

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

COMMERCIAL CASE NO. 87 OF 2013

**AFRISCAN GROUP (T) LTD PLAINTIFF
VERSUS
SAID MSANGI DEFENDANT**

15th & 17th June, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an objection by Mr. Mbamba, learned counsel for the defendant against a prayer made by Mr. Rutabingwa, learned counsel for the plaintiff to have a copy of the document titled "Power of Attorney" being tendered and received in evidence. The prayer was made during the testimony of one Ulf Nilsson PW1 who purportedly issued the power of attorney to one David Mahende to authorize the said Mahende, Director of the plaintiff company to be signatory of the bids of the tenders of Mombo Irrigation Scheme and Lekitatu Irrigation Scheme. It was alleged that the original was in the hands of the Ministry of Agriculture to which it was given during the tendering process some fifteen years back, hence the prayer to tender its copy.

The prayer was strenuously objected by Mr. Mbamba, learned counsel for the defendant stating that the document was inadmissible in terms of section 67 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (hereinafter "the Evidence Act"). Mr. Mbamba argued with some force that the section dictates, *inter alia*, that secondary evidence may be admitted when the original is lost or cannot be found.

The evidence which is at the centre of controversy in this instance is a photocopy which is certainly secondary evidence. Admissibility of secondary evidence is governed by section 67 of the Evidence Act. For easy reference, I reproduce the section as under:

"(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;

(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."

I have quoted *in extenso* the section in order to see whether the present situation fits in anywhere in the provision. In the instant case, the evidence sought to be tendered is, as already alluded to above, secondary evidence. The reason unveiled by the plaintiff why they have opted that course is that the original was tendered to and is in the hands of the Ministry of Agriculture. Nothing has been stated if the original is not available. It is not even stated that persons from the Ministry will not be available. The document is a photocopy which is not even certified. It is the law, as was held in ***Amiroonnissa Vs Abedoonnissa***, 23 WR 208, that:

"Before a party is entitled to give other secondary evidence of the contents of the original, the non-production of the original must be satisfactorily accounted for".

[Referred to at p. 1437 **Sarkar, Law of Evidence**, 17th Edition, Reprint 2011].

In the case at hand, the non-production of the original of the document intended to be tendered has, in my view, not sufficiently been accounted for. That apart, the document is not even certified. I wish to emphasize here that even if the document was certified, it still would be inadmissible for lack of proper foundation of its admissibility in evidence. It has been held that where no foundation is laid in giving secondary evidence certified copies as inadmissible - see ***Roman Catholic Mission Vs S, A*** 1966 SC 1457 referred to at the same page of **Sarkar, Law of Evidence** (supra).

In sum, no sufficient explanation falling within the ambit of section 67 of the Evidence Act has been given to warrant this court admit the uncertified photocopy of the document intended to be tendered. It is for these reasons I find the objection by Mr. Mbamba, learned counsel to be rich in merit and accordingly sustain the same.

Order accordingly.

DATED at DAR ES SALAAM this 17th day of June, 2015.


J. C. M. MWAMBEGELE
JUDGE

