Village Somalia, under normal circumstances, the people for whom the agreement is made take the original. On our part we took a copy, and SOS took the original.”*

10. To be noted is that the Defendant is SOS Kinderdorf International. It asserts that it is not SOS Children's Village Somalia. An argument that even if the agreement was left with SOS Children's Village Somalia, the notice served upon the Defendant's advocate is of no effect because the agreement is not in the possession or power of the Defendant.

11. On the other hand, the case by the Plaintiff is that SOS Children's Village Somalia is one of the operating names of the Defendant in Somalia.

12. Admittedly the document sought to be produced is one made between “SOS Children's Village in Somalia” and the Plaintiff. Looking at the pleadings and the matter as it has evolved in the course of the part hearing, the issue whether “SOS-Children's Village in Somalia” is the same entity as the Defendant is a substantive question to be determined once all the evidence is before the Court.

13. If the Court finds that SOS-Children's Village in Somalia is the same entity or a trade name of the Defendant then it must necessarily admit the document. The inverse is true as well. Clearly then whether or not to admit the agreement into evidence is not a call this Court can make before hearing all the evidence.

14. For this reason, the decision on whether or not to admit the Agreement dated 16<sup>th</sup> June 1998 shall abide the judgment of this Court. For now, the document remains marked.

**Dated, Signed and Delivered in Court at Nairobi this 11<sup>th</sup> Day of November 2019**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Nyaga holding brief for Asli for Plaintiff

Onyango holding brief for Ojiambo SC for Defendant

