



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 174 OF 2017

JULIUS OTIENO ONYANGO.....PLAINTIFF/APPLICANT

VERSUS

JAMES MARK ODHIAMBODEFENDANT/RESPONDENT

R U L I N G

1. This Court is called to determine the application dated 6th December 2019 which is brought under the provisions of sections 36, 66, 68, 71 and 128 of the Evidence Act and section 3 and 3A of the Civil Procedure Act. The Plaintiff/Applicant prays for orders;

1) That the attendance of the maker of the agreement dated 16th July 2016, cannot be procured without undue delay as such a copy of it be produced in this matter forthwith by the Applicant who equally signed it.

2) That a copy of the agreement dated 16th July 2016 be produced as secondary evidence on the person legal bound to produce it has failed to do so even after notice under section 69 of the Evidence Act was issued.

3) That in the alternative and without prejudice to the foregoing PASCAL PANYAKO ETYANG be compelled to appear in court and produce the agreement dated 16th July 2016.

2. The application is premised on the following grounds listed on its face as well as the affidavit sworn in support by the Applicant;

(a) The document is the hand writing of one PASCAL PANYAKO ETYANG who did so for and on behalf of the Defendant herein.

(b) The original documents remained in possession of PASCAL PANYAKO ETYANG.

(c) The presence of the said PASCAL PANYAKO ETYANG cannot be procured without undue delay even after notice has been issue.

3. The application is opposed by the replying affidavit filed on 21/1/2020. The Respondent deposed that he objected to the production of the agreement dated 16/7/2016 because he needed the person who wrote it to attend court and produce it. The Respondent denied signing the impugned agreement. That he lodged a complaint against the Plaintiff to complete the sale transaction whereby the Applicant undertook to refund Kshs.150,000 within 3 months. That there was no need for him (the Respondent) to lodge the complaint if a refund agreement had been made.

4. The Respondent denied that Pascal Panyako Etyang is known to him. That the alleged Pascal acted in cahoots with the Applicant to craft the refund agreement and affix signatures in order to draw the fraudulent benefit of implying that the Respondent had been refunded his money. The Respondent urged the court to disallow the application.

5. The advocates on record for the parties have filed written submissions in arguing the motion. I have read and considered the same and also perused the signatures appearing on the agreement of 16/7/2016. The document was signed by Anna Achieng referred to as refunder; James Mark Odhaimbo (Defendant) referred to as receiver and they signed in the presence of Julius Otieno Onyango (Plaintiff), Eliakim Omondi Okungu and Pascal Panyako Etyang. The Plaintiff was thus a witness to the impugned agreement.

6. Section 68(1) (a) (i) and (ii) of the Evidence Act provides that;

“(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 of, or not subject to, the process of the court”

7. The person sought to be called to produce the document is not a party to these proceedings. The contents of the document as deposed by the Defendant is not favourable to him as he states that the same was crafted to fraudulently benefit the Applicant. He denied that Pascal Panyako was his witness. The pleadings clearly make the document to fall under the provisions of section 68(1) above quoted. Secondary evidence is also described to include 66(e) – **“oral accounts of the contents of a document given by some person who has himself seen it”**. In this case the Plaintiff saw it since he is described as present during the execution of the agreement of 16/7/2016.

8. Section 35 of the Evidence Act on production/admissibility of documentary evidence states thus;

(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 that 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 matters 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.

(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.

9. In view of the provisions of the Evidence Act cited, I am persuaded to find that the Plaintiff is qualified to produce the agreement of 16/7/2016 without necessarily calling the maker. If any prejudice is likely to be suffered by the Respondent as he alleges, he is at liberty to either call the said Pascal Panyako and or refer the document for examination of the disputed/questioned signatures. The impugned agreement was served on him at the institution of this case so it is not something he is being ambushed with.

10. Consequently, the application dated 6th December 2019 is allowed in terms of **prayer (1) and (2)** by granting an order allowing the Plaintiff/Applicant to produce the agreement dated 16/7/2016. No costs is awarded to either side.

Dated, signed & delivered at BUSIA this 10th day of November, 2020.

A. OMOLLO

JUDGE