

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.139 OF 2019**

BANK OF AFRICA TANZANIA LTD.....PLAINTIFF

Versus

OM-AGRO RESOURCES LTD.....1st DEFENDANT
FATUMA SAID ALLY.....2nd DEFENDANT
MASHAKA HEBERT MSUMAI.....3rd DEFENDANT
NAZIR MUSTAFA KARAMAGI.....4th DEFENDANT
EMIR NAZIR KARAMAGI.....5th DEFENDANT
**PRATHEESH KUMAR THANKAPPAN
PILLAI.....6th DEFENDANT**
JUMA HASSAN KILIMBAH.....7th DEFENDANT

Last Order: 06th May 2021
Ruling: 10th May 2021

RULING

NANGELA, J.:

This ruling arises from an objection raised by Mr Kasaizi, learned advocate for the 1st, 2nd, 4th, 5th and 7th Defendants. Earlier, in the course of hearing of this case, I made also a minor ruling in which I proceeded to admit electronic letters of credit (E-LCs) and I reserved my

reasons for that decision. I will, therefore, include those reasons I reserved in this ruling.

The current objection which prompted this ruling concerned admissibility of two documents titled "Guarantee and Indemnity (By Individual(s) Guarantor (s)). The First document, is said to have been signed by Mr Nazir Mustafa Karamagi and Mr Emir Nazir Karamagi (as Guarantors) in favour of Bank of Africa (Tanzania) Limited, and, the second is alleged to be issued and signed by Pratheesh Kumar Thankappan Pillai/ Juma Hassan Kilimbah, in favour of Bank of Africa (Tanzania) Limited.

The objection regarding the admissibility of these documents was raised on the ground that, the documents were not attached to the Plaint. It was also contended that, those documents in the list of documents are different as they do not bear the stamp of the Registrar of Titles. Also, that, the documents are secondary copies for which no notice was issued under section 68 of the Evidence Act.

Mr Nyaisa, the learned advocate for the Plaintiff, had produced these documents seeking that they be admitted under **Order XIII rule 2 of the Civil Procedure Code**.

He also submitted that, they are public documents under section 83(a) of the Evidence Act, 1967, Cap.6 RE 2019 and, that, they are also being produced as secondary evidence under section 67(c) and (e) of the Evidence Act. Mr Nyaisa told this Court that, the documents are copies requested from the Registrar of Titles since the originals were lost and, the 4th and 5th Defendants stated, as per **Exh.P12** (which are letters from these defendants) that, they do not have the originals and do not know them either. As such, he argued that, on the account of **Exh.P.12**, the requirement of notice under section 68 as argued was meaningless.

Mr Nyaisa produced a Police Loss Report which was to the effect that the original documents went missing from the Plaintiff's custody, hence, forcing the Plaintiff to seek and rely on secondary evidence. The Secondary evidence involved certified copies of the same document obtained

from the Office of the Registrar of Titles, where a set of original documents were also filed as per the requirement of the law. He sought to rely, therefore, on those certified copies from the Registrar's office.

I have looked at the documents. I will proceed and overrule the objection as baseless and a waste of the precious time of this Court. I hold that view due to the following reasons:

First, even if the documents are secondary evidence, they have met the requirements of admissibility of secondary evidence under section 67 (1) (c), (e) and (f) and section 67 (2) and (4) of the Evidence Act, Cap.6 R.E 2019.

That particular provision of the Evidence Act provides as follows:

"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;**
- (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.

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).

Secondly, even though the documents were not attached to the Plaint, as argued by Mr Kasaizi, and were not those in the list filed in this Court, the same can still be admitted under **Order XIII rule 2 of the Civil Procedure Code, Cap.33 R.E 2019**, provided that good cause is shown as to why they could not be produced as per the requirements of the law.

That position was emphasized in the earlier ruling of this case in this same case, **Bank of Africa (Tanzania) Ltd v OM-Agro Resources Ltd v Fatuma Said Ally and 6 Others, Comm. Case Np.139 of 2019, (unreported) (the ruling issued on 19th March 2021.**

In that ruling this Court stated that:

"...documents may, as well, be produced in court for consideration under Order XIII rule 1 (1), and (2) of the CPC. However, those which were not produced in line with what rule 1 of Order XIII provides, may be produced under

Order XIII rule 2 where sufficient explanation is given. It means, therefore, that, such documents will still be received in Court unless challenged under a different law relating to admissibility of documents.”

(See also the case of **National Bank of Commerce Ltd v Nabro Ltd and Another, Commercial Case No.44 of 2001, (unreported)**, as well as the Court of Appeal Decision in **Eusto K Ntagalinda v Tanzania Fish Processors Ltd, Civil Appeal No.23 of 2012 (CAT) (Mwanza) (unreported)**).

Thirdly, in the case of **Latifa Hassan Alibhai v Jayendra J Amrchand and Another, Land Case No.199 of 2019 (unreported)** (a ruling issued on 30th April 2021), this Court, when faced with a similar issue of admissibility of documents under Order XIII rule 2 of the CPC, had the following to say:

“In my view, therefore, that, although Order XIII rule 2 of the CPC calls for good cause to be shown to the satisfaction of the Court before document not produced as per rule 1 of Order XIII is permitted, taking into account the principles of justice, equity and common sense, I find that this Court can still proceed and receive that particular document. The reasons for such a position is that, the document, seems to be a Certificate of Title issued by a government office, and can be of assistance in the proper determination of this suit. This sort of position should not seem to be alarming anyone because ... the Court was of very convincing views that since:

"Courts exist to assure fair trials, documentary evidence, even though filed late, should not generally be excluded, if such evidence be needed for proper decision of the case"

The Court relied also on another Indian case of *Gopika Raman Roy v. Atal Singh*, 56 Ind App 119, at p. 127: (AIR 1929 PC 99 at p. 103), where their Lordships of the Privy Council observed, that:

"... even where rules of exclusion apply and the documents cannot be filed without leave of the Court, **that leave should not ordinarily be refused where the documents are official records of undoubted authenticity, which may assist the Court to decide rightly the issue before it ."** (Emphasis added).

In this instant case at hand, the documents sought to be admitted in evidence were secondary evidential materials of an original document which is held in the office of the Registrar of Titles. The copies bear a stamp of the Registrar's office certifying that they are true copies of the original.

The justification given regarding why these were being produced under **Order XIII Rule 2** is that, while this case was pending in Court, the originals whose copies had been attached to the Plaintiff earlier went missing from the custody of the Plaintiff and the matter was reported to the Police. A Police Loss Report was also produced. Certainly,

this justification constitutes a sufficient cause **under rule 2 of Order XIII of the CPC**. As such I will proceed to overrule the objection.

As I stated earlier, herein, in the course of the hearing of this case, I also made a ruling concerning admissibility of *electronic letters of credit* which I admitted as **Exh. P.9**. I reserved the reasons for my ruling. I will briefly state them in this ruling as well since the objection emanated from the same case on the same day.

Essentially, I held that, the said electronic letters of credit, which constitute electronic documents or *e-documents*, were admissible because, the law is very clear that, an e-document should not be denied admissibility only because it is an *e-document*. **Section 64 A** of the Evidence Act, Cap.6 R.E 2019 is well applicable here.

Secondly, the filing of these documents was supported by a verifying affidavit of **PW-1** which certified their authenticity. Although Mr Kasaizi argued that he was not served with that certificate of their authenticity, the record in Court indicates that, such was filed and, the learned counsel for the Plaintiff did inform the Court that, Mr Kasaizi was served with a same set of documents as those filed in the Court.

Mr Kasaizi's reliance on the case of **Exim Bank (T) Ltd v Kilimanjaro Coffee Company Ltd, Comm. Case No.29 of 2011** (unreported) regarding the kind of

certificates which should be filed in court is, in my view, not a relevant authority here and, I will not follow it. The reasons are simple.

One, that decision emanated from one of those cases whose decisions were given at a time when Courts were charting a path in an uncharted terrain of electronic world. By then, the trajectory to be followed was uncertain at the time compared to the present day when the Parliament has done its job of amending the law of evidence to accommodate admissibility of electronic documents and the further enacted **The Electronic Transactions Act, ETA, 2015**.

The case of **Onesmo Nangole v Dr Steven Lemomo Kiruswa and 20Others, Civil Appeal No.117 Of 2017, CAT, DSM (unreported)** does reflect on the levels of the current development of the law.

Two, when there is clear provisions of the law, it is the law that takes precedence. So I will be guided by the provisions of the law.

The **third** reason regarding why I admitted the documents is that, although Mr Kasaizi tried to refer to section 18 of the Electronic Transactions Act, 2015, that section could be applicable only if he was questioning the reliability and integrity of the electronic LCs. In this case, it was not the issue and he never challenged their reliability or integrity.

Moreover, although he tried to challenge the authority of **PW1** to produce them in Court, the Certificate filed did indicate that **PW1**, as an authorised person, had access to the Core Operating System of the Plaintiff Bank. I totally agree with the submission of Mr Nyaisa that, the Certificate of Authenticity cannot be challenged by mere words and the authority of **PW-1** to tender the documents cannot be challenged either, the reason being that, she was a custodian of the documents and the only authorised person to access them.

I fully agree with Mr Nyaisa that, case of **DPPv Mirzai Pirkakhishi @Hadji and 3 Others, Criminal Appeal No.493 of 2016, CAT, DSM (Unreported)**, is relevant to this case as it held, among other things, that:

"a possessor or a custodian or actual owner or like are legally capable of tendering the intended exhibits in question provided he has knowledge of the thing in question."

In this instant case, PW-1 has full knowledge of the electronic letters of credit and was the only authorised person who was authorised to access the Core Operating System of the Bank and retrieve them for use in this case. She thus had the full knowledge of them.

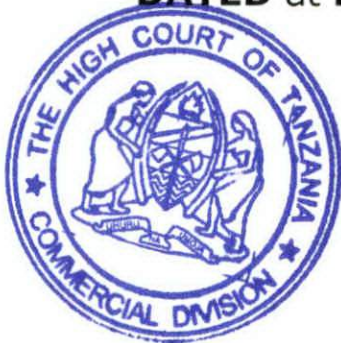
In view of the above, I am of the view that, the filing of the Certificate of Authenticity of the electronic records, which record were filed in Court as additional documents, was proper and so were the electronic

documents filed. Further, as explained by **PW-1** the LC's had attachments which together supported the transaction and the attachments cannot as well be queried as Mr Kasaizi wants this Court to do.

It was for such reasons; therefore, I decided to admit in evidence the electronic LCs. With that in mind, and since I have already stated that the objections raised by Mr Kasaizi have no merits, I hereby proceed to overrule them. Since the documents had been tendered, I hereby proceed to admit them in evidence as it shall be indicated in the file.

It is so ordered.

DATED at DAR-ES-SALAAM 11th MAY, 2021.



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**DEO JOHN NANGELA
JUDGE**