

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 16 OF 2022

**DELINA GENERAL ENTERPRISES LIMITED PLIANTIFF
VERSUS**

KCB TANZANIA LIMITED 1st DEFENDANT

KCB KENYA LIMITED 2ND DEFENDANT

Date of Last Order: 02/08/2022

Date of Ruling: 03/08/2022

RULING

MAGOIGA, J.

Miss Suzan John Mayala (to be referred herein as '**DW1**') sought to tender in evidence two affidavits and four bank statements as exhibits in support of the defendants' case and counterclaim in this suit but same was met with objection from the learned advocate for the plaintiff on reasons that:-

- i. The four bank statement intended to be tendered are different from the one attached to the pleadings for containing stamp, signature and date of 02.08.2022;
- ii. Affidavit of Emmanuel Kitila and Gadian Maketa were all deposed on 27th June, 2022 and refers to statements shown by Trustmark



Attorneys but not the four statements. According to Mr. Mwalongo, the affidavits and documents have no connection;

- iii. The bank statements being computer printer out but paragraphs 2 of each affidavit state that they originate from Trustmark Attorneys as the source and not the bank, hence, in his view cannot be admitted in evidence.
- iv. Much as the defendant has opted to verify them by affidavit the plaintiff will be denied a right to cross examine the witnesses and as such a denial of right to be heard.

On the totality of the above reasons, Mr. Mwalongo strongly urged this court not to admit the two affidavits and four bank statements.

Mr. Msuya was not moved by the reasons argued by Mr. Mwalongo and in rebuttal argued that a mere stamp, signature and date without any material difference cannot be a reason for not admitting the documents. Mr. Msuya pointed out that the pertinent question is, at what point in time verification is done? In answering this question, Mr. Msuya argued that section 79 which applies for verification do not state when verification is to be done and concluded that a mere fact that the document is verified does not defeat the provisions of section 79 of the Tanzania Evidence Act.



On the second point that the documents originated from Trustmark Attorneys, Mr. Msuya argued in reply that paragraph 2 of the affidavits subject of attack do not refers to Trustmark Attorneys as the source of the bank statement and added that the said paragraph should not be read in isolation but must be read together with other paragraphs. According to Mr. Msuya, all affidavits are made under sections 78 (1), (2) 78A (1), (2) and 79 (1), (2) of the Tanzania Evidence Act, [Cap 6 R.E.2022] and the entire affidavits complied with the said provisions.

On the arguments that the plaintiff will be denied an opportunity to cross examined the deponents it was the reply of Mr. Msuya that much as sections 78 and 79 allows a partner to swear an affidavit, then, is not a requirement of the law and it is the law that allow the situation we have. Further the learned advocate for the defendants added that after all, the opportunity is there for the plaintiff counsel to cross examine the witness after admission of the documents.

On the argument that the affidavits do not support the statements, Mr. Msuya argued in rebuttal that the statement is clear are from the bank and no way can come from Trustmark Attorneys.



On the above reasons, Mr. Msuya invited this court to overrule the objection and proceed to admit the documents.

In rejoinder, Mr. Mwalongo argued that verification was done under section 79 (2) and the affidavit was sworn on 27/06/2022, but nowhere refer to verification done on 02/08/2022. Failure to harmonize the affidavit and the date of verification is good as not done at all and the law is very clear the documents should not be admissible. According to Mr. Mwalongo, nowhere the affidavit stated that verification was done of 02.08.2022 and insisted that verification, if any, was done on 27/06/2022 and hence, same should not be admitted.

On their originality, it was rejoined by Mr. Mwalongo that nowhere in the affidavit stated they are from the bank but what is stated is that were shown by Trustmark Attorneys and insisted are not to be admitted.

Before going into the rivaling arguments of the learned advocates for parties on admissibility of the affidavits and the bank statements, I find it imperative to state that, admission of any print out of bank statements in any judicial proceedings are guided by the provisions of sections 78 (1), (2)



78A (1) (2) and 79(1) and (2) of the Tanzania Evidence Act, [Cap 6 R.E. 2019]. For easy of reference, the said sections provides as follows:

Section 78. Proof that book is a banker's book

(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

(2) Such proof under subsection (1) may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any commissioner for oaths or a person authorised to take affidavits.

Section 78A (1) A print out of any entry in the books of a bank on micro-film computer, information system, magnetic tape, or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures accuracy of such print out, and when such a print out is supported



by a proof stipulated under sub section 2 of section 78 that it was made in the usual and ordinary course of business, and that the book is in the custody of the bank it shall be received in evidence under this Act.

(2) any entry in any bank's book shall be deemed to be primary evidence of such entry and any such banker's book shall be deemed to be a "document for purpose of subsection (1) of section 64.

Section 79. Verification of copy

(1) A copy of any entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

(2) The proof under subsection (1) shall be given by person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner for oaths or a person authorized to take affidavits.



Going by the literal wording of the provisions of section 78 (1) there are three cumulative ingredients that the court has to consider in admitting copy of the banks's book in judicial proceedings, these are:

- i. The book was at the time of making of the entry one of the ordinary books of the bank;**
- ii. The entry was made in the usual and ordinary course of business**
- iii. And the book was is in the custody or control of the bank.**

Further sub section (2) of section 78 provides how and when the above imperative ingredients are to be proved. This can be done by a partner or officer of the bank in two modes namely; by oral or by a sworn affidavit before commissioner for oaths or any person authorized to take affidavits.

It is further my considered opinion that the import of taking such safeguards in admitting print out of the bank's book, which includes bank statements, is to go in hand with the computer generated evidence without compromising to the dangers of easy manipulation that may carry the order of the day.



The wording of section 78A (1) and (2) insisted that the three ingredients are imperative to be shown in the affidavit or by oral testimony of the person who intends to tender them and once complied with, then, the bank statement must be admitted and treated as primary evidence.

Going further by the literal wording of section 79 (1) adds one independent ingredients that ***the said bank's book must have been examined and compared with the original and found correct.*** (emphasis mine).

Sub section 2 of section 79 provides that the above ingredient of ***verification should be given by the person who has examined the copy with the original entry and found is correct to be done orally during tendering if was the one involved or by affidavit. (emphasis mine.***

It should be further noted that in 2007 the Tanzania Evidence Act, was amended by Act, No.2 of 2007 which defined Bank's books and added section 78A which stated that any printer out from the computer can only be admissible in evidence if it complies with the provision of section 78 (2) and that once complies with the same provisions is considered primary evidence for purpose of section 64(1) of the Act.



Lastly but not least the provisions of section 18 of the Electronic Transaction Act, 2015 do not apply to Bank's book which are within the domain of Part IV of the Tanzania Evidence Act.

With that in mind and now back to the instant objection, the issue for determination is whether the alleged affidavits and bank statements met the threshold of the provisions of sections 78, 78A and 79 for admission bank statements into evidence.

Mr. Mwalongo for the plaintiff objected their admission on four fronts, namely; verification was done on two different dates and without any comparison as to their correctness, the same were from the Trustmark Attorney as the source according to paragraph 2 of the affidavits, much as verification was done by affidavit and if the deponents were not called will deny the plaintiff right of cross examination of the deponents and that the affidavit are not connected to the bank statements by having two dates of affidavit and verification which do not match.

Mr. Msuya, on the other hand, was of the firm view that the affidavit are intact and complied with the provisions of sections 78, 78A and 79 of Cap 6 R.E. 2019. According to Mr. Msuya, a mere difference in dates alone cannot



invalidate their admission, paragraph 2 should not be read in isolation with other paragraphs, nowhere the statements refers to Trustmark Attorneys as the source and that section 79(2) allows tendering of the same without necessarily requiring of the deponents to come but in case he wants them he can pray to court for their attendance and cross examined them.

Having carefully considered the rivaling arguments of the learned advocates for parties and having revisited the law and the contents of the affidavits in dispute, with due respect to Mr. Msuya, I find out that the affidavits in dispute did not meet the threshold of sections 78(1),(2) 78A (1), (2) and 79 (1), (2) of the Evidence Act. I will explain. **One**, none of the paragraphs in the affidavits stated that the same were made in the usual and ordinary course of business of the bank. What I gathered from paragraphs 3-12 of the affidavit of Emmanuel Kitillah, an IT officer of the defendant was on the computer systems and their safe guards alone. Indeed, the deponent had in mind of the requirements of section 18 rather than requirements of sections 78, 78A and 79 of the Act.

Two, None of the affidavit stated that the entries were made in the usual and course of the business. What one gathers from the affidavit of Gaidian



Maketa is that the entries reflects outflow of funds in the current account and bank charges. When that flows comes in the affidavit is silent.

Three, none of the affidavit stated the said bank's books are in custody of the bank but as rightly argued by Mr. Mwalongo the said statements were in control of the Trustmark Attorneys who showed the deponents (as per paragraphs 2 of each affidavit) and without comparing them with original entries deposed to their accuracy. Worse enough Mr. Maketa deposed at paragraph 8 that the same are tested by sampling by way of regular sampling by both internal and external auditors and that it was based on sampling that he deposed to their accurate. This is not what the law requires of bank's books for purposes of admissibility.

Four, none of the affidavits stated that he personally compared the original documents with copies intended to be tendered in evidence. This was an imperative and inescapable requirement in this case where a dispute is on the bank statements themselves. It was not done in this case.

Five, the verification done by deponents was to the accuracy of the operations of computer systems and not the entries when compared with the origin. This even worse because none of the affidavit stated that the



bank statements were printed by the deponents and compared as required by law.

Six, I agree with Mr. Mwalongo that verification which was done on 02.08.2022 was done without any supporting affidavit of the person who verified the said bank statements, hence, inadmissible. Mr. Msuya that verification alone by different dates does not affect the documents is rejected because verification which is mandatory has a purpose to serve that is to ensure accuracy of the entries. The outright question is why verify on two different dates and it creates doubt which one to believe and which one is accurate?.

On the totality of the above reasons, this court finds the affidavits in support of the bank statements are devoid of the requirements in sections 78, 78A and 79 and much as the opening statement in sections 78 and 79 not to admit, then, this court is constrained not to admit the affidavits together with the bank statements in dispute.

Other matters argued become for academic exercise after my holding above.



That said and done the documents are inadmissible and the objection is sustained.

Order accordingly.

Dated at Dar es Salaam this 3rd day of August, 2022.



A handwritten signature in black ink, appearing to read "S.M. Magoiga", written over a horizontal line.

S.M. MAGOIGA

JUDGE

03/08/2022.