



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 17 OF 2014

RICHARD TOROITICH.....PLAINTIFF

VERSUS

MIKE K. LELMET

ELISHEBA C. LELMETDEFENDANTS

PAULINE J. LELMET

ESTHER J. LELMET (*suing as administrators of*

***the estate of WILLIAM CHERUIYOT LELMET*)**

R U L I N G (3)

1. The document in issue is a copy of a statement of account in respect of Account No. [...] in the name of the plaintiff apparently issued on 31/3/2005 by the plaintiff's banker, Standard Chartered Bank. At first the counsel for the plaintiff, probably concerned that the copy of the document would not be admitted by this court, as evidence, applied for it to be marked for identification as "PMF14".
2. As soon as the court observed that the document would be marked as "PMF14" counsel for the defendants Prof. Sifuna rose and asked the court to admit the document as "P. Exhibit 4". This of course would mean that there would be no need to call the maker and that the need for a certificate under the law would not be raised at all. The court obliged and marked the document as "P. Exhibit 4" as requested by Prof. Sifuna.
3. In effect the said document was admitted in evidence in the suit. A few seconds after this admission, as is recorded in the proceedings, Prof. Sifuna rose and purported to object to the admission of the said document. He urged that it was not accompanied by a certificate; that the plaintiff was not the maker; that **Section 106B of Cap 80** prohibits such admission; that there must be other evidence showing the computer that printed it was working well and that under **Section 35** the plaintiff cannot produce the document. He also relied on **Act 159 of the Constitution of Kenya** to state that the mere fact that he had allowed the document does not negate the fact that his client was still the owner of the suit and therefore could revoke such admission if he disagreed with the counsel's act of admitting it. He states that he now had express instructions issued inside the courtroom soon after the admission that the client did not agree with it.
4. In response Mrs. Kibe stated that all counsel had ostensible authority to bind their client and that the proper mechanism for review of the court's decision which she points out was made by consent, has not been invoked. She urges that proceedings cannot be orderly if counsel were allowed to revoke things in court soon after uttering them for the record.
5. In addition she pointed out that Prof. Sifuna admitted that the defendants have the original draft that emanated from the transaction and account which reflects the Kshs.270,000/= deposited which is reflected in the statement.
6. I have considered the objection and in my view, first, it was made too late in the day. Secondly, the admission was by consent of the parties and a consent cannot be set aside as casually as Prof. Sifuna would now have this court believe. I agree with Mrs. Kibe for the plaintiff that there are mechanisms for review which must be invoked for the review order to issue from this court on the matter.
7. Lastly I cannot take what Prof. Sifuna has said from the bar – that his client has just instructed him just soon after the admission and truly, this court cannot be in any manner be witness to such instructions – and I must treat that allegation with caution.
8. The upshot of the foregoing is that the objection to the document has come too late, the court has already recorded the consent, and the admission cannot be now casually set aside. I therefore dismiss the said objection and order that hearing do proceed.

Dated, signed and delivered at Kitale on this 8th day of February, 2018.

MWANGI NJORGE

JUDGE

COURT

Ruling read in open court in the presence of the parties and their counsel.

Court Assistant - Isabellah.

MWANGI NJORGE

JUDGE

8/2/2018