

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

COMMERCIAL CASE NO. 75 OF 2010

**ENGEN PETROLEUM TANZANIA LIMITED PLAINTIFF
VERSUS
WILFRED LUCAS TARIMO t/a SANGO PETROL STATION DEFENDANT**

23rd June & 28th October, 2016

RULING

MWAMBEGELE, J.:

At the centre of controversy between Mr. Sinare Zaharani and Mr. Nelson Merinyo, the learned counsel for the parties which is the subject of this ruling is production in evidence by Shaaban Said Kayungilo PW1 of secondary evidence; a Faxed Order No. 191 dated 16.09.2016 authored by the defendant. A copy of the document was in the process of being tendered on 23.06.2016 during the testimony of PW1 but Mr. Merinyo, learned counsel for the defendant objected on the grounds that it was secondary evidence and this court (Nyangarika, J.) had ruled that such kind of document was inadmissible. Mr. Zaharani, learned counsel for the plaintiff stated that its original is in the hands of the defendant and that they had already issued a Notice to Produce and the document sought to be tendered is listed under item 4. Mr. Merinyo stuck to his guns arguing that there was no way the plaintiff could have released the petrol products without the original.

I have scanned the record of this case and have found that the same arguments were fronted by the learned counsel for the parties for and against the reception of an akin document on 16.12.2014 before my brother at the Bench Nyangarika, J. during which PW1 sought to tender Faxed Order No. 189 dated 15.09.2016 and listed as item 3 in the Notice to Produce by the plaintiff filed in this court on 24.05.2013. The ruling thereof was delivered on 19.09.2015. In that ruling, this court ruled that the document was inadmissible in evidence.

Mr. Sinare, learned counsel, through the same witness, wants to introduce in evidence Faxed Order No. 191 dated 16.09.2016 and listed as item 4 in the same Notice to Produce by the plaintiff filed on 24.05.2013. Mr. Merinyo, told the court that this court had ruled upon an akin document that it was inadmissible and therefore, perhaps for consistency, the same should be the holding in respect of the present document intended to be tendered in evidence.

Let me state at this juncture that this ruling ought to have been pronounced on 03.08.2016 but because I was out of the station for two consecutive months for a special assignment upcountry which special assignment ended on 22.09.2016, the ruling could not be delivered as planned.

I have read the ruling of this court in respect of the inadmissibility of Faxed Order No. 189 dated 15.09.2016 and listed as item 3 in the Notice to Produce by the plaintiff filed in this court on 24.05.2013. The reason why the document was held to be inadmissible was that the document was secondary evidence and the same was supposed to be in the hands of the plaintiff. The same arguments have been brought by the learned counsel in respect of Faxed Order No. 189 dated 15.09.2016 and listed as item 4 in the Notice to

Produce by the plaintiff filed on 24.05.2013. The reasoning of this court on the previous document is also relevant in respect of the present document and I intend to adopt the said reasoning and verdict in this ruling.

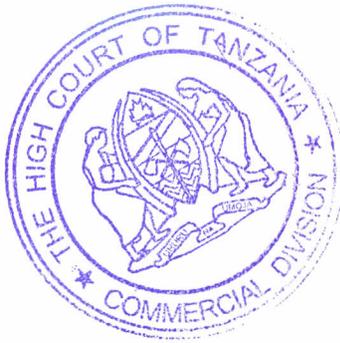
The document sought to be tendered is a copy and the conditions set out in section 67 (1) (a) (i) and (iii) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 have not been satisfied. That is to say, there is no evidence from the witness that the plaintiff never received the original and that the same is still in the hands of the defendant. What we have is just a statement from the Bar by Mr. Zaharani, learned counsel. The situation is exacerbated by the fact that it is not indicated as to how the document sought to be tendered; a copy, came into the hands of the plaintiff while business best practice would have required that its original should have been in the hands of the plaintiff; the supplier of the goods the subject of the document under discussion. I agree with Mr. Merinyo, learned counsel, that the document sought to be tendered should suffer the same consequences as did Faxed Order No. 189 dated 15.09.2016 and listed as item 3 in the Notice to Produce by the plaintiff filed in this court on 24.05.2013. That document, a kith to the present one, was ruled by this court to be inadmissible. One of the tenets of this court is predictability.

In the final analysis, I sustain the objection by Mr. Merinyo, learned counsel for the defendant and hold that the document is not admissible in evidence for the reasons given above and for the reasons given in the ruling of this court of 19.09.2015. For the avoidance of doubt, other documents tendered by PW1 along with the above document which has been held inadmissible; that is Cheque No. 100811, Tax Invoice of 16.09.2008, Loading Order of 16.09.2008 and Marketing Order of 16.09.2008, to which Mr. Merinyo learned

counsel for the defendant had no objection, will be marked accordingly on continuation of PW1's testimony on a date to be slated today.

Order accordingly.

DATED at DAR ES SALAAM this 28th day of October, 2016.




J. C. M. MWAMBEGELE
JUDGE