

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 85 OF 2020**

**AFRISA CONSULTING LIMITED.....PLAINTIFF**

**VERSUS**

**ALVIC BUILDERS TANZANIA LIMITED.....DEFENDANT**

Date of Last Order: 25/08/2021

Date of Ruling: 01/09/2021

**RULING**

**MKEHA, J.**

The present ruling results from preliminary points of objection raised by Mr. Masatu learned advocate for the defendant. The objections are aimed at inviting the court to hold that an Investment Agreement which the plaintiff's 2<sup>nd</sup> witness prayed to tender into evidence is inadmissible. The objections are to the following effect:

That, the said document is not stamped in terms of the provisions of the Stamp Duty Act.

That, the said agreement was not properly executed as per section 39 of the Companies Act which requires a common seal or stamp and that the

agreement ought to be witnessed by a Director and Company Secretary or two Directors. According to Mr. Masatu learned advocate, none of the two options was compiled with, in execution of the said document. The other objection is to the effect that the document sought to be tendered is a photocopy which contravenes the provisions of Section 66 of the TEA. According to Mr. Masatu learned advocate, issuance of notice to produce by the plaintiff's advocate could not assist the plaintiff in circumstances whereby conditions listed under section 67 of the TEA had not been fulfilled. The learned advocate submitted that, there was nothing from the witness suggesting that the original was in control or power of the defendant. The learned advocate cited decisions in **Nitynanda Roy Vs Rashbehari Roy** of Calcutta Court, AIR 1953 Cal 456 and **Engen Petroleum Tanzania Limited Vs Wilfred Lucas Tarimo t/a Sango Petrol Station** Commercial Case No. 75 of 2010.

Mr. Kyashama learned advocate submitted in reply that, in terms of the principle of overriding objective the document ought to be admitted. Reliance was put on the decision in **Arusha City Council & Others Vs. Ms. MIC (T) LIMITED**, CIVIL CASE No. 45 of 2018 (H) DSM. The learned advocate invited the court to overrule the first objection.

As to the 2<sup>nd</sup> objection the learned advocate was of the opinion that the same had nothing to do with admissibility but weight to be attached to the said exhibit after admission of the same.

The learned advocate submitted in respect of the 3<sup>rd</sup> objection that section 68 does not support, Mr. Masatu's objection. He urged the court to rely on section 95 of the CPC in admitting the said exhibit. Mr. Masatu's rejoinder was reiteration of what had been submitted in chief.

Regarding failure to stamp the agreement, it is the holding of this court that the said anomaly cannot be overemphasized as to lead to a conclusion that failure to adhere to the provisions of the Stamp Duty Act in the manner explained by Mr. Masatu necessarily leads to inadmissibility of a documentary exhibit. The said anomaly which is conceded by the learned advocate for the plaintiff can be rectified by ordering the offending party to pay the fees chargeable and thereafter proceed with the matter as if the document did not suffer from the said infirmity. See: **ELIBARIKI MBUYA VS AMINA ABEID (2000) TLR 122**. I therefore overrule the first objection for being unmeritorious.

Regarding the 2<sup>nd</sup> objection, Mr. Masatu had no indication that the 2<sup>nd</sup> plaintiff's witness was not a company Director or that what appears on the documents sought to be tendered is not his signature. Neither was there a claim from Mr. Masatu that the signatory was not authorized to enter into the agreement he entered into on behalf of the plaintiff. That being the position, I am unable to uphold the second objection for reasons offered by Mr. Masatu in his objection regarding non-compliance of section 39 of the Companies Act. The 2<sup>nd</sup> objection is overruled for having no merit.

Mr. Kyashama learned advocate has invited me to admit secondary evidence without giving reasons as to the whereabouts of the original as required by the law. Mr. Masatu has urged the court to decline accepting Mr. Kyashama's invitation for failure to fulfill conditions listed under section 67 of the TEA. Mr. Kyashama desisted from commenting on failure of the 2<sup>nd</sup> plaintiff's witness to state in his statement the whereabouts of the original document which was in his possession presumably when he gave his witness statement.

The principle is, secondary evidence of an ordinary document is admissible only when the party desirous of admitting it has proved that he has no possession or control of it and further that he has done what can be done to procure the production of it. He has to account for non production in one of the

ways indicated under section 67 of the TEA. The witness' statement in the instant case has nothing to that effect. I therefore hold the document inadmissible.

See: Ruling on a similar objection in **ENGEN PETROLEUM TANZANIA LIMITED VS WILFRED LUCAS TARIMO t/a SANGO PETROL STATION**, Commercial Case No. 75 OF 2010, Mwambegele, J (as he then was).

For the foregoing reasons, I sustain the 3<sup>rd</sup> ground of objection and thereby reiterate holding that, secondary evidence sought to be tendered is inadmissible.

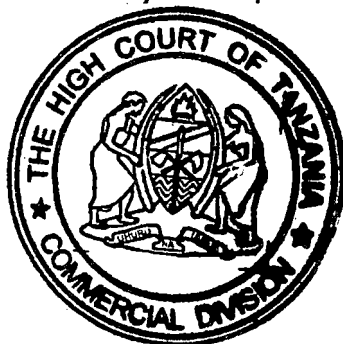
Dated at Dar es Salaam this 1<sup>st</sup> day of September, 2021.

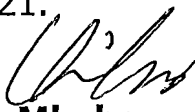
  
**C.P. Mkeha**

**Judge**

**01/09/2021**

**Court:** Ruling is delivered in the presence of the parties' advocates in open court on this 1<sup>st</sup> day of September, 2021.



  
**C.P. Mkeha**

**Judge**

**01/09/2021**