



REPUBLIC OF KENYA

IN THE ENVIRIONEMNT & LAND COURT

AT MOMBASA

ELC CASE NO. 279 OF 2014

HARISH RAMJI MANJI.....1ST PLAINTIFF

ASHVIN RAMJI MANJI.....2ND PLAINTIFF

-VERSUS-

SEDONA LIMITED.....1ST DEFENDANT

DIAMOND TRUST BANK LIMITED2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

RULING

1. Mr. Taib for the 1st and 2nd Defendants has raised an objection that the witness Mr. S. S. Jowhal Advocate cannot produce the sale agreement because he acted for both the vendor and the purchaser. He also objects to the production of the other documents as they are copies and they require the makers to produce them.

Such documents are contained in the Plaintiff's list of documents and the supplementary list of documents.

2. Mr. Adan for the Plaintiffs prays that the Plaintiff be allowed to produce copies. That Section 35 and 36 of the Evidence Act give exceptions where documents may be allowed without calling the makers.

3. I have considered the submissions of counsels. I have also considered the relevant provisions of the law.

4. Mr. S. S. Jowhal Advocate told the court that he is the one who drew up a sale agreement between the Plaintiffs and one Stephen N. Karanu. He is the person best placed to produce the said sale agreement.

5. Section 35 (2) of the Evidence Act states;

“In any civil proceedings, the court may at any state of the proceedings, if having regard to all the circumstances of the case, it is satisfied that undue delay and expense would otherwise be caused order that such a statement as is, maintained in subsection (1) of this Section shall be admissible or may, without any such order having been made, admit such a statement or 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 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.”

6. From the foregoing, I agree with counsel for the Plaintiff that the makers of these documents will be procured with undue delay and expense. This is a court of justice. It ought to deal with substantive justice and not technicalities.

7. No prejudice will be occasioned to the 1st and 2nd Defendants if these documents are admitted as they will have an opportunity to cross examine the witnesses.

8. I find that the Plaintiffs documents No. 1-4, 6-29 fall within the exceptions set out in Section 35 (i) (b) of the Evidence Act. They can be produced without calling the makers.

9. I find the 1st and 2nd Defendants counsel's objection to their production to be without merit and therefore overruled.

It is so ordered.

DATED, SIGNED and DELIVERED at Mombasa on the 19th day of December, 2017.

L. KOMINGOI

JUDGE

19/12/2017