



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 197 OF 2012

APAR INDUSTRIES LTD. PLAINTIFF

VERSUS

JOE'S FREIGHTERS LTD. DEFENDANT

RULING

1. During the hearing of this suit, controversy arose as between counsel for the parties as regards an alleged letter supposedly written by the Defendant dated 24th November 2011 and which was to be found at page 136 of the bundle of documents exhibited to the Supporting Affidavit of **Ashwin Shah**, the Vice President (Marketing) of the Plaintiff Company sworn on 18th October 2012. When that bundle of documents was sought to be put into evidence by the Plaintiff through the testimony of **Nilesh Baria** (PW 1), Mr. Kimathi for the Defendant, although consenting to the other documents in the bundle going in, protested as regards the production of that particular letter. At that time on 18th November 2013, this Court directed that the said letter (which was marked "MFI 1") would have to be proved by other Plaintiff's witnesses if it was to be produced in evidence before Court.
2. When the hearing resumed before this Court on 27th March 2014, I had had an opportunity to peruse the said letter "MFI 1". I formed the opinion that the case largely turned on the genuineness of that letter. Learned Counsel for the Plaintiff had then attempted to put it into evidence through PW 3 Paul Karuga, a Revenue Officer with the Kenya Revenue Authority ("KRA"). The Court directed that PW 3, although an officer of the institution to whom the letter was addressed, should produce the KRA file in connection with the matters before Court. This PW 3 did, when he reappeared before this Court on 24th April 2014. He brought with him the original KRA file. He noted that despite the fact that there were other letters on the file from the Defendant to KRA, the particular letter dated 24th November 2011 did not appear thereon. Produced before Court as Plaintiff's Exhibits Nos. 7 and 8 were copies taken of two original letters on the KRA file one undated but received by the KRA 20th September 2011 and the other dated 8th December 2011 (Plaintiff's Exhibits Nos. 7 and 8 respectively).
3. Mr. Nyaanga, learned counsel for the Plaintiff submitted as regards the production of "MFI 1" into evidence that although the letter did not appear on the KRA file, Plaintiff's Exhibits 7 and 8 showed that there had been correspondence between the Defendant and KRA. He pointed out that Plaintiff's Exhibits 7 and 8 spoke about the same subject as "MFI 1". He maintained that "MFI 1" did not radically depart from this procedure adopted by the Defendant in dealing with tax matters in this connection and he felt that it should be allowed into evidence.
4. Mr. Kimathi, learned counsel for the Defendant, stated that the latter still maintained its objection to the production of "MFI 1" as an exhibit in this Court. In his view, the correspondence between the Defendant and KRA as evidenced by Plaintiff's Exhibits 7 and 8 was a good thing as it shows

that on the KRA file, there was such correspondence. The whole question was whether “MFI 1” emanated from the Defendant which he maintained that it did not. He could not agree with Mr. Nyaanga that, although the 3 letters spoke of the same subject matter, such was not in dispute but that could not be used to validate “MFI 1”. Counsel pointed out the variations between Plaintiff’s Exhibits 7 and 8, one hand and “MFI 1” on the other. Certainly Plaintiff’s Exhibit 7 and “MFI 1” were talking about different issues although, naturally, they referred to the same subject matter. Parties were not privy to the Defendant’s filing system and so the departures as pointed out from the given references were not of any consequence.

5. Further the Defendant’s Counsel noted that PW 3 had pointed out in evidence the different positioning of the logo of the Defendant on Plaintiff’s Exhibits 7 and 8 (on the left side of the letterhead) and on “MFI 1” where the Logo was positioned in the centre of the Defendant’s letterhead. That letter also contained the logo of “GFFG” which was not present in Plaintiff’s Exhibits 7 and 8. There was also the issue of the signature appearing on those Exhibits which were the same but which were distinguishable from that which appeared on “MFI 1”. He noted that all three documents were purported to have been signed by Joseph Claudio. He pointed to two further documents on the Court’s file which detailed Mr. Claudio’s signature, one being the Replying Affidavit dated 14th November 2012 and a Supporting Affidavit dated 12th March 2013. Both these examples of Mr. Claudio’s signature differed from that detailed on “MFI 1”. Mr. Kimathi concluded his submissions by detailing that there was no Genesis for “MFI 1” to be allowed in as an exhibit particularly as the Defendant had denied its existence. The Defendant, being a Clearing and Forwarding agent was well known to KRA and anybody could have laid his hands on a copy of the Defendant’s letterhead paper.
6. In a brief response, Mr. Nyaanga referred to other documentation on the Court file which contained the signature of the said Joseph Claudio. He pointed to the Affidavit in support of the Winding-up Petition relating to the Defendant Company as well as the signature on the Articles of Association of the same. He also pointed to examples of Mr. Claudio’s signature on documents at pages 193, 200, 201, 212, 213 and even 243 of the Affidavit in support of the Petition for winding-up of the Defendant Company. He maintained that those signatures compare favourably with that on “MFI 1”. Accordingly, he requested this Court to admit the document into evidence.
7. The Court is disturbed as to the positioning of the Defendant’s logo in the centre of “MFI 1”, as well as the logo of “GFFG” appearing thereon. As regards Mr. Joseph Claudio’s signature, there was abundant evidence before this Court as to how it differed on the various documents pointed out by both counsel. The Court does not consider that the issue of the signature has any bearing one way or another as to whether “MFI 1” should be allowed into evidence or otherwise. However, what is of more relevance, is the fact that the said letter does not appear on the KRA file and that there seemed to be no response thereto from KRA.
8. **Section 35 of the Evidence Act (Cap 80, Laws of Kenya)** reads as follows:

“35. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of the fact if the following conditions are satisfied, that is to say –

- a. **If the maker of the statement either –**
 - i. **had personal knowledge of the matters dealt with by the statement; or**
 - ii. **where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matter dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and**
- b. **If the maker of the statement is called as a witness in the proceedings:**

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he 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.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence –

- a. notwithstanding that the maker of the statement is available but is not called as a witness;
- b. notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

(3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner”.

The Court understands that the Defendant does not intend to call as a witness the said Mr. Joseph Claudio. More's the pity as this was the one individual who could perhaps shed light on whether “MFI 1” was a genuine letter emanating from the Defendant or otherwise. The Court is also somewhat puzzled that the Plaintiff has never served upon the Defendant a notice that it should produce its file copy of “MFI 1”.

9. **Section 67** of the *Evidence Act* details that documents must be proved by primary evidence except in the cases as detailed in **section 68**. That section reads as follows:

“68. (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases –

- a. when the original is shown or appears to be in the possession or power of –
 - i. the person against whom the document is sought to be proved; or
 - ii. a person out of reach or, or not subject to, the process of the court; or
 - iii. any person legally bound to produce it,

and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;

- b. when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;
- 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;

- d. **When the original is of such a nature as not to be easily movable;**
 - e. **When the original is a public document within the meaning of section 79 of this Act;**
 - f. **When the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;**
 - g. **When the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.**
- a. **In the cases mentioned in paragraphs (a) (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.**
 - b. **In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.**
 - c. **In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.**
 - d. **In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents”.**

10. This Court takes particular cognizance of **section 68 (1) (a) (i)** of the *Evidence Act* as above. If the Plaintiff maintains that the said Mr. Joseph Claudio signed “MFI 1” and that it emanated from the Defendant then secondary evidence of the same can only be put before this Court after a notice to produce a document as required by **section 69** of the *Evidence Act* has been given and such person refuses or fails to produce it. In view of the fact that the letter does not appear on the KRA file, the Court is left with the impression that either the document had been fabricated for production before Court or that the Original thereof has gone missing off the KRA file. Whichever, the Plaintiff still has work to do if it wishes to have “MFI 1” admitted into evidence.

11. As a result, at this juncture, the Court is not prepared to allow “MF 1” into evidence and the Plaintiff’s Application in that regard is hereby dismissed. Costs shall be in the cause

DATED and delivered at Nairobi this 12th day of May, 2014.

J. B. HAVELOCK

JUDGE