

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT TANGA

LAND CASE NO. 07 OF 2020

ATHUMANI BAKARI KIMBWIGIRI PLAINTIFF

VERSUS


- 1. LAURENT MARTINE LOWRI 1ST DEFENDANT**
- 2. SALUM NDIBWIZA SALUM..... 2ND DEFENDANT**
- 3. MAZILI MAZILI EDWARD..... 3RD DEFENDANT**
- 4. HOSSEIN MOHAMED NJEZO.....4TH DEFENDANT**
- 5. JABIR BAKARI KIMBWIGIRI..... 5TH DEFENDANT**
- 6. ABBAS BAKARI KIMBWIGIRI.....6TH DEFENDANT**
- 7. AMINA BAKARI KIMBWIGIRI..... 7TH DEFENDANT**
- 8. BAKARI ATHUMANI SWALEHE.....8TH DEFENDANT**
- 9. LEONARD GERALD BURA.....9TH DEFENDANT**

RULING

22/02/2023 & 23/02/2023

MANYANDA, J.

In this suit, Athuman Bakari Kambwigiri, the Plaintiff, is suing the nine (9) abovenamed Defendants, Laurent Martine Lowri, Salum Mdibwiza Salum, Mazili Mazili Edward, Hossen Mohamed Njezo, Jabiri



Bakari Kimbwigiri, Abbas Bakari Kimbwigiri, Amina Bakari Kimbwigiri, Bakari Athumani Swalehe (now dead) and Leonard Gerald Bura, hereafter referred to as the "the defendants". He is suing them for ownership over a parcel of land measuring 80 acres located at Kilimamzinga Village in Negero Ward in Kilindi District, Tanga Region, hereafter referred to as the suit land", and payment of general damages for using the suit land for mining activities.

The Defendants denied the allegations. With leave of the Court, hearing of the suit proceeded under Order XVIII by filing sworn statements of witnesses.

Hearing of defence evidence commenced on 21/02/23 after conclusion of the plaintiff's evidence. When the 2nd defence witness was testifying, the Counsel for Defendants, Mr. Peter Bana, learned Advocate, referred this Court to a notice filed by the Defendants on 03/11/2021 in which the Defendants intimated to the Court their intention of relying on secondary evidence by tendering photocopies of documents contained in that notice. The notice is filed under section 68 of the Evidence Act, [Cap. 6 R. E. 2019]

Mr. Richard Rweyongeza, learned Advocate, for the Plaintiff raised an objection to the said notice on the ground that it has been brought

under inapplicable law. That, section 68 of the Evidence Act applies to a notice requiring the adverse party to produce the original document or else the party giving the notice will rely on secondary evidence.

Mr. Rweyongeza added that, he understands that the principle of wrong or none citation of enabling provision of law is no longer applicable after the introduction of the overriding objectives principle, commonly known as oxygen principle via amendments of the Civil Procedure Code, [Cap. 33 R. E. 2019] by adding sections 3A and 3B via Act No. 8 of 2018. However, he was of the views that in matters of notices to rely on secondary evidence, such as the impugned notice, section 68 does not apply but it is section 67 of the Evidence Act that applies.

He added that section 67 does not require a notice to the adverse party prior to production of secondary evidence instead it is depended on the foundation laid by the evidence from the witness intending to tender the copy. Which may be that the original document which was in the hands of the concerned party is out of reach due to either been lost or destroyed.

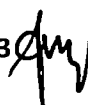
He closed his submission in chief arguing that the oxygen principle is inapplicable in this situation where the notice is not only unknown in



law but also misplaced, it is subject to be expunged from the records of this matter.

In reply, Mr. Bana conceded that the notice is wrongly based on section 68 instead of section 67 both of the Evidence Act. He also conceded that the principle of wrong or none citation of enabling provision of law is no longer applicable after the introduction of the overriding objectives principle. Therefore, he insisted that the defect of citing section 68 instead of section 67 is curable under the principle in sections 3A and 3B Civil Procedure Code because the gist of the notice is to show the Defendants' intention to use secondary evidence, hence no miscarriage of justice occasioned to the Plaintiff. He was of the views that the contents of the notice satisfy the provisions of section 67 of the Evidence Act for Defendants to use secondary evidence which are copies of documents.

Mr. Bana submitted further that there was no need of stating matters of relying secondary evidence and the grounds thereof in the body of the statement of the witness. He was also of the views that Statement D2, which is the admitted statement of the second witness (PW2), reveals clearly that the documents of which copies are intended to be produced came from the witness (PW2) himself and that other

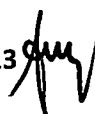


reasons for absence of the original documents will be elaborated by the witness in his testimony in court. He invited this court to avoid unnecessary technicalities and dispense substantive justice. He prayed the objection to be overruled.

In a short rejoinder, Mr. Rweyongeza submitted that in the first place, they are not objecting to the admission of the documents but that they are moving this Court to expunge from the records of this matter the notice to rely on secondary evidence because it is not a requirement of the law, hence the notice is unknown in law. That as regard to admissions of documents, Mr. Rweyongeza said a right time is yet to come, it will be during testimonies of the witnesses. He reiterated his prayer to have the notice expunged.

I have dispassionately followed the equally urging submissions by the learned Counsel for both sides. The issue is whether in the circumstances for which the notice is intended need to be either under section 67 or section 68 of the Evidence Act.

In our jurisdiction, as a general law, documents are required to be proved by primary evidence. This is according to the provisions of section 66 of the Evidence Act. It reads as follows: -



66. Documents must be proved by primary evidence except as otherwise provided in this Act.

Primary evidence is defined under section 64(1) of the Evidence Act to mean the original document. It reads as follows: -

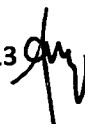
64.-(1) Primary evidence means the document itself produced for the inspection of the Court.

However, as provided in the provisions of section 66, there is an exception to this general law. Such an exception is provided under section 63 of the same law which reads as follows: -

63. The contents of documents may be proved either by primary or by secondary evidence.

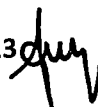
Secondary evidence is defined under section 65 of the same law to mean certified or uncertified copies of the original document. It reads as follows: -

65. Secondary evidence includes- (a) certified copies in accordance with the provisions of this Act; (b) copies made from the original by mechanical process which in themselves ensure the accuracy of the copy and copies compared with such copies; (c) copies made from or compared with the original; (d) counterparts of documents as against the parties who did not execute them; (e) oral accounts of the contents of a document given by some person who has himself seen it.



As seen above, a document is required to be proved by primary evidence, but secondary evidence is also admissible to prove a document in modes explained under section 67 of the Evidence Act. For easy of reference, I hereby reproduce 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; (ii) a person out of reach of, or not subject to, the process of the court; or (iii) 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) when 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; and (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. (4) In the cases mentioned in paragraphs (e) and (f) of subsection (1), a certified copy of the document, but no other kind of secondary evidence, is admissible. (5) In the case mentioned in paragraph (g) of subsection (1), evidence may be given as to the general result of the accounts or documents by any person who has examined them and who is skilled in the examination of such accounts or documents. (Emphasis added)

Now section 68 provides the circumstances in which a notice of relying to produce a copy are provided It reads as follows: -

68. Secondary evidence of the contents of the documents referred to in paragraph (a) of subsection (1) of section 67 shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as prescribed by law; and if no notice is prescribed by law,

then such notice as a court considers reasonable in the circumstance of the case: (Emphasis added)

Also, there are exceptions to the requirement of section 68 under the proviso to section 68 which reads as follows: -

"Provided that, the notice shall not be required in order to render secondary evidence admissible in any of the following cases- (a) when the document to be proved is itself a notice; (b) when, from the nature of the case, the adverse party must know that he will be required to produce it; (c) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force; (d) when the adverse party or his agent has the original in court; (e) when the adverse party or his agent has admitted the loss of the document; (f) when the person in possession of the document is out of reach of, or not subject to, the process of the court; and (g) in any other case in which the court thinks fit to dispense with the requirement."

As it be seen section 68 of the Evidence Act qualifies the application of section 67 of the same law as far as admission of documents of which original documents are shown or appears to be in the possession or power of 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 a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it.

Copies of documents in such circumstances, are admissible, only after a notice to produce the original documents which are in hands of the adverse party; a person possessing them is out of reach; or was legally bound to produce it but failed without excuse, is served upon them.

This, in my views, is the meaning of the words *"the contents of the documents referred to in paragraph (a) of subsection (1) of section 67 shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as prescribed by law"*.

I have visited the impugned notice and found that it is a notice telling the adverse party that at the first hearing of the suit or on any subsequent days, the defendants will crave leave to use copies of secondary documents which are correspondences made by the Plaintiff and his co-partnership members in the Exhibit D2.


As it can be seen, the wording in the notice do not show that the notice is in possession of the original documents, hence, requiring him to produce them, but it is a notice to use copies of correspondences.

In the circumstances, I am convinced that the circumstances contained in the impugned notice do not fall within the ambit of the provisions of section 68 of the Evidence Act.

The defendants are not obliged to notify the Plaintiff of their need to use copies because it is not said that their originals are in the hands of the Plaintiff. The copies of document of the defendants appear to fall under other provisions of section 67 of the Evidence Act than subsection (1)(a) of the Evidence Act.

It is only where it is shown that the original documents are in hands of the adverse party; a person possessing them is out of reach; or was legally bound to produce it but failed without excuse, that a notice to produce is needed.

To this end, with due respect to Mr. Bana, I second the views of Mr. Rweyongeza that the impugned notice is useless because it is not backed by the facts therein. Since it is a matter of evidence, it is upon the Defendants to establish the grounds of admission of the copies they intend to rely on the testimonies of their witnesses per the provisions of



section 67 other than sub-section (1)(a) of section 67 of the Evidence Act.

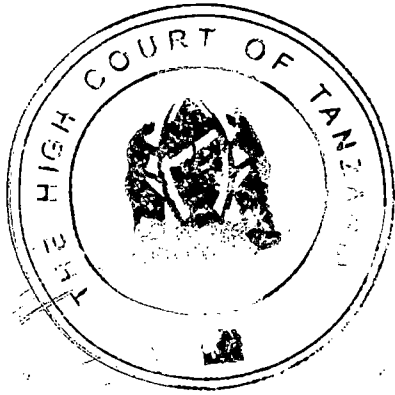
What is the way forward? Mr. Bana invited this Court to exercise its powers to overrule the objection basing on the oxygen principle. On the other hand, Mr. Rweyongeza was of the views that the impugned notice be expunged from the record of this matter.

As stated above, I have found that the impugned notice is unnecessary because the law allows the witness to produce their copies and at the same time the same law does not support the notice. Then, I failed to see why it should remain in the record. Again, I second the views of Mr. Rweyongeza that the impugned notice being redundant, is adding an unnecessary burden in the records of this matter.

The oxygen principle is useful in situations which the issue concerned is legally recognized, useful and necessary for dispensation of substantive justice but contain unprejudicial defects or wrongly lodged, which is not the case here. In my firm views, the impugned notice deserves to be expunged.

Consequently, I do hereby expunge the purported notice. Order accordingly.

Dated at Tanga this 23rd day of February, 2023




F. K. MANYANDA

JUDGE