

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 73 OF 2016

CONSOLIDATED INVESTMENT LTD PLAINTIFF

Versus

EDWIN DAMACEN DEFENDANT

Date of Last Order: 25/07/2019

Date of Ruling: 12/09/2019

R U L I N G

MGONYA, J.

The question before me is whether the copy of Memorandum of Understanding between the parties herein and in support of the Police report in respect of the fire that had occurred into the Plaintiff's premises in the year 2015; can be tendered and admitted as evidence before this honorable Court and in particular in favor of the Plaintiff in this **Civil Case No. 73 of 2016.**

When the matter came for hearing of Plaintiff's case, PW1 the Plaintiff herein Michael Njumba led by Ms. Aziza Msangi the learned counsel made a prayer to tender the above stated Memorandum of Understanding together with the attached police

report as one of the Plaintiffs evidence before this honorable court.

Mr. Rwegasira, Counsel for the Defendant was not moved in any way by the said prayer. He vehemently resisted the prayer based on the points of objection to the effect that:-

- (i) The document that is the Memorandum of Understanding alleged to be between parties is the photocopy;
- (ii) Further, the said Police report doesn't mention particularly if the said Memorandum was amongst the documents involved in the said fire;
- (iii) Moreover, the said Report don't even have the name of the Defendant herein to indicate that the documents involved had connection with the later;
- (iv) Further that the document at hand is not signed by the Plaintiff as the Director of the Company in issue; and
- (v) Finally, the document is unstamped under S. 47 (1) of the Stamp duty Act Cap 189 [R. E. 2002].

Submitting on the point of objection, Mr. Rwehumbiza for the above objections serve for the last one on stamp duty, didn't go to the detail as what the law states on the said objections.

Responding on the last point on stamp duty, Ms. Msangi admitted that the document in issue is not stamped. However, averred that the law is clear and permits the party to pay the tax even in the midst of the proceedings. She thus prayed that the Defendant be availed with time to do the needful.

On the other points of objection collectively, it was Ms. Msangi's assertion that, the matter of the Plaintiff signing or not signing the document is not an issue but the crucial matter here is the contents of the same as the document was secured from the Advocate's records as it is.

Further, on the doubt that the same might have not come from the Advocate's records, Ms. Msangi told the court that the same does not have any legal backup.

Lastly, on the Police Report that the same does not bear the Defendant's name, the learned Advocate informed the court that the mere fact that there is a name of the Defendant, even by his one name (DANASEN), the same is enough to show that among the documents that were involved in the fire are those involved Mr. Damasen, the Defendant herein.

In determining the points of objection before me, let me determine the last one on the stamp duty first. Upon looking at

the Memorandum of Understanding, it is not disputed that the same is not stamped. However, I am also aware of the provisions of Section 47 (1) of the **Stamp Duty Act Cap. 189** which states:

" 47(1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is dully Stamped."

The above provision provides for the mandatory obligation for an instrument chargeable with duty be stamped in order to be admitted in evidence. The issue is whether the copy of Memorandum of Understanding before this court is an instrument chargeable with duty.

The provision of **Section 5 the Stamp Duty Act Cap. 189 [R.E. 2002]** requires every instrument specified in the scheduled to the Act and which was executed in Tanganyika to be chargeable with duty.

Item 5(a) of the schedule to the Stamp Duty Act Cap 189 [R.E. 2002] specified ***"Agreement or Memorandum of Agreement) if relating to the sale of a bill of exchange"*** of which the Stamp duty is chargeable for 500/=. Now, since the Memorandum of Understanding before the court exceeds the value above amount which has been exempted as seen under item 5(b), then the same deserves the stamp.

Now, it is clear on my eyes that the Memorandum of Understanding is not stamped and therefore cannot be admitted as evidence in this matter. It follows therefore the said Memorandum of Understanding cannot be considered in deciding the rights of the parties regarding the disputed property.

The Court of Appeal of Tanzania in the case of ***MALMO MONTAGEKONSULT AB TANZANIA BRANCH VS MARGERET GAMA in Civil Appeal No. 86 of 2001***, the court observed that:-

"Once the Sale Agreement is excluded as evidence, it follows that there is no legal evidence."

Now, how should the court proceed with the document which is unstamped; and in particular, what does the justice demand in this case under the given circumstances?

In the upshot, I am satisfied that this limb of objection raised by Mr. Rwegasira learned counsel is meritorious. **However**, for the interest of justice, I accordingly order in terms of provision **(a) to Section 47(1) of the Act Cap. 189**, the stamp duty on the Memorandum of Understanding be paid before the said document is admitted as evidence. The Plaintiff is hereby given one weeks' time from the date of this Ruling to execute the said requirement.

Coming to the other points of objection; I have gone through the contents of the Police Report in respect of Plaintiff reporting the fire incident that had occurred in his office premises of which destroyed the entire records that were in that office mentioning different clients' names and other files that were involved in that fire. I have gone carefully the report and I have come across the phrase stating **"Debtors Files of Edwin Rwiliza Damacen"** to be amongst the documents that were involved in fire hence lost completely. Coming back to the records of this case, the Defendant's name herein appears as **EDWIN DAMACEN**. Under the circumstances, since it is not disputed that the parties had at once business relationship, and since I don't doubt the Police Report which has been prepared by the Government entity, it suffices to say that this point is meritless as the court is satisfied

that the person or institution referred in the report is the same as the Defendant herein.

As to the Plaintiff to the copy of Memorandum of Understanding at hand, the same is meritless since I am satisfied that there was a fire incident at the Plaintiff's office which was dully reported and hence even the efforts that the Plaintiff made to acquire the copy at his Advocate need to be appreciated. In the vent therefore, the copy obtained from the Plaintiff's Advocate in whatever form is well appreciated and deserves to be admitted before the court for evidence.

From the above explanation, it suffices to say that the other points of objection are **meritless, hence fail** and pave the way to the admission of the documents at hand for evidence as prayed.

It is so ordered.




L. E. MGONYA
JUDGE
12/09/2019

Court: Ruling delivered in the presence of Mr. Rwegasira, Advocate for the Defendant, also Mr. Rwegasira, Advocate holding brief for Ms. Aziza Msangi, Advocate for the Plaintiff and Ms. Janet Bench Clarke in my chamber today 19th September, 2019.




L. E. MGONYA
JUDGE
12/09/2019