

**IN THE HIGH COURT FOR ZANZIBAR
HOLDEN AT TUNGUU
CIVIL CASE NO. 49 OF 2017**

1. UNITED AFRICAN FEEDER LINE (U.A.F.L) PLAINTIFFS
2. ZANZIBAR SHIP SURVEY AND
CONSULTANCY LIMITED

VERSUS

1. SAHAD INVESTMENT COMPANY LIMITED DEFENDANTS
2. RAJAB MWINYI HAJI
3. VEGA STAR

RULING

DATE OF RULING: 15.5.2023

BEFORE: ISSA, A. A., J

This ruling arises out of the objection raised by the plaintiff's advocate with respect to the admission of a bank statement of the 1st defendant from NMB Bank. The background to the case is that the 1st plaintiff is the maritime shipping company established under the law of Mauritius and the 2nd plaintiff is her agent in Zanzibar. The plaintiffs claims from the 1st defendant payment of US\$ 241,760 as balance for the Cost, insurance and Freight (CIF) for the shipment service of metric tons 3360 of cements packed in 138 containers ordered by the 1st defendant from Karachi, Pakistan to Zanzibar port. The 1st defendant was supposed to make the payment before the delivery of the cargo, but with the assistance from the 2nd and 3rd defendants, she was able to take out the shipment from the port without paying the said amount. Hence, a suit to recover the said amount and damages was filed against the defendants.

In the hearing of this case the plaintiffs were represented by learned advocates Mr. Rajab Ngwatu and Mr. Saleh A. Said, the 1st defendant was represented by learned advocate Captain Ibrahim Mbiu Bendera while the 2nd and 3rd defendants were represented by learned advocate Mr. Rajab A. Rajab.

When the managing director of Sahad Investment Ltd, the 1st defendant, Yussuf Moh'd Yussuf was testifying in court he tendered in evidence the bank statement of the NMB purporting to prove that through Telegraphic Transfer (TT) he paid an amount of money to Eastborne Maritime Ltd. The admission of the said bank statement was objected by Mr. Ngwatu as the exhibit did not meet the requirement of section 73 of the Evidence Act. He said the bank statement came from device.

Hence, it should be accompanied by affidavit which will confirm the stability of the device and confirm that the computer was working regularly and had no problem. He said this is confirmed by a certificate or affidavit from the officer responsible. He cited section 18(1), (2) and (4) of the Electronic Transaction Act, Cap. 242 of the Laws of Tanzania and said that provision explained clearly the condition required to be complied with before a document is received. In addition, he said the officer of the bank is required to confirm by issuing a certificate. He prayed for the bank statement not to be received in evidence.

Captain Bendera, on the other hand, made a short reply saying that the evidence produced is not an electronic transaction. It is a copy of a bank statement. It is a secondary evidence and section 71 of the Evidence Act is applicable. He prayed for the evidence to be admitted.

Due to the complexity of the issue in question; the court asked the learned advocates to make submission on the issue whether the bank statement is an electronic record or not. Mr. Ngwatu submitted first and said section 3 of the Evidence Act has clearly said what is an electronic record; it is a record created by electronic means, and in the present case we are talking about a computer. He said a bank's statement is an electronic record as it is an output from electronic device. Therefore, in order to be admitted it must comply with section 73 of the Evidence Act and section 18 of Electronic Transaction Act.

Mr. Rajab, on behalf of the 2nd defendant did not say much. He submitted that the bank statement is an output from the computer of the NMB Bank. Therefore, since there is no dispute on that it should follow the procedure.

Captain Bendera, the learned advocate for the 1st defendant submitted that what was said lacked merit as section 3 of the Evidence Act was not properly interpreted. The bank statement was not sent or received electronically, it was handed to the 1st defendant. It is the same as a document which was written in a computer and then signed. It is a normal document and not an electronic document. With respect to section 73 he submitted that this is a copy of the bank statement which is signed and stamped. Hence, it cannot be said to be an electronic evidence.

The issue in question calls for interpretation of section 73 of the Evidence Act No. 9 of 2016, but before doing so a word should be said regarding the Electronic Transaction Act, Cap. 242 of the Laws of Tanzania. This Act was enacted to deal with electronic transaction and it was intended to be applicable in both Mainland Tanzania and Zanzibar. But it has not yet been tabled in the House of Representatives in accordance with section 132 of the Zanzibar Constitution, 1984, hence, it is not applicable in Zanzibar. Therefore, our focus is on section 73 of the Evidence Act which reads:

"(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer herein referred to as the computer output shall be deemed to be also a document, if the condition mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated herein of which direct evidence would be admissible.

(2) The conditions referred to in subsection (1) of this section in respect of a computer output shall be the following:...

(3) N/A

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following:

- (a) identifying the electronic record containing statement and describing the manner in which it was produced;*
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; or*
- (c) dealing with any of the matters to which conditions mentioned in subsection (2) of this section relates;*

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities, whichever is appropriate, shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.

(5) N/A

(6) N/A

Section 73 as we have seen above started with a non-obstacle clause. It forms a complete code for the admissibility of electronic evidence; it does not depend on other provisions in its interpretation of the admissibility of the electronic evidence. Further section 73 (1) clearly stipulates that the provision deals with secondary evidence of the electronic evidence and not the original. The following words have been used: *"any information contained in an electronic record which is printed on a*

paper, stored, recorded or copied in optical or magnetic media produced by a computer herein referred to as the computer output".

Therefore, the conditions which were mentioned under subsections (2) to (6) are applicable to those secondary computer outputs and they are not applicable when the original is produced. For instance, when a laptop computer, a tablet, a cellphone is produced in court by a person using those devices there is no necessity of applying those conditions particularly in the case where a certificate is required under subsection (4). But when the computer output is produced which is a secondary evidence, the conditions stipulated in section 73 has to be satisfied before they are admitted in court.

The second question is what is an electronic record. Fortunately, section 2 has defined electronic record as follows:

"electronic records means a record created, generated, sent, communicated, received, or stored by electronic means."

There is no doubt that the bank statement from NMB is a record created, generated and stored by electronic means. Most of the banks nowadays, has a software in their computers (Bank operation system) in which all transactions made on a specific account are recorded. When a bank statement is demanded by a customer, the system will arrange the transactions and then generate the bank statement which will be printed and given to customer. Hence, a bank statement by any interpretation is an electronic record. The burning question is that whether before the bank statement is admitted in court is it required to comply with section 73.

Mr. Ngwatu and Mr. Rajab have argued in favour of complying with section 73 while Captain Bendera asks us to treat it as a normal documentary evidence. Hence, since it is a secondary evidence it should comply with section 71 of Evidence Act. Unfortunately, the argument of Captain Bendera does not hold water as bank statement has always been treated differently. In our laws we have Evidence (Banker's Book) Decree, Cap. 6 of the Laws of Zanzibar. This decree was enacted in 1949 and the long title reads: "A decree to amend the Law of evidence with respect to Banker's Book". This law was enacted to make special provisions with respect to banker's book. The banker's book was defined in section 2 as follows:

"banker's book" includes a ledger, day-book, cash book, account book and any other book used in the ordinary business of the bank".

The bank statement of today is equivalent to a copy of an entry in a banker's book. The decree enacted special provisions with respect to admission in evidence of a copy of an entry in a banker's book. These are section 4 and 5 which reads:

- "4 (1) A copy of any entry in a banker's book shall not be received in evidence under this Decree unless it be first proved that the book was at the time of the making of the entry in 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 may be given by a person who is, or is discharging the duties of a manager, sub-manager or accountant of the bank, and may be given orally or by an affidavit sworn before any commissioner for oaths or persons authorised to take affidavits.*
- 5 (1) A copy of an entry in a banker's book shall not be received in evidence under this Decree unless it be further proved that the copy has been examined with the original entry and correct.*
- (2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given orally or by an affidavit sworn before any commissioner for oaths or persons authorised to take affidavits."*

Therefore, unlike other secondary evidence which were covered under section 63 and 65 of Evidence Decree, Cap. 5 of the Laws of Zanzibar (now section 69 and 71 of Evidence Act), special provisions were made with respect to the admission of copy of an entry in a banker's book. As we have seen, the in above provisions conditions have been stipulated which are required to be complied before the copy of the entry is admitted in court. Further, a proof was to be provided by officers of the bank either orally or through an affidavit. In addition, further proof either orally or through affidavit was also required from the person who compare the copy with the original.

Coming back to the issue in question which is the admission of the bank statement, this Court is of the view that although Evidence (Banker's Book) Decree has not been repealed, but the passage of time and the changes of technology in banking operations, the decree has become obsolete or redundant. Further, as we have explained above that the bank statement and how it is generated conforms to what we call "electronic record". Therefore, bank statement should be read into the definition of electronic record. Furthermore, as we have already mentioned section 73 is a code by itself in the matter of admissibility of electronic evidence. Hence, the admission of electronic evidence including the bank statement should comply with section 73.

Therefore, the bank statement which has been tendered by the 1st defendant has not complied with section 73. Hence, the court refuses to admit the same and it is returned to the 1st defendant who is advised to comply with section 73 of the Evidence Act.

In case of difficulties in getting the certificate our laws contain various provisions which can be used in facilitating the party in obtaining the certificate. These provisions include section 181 of the Evidence Act. Order XIX Rule 6 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar and Section 132 of the Criminal Procedure Act No. 7 of 2018 which empower the court to order for the production of any document or thing during the course of the trial. If the competent person/entity refuses to grant the certificate the party who wishes to rely on the electronic record can apply to the court for an order to produce the requisite certificates.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
15/5/2023

COURT

This ruling was delivered in open court on this 15/5/2023 in the presence of Captain Ibrahim Bendera, the learned advocate for 1st plaintiff and Ms. Mwanaidi Abdalla, the learned advocate for 2nd and 3rd defendants and in the absence of the advocate for the plaintiffs.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
15/5/2023

I certify that this is a true copy of original

DEPUTY REGISTRAR
HIGH COURT, ZANZIBAR

