

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 203 OF 2017

JCDECAUX TANZANIA LIMITED PLAINTIFF
VERSUS
IMPERIAL MEDIA AGENCIES LIMITED 1ST DEFENDANT
FRANK JOHN NICODEMUS 2ND DEFENDANT

RULING

K. T. R. Mteule, J

During hearing of the plaintiff's case, the Witness wanted to tender a lease agreement in a form of photocopy. He stated that the original document may have been lost or misplaced when they were moving the offices.

Mr. Makubi Kunju Advocate for the Defendant objected the admissibility of the document on the following grounds. **Firstly**, that the document is not original and procedure to tender it has not been complied with as per **Section 66 of the Evidence Act Cap 6 of 2019 R.E.** **Secondly**, that the witness is not a competent person to tender the document as it does not concern the plaintiff for not being a party to the lease agreement which is between the 1st Defendant and Continental Outdoor Media.

On the fact that the document was lost, Mr. Makubi contended that there is no proof such as police loss report to substantiate the loss or misplacement. Mr. Makubi prayed for the document not to be accepted as evidence.



In responding on the competence of the witness, Mr Kamuzolla referred to Exh. P1 which indicated that the plaintiff once changed her name from Continental Outdoor Medial to JCDecaux, who is the plaintiff. According to Mr. Kamuzolla, JCDecaux is the same Continental Outdoor Medial who entered into that lease agreement with the Defendant. He submitted that the witness is competent.

With regards to compliance with **section 66 of the Evidence Act**, The Counsel for the Plaintiff submitted that the document falls within allowable exception of **Section 67 (1) (b) and (c) of the Evidence Act** as it is sought to be proved against the Defendant who has not disputed its existence in the Written Statement of Defence (WSD) and in all other pleadings in this matter. Mr. Makubi referred to paragraph 13.7 of the plaint which mentioned the document and disputed agreement which is annexed thereto as JTL17. According to Mr. Kamuzolla, the 1st Defendant's WSD neither responded to this paragraph nor to its annexure JTL17. Citing Order VIII Rule 5 of the CPC, Mr. Kamuzolla contended that an allegation of fact if not specifically denied by necessary implication shall be taken to have been admitted.

From the parties' submissions, two points of objection need to be addressed. I will do so by addressing one after another. The first point is on the originality of the document. According to the Counsel for the Defendant, the document is a photocopy which is not acceptable according to **Section 66 of the Evidence Act** and the witness has not provided any police loss report to substantiate what he said that the document was misplaced. According to the plaintiff's counsel, Section 67 (1) (b) and (c) of the Evidence Act provides exception to Section 66 when a document is sought to be proved against the Defendant who has not disputed its existence in the WSD. For clarity, I will reproduce Section 67 hereunder.

"67. -(1) *Secondary evidence may be given of the existence, condition or contents of a document in the following evidence 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; a person out of reach of, or not subject to, the process of the court; or*
 - (ii) *a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;*
- (b) *when the existence, condition or contents of the original have been 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 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 83;*
- (f) *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 originals consist 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.*

(2) *In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1) any secondary evidence of the contents of the document is admissible.*

(3) *In the case mentioned in paragraph (b) of subsection (1) the written admission is admissible.*



It is right that from the above section 67 (1) (b) when the existence, condition or contents of the original document have been proved to be admitted in writing by the person against whom it is proved, then a copy of such a document can be admitted. The counsel for the Defendant disputed to have admitted the existence of the contested document. In the 1st Defendant WSD, the response to the contents which referred the tendered agreement is reflected in Paragraph 5. In that paragraph, the Defendant neither denied nor admitted. In this kind of a situation, the law presumes admission, which means the person is admitting the fact (Order VIII Rule 5 of the CPC). Since the 1st Defendant did not dispute the existence of this document, the words in the Written Statement of defence amounts to admission. Consequently, the exception in Section 67 (1) (b) of the Evidence Act applies in this matter.

Another point of departure amongst the parties on the admissibility of this lease agreement is the contention by Mr. Makubi that there is no evidence that the document is lost due to lack of police loss report. This is contested by Mr. Kamuzolla who contended that no legal requirement to report the loss of a lease agreement. That the witness has stated on oath that the document is misplaced when they were moving the office. In my view, a statement given on oath constitutes evidence unless proved otherwise. If the counsel for the defendant has any evidence to the contrary, he could have provided it to disprove what is already stated by the witness on oath. Otherwise, the witness has laid a foundation to explain why he does not have the original lease agreement. From this analysis the first point of objection fails.

The second point of objection is based on the competence of the witness to tender the lease agreement in which he is not a party. It is not in dispute that once in time, the Plaintiff used the Name Continental Outdoor

Media (T) Limited which she later changed to JCDecaux TANZANIA LIMITED. It has been established in our case Law that the test for competence in tendering exhibit is whether the witness has knowledge of the document and that he possessed the thing in question at some point in time albeit shortly. **(DPP vs Minzai Pirbakhaishi, Criminal Appeal No. 493 of 2016 pages 6, 7 and 8).**

Since it is not in dispute that the plaintiff once in time used the name appearing on the tendered lease agreement and since the witness is a Principal officer of the plaintiff who in his statement stated that he conducted search which discovered the document, this alone is sufficient to show that the witness had opportunity to access the document due to his capacity in the Plaintiff's company. This point of objection as well lacks merit.

Having found both points of objection not sufficiently founded, the same are hereby overruled. Order accordingly

Dated at Dar es Salaam this 24th Day of November 2021




KATARINA. T. REVOCATI MTEULE

JUDGE

24/11/2021