

**THE UNITED REPUBLIC OF TANZANIA
(JUDICIARY)
THE HIGH COURT – LAND DIVISION
(MUSOMA SUB REGISTRY AT MUSOMA)
AT MUSOMA
LAND CASE NO. 20 OF 2023**

SAMSON MRIMI GESASE & 151 OTHERS PLAINTIFFS

Versus

NORTH MARA GOLD MINE LIMITED DEFENDANT

RULING

12.06.2024 & 13.06.2024

Mtulya, J.:

The law regulating proof of documents by secondary evidence is enacted in section 67 (1) (a)-(g) of the **Evidence Act [Cap. 6 R.E. 2019]** (the Evidence Act). According to this court, in the precedent of **Athumani Bakari Kimbwigiri v. Laurent Martine Lowri**, Land Case No. 7 of 2020, 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 to appear to be in possession of a person against whom the document is sought to be proved.

In the opinion of this court in the indicated precedent, at page 11 of the Ruling, persons in possession of the original document must be given notice to produce the intended documents in original form. This court then had distinguished notices to produce copies of the intended exhibits and notices issued to persons in possession of the original documents. According to the court, a notice informing an

adverse party that at the first hearing of the suit the defendant will use copies of secondary documents does not fall within the ambit of section 68 of the Evidence Act.

The thinking of this court was blessed by the Court of Appeal (the Court) in the precedent of **Daniel Apael Urrio v. Exim (T) Bank**, Civil Appeal No. 185 of 2019 at page 15 of the Judgment, that:

In terms of section 68 of the Tanzania Evidence Act, 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. Nonetheless, for reasons best known to the appellant himself, he resolved to opt to neither of the two.

In the opinion of the Court, as reflected at page 15 and 16 of the judgment, documents which are copies and problematic cannot enjoy admission, during hearing of disputes, under the discretionary powers of courts enacted under section 67 (1) (g) of the Evidence Act in absence of notices issued to the possessor of the original documents.

In the course of hearing of the present case, **Patrick Marwa Nkaina (PW1)**, prayed to tender a bundle of documents in secondary evidence called **Compensation Inspection Form** (the form). However, the record is silent on a notice to produce the documents in court issued to the defendant or leave of this court to issue summons to the defendant to produce or to testify in the case.

According to **Mr. Stephen Ndila Mboje**, learned counsel for the plaintiffs, PW1 is allowed to tender and this court may admit the form under section 67 (1) (a) (i) of the Evidence Act. According to Mr. Mboje, the provisions of section 68 of the Evidence Act, which qualifies section 67 of the same law, when read in plain meaning it is very certain that it refers section 67 (1) (a) without any paragraphs in romans (i) to (iii). In his opinion, the law in plain language must be interpreted as it is without any further interpolations.

Regarding the precedents of this court and the Court of Appeal in **Athumani Bakari Kimbwigiri v. Laurent Martine Lowri** (supra) and **Daniel Apael Urio v. Exim (T) Bank** (supra) respectively, Mr. Mboje contended that the dual decisions regulated general provisions in section 67 and 68 of the Evidence Act without further conversations of section 67 sub section (1) paragraph (a) roman (i) to (iii). Such views of Mr. Mboje were bitterly contested by **Mr. Faustin Malongo** and **Ms. Caroline Kivuyo**, learned counsels of the defendant. According to the dual, the issue of notice is paramount

and that the plaintiffs must first issue the defendant notice to produce secondary evidence before the form is tendered and admitted as exhibit in the instant case in order to comply with section 68 of the Evidence Act.

The dual submitted that the Court in the precedent of **Daniel Apael Urio v. Exim (T) Bank** (supra) has interpreted section 67 (1) (a) (ii) of the Evidence Act to show that there is no distinction in romans enacted in paragraph (a) of sub section 1 of section 67 of the Evidence Act. In the opinion of the dual, whether a document is produced under roman (i) or (ii) of section 67 (1) (a) of the Evidence Act, a notice to produce is necessary.

The dual also complained further that the form which PW1 is intending to produce in the instant case as exhibit was not pleaded in the plaint as a result the defendant did not admit or deny the same, which makes the document so tricky to be admitted. In the opinion of the dual, the nature of the form and the way it was brought had left the defendant unaware of the same and whether PW1 would produce secondary evidence on the subject. To the dual, the nature of present pleadings cannot allow the plaintiffs to enjoy the exemptions enacted under section 68 of the Evidence Act to decline a notice to produce.

I have glanced the present record, submissions of the learned minds of the parties and perused the indicated precedents in **Athumani Bakari Kimbwigiri v. Laurent Martine Lowri** (supra) and **Daniel Apael Urio v. Exim (T) Bank** (supra). The plaintiffs' pleadings are silent on the specific form which is intended to be produced by PW1 as an exhibit in the case. The form was attached as part of the additional lists of documents to be relied by the plaintiffs. It is unfortunate that the form was not specifically pleaded by PW1 or conceded by the defendant in defence. In the circumstances, it cannot be said that the defendant was very well aware of the form and therefore bound by pleadings of the case.

I consulted the decision of this court in **Athumani Bakari Kimbwigiri v. Laurent Martine Lowri** (supra) and found conversations on application of sections 63, 64, 65, 66, 67 and 68 of the Evidence Act. The decision generally shows that documents must be proved by primary evidence or original document save for exception available in section 63 of the Evidence Act, which invite secondary evidence or copies of documents. However, in order for the secondary evidence or copies of documents to be admissible, they must comply with section 67 of the Evidence Act, which is qualified by section 68 of the same Act. Finally, at page 10 of the Ruling, this court thought that:

...the meaning of the words contents of the documents referred to in paragraph (a) of sub section (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 notice to produce the document.

On the other hand, the Court had a very brief discussions on enactment of section 67 and 68 of the Evidence Act, in the precedent of **Daniel Apael Urio v. Exim (T) Bank** (supra), at page 13 and 14 of the Judgment, and at page 15 thought that:

In terms of section 68 of the Tanzania Evidence Act, 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. Nonetheless, for reasons best known to the appellant himself, he resolved to opt to neither of the two.

In the opinion of the Court, at the same page 15 of the Judgment: *it was the appellant himself who failed to comply with the*

requirement of the law and cannot shift the blame to the trial judge for refusing the document in performing what he was required to do by the law. However, both cited courts were silent in application of romans (i) to (iii) in the enactment of section 67 (1) (a) of the Evidence Act. Today, in this court a dispute arose whether the romans letters are part of the statements produced by the cited two (2) decisions issued by the courts.

This takes this court to the rules of interpretation of the law. Mr. Mboje thinks plain interpretation must be employed by this court and read section 68 of the Act as it is. According to him, section 68 cites section 67 (1) (a) without any further interpolations and that this court must abide with the words without any additions, whereas the dual counsels think that the romans are covered from reading of the precedents. I am aware that there are three (3) important rules of statutory interpretation, namely: plain/literal, which construe the words as they are: golden rule which is invited to resolve ambiguities in the provision of the law; and finally, mischief rule which searches the intention of legislature to cure absurdity.

Reading the provisions of the law in section 68 and 67 (1) of the Evidence Act, there is no any ambiguities. They are clear and straight forward. However, the question is whether the two cited sections are read separately or together as a whole for the purpose of appreciation of the context of each section. The reply is obvious

that they are read together as one as it was resolved by this court in in the case of **Athumani Bakari Kimbwigiri v. Laurent Martine Lowri** (supra) that section 67 of the Evidence Act is qualified by section 68 of the same Act.

Having said so, the question remains whether section 67 (1) (a) of the Evidence Act and its associated sub romans is read as whole or separately. I think, in my views, the section is read as a whole. There are reasons to such effect; First, reading section 67 (1) (a) of the Evidence Act as a separate provision, it does not bring any meaning, unless paragraphs in roman (i) to (iii) are invited. In brief the section provides that:

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:

Reading the above provision of the law, it is vivid that it does not bring any sense until when the appropriate paragraphs in roman letters are invited to produce alternatives in: first, *the person against whom the document is sought to be proved*; or second, *a person out of reach of, or not subject to, the process of the court*; or third, *a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it*. In that

case, any alternative cited in the provision must invite section 68 of the Evidence Act on notice to produce.

Secondly, I am aware the enactment of 67 (1) (a) of the Evidence Act is silent on the purposes of requiring notice. However, in my opinion, I think, the section has two (2) aims, namely: first, affording the opposite party an opportunity to produce the document when requested; and second, if the document is not produced, to allow the adverse party to produce secondary evidence. In the context of the present case, where plaintiff is silent on the document and the defendant has not admitted or denied the form, it is unsafe to admit the same on record to be exhibit.

I am aware that Mr. Mboje has produced the decision of this court in **JV Tangerm Construction Co. Limited & Technocombine Construction Limited (A Joint Venture) v. Tanzania Ports Authority & Another**, Commercial Case No. 117 of 2015 arguing that a prayer to introduce secondary evidence may be registered at any point during proceedings before a party closes its case. He may be correctly right, but that question has to wait for an appropriate moment. This court was asked to reply a question whether PW1 can tender and this court admit secondary evidence under section 67 (1) (a) (ii) of the Evidence Act in absence of notice to the defendant to produce the original document. The reply is obvious in negative and this court has already replied the same.

In the end, I sustain the objection registered by the defendants' learned counsels, Mr. Malongo and Ms. Kivuyo, and hereby decline to admit the form. I do so without costs as PW1 was cherishing is right to produce exhibits in the case. Let the hearing of PW1 proceed in accordance to the law regulating civil cases.

Accordingly ordered.





F.H. Mtulya

Judge

13.06.2024

This Ruling was delivered in Chambers under the Seal of this court in the presence of **Mr. Stephen Ndila Mboje**, learned counsel for the plaintiffs and in the presence of **Mr. Faustin Malongo** and **Ms. Caroline Kivuyo** for the defendant.


F.H. Mtulya

Judge

13.06.2024