

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.755 OF 1992

DR. KAKONGE:.....PLAINTIFF

VERSUS

CHRISTINE BITABEIHO:.....DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING:-

The plaintiff in this case brought an action against the defendant seeking orders for the award of the general and special damage for the unlawful detention of his vehicle. He also prayed for a declaration that motor vehicle registration number UPX 135 Mitsubishi Toyota was the property of the plaintiff. During the course of the trial when the plaintiff purported to tender in evidence a photostat copy of a document under S.63 of the Evidence Act which document he said was forged alleging sale by the plaintiff to the defendant's late husband that was objected to by the defence. Hence this ruling to resolve the matter.

Mr. Winyi the learned counsel appearing for the defendant submitted that notwithstanding the circumstances under which the marked annexure "E". The circumstances under which they obtained it have to be considered. Kakonge (the plaintiff) was alleged to have received a photostat copy from him in September 1992. He was wondering whether photostat copy he is alleged to have received from the counsel was the same copy. The plaintiff says there was an agreement annexure "C" and the defendant said there was an agreement between him and the plaintiff. Allegations of fraud have been made. They could not just admit section 63 of the Evidence Act (Cap 43) as that could cause a lot of injustice. They felt annexure "E" having been annexed to the plaint he saw no reason why the same should be admitted as an exhibit. He

submitted that he wanted the admission of Annexure “E” to be stayed and be left for observation only.

In reply Mr. Muhwezi submitted that it is properly provided under the law that such document could be admitted as secondary evidence. The defendant and his lawyer were not denying that they gave the document to the plaintiff. If there was any original at all it was in the defendant’s possession. So that the photostat copy qualified to be tendered in evidence. It was irrelevant that the document is an annexure to the plaint. It is an annexure to give general picture as what case was going to be brought up. The plaintiff wished to tender in evidence to prove the case in the pleadings and not for merely observation. It is irrelevant that the annexure “C” had been agreed upon and that therefore there was no need of putting in annexure “E”. The fact that both of them are crucial and they are the gist of this case. It is therefore of evidential value that annexure ‘E’ be accepted as an exhibits. He prayed that the objections by his learned friend be rejected and dismissed with costs.

The law provides that documents must be proved by primary evidence but there is exception to that law where secondary evidence may be given of the existence, condition or contents where for instance where the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved see section 62 r 63 (a) of the Evidence Act Cap 43.

However under section 64 of the same Act secondary evidence of the contents of document referred to in section 63(a) 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 is, or to his advocate such notice to produce it as is prescribed and if no notice is prescribed then such notice a court considers reasonable in the circumstances of the case, provided that such notice shall not be required in order to tender secondary evidence admissible in any of the following cases, or in any other case in which the courts thinks fit to dispense with it Viz

a.....

b. When from the nature of the case the adverse party must know he will be required to produce it.

c. When it appears or proved that the adverse party has obtained the original by fraud or force.

However J.S. Henderson on the law of Evidence 20th Edition page 4 to 15 had this to say about secondary evidence. "It is admitted in cases where the principle which excludes it namely, the supposed existence of better evidence behind, which it is in the power of the party to produce does not apply. It is admissible if ground be laid for it by proving that better evidence cannot be obtained Rainy Vs. Bravo LR UPC 287. In when any written instrument is in the possession or power of the opposite party secondary evidence of its contents is admissible without previous proof of a notice to produce the original R vs. Elworthy LR ICC 103, 37LJMCB. The purpose of this notice is to give the party an opportunity to produce it if he pleases Dwiyar Vs. Collins 21LJ EX 225 7 EX 639, where however from the nature of the proceedings the party in possession of the instrument necessarily has notice that he is to be charged with possession as in the case of trover for a bond a notice to produce is not necessary. **HOW vs. HALL 14 EAST 274, Scott vs Jones 4 Taunt S65.**"

In the instant case the document which the plaintiff is desirous to tend in evidence is a photostat copy Annexure "E" which is an agreement to the effect that the plaintiff transferred the interest of his vehicle u the defendants counsel and argued that the document was not written by him. It was a fraud and that it is reflected in his pleadings.

In his written statement of defence the defendant averred that he admitted the contents of paragraphs 3 & 4 of the plaint in as far as that the plaintiff sold the defendant's husband the said vehicle the purchase price paid in full and property interest there in passed vide annexure "E" to the plaint, the rest of the allegations were denied and the plaintiff shall be put to strict proof thereof. From what has transpired the original document appears to be in the possession of the defendant's counsel which is the adverse party in this case and although it is mandatory that notice to produce the original document Annexure "E" must have been given to the plaintiff previously but looking at the nature and circumstances of this case the defendant must have known that he would be required to produce and or prove the original document. More so specially where the plaintiff then alleged that the document was obtained by fraud whereas the defendant insisted that annexure was a genuine in the circumstances previous notice necessary to be given to the defendant before secondary evidence of Annexure "E" could be admitted was

in my humble opinion rightly dispensed with by the plaintiff. I do not agree with Mr. Winyi that since Annexure E has been annexed to the plaint it should not be admitted in evidence. It is trite law that evidence must be consistent with pleadings and the court is not permitted to reach a decision based a ground which is not pleaded. See **Captain Harry Grandy vs. Gaspair Air Charles Ltd (1955—1956) XII EACA P 139.** The plaintiff was justified in tendering the photostat copy Annexure E in order to prove what was in the pleadings. I do not also subscribe to the submission by the learned counsel appearing for the defendant that since the agreement annexure “C” was admitted by the defendant therefore annexure “E” should not be tendered in evidence. Both Annexure “E” & “C” represent two different situations. Annexure C as pointed out earlier on was an agreement between the plaintiff and the defendants husband permitting the later to hire or rent the plaintiff’ S vehicle for a stipulated period whereas annexure “E was a complete transfer of the plaintiff’s vehicle to the defendant’s husband after some goods consideration as was alleged in the said document. It defeats my imagination therefore when Mr. Winyi submitted that there will be some injustice cause to the defendant when Annexure E would be received in evidence. I do not see any injustice here since all that the plaintiff was trying to do was to lead evidence to prove his case.

From what has been explained above the photostat copy Annexure E is admissible in evidence and the preliminary objection by Mr. Winyi therefore that the said document is inadmissible in evidence is overruled with costs.

I. MUKANZA

JUDGE

17.3.1993.