

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO. 71 OF 2019**

**BETWEEN**

**DEVELOPMENT BANK OF KENYA LIMITED.....**  
**PLAINTIFF**

**AND**

**AMBROSE DICKSON OTIENO RACHIER.....1<sup>ST</sup>**  
**DEFENDANT**

**OTIENDE AMOLO.....2<sup>ND</sup>**  
**DEFENDANT**

**J. OKOME ARWA.....3<sup>RD</sup>**  
**DEFENDANT**

**FRANCIS OLALO.....4<sup>TH</sup>**  
**DEFENDANT**

**STEPHEN LIGUNYA.....5<sup>TH</sup>**  
**DEFENDANT**

**AYDEN GROUP KENYA LIMITED.....6<sup>TH</sup>**  
**DEFENDANT**

**JAMES OJWANG alias JIMMY OJWANG.....7<sup>TH</sup>**  
**DEFENDANT**

**VICTOR KIDIWA.....8<sup>TH</sup>**  
**DEFENDANT**

**RUSTON SECURITIES KENYA LIMITED.....9<sup>TH</sup>**  
**DEFENDANT**

## **RULING**

### **Introduction and Background**

1. The Plaintiff and the 2<sup>nd</sup> - 5<sup>th</sup> Defendants (“the Defendants”) have both filed Notices objecting to various documents intended to be produced by each of them at trial. The Defendants’ Notice is dated 16<sup>th</sup> September 2024 and they object to 20 documents the Plaintiff seeks to rely on primarily for want of compliance with the **Evidence Act**. They specifically allege that a letter dated 7<sup>th</sup> January 2013 is a forgery in that when the suit was filed, the only letter in existence was an unstamped version and that the 1<sup>st</sup> Defendant highlighted in his Defence that the letter lacked the Plaintiff’s stamp, proving it was never delivered. The Defendants claim the Plaintiff responded to this objection by fraudulently stamping the letter and introducing it as the "stamped copy" to create the false impression it was received in the ordinary course of business. The Defendants demand the production of the original of both versions of this letter and they state that if the letter is to be admitted, the Plaintiff must also produce the register of received letters, CCTV footage, and call data records to verify its authenticity.

2. For the majority of the remaining documents listed as *S/No* 2-20, the Defendants state that the Plaintiff has tendered photocopies of crucial documents such as cheques, warrants, court rulings, title deeds and sale agreements and that it has not laid the basis for producing copies rather than originals as required by **sections 5, 46, 55,64-71, 82,97,106B,134,139,144 and 177** of the ***Evidence Act***. They specifically note regarding Item 6 which is a Cheque dated 17<sup>th</sup> December 2013 that "*It is not an original copy*" and they allege breach of Advocate-Client confidentiality stating that the Letter of offer dated 7<sup>th</sup> January 2015 and correspondences thereto are alleged to be communications between the firm of *Messrs. Rachier & Amollo LLP* and their client. The Defendants aver that these are privileged and confidential and they urge that the Plaintiff explains how it obtained these copies without the client's consent, citing a breach of **Article 31(c) and (d)** of the ***Constitution*** on the Right to Privacy. The Defendants also invoke **Article 50(4)** of the ***Constitution***, arguing that if evidence was obtained in a manner that violates rights or fundamental freedoms, it must be excluded if its admission would render the trial unfair or be detrimental to the administration of justice.
3. The Defendants also take issue with Item no. 7 which is an application for a warrant to seize property which they state that the

deposition therein does not comply with the formal requirements of the ***Oaths and Statutory Declarations Act***.

4. In response, the Plaintiff filed the Grounds of Opposition dated 30<sup>th</sup> October 2024 stating that the allegations of forgery are unsubstantiated and should be determined at trial and that the documents are relevant to proving key facts such as instructions to cash cheques, debiting of Plaintiff's account by *Commerzbank AG*, fraud investigations, and Defendants' attempts to settle the debt. Further, that the documents are admissible under various sections of the ***Evidence Act*** primarily **sections 6-9, 12, 15, 16, 35, 43, 45, and 176**, that foreign documents like the US warrant and application and their admissibility are not barred by **section 43** of the ***Evidence Act***.
5. The Plaintiff also avers that documents shared within a bank-customer relationship are not protected by advocate-client privilege under **section 134** of the ***Evidence Act***, that several documents were adduced by their makers or formed part of correspondence between parties, supporting admissibility, documents were lawfully obtained, not illegally procured and that the interest of justice requires dismissal of the objection and admission of the Plaintiff's documents.

6. In its Notice dated 30<sup>th</sup> October 2024, the Plaintiff also objects to the production of three specific affidavits included in the Defendants' Trial Bundle dated 17<sup>th</sup> September 2024 including the affidavit of the 1<sup>st</sup> Defendant sworn on 6<sup>th</sup> June 2019, the affidavit of the 8<sup>th</sup> Defendant sworn on 21<sup>st</sup> June 2019 and the affidavit of Robert Otieno sworn on 26<sup>th</sup> June 2019. The Plaintiff states that the deponents of these affidavits must appear in court for cross-examination on the contents of their affidavits, in accordance with **section 35** of the ***Evidence Act***
7. The court directed that the two Notices be canvassed by way of written submissions which are on record and together with the pleadings I have considered and I will be making relevant references to the same in my analysis and determination below.

### **Analysis and Determination**

8. I have gone through the Notices, the response to the same and the parties' submissions and note that the court is being invited to decide whether to allow the objections by the parties to the production of the listed documents. On the letter dated 7<sup>th</sup> January 2013 being a forgery, I am inclined to agree with the Plaintiff that this allegation is a matter of fact to be determined at a full trial through cross-examination, not at an interlocutory stage. This is an allegation that as of necessity requires calling of evidence as it is a

contested part which has not as yet been proved (see **Sudhaben Amrittal Shah & Another V Faruk Swaleh Baya & 5 Others [2010] KEHC 2394 (KLR)**).

9. In any event, I am in further agreement with the Plaintiff that this letter is admitted to have been authored by the Defendants in their pleadings and they cannot now claim that the Letter itself is a forgery. As the Letter's existence and authorship is admitted by the Defendants, it follows that it is admissible as evidence and its true weight, relevance and/or authenticity can be examined at trial.
10. Having gone through **sections 6-15, 35,36 and 64-70** of the **Evidence Act** it is also my finding that this letter and the other documents being objected to by the Defendants are relevant to the facts in issue and are admissible as evidence in this matter. Once again, I find that the Defendants are conflating admission of a document with testing its contents. **Section 35(1)** allows a statement in a document to be admitted even if the maker is not called, provided certain conditions such as death, the maker not being able to be found, incapacity and unreasonable delay or expense are met and **section 35(2)** gives the court discretion to admit such statements without calling the maker. The Plaintiff has explained that while it holds some original documents like the Shipment Waybill, they intend to rely on photocopies for others

such as the foreign cheques because the originals were transmitted to *Commerzbank AG* in the ordinary course of business.

11. I note that the Defendants' objection does not challenge admissibility under the conditions set out in **section 35(1)** but merely asserts that the deponents therein must be cross-examined. That is not a condition for admissibility but a matter of weight provided for under **section 36** or mode of proof, not a bar to production. Furthermore, affidavits are primary evidence of their contents as set out in **section 65** and they are not secondary evidence requiring justification under **section 68**. I note that the Objection does not allege lack of personal knowledge or failure to satisfy **section 35** conditions and even if the deponents are not called, the court may still admit the affidavits and attach appropriate weight. If the Defendants wish to cross-examine the deponents, they can apply to have them called for cross-examination, not object to the affidavits being produced as the two are distinct. It is for these reasons that I also find that the Plaintiff's objection to the Defendants' affidavits intended to be produced as evidence has no merit as their weight will be tested at trial.

12. On some of the documents being privileged in an advocate-client relationship, I am inclined to agree with the Plaintiff that the same were shared within a bank-customer relationship and they are

therefore not privileged. My reading of **section 134** of the ***Evidence Act*** tells me that the privilege is strictly confined to communications made to an advocate in the course and for the purpose of his employment as such; documents with which the advocate has become acquainted in the course and for the purpose of his professional employment and advice given by the advocate to the client in the course and for the purpose of such employment. The section does not extend to communications made in any other capacity, including commercial dealings, banker-customer relationships, business negotiations, debt settlement discussions or conveyancing or sale transactions not involving legal advice.

13. The documents in question are Letters forwarding sale agreements, correspondence seeking extension of time and indulgence in settling a debt, summaries of outstanding balances, emails and letters regarding cashing of cheques, offer letters and annexures relating to property transactions; all of which were exchanged within a banker-customer relationship, not an advocate-client relationship. I find that even where some Defendants are advocates, the communications were not seeking or giving legal advice, made in the course of professional legal employment or confidential communications for the purpose of

litigation or legal representation. They were commercial/financial communications between a bank and its customers regarding debt settlement and cheque processing where privilege does not attach.

14. Even if the relationship were Advocate-Client, exceptions apply as the proviso to **section 134(1)** removes privilege where: *(a) any communication made in furtherance of any illegal purpose; (b) any fact observed by any advocate ... showing that any crime or fraud has been committed.* The Plaintiff's case involves allegations of fraud and fraudulent cheques and if the communications were made in furtherance of or relating to such conduct, privilege would not apply in any event. It is also my finding that **Article 31(c)** of the **Constitution** does not create evidentiary privilege, it protects against unlawful interference with correspondence, not against disclosure in judicial proceedings where documents are relevant. I also find that **Article 50(4)** is not engaged as the Plaintiff obtained the documents from the Defendants themselves in the ordinary course of dealings. Further, no claim of without prejudice privilege has been raised, and even if it were, it would not apply to communications that are not genuine settlement negotiations or where fraud is alleged.

15. On non-compliance of **section 106(B)** of the **Evidence Act**, the Plaintiff has submitted that Certificates dated 30<sup>th</sup> October 2024

were filed and served upon the Defendants on 31<sup>st</sup> October 2024 and by email on 4<sup>th</sup> November 2024 meaning that the Plaintiff has met the legal threshold set out in **section 106B**. In any event, I find that that the interests of justice are better served by admitting these documents and evaluating their probative value alongside all other evidence. Technical non-compliance, if any, will be considered when the Court assigns weight to each piece of evidence during the final judgment

**Conclusion and Disposition**

16. In the upshot, the Court finds that neither party has made a sufficient case to warrant the striking out of evidence at this stage. Admissibility is a low threshold as the ultimate truth and reliability of the documents are matters for the trial. Accordingly, I dismiss both Notices of Objection dated 16<sup>th</sup> September 2024 and 30<sup>th</sup> October 2024 with no order as to costs. All documents and affidavits currently in the respective trial bundles shall be admitted for identification, and their weight and relevance shall be analyzed by the Court at the conclusion of the trial.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this  
19<sup>TH</sup> DAY OF FEBRUARY 2026**

.....

**J.W.W. MONGARE  
JUDGE**

**IN THE PRESENCE OF**

1. Ms. Mathangani and Mr. Regeru SC for the Plaintiff.
2. Mr. Wakwaya holding brief for Dr. Arwa for the 2<sup>nd</sup> - 5<sup>th</sup> Defendants.
3. N/A for the 1<sup>st</sup> Defendant
4. Amos- Court Assistant

ORIGINAL