

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 40 OF 2015

BACO AND AYUBU TRADING COMPANY LIMITED PLAINTIFF

VERSUS

PERMANENT SECRETARY,

MINISTRY OF DEFENCE AND

NATIONAL SERVICE 1ST DEFENDANT

CHIEF OF DEFENCE FORCES, TANZANIA PEOPLE'S

DEFENCE FORCES HEADQUARTERS 2ND DEFENDANT

THE HON. ATTORNEY GENERAL,

ATTORNEY GENERAL'S CHAMBER..... 3RD DEFENDANT

RULING

K. T. Revocati Mteule, J

16/9/2021 & 21/9/2021

During the hearing of the plaintiff's case, the Witness, (PW1) attempted to tender as exhibit a letter dated 27th September 2013 originating from Tanzania Ports Authority addressed to Revenue Manger. Mr Baraka Nyambita learned Principal State Attorney for the Defendants objected to the admissibility of this letter as exhibit basing on the following grounds:

1. The witness is neither the maker nor the addressee of the document
2. The production of the document contravenes Sections 85 (1) and 83 (a) and (b) of Tanzania Evidence Act which classifies it as a public document



Responding of the first ground, Mr. Malimi for the plaintiff replied that the objection is misconceived since the witness is conversant with the document as he said he got it from the defendant, the source well known and that it refers to this matter in dispute. According to Mr. Malimi the requirement of being a maker or addressee is not a part of the law as **Sections 62 (1) and 137 (1)** requires it only to be relevant to the dispute and that the witness must be competent to tender it. He summarised this requirement as relevance, materiality and competence of witness as only requirement for a witness to tender exhibit. The counsel referred to the **Court of Appeal Case in Republic vs Charles Abel Gasirable pp 12 – 17** and **Criminal Appeal No. 4/93 of 2016; DPP vs Mizrai Pirkakhshi** and **Criminal Appeal No 500/39 of 2016 CoA at Arusha, Hamis Said Adam vs Republic pp. 11 – 13** and supplied to the Court the copies. According to Mr. Malimi, in these decisions the issue of being a maker of a document or the addressee is not relevant but what matters is the knowledge of the witness to the document.

On the issue of certification of the document and fees payment, Mr. Malimi requested for the leave to defer its production so that they can cure the anomaly by paying the necessary fees and seeking the relevant certification before producing it.

It was a prayer by Mr. Malimi that the court invokes Section 3A (d) and (2) of the CPC which was brought by Act No. 3 of 2018 introducing overriding objectives, to focus on substantive justice.

In rejoinder, Mr. Baraka challenges the relevance of overriding objectives in procedure and the relevance of the cited cases in this matter. According to him these are not relevant.



I have gone through the submissions from both parties and the provisions of law under which the objection is premised. Starting with the first point of objection that the witness is not competent to tender the document for being neither the maker nor the addressee, Mr. Baraka did not cite any law or authority to substantiate his assertion. Mr. Malimi has supplied 3 case laws to counter this argument although Mr. Baraka contested their relevance in this matter. I have gone through the decisions. As rightly submitted by Mr. Malimi, in all these cases, the Court of Appeal described the test to identify competent person in tendering exhibit, quoting from Mizrai and Hamis cases cited by Mr. Malimu thus:

"The test for tendering exhibit is therefore whether the witness has the knowledge and he possessed the thing in question at some point in time albeit shortly."

In the strength of the decisions cited by Mr. Malimi it is jurisprudential position that it is not mandatory for documentary evidence to be tendered by only the maker or addressee of such document. I have considered the argument by Mr. Baraka that these decisions are not relevant to this matter. He did not give details of this assertion. From the gist of what the Court of Appeal decided in respect of tendering of evidence, I see that the position established therein fits squarely with the instant situation. In the witness statement, it is stated how the witness came across the document. Since it is not in dispute that the witness is conversant to the document and it is in his possession, I find the witness competent to tender it.

With regards to the second point of objection on the alleged impropriety in procedure to acquire the public document, I find it proper for purpose of clarity reproduce Sections 85 (1) and 83 (a) and (b) of Tanzania Evidence Act, Cap 6 of 2019 R. E hereunder.



83. The following documents are public documents-

(a) documents forming the acts or records of the acts of-

(i) the President of the United Republic;

(ii) official bodies and tribunals; and

(iii) public officers, whether legislative, judicial or executive;

(b) public records kept in the United Republic of private documents

Section 85 (1) states:

"85.-(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of the copy that it is a true copy of that document or part thereof, as the case may be, and such certificate shall be dated and subscribed by the officer with his name and official title, and shall be sealed if the officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies."

It is apparent that there are prescribed procedure to acquire the public document as provided by Sections 85 (1) and 83 quoted above which is related to certification and fees payment. Mr Malimi does not dispute this but has requested for the court to allow the witness to defer the production and comply with the prescribed procedure.

In my view, the mode proposed by Mr. Malimi works better. The above provisions do not state that consequences of noncompliance with this provision have only one option which is to outright refuse admission of the

document as exhibit. Since availability of more information is important for proper determination of the case, will adopt a more flexible approach to accommodate interests of justice by allowing the request by Mr. Malimi to defer the production of this document and cure the anomaly by making sure that the witness complies with the law by paying the necessary fees and do the required certification.

Having found that the witness is competent to tender the document as exhibit and havind found that no specifically prescribed punitive procedure for noncompliance with Section 85 (1) of the Evidence Act, I partly allow the objection and order the plaintiff to comply with Section 85 (1) including payment of necessary fees and obtaining the required certification before tendering the document as exhibit. Order accordingly.

Dated at Dar es Salaam this 21st Day of September 2021



A handwritten signature in blue ink, appearing to be "Katarina T. Revocati Mteule, J".

Katarina T. Revocati Mteule, J

JUDGE