IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

CIVIL CASE NO. 03 OF 2021

MOHAMMED ENTERPRSIES (TANZANIA) LIMITED ....1ST PLAINTIFF

TANZANIA COMMODITIES TRADING COMPANY ....2ND PLAINTIFF

VERSUS

SHISHIR SHYAMSINGH ....DEFENDANT

RULING

31/8/2022 & 31/8/2022

L.M. Mlacha,J

PW1 JAVED BHALLOO was lead by his counsel Ms Neema Mahunga to tell the court that there were expired products in the operations of the second plaintiff company, Tanzania Commodities Company Limited at Kigoma branch where the defendant Shishir Shyamsingh worked as branch manager. PW1 was shown 3 documents which are part of the pleadings before the court namely, an e-mail from the branch Manager addressed to the Branch Co-ordinator (PW1) and other staff of the company, Physical Stock Verification for Expired Stock and a letter from the Municipal Health Officer Kigoma in respect of expired goods. PW1 was lead to proceed to tell the court that he got the first document, the e-mail in the course of his operations as branch coordinator. It was addressed to him. He is also the custodian of it. He went on to say that the original documents of the other two documents are with the government lawyer (state attorney) in connection with criminal case No. 149/2020. He is the custodian of the copies. He asked the court to receive the 3 documents as exhibit.

Mr. Daniel Rumenyela objected the admission saying that the provisions of section 18(2) (a), (b) and (c) and (3) has not been complied with in respect of the first document which is an electronic document. He said that the witness did not tell us the authenticity of the device which generated the electronic document. He also challenged the word government lawyer saying that it is not reflected in the notice to produce. He argued the court to reject the documents.

In reply Ms. Neema Mahunga told the court that the witness has said that the e-mail was addressed to him and produced the hard copy which he needed to tender. He is also the custodian of the document. He added that the document is also physically present in his e-mail address. Counsel submitted that there was no non compliance to section 18 (2) and (3) of the Act.

Mr. Daniel Rumenyela maintained his earlier position in the rejoinder submissions.

Given the repeated nature of objections based on admissibility of documents based on the notice to produce and electronic evidence, I find necessary to examine the law to some details for future guidance. Going through the submissions I could not get difficulties in the admissibility of the second and third documents because they were not electronically produced and are a subject of the notice to produce which was properly served to the defendants. The law is that a party who wants to rely on secondary evidence during trial must lodge a notice under section 67 (1) (c) of the Evidence Act, cap 6 R.E. 2019 and served it to the other side. He must also observe the rules as to notice to produce contained under section 68 of the Act. The applicability of section 68 was well explained in **Daniel Apael Urio v. Exim (T) Bank** Civil Appeal 185 of 2019 page 15 where it was said as under:

> *"In terms of section 68 of the TEA, before the appellant could rely on the copy of the document there were two options open for him that is,* ***one,*** *serving the party in possession of the document with a notice to produce the document in court, or*

***two**, by requesting the court to issue summons to the party in possession of the document to appear in court and testify."*

The law does not provide to what should be done in case a person has a query or objection to the notice. But the general frame of the Civil Procedure Code and principles of civil litigation demand that where a party is opposing something in court he has to do so by way of affidavit. In other words if a person is served with a notice to rely on secondary evidence on reasons stated in the notice and does not object, he should not be heard to object the admission of secondary evidence during trial. If he has an objection he has to file a counter affidavit at an early stage stating the reasons as to why secondary evidence should not be received. A party who does not take any action by way of a counter affidavit to object the notice, in my view, should not be heard to complain later during the hearing. The rules of estopped will operate against him. See section 123 of the evidence Act cap 6 r.e 2019. Mr. Rumenyela did not object the notice. The witness has said that he is the custodian of the documents and therefore competent to tender. He being the custodian of the documents in his capacity as branch coordinator, has the capacity to tender them. The objection based on the second and third documents is thus baseless and dismissed.

Next is on the admissibility of the first document, the e-mail. As correctly pointed out by counsel, this is an electronic document. Its admissibility is governed by section 64A of the Evidence Act cap 6 R.E. 2019. Subsection (2) of section 64Aprovides that the admissibility and weight of electronic evidence should be determined in the manner prescribed under section 18 of the Electronic Transaction Act 2015. This position was held by the court of appeal in Onesome **Nangole v. Dr. Steven Lemomo Kiruswa And 2 Others,** (CAT), Civil Appeal No. 117 of 2017 page 23 and the decision of this court in **Christina Thomas V. Joyce Justo Shimba,** (Hc), Pc. Civil Appeal No. 84 OF 2020 (A. Z. MGEYEKWA, J.).

Both counsels made reference to section 18 meaning that they agree that this is the relevant provision. I agree with them. The issue now is how do we go about? Section 18 must be read in line with principles of admissibility of exhibits. In **Affary Saidi Mwalimu v. The Republic,** (CAT), Criminal Appeal No. 497 of 2019 pages 12-13 the Court of Appeal followed its earlier position set in The **DPP vs. Mirzai Pirbakhsh @ Hadji and Three Others,** Criminal Appeal No. 493 of

2016 (unreported), on categories of people who can tender exhibits in court. It stated thus: -

> *"A person who at one point in time possesses anything, a subject matter of ... is not only a competent witness to testify but he could also tender the same. ... The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So,* ***a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question.****" (Emphasis added)*

So he who wants to tender an exhibit in court must lay the foundation based on what has been said above before doing it. The witness must be lead to identify the exhibit properly before asking the court to receive it as an exhibit for a person cannot tender something which is not known to himself. Further the witness must be competent to tender it. The competent witness is the maker of the document or its custodian. See the two conditions are met, then we can go safely to section 18.

Section 18 is reproduced in full as under for easy of reference:

18 – (1) *In any legal proceedings nothing in the rules of evidence shall apply so as deny the admissibility of data message on ground that it is a data message.*

(2) In determining admissibility and evidential weight of a data message the following shall be considered: -

a) The reliability of the manner in which the data message was generated stored or communicated.
b) the reliability of the manner in which the integrity of the data message was maintained.
c) The manner in which its originator was identified and
d) (d)Any other factor that may be relevant in assessing the weight of evidence.

(3) The authenticity of an electronic records system in which an electronic record is recorded or stored shall in the absence of evidence to the contrary be presumed where

a) There is evidence that supports a finding that at all material times the computer system or other similar device was operating properly or if it was not the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system.

b) It is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it or.

c) It is established an electronic record was recorded or stored in the usual and ordinary course of business by person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

(4) For purposes of determining whether an electronic record is admissible under this section an evidence may be presented in respect of any set standard. Procedure usage or practice on how electronic records are to be recorded or stored with regard to the type of business or endeavors that used recorded or stored the electronic record and the nature and purpose of the electronic record.

Section 18 (1) allows the reception of electronic evidence in court. In other words, documents generated from the computer have been given equal evidential value like other documents. Subsection (2) provides for matters to be considered in deciding whether an electronic document should be admitted or not. We have 4 scenarios;

i) Reliability of the manner in which the document was generated, stored or communicated. The law talks of the way the document was *generated, stored or communicated.* We check on the way the document was generated, stored or communicated. It must have been generated, stored and communicated in circumstances which prevent the tempering of the document. The witness must be lead to say the way the document has been generated stating the type of computer and the printer used. He must say if he is the one who generated and stored the document or someone else. If it is someone else, he must say the way it was communicated to him and the place of storage, and if it was safely stored.

In our case, the witness said that the document is an e-mail in a hard copy. He received the e mail from the defendant. It was communicated to him from the defendant through an e-mail. He printed it to get the hard copy. It is existing in his e mail to date. He has told us the way it has been generated. He printed it from his e-mail using his printer. He kept it as a custodian. So, the first condition was properly met.

ii) The law talks of reliability of the manner in which the integrity of the document was maintained. This takes us to the systems. The witness must say if the computer system and the printer were reliable. The witness said the way he generated and kept the document but did not say if he believed the system to be without defects. Given the nature of the system which is an e- mail as opposed to the company internally created software, I don't find any problem with that. I will only advice the counsel to remember to lead his witness to say whether the systems and printers were reliable in future.

iii) The law talks of the manner in which the originator was identified. He must say the way he identified the originator, in our case, the way he discovered that the e mail came from the defendant. The witness said that the defendant was under him. He knew his e-mail address. Given the relationships, he must have known the originator to be the defendant through the e-mail address. I don't find any problem in this area.

iv) The Law talk of any other factor relevant in the assessment of the weight of evidence. I think this takes us to the two areas which were discussed earlier; the requirements of laying the foundation and competency of the witness to tender the document. The witness was competent to tender the document but there was no sufficient grounds laid before asking him to tender the document. The counsel was in a rush to kick the ball to the goal without organizing the player. That area had a weakness but given sensitivity of the exhibit I will apply the overriding objective principle to cure the irregularity. I will add that he should be careful in future.

Subsection (3) talks of authenticity of the electronic records system. It says that the authenticity of the record systems where the document is recorded or stored, shall, in the absence of the evidence to the contrary, be presumed where there is evidence showing that the computer systems were operating properly or if it was not, the fact that the defect did not affect the document or where it is established that the document was recorded or stored by the adverse party. It has a general presumption that the computer systems and the printer are in a good condition unless proved otherwise. The witness must be lead to say if the computer system and printers were in good condition and if they, had defects to what extent did they affect the document. Ms. Neema did not lead the witness to tell the court that the computer system and printers were okay. But on reasons explained above I will not allow the shortcoming to defeat justice.

Before putting my pen off, for emphasis I will say the following; that, before leading a witness to tender an electronic document the party leading the witness must lay the foundation generally required before tendering documents and show the court that the witness is competent to tender the document. He will there after lead the witness testify say the type of system and the device used, the type of printer, the manner in which the document was generated, stored and communicated to the witness, the originator and the authenticity of the systems and the printer. All done, he will then ask the witness to say, if he was ready to tender the document as exhibit or not. It is not enough merely to lead the witness to the identification of the document and proceed to tender it.

That said, on the reasons explained above, with respect to Mr. Rumenyela, the objection is dismissed, costs in course.

THE HIGH COURT OF TANZANIA

L.M. Mlacha

Judge

31/8/2022

Court: Ruling delivered to the parties.

THE HIGH COURT OF TANZANIA

L.M. Mlacha

Judge

31/8/2022