IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

COMMERCIAL CASE NO.10 OF 2008

1. LAZARUS MIRISHO MAFIE ..... 1ST PLAINTIFF
2. M/S SHIDOLYA TOURS & SAFARIS ..... 2ND PLAINTIFF

VERSUS

ODILO GASPER KILENGA Alias MOISO GASPER ..... DEFENDANT

Date of last order: 27.05.2010

Date of final submissions: 30.07.2010

Date of ruling: 01.10.2010

RULING

MAKARAMBA, J.:

This is a ruling on a preliminary objection on a point of law the Defendant's Counsel, Mr. Albert Msando raised in this Court on the 27th day of May 2010 in the course of hearing of this suit that some e-mail the Plaintiffs' Counsel sought to tender in evidence through the 1st Plaintiff was inadmissible. On that day, the Plaintiff's Counsel, Senior Counsel Mahatane, while leading the 1st Plaintiff (PW1) in testimony in chief, sought to tender in evidence e-mail containing statements the 1st Plaintiff claim the Defendant made and which the 1st Plaintiff allege to be defamatory. Following the objection, this Court, after hearing brief oral submissions

payments to ***Rockjumper Birding Tours*** company. By necessary implication, the Plaintiff allege further, the Defendant called the Plaintiffs dishonest persons and thieves who wantonly steal from clients, something the Plaintiff claim that it is all false. The Plaintiffs further allege that the Defendant published the said false e-mail statement to one KAREN ERASMUS and also to one ADAM in South Africa, as a result of which the Plaintiffs claim to have suffered a great deal of damage not only to their personal reputation and character but also to their tourist business generally. The Plaintiffs' claim against the Defendant is for certain sums of monies as special and general damages resulting from the alleged defamatory e-mail statement which the Plaintiffs claim was sent, made and published by the Defendant. It is the admissibility of the alleged defamatory e-mail statement which the preliminary objection the Defendant's Counsel raised concerns. The main contention of the Defendant's Counsel is that the e-mail containing the alleged defamatory statements being part of electronic evidence is not admissible in evidence in civil proceedings and should therefore be rejected.

The point of law involved in the preliminary objection is that an e-mail being part of electronic evidence is not admissible in civil proceedings. This point of law is a novel one as it has not been dealt with previously by our courts. As rightly submitted by the Defendant's Counsel, the admissibility of electronic evidence in civil proceedings is not yet part of our laws. A novel legal issue as it is obviously creates some challenges to courts which necessarily call for judicial innovation as it holds a stake in the development of the law in so far as the admissibility of electronic evidence

evidence, and the decision of this Court in the case of **THE TRUST BANK OF TANZANIA VS LE-MARSH ENTERPSRISES LTD. AND TWO OTHERS, Commercial Case No.4 of 2000** (unreported), which dealt with the issue "*whether or not a computer print-out is a banker's book under the Evidence Act, 1967,*" there is dearth of statutory provisions and case law on admissibility of electronic evidence in civil proceedings generally.

The first task of this Court however, is to examine the existing provisions in our law on admissibility of documentary evidence and construe them broadly if possible in order to establish a set of rules to guide admissibility of electronically stored information generated for use in court of law as evidence in civil proceedings. The Defendant's Counsel in his submissions mentioned the amendment to the Evidence Act, 1967, brought about by the *Written Laws (Miscellaneous Amendments) (No.2) Act of 2006]*, dealing with what the Plaintiffs' Counsel see to be a "restrictive approach" as it concerned itself only with electronic evidence and records in the banking business under the Banker's Books in the Evidence Act, 1967. This approach, restrictive as it is, in the Plaintiffs' Counsel opinion was most probably ushered in as a result of judicial advice His Lordship Justice Nsekela of the High Court of Tanzania (as he then was) gave in **THE TRUST BANK OF TANZANIA VS LE-MARSH ENTERPSRISES LTD AND TWO OTHERS, Commercial Case No.4 of 2000** (unreported), a case which the Defendant's Counsel also cited in his main submissions. The Plaintiffs' Counsel on his part however, went further to explore a subsequent amendment to the *Evidence Act*, 1967 brought

business. The further argument by the Defendant's Counsel is that even with that, it is only upon meeting the criteria set out in the new section 78A (1) inserted by section 36 of the Amending Act No. 2/2006, which provides as follows:

> *"36. The principal Act is amended by adding immediately after section 78 the following new 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 the accuracy of such print out, and when such print out is supported by a proof stipulated under subsection (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." (the emphasis is of the Defendant's Counsel).*

The Defendant's Counsel having submitted on the shortcomings in the existing law on the admissibility of electronic evidence in civil proceedings, proceeded to explore case law on the subject. The Defendant's Counsel managed to unearth so far the only case decided by our courts which is closer to the situation at hand, that of **THE TRUST BANK OF TANZANIA VS. LE-MARSH ENTERPSRISES LTD AND TWO OTHERS, Commercial Case No.4 of 2000** (unreported), where the Commercial Division of the High Court of Tanzania dealt with the issue "*whether or not a computer print-out is a banker's book under the Evidence Act, 1967.*" The Defendant's Counsel however distinguished this case with the issues at hand and submitted that they do not bear any

relation to admissibility of electronic evidence in other civil proceedings. The Plaintiff's Counsel wondered if this does not amount to creating an absurdity, which in any event needs to be cured by courts, suggesting that it is within the boundaries of the wisdom of the Court to extend the same terms and conditions to civil proceedings for admissibility of electronic evidence as in criminal proceedings, where the burden of proof is on a ***balance of probabilities,*** a much lighter burden than in criminal proceedings where it is ***beyond any reasonable doubt***. In buttressing further his point the Plaintiffs' Counsel argued that if the legislature has already enacted a law to admit electronic evidence in criminal matters, where the burden of proof is much higher than in civil proceedings, then it will be within the boundaries of its wisdom if this Court extends to civil proceedings the same terms and conditions for admissibility of electronic evidence as for criminal proceedings. In the considered opinion of the Plaintiffs' Counsel, the Court will not be laying down for the first time a new rule as the Defendant's Counsel asserts, but it will be only ***extending*** to civil proceedings "*that which the legislature has already done in respect of criminal proceedings.*" Otherwise there is no legal logic, in the opinion of the Plaintiffs' Counsel, why the legislature did not include the admissibility of electronic evidence in civil proceedings in section 33 of the *Written Laws (Miscellaneous Amendments) Act [Act No.15 of 2007*, an absurd lacunae unreasonably left by the legislature, which is imperative for the Courts to plug given the overwhelming and universal use of computers, e-mails, electronic storage of information, electronic print-out etc., the Plaintiffs' Counsel very happily and confidently surmised.

with admissibility of electronically stored information. In that case, Judge Grimm also realized that in the United States of America cases abound regarding the discoverability of electronic records, but there is lack of comprehensive analysis of the many interrelated evidentiary issues associated with electronic evidence.

As I intimated to earlier, the task of this Court is to analyze and broadly construe the existing laws in order to establish court rules on admissibility of electronic evidence in civil proceedings. In the considered opinion of the Defendant's Counsel, given the absence of any express authority in statutory provisions in an Act of Parliament or precedent, the present case is not one of those situations where a court may lay down a rule for the first time. The Defendant's Counsel argued further that there is so much at stake involved if electronic records are received in evidence in civil proceedings without there being in place acceptable rules and procedures for their admissibility. The Plaintiffs' Counsel much as he seems in a way to appreciate the view by the Defendant's Counsel on the stakes involved in admitting in evidence electronically stored information in civil proceedings, which stakes although the Defendant's Counsel referred to them without any further elaboration, they relate particularly to other primary rules of evidence such as the rules on hearsay, rules of authenticity; identity of the author of the document or information etc.

The Plaintiff's Counsel however, is of the strong view that the present case is a fit one for the courts to lead the way by filling the lacunae in the existing laws on admissibility of electronic evidence in civil proceedings by extending to civil proceedings that "*which the legislature has already done*

Evidence is Admissible in Court" where the learned author discusses some provisions in the Kenyan Evidence Act particularly section 65 which allows the admittance of computer print outs for use in trial and section 65(6) which provides for standard of authentication needed before electronic evidence can be admitted.

The Defendant's Counsel argues that one of the most critical issues courts will be faced with in relation to admitting in evidence electronic evidence such as e-mail is its authenticity. According to the Defendant's Counsel any person can easily log into someone's e-mail account and create documents, even bearing a company's letter head and the president's signature. The Defendant's Counsel insisted that the Tanzania Evidence Act, 1967 does not provide for the admissibility of electronic records and there are no standards or rules set for the admissibility of such evidence in our law. The Defendant's Counsel argued further that the Plaintiffs have not even on their own motion before filing the suit or before tendering the alleged emails in evidence, tried to establish and adhere to the standards followed in other jurisdictions so that issues such as hearsay, authenticity, relevancy, unfair prejudice, and whether the emails are original documents or duplicates would not arise.

The Commercial Division of the High Court of Tanzania in **Commercial Case No.4 of 2000** between **TRUST BANK TANZANIA LTD AND LE-MARSH ENTERPRISES LTD**, (unreported) has already developed the law by recognizing computer print outs as evidence, which is now part of our law following amendments done to the Evidence Act. The issue in that case was *whether or not a computer print-out is a banker's*

Furthermore, currently in England, the substantive provisions in the English Civil Evidence Act of 1995 allow the admission of copies of any degree of remoteness from the original by providing as follows:-

"8.--(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved–
(a) by the production of that document, or
(b) ***whether or not that document is still in existence, by the production of a copy of that document or of the material part of it, authenticated in such manner as the court may approve.***
(2) ***It is immaterial for this purpose how many removes there are between a copy and the original.***

9.--(1) ***A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.***
(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.
For this purpose--
(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and
(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.
(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.
(4) In this section–
"records" means records in whatever form;
"business" includes any activity regularly carried on over a period of time, whether for profit or not, by anybody (whether corporate or not) or by an individual;

Tanzania is still highly unsatisfactory. The main task for this Court presently is therefore to develop the law a step further by setting out guiding standards for recognizing admissibility of electronically stored evidence in civil proceedings. It is worth noting that this Court in **Commercial Case No.4 of 2000 between TRUST BANK TANZANIA LTD AND LE-MARSH ENTERPRISES LTD,** unreported) has already established judicially that a computer print-out is a banker's book under the Evidence Act, 1967, which has now been legislated and therefore part of our law. In that case, this Court embarked on a journey of statutory interpretation by appreciating first that the term "*bankers book*" was not defined anywhere in the Evidence Act, 1967. Different however from the present case the term "*document*" is already defined in the Evidence Act, 1967. The first task for this Court is therefore to establish whether a computer print-out of statements contained in an e-mail is a document in the context of our law of evidence.

The learned author Tania Correia, a Legal Consultant in a web article titled "***Legal Admissibility of Documentary Evidence in Civil and Criminal Proceedings***" (downloaded on 27/09/2010 at http://www.ssrltd.com/WhitePapers/Legal%20Admissibility%20of%20Documentary%20Evidence%20in%20Civil%20and%20Criminal%20Proceedings.pdf), gives some quite insightful thoughts on the meaning of the term "*document*" and makes a distinction between admissibility and weight of evidence. In the said article, the learned author kicks off the discussion by citing a very old English case of **R. V. DAYE (1908) 77LJK8 659** where it was stated that:

Bridge L.J. referred to at page 82 of **BARKER V. WILSON [1980] 2 All E.R. 80**, cited in **Commercial Case No.4 of 2000 between TRUST BANK TANZANIA LTD AND LE-MARSH ENTERPRISES LTD,** (unreported), as "*made by any of the methods which modern technology makes available*", had come into existence. An e-mail form part of documents made by modern technology. Contrary to the view entertained by the Defendant's Counsel that the business of creating a rule on admissibility of electronically stored information such as an e-mail should be left to the legislature since this kind of rule has not been done before, I am alive to the words of Lord Denning in **PACKER V PACKER [1954] P 15** that:

> "*...If we never do anything which has never been done before, we shall not get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.*"

In the present case, the duty of this Court is to "*construe*" the words in the existing laws and then to "*extend*" that construction to cover electronically stored information. The idea is not as the Plaintiffs' Counsel would wish this Court to do to extend to civil proceedings rules on admissibility of electronic evidence developed for criminal proceedings, but to construe the term "*document*" in section 3 of the Tanzania Evidence Act, 1967 [Cap.6 R.E. 2002] to encompass an e-mail for purposes of admissibility in civil proceedings. In so doing, this Court will be fulfilling one of its basic and noble duties under Article 107A of the Constitution of Tanzania as the last arbiter of rights and custodian of the laws. As was

course to the general evidentiary rules on documentary evidence found in Part III of the Evidence Act, [Cap.6 R.E. 2002].

According to section 3 of the Evidence Act, 1967 the term "*document*" includes among other things "*writing*", "*every recording upon any tangible thing*" and "*any form of communication, which may be used for the purpose of recording any matter*" provided that "*such recording is reasonably permanent and readable by sight.*" An e-mail is also a writing containing electronically recorded information. The only difference between paper documents and electronic documents however, is that, whereas the former is "reasonably permanent" and readable by sight, the latter may not be reasonably permanent although it is readable by sight. This is where the requirement for authentication comes in. An e-mail being an electronically produced document forms part of computer records capable of being retrieved from a computer database containing relevant information. The need for authentication also comes in particularly in terms of need to prove reliability of the equipment and mode of entering data. An e-mail being an "electronically produced *document*" within the meaning assigned to that term under section 3 of the Evidence Act, 1967, in my view much as issues about its admissibility in evidence in civil litigation may arise, the standards to be set by courts as to authentication go more to the weight to be attached by this Court to the e-mail in the event it is admitted in evidence.

The existing rules in our law of evidence on admissibility of documents in my view suffice to cover electronically generated information without requiring the intervention of Parliament. The only thing which is missing is standards for determining authenticity. As for standards on

in some fraud actions, where this may not be the case for example, if a signature is at issue then it is obviously better to produce the original document rather than an electronic image or even a photocopy of it. In the present case arguments over the admissibility of the e-mail as electronically generated evidence can lead to investigations into the computer system which produced the paper on which the e-mail statements is produced, the method of its storage, operation and access control, and even to the computer programmes and source code used. It may also be necessary for the Plaintiffs to satisfy this Court that the information on the e-mail was stored in a "proper" manner.

The Defendant's Counsel has advanced arguments questioning the authenticity of the disputed e-mail which in my view is a tactic to discredit the e-mail as piece of evidence and make it inadmissible. It is therefore very important that the Plaintiff seeking to use the electronic information on the e-mail in this Court to have an ***audit trail***. The issues relating to authenticity which the Defendant's Counsel has raised in relation to computer generated records, in my view, would not have been a problem in these proceedings if the Plaintiffs had disclosed the evidence through the process of discovery, where the documents in the possession, power and control of the parties relating to the issues in dispute would have been exchanged. In the present case, the process of discovery did not take place. The Plaintiff simply annexed the disputed e-mail to the Plaint. It is common practice for parties in a civil suit to provide and exchange a list of documents and as such a document which is asserted on the list to be a copy is presumed to be a true copy unless its authenticity is specifically

United States Federal Rules of Evidence. The underlying concept under the Evidence Act, 1967 is relevancy of evidence to the facts in issue. In relation to electronic evidence a party seeking it to be admitted in evidence has to lead evidence sufficient to support a finding that the matter in question is what its proponent claims. Authentication of electronically stored information may require greater scrutiny than that required for the authentication of "*hard copy*" documents but this does not mean abandoning the existing rules of evidence when doing so. In general, electronic documents or records that are merely stored in a computer raise no computer-specific authentication issues. If however, a computer processes data rather than merely storing it, as is the case presently where there is a computer print out of e-mail statements, authentication issues may arise.

In **JACK R. LORAINE AND BEVERLY MACK VS. MARKEL AMERICAN INSURANCE COMPANY Civil Action No.PWG-06-1893,** Judge Grim revisited the relevant rules in the US Federal Rules on Evidence and made the following observation:

> *"Although Rule 901(a) addresses the requirement to authenticate electronically generated or electronically stored evidence, it is silent regarding how to do so. Rule 901(b), however, provides examples of how authentication may be accomplished. It states:*
> *(b) Illustrations.*
> *By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming to the requirements of this rule:*
> *(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.*

According to Judge Grimm, the ten methods identified by Rule 901(b) of the US Federal Rules of Evidence are non-exclusive citing the FEDERAL RULES ON EVIDENCE 901(b) Advisory Committee's has noted that "*The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law*"; also citing WEINSTEIN at §901.03[1] that "*Parties may use any of the methods listed in Rule 901(b), any combination of them, or any other proof that may be available to carry their burden of showing that the proffered exhibit is what they claim it to be.*"

Judge Grimm having revisited the relevant rules in the US Federal Rules of Evidence on electronically stored information (ESI) remarked that "*there is no form of ESI more ubiquitous than e-mail.*" As was in that case, it is the category of ESI at issue in the present case. According to Judge Grimm:

> "*Although courts today have more or less resigned themselves to the fact that "[w]e live in an age of technology and computer use where e-mail communication now is a normal and frequent fact for the majority of this nation's population, and is of particular importance in the professional world, ...Perhaps because of the spontaneity and informality of e-mail, people tend to reveal more of themselves, for better or worse, than in other more deliberative forms of written communication. For that reason, e-mail evidence often figures prominently in cases where state of mind, motive and intent must be proved. Indeed, it is not unusual to see a case consisting almost entirely of e-mail evidence provided the following guidance in establishing the authenticity of electronically stored information:*"

Rule 901(b)(4) of the US Federal Rules of Evidence is one of the most frequently used by Courts in the United States of America to authenticate e-mail and other electronic records. It permits exhibits to be authenticated or identified by "[*appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.*" Courts in the United States of America have recognized this rule as a means to authenticate ESI, including e-mail, text messages and the content of websites [See ***United States v. Siddiqui***, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (*allowing the authentication of an e-mail entirely by circumstantial evidence, including the presence of the defendant's work e-mail address, content of which the defendant was familiar with, use of the defendant's nickname, and testimony by witnesses that the defendant spoke to them about the subjects contained in the e-mail*). Rule 901(b)(9) of the US Federal Rules of Evidence recognizes one method of authentication that is particularly useful in authenticating electronic evidence stored in or generated by computers. It authorizes authentication by "*evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.*" In addition to the non-exclusive methods of authentication identified in Rule 901(b), Rule 902 of the US Federal Rules of Evidence identifies twelve methods by which documents, including electronic ones, may be authenticated without extrinsic evidence, commonly referred to as "self-authentication."

also to be specific in presenting the authenticating facts and, if authenticity is challenged, should cite authority to support the method selected.

(3) The Hearsay Rule

The other hurdle which must be overcome when introducing electronic evidence is the potential application of the hearsay rule. Hearsay issues are pervasive when electronically stored and generated evidence is introduced. According to PAUL R. RICE, ***ELECTRONIC EVIDENCE: LAW AND PRACTICE***, 262 (ABA Publishing 2005):

> *"Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted by the out-of-court declarant. It is offered into evidence through the testimony of a witness to that statement or through a written account by the declarant. The hearsay rule excludes such evidence because it possesses the testimonial dangers of perception, memory, sincerity, and ambiguity that cannot be tested through oath and cross-examination.")*

There are five separate questions that must be answered:

(i) *does the evidence constitute a statement;*
(ii) *was the statement made by a "declarant";*
(iii) *is the statement being offered to prove the truth of its contents;*
(iv) *is the statement excluded from the definition of hearsay; and*
(v) *if the statement is hearsay, is it covered by one of the exceptions to the hearsay rule.*

It is critical to conduct a proper hearsay analysis by considering each of the above questions.

definition of hearsay. Judge Grim commented that "*given the near universal use of electronic means of communication, it is not surprising that statements contained in electronically made or stored evidence often have been found to qualify as admissions by a party opponent if offered against that party*" citing ***Siddiqui case***, 235 F.3d at 1323 (*ruling that e-mail authored by defendant was not hearsay*).

(4) The original writing rule

When counsel intends to offer electronic evidence at trial he must determine whether the original writing rule is applicable, and if so, the Counsel must be prepared to introduce an original, a duplicate original, or be able to demonstrate that one of the permitted forms of secondary evidence is admissible. In the present case, the Plaintiffs' Counsel did not address the original writing rule, despite its obvious applicability given that the e-mail was closely related to the controlling issue in this suit which is defamatory statements contained in the e–mail which the Plaintiffs allege were published by the Defendants and therefore prove of the contents of the e-mail will be an issue. It has been acknowledged that the original writing rule has particular applicability to electronically prepared or stored writings, recordings or photographs. Judge Grim cited one respected commentator who observed as follows:

> *"Computer-based business records commonly consist of material originally produced in a computer (e.g. business memoranda), data drawn from outside sources and input into the computer (e.g. invoices), or summaries of documents (e.g. statistical runs).*

(5) The need to balance its probative value against the potential for unfair prejudice, or other harm.

According to Judge Grimm, when a lawyer analyzes the admissibility of electronic evidence, he or she should consider whether it would unfairly prejudice the party against whom it is offered, confuse or mislead the jury (or assessors in this part of the world), unduly delay the trial of the case, or interject collateral matters into the case. Courts are particularly likely to consider whether the admission of electronic evidence would be unduly prejudicial in the following circumstances:

> *(1) When the evidence would contain offensive or highly derogatory language that may provoke an emotional response;*
>
> *(2) When analyzing computer animations, to determine if there is a substantial risk for mistaking them for the actual events in the litigation;*
>
> *(3) when considering the admissibility of summaries of voluminous electronic writings, recordings or photographs;*
>
> *(4) In circumstances when the court is concerned as to the reliability or accuracy of the information that is contained within the electronic evidence.*

I have endeavoured to outline in greater details the above the five hurdles discussed by Judge Grimm which any Counsel seeking to tender in evidence electronically stored information may face. Whether the e-mail as part of electronically stored information (ESI) is admissible into evidence is determined by a collection of five standards as outlined above which present themselves like what Judge Grimm referred to as "a series of

(5) Is the probative value of the e-mail substantially outweighed by the danger of unfair prejudice or other identified harm?

I consider the above standards to be the set court rules for guiding this Court in determining the admissibility of electronically stored information (ESI), which is not limited to e-mails only, but may encompass other forms of electronic evidence such as computer print outs, website messages etc.

Given the pendency by the Plaintiffs' to clear the hurdles in seeking the e-mail to be admitted in evidence using the standards as outlined by this Court above, this Court cannot at this stage and point in time, conclusively determine the preliminary objection. The trial will proceed with the examination in chief of PW1 from where it ended by the Plaintiffs' Counsel clearing the hurdles that present themselves in the five set standards for testing admissibility of electronically stored information as outlined in this ruling. I shall make no order for costs. It is accordingly ordered.

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R.V.MAKARAMBA

JUDGE

01/10/2010

Ruling delivered in Chambers this 1st day of October 2010 in the presence of Mr. Lazaro, I., and Mr. Lazaro, Mafie, the Plaintiff in person and in the presence of Mr. Odillo, Gaspar, the Defendant in person and in the absence of their Advocates.

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R.V. MAKARAMBA

JUDGE

01/10/2010

Word count: 9,841

hurdles to be cleared by the proponent of the evidence." Failure to clear any of these evidentiary hurdles means that the evidence will not be admissible.

The Plaintiffs must therefore consider the following standards rules:

(1) Is the e-mail relevant as determined under the Evidence Act, 1967 [Cap.6 R.E. 2002] (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be)?;

(2) If relevant under the Evidence Act, 1967 [Cap.6 R.E. 2002] as amended is it authentic in the sense that, can the proponent show that the e-mail is what it purports to be?

(3) If the e-mail is offered for its substantive truth, is it hearsay as defined under the rules in the Evidence Act, [Cap.6 R.E. 2002] as amended and if so, is it covered by an applicable exceptions to the hearsay rules under the Evidence Act, 1967 [Cap.6 R.E. 2002] as amended?;

(4) Is the e-mail that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the e-mail?; and

*The admissibility of computer-based records "to prove the content of writing" is subject to the best evidence rule... which generally requires the original of writing when the contents are at issue, except that a "duplicate" is also admissible unless a genuine issue is raised about its authenticity. A duplicate includes a counterpart produced by "electronic re-recording, which accurately reproduces the original." Courts often admit computer-based records without making the distinction between originals and duplicates [*WEINSTEIN at § 900.07[1][d][iv]."

It is apparent that the definition of "*writings, recordings and photographs*" in our Evidence Act includes evidence that is electronically generated and stored. Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form that the information ultimately assumes for useable purposes is words and figures. Hence, the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments. According to Judge Grimm, the following are circumstances in which secondary evidence may be introduced instead of the original:

(a) *whether the writing, recording or photograph ever existed in the first place;*

(b) *whether some other writing, recording, or photograph that is offered into evidence is in fact the original; and*

(c) whether "other" (i.e. secondary) evidence of contents correctly reflects the content of the writing, recording or photograph.

The second question that must be answered in the hearsay analysis is that a "*writing*" or "*spoken utterance*" cannot be a "*statement*" under the hearsay rule unless it is made by a "*declarant*", that is, a person who makes a statement. When an electronically generated record is entirely the product of the functioning of a computerized system or process, such as the "*report*" generated when a fax is sent showing the number to which the fax was sent and the time it was received, or an e-mail print out, there is no "*person*" involved in the creation of the record or the e-mail print out, and no "*assertion*" being made. For that reason, the record or e-mail print out is not a "*statement*" and cannot be hearsay.

The key to understanding the hearsay rule is to appreciate that it only applies to intentionally assertive verbal or non-verbal conduct, and its goal is to guard against the risks associated with testimonial evidence: perception, memory, sincerity and narration. Cases involving electronic evidence often raise the issue of whether electronic writings constitute "statements." Where the writings are non-assertive, or not made by a "person," courts in the United States have held that they do not constitute hearsay, as they are not "statements" [See ***United States v. Khorozian***, 333 F.3d 498, 506 (3d Cir. 2003)].

The third question that must be answered in determining if evidence is hearsay is whether the statement is offered to prove its substantive truth, or for some other purpose. Once it has been determined whether evidence falls into the definition of hearsay because it is a statement, uttered by a declarant, and offered for its substantive truth, the final step in assessing whether it is hearsay is to see if it is excluded from the

Judge Grimm discussed in detail the five distinct but interrelated evidentiary issues that govern whether electronic evidence will be admitted into evidence at trial or accepted as an exhibit, namely:

(1) ***Relevance***

The first evidentiary hurdle to overcome in establishing the admissibility of ESI is to demonstrate that it is relevant, as defined by Evidence Act, [Cap.6 R.E. 2002] as amended. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. It is important therefore for the proponent of the evidence to have considered all of the potential purposes for which it is offered, and to be prepared to articulate them to the court if the evidence is challenged.

(2) Authenticity

The party seeking an ESI to be admitted in evidence must provide authenticating facts for the e-mail and other evidence that the party wish to proffer in support of its case but not simply to attach the exhibits. Absence of authentication strips the e-mails of any evidentiary value because this Court can not consider them as evidentiary facts. The Plaintiff has to cure the evidentiary deficiencies. The Plaintiffs' Counsel needs to plan which method or methods of authentication that will be most effective, and prepare the necessary formulation, whether through testimony, affidavit, admission or stipulation. The proffering Counsel needs

Judge Grimm recognizing that not surprisingly, there are many ways in which e-mail evidence may be authenticated proceeded to state that one well respected commentator has observed:

> *"[E]-mail messages may be authenticated by direct or circumstantial evidence. An email message's distinctive characteristics, including its "contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" may be sufficient for authentication.*
>
> *Printouts of e-mail messages ordinarily bear the sender's e-mail address, providing circumstantial evidence that the message was transmitted by the person identified in the e-mail address. In responding to an e-mail message, the person receiving the message may transmit the reply using the computer's reply function, which automatically routes the message to the address from which the original message came. Use of the reply function indicates that the reply message was sent to the sender's listed e-mail address.*
>
> *The contents of the e-mail may help show authentication by revealing details known only to the sender and the person receiving the message. E-mails may even be self-authenticating. Under Rule 902(7), labels or tags affixed in the course of business require no authentication. Business e-mails often contain information showing the origin of the transmission and identifying the employer company. The identification marker alone may be sufficient to authenticate an e-mail under Rule 902(7). However, the sending address in an e-mail message is not conclusive, since e-mail messages can be sent by persons other than the named sender. For example, a person with unauthorized access to a computer can transmit e-mail messages under the computer owner's name. Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness."*

(2) Non-expert opinion on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.
(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority."

disputed by the other party. If, however, the admissibility of the document is being disputed as is the case presently, evidence as to its authenticity will be required. In criminal proceedings, however, where the burden of proof is much higher than in civil proceedings, it will always be necessary for the party seeking admissibility of a particular document to be able to produce some founding testimony as to the source and authenticity of the document, especially if it is an image, otherwise the courts may refuse to admit the evidence. I presume this is the reason why the legislature in Tanzania provided specifically for the admissibility of "***computer records***" in criminal proceedings vide the ***Written Laws (Miscellaneous Amendment) Act, No.15 of 2007,*** the Plaintiffs' Counsel alluded to in his submissions. It is the discretion of this Court properly directing its mind on the relevant law, to always to exclude evidence which has doubtful value. In criminal proceedings a prosecutor or party to civil litigation will always need to be prepared to offer further evidence about the source of electronic evidence and the processing and storage it has undergone since it was first recorded. As it was held in one English case, that of **R.V. ROBSON and HARRIS [1972] 1W.L.R. 651**), "*a person producing a recording as evidence must describe its provenance and history so as to satisfy the judge that there is a prima facie case that the evidence is authentic.*" In the present case the Plaintiffs have not been able to cross the hurdle of proving the authenticity of the e-mail they are seeking to produce in evidence. Our Evidence Act, 1967 however does not contain any express provision on authentication and identification of electronically stored information as is the case with the Kenyan Evidence Act or the

relevancy and hearsay, the existing rules of evidence suffice. The rules to be developed by courts are for setting out prior requirements to be met before an electronically generated document can be admitted in evidence in civil proceedings. This is where the opinion given by Judge Grimm in **JACK R. LORAINE AND BEVERLY MACK VS. MARKEL AMERICAN INSURANCE COMPANY Civil Action No.PWG-06-1893** becomes relevant.

As the Defendant's Counsel correctly argued the fact that the weight of an e-mail being a computer generated record as evidence may be reduced unless there is sufficient authentication to convince the court that it is an accurate copy, is highly critical. ***Authentication is proving to the court that a document is what it purports to be.*** In the present case, the Plaintiffs have to prove that the original of the e-mail sought to be tendered in evidence is authentic and also that the e-mail has not been altered since the date it was retrieved from the computer. As the learned author in "***Legal Admissibility of Documentary Evidence in Civil and Criminal Proceedings" (supra)*** argues such authentication evidence would normally be in the form of an "*audit trail*" that is, ***showing how the original document (e-mail) was turned into an electronic image stored in the computer system from where it was retrieved and then produced to the court***. If an audit trail like this cannot be produced, the electronic evidence may be rejected.

The content of the e-mail document could also be an issue. In civil proceedings there is unlikely to be any problems about producing copies of the various e-mail documents (either electronic or as a hard copy), except

appreciated by the highest court of the land in **TANZANIA COTTON MARKETING BOARD VS CORGECOT COTTON COMPANY SA [1997] TLR 165** while construing the words "*registered post*" in Rule 4 of the Arbitration Rules, 1957:

> "*...the words registered post should be interpreted widely enough to take into account the* ***current development in communication technology*** *that has taken place since 1957 when the rules were enacted. It is common knowledge that since that time other modes of postage have been introduced." (the emphasis is of this Court).*

In that case, the DHL courier services which were not in existence in 1957 when the postage rule in the Arbitration Rules was promulgated, was considered to be a modern mode of postage and thus falling within the words "*registered post*" in Rule 4 of the Arbitration Rules, 1957. In 1875 when the Indian Evidence Act from which our current Evidence Act, 1967 derives was promulgated, the modern methods of making e-mail by computers were not yet in existence. This Court however, given technological revolution in information communication which has been sweeping the world since the last century, cannot afford to hide behind old ways of communicating by refusing to accept other types of electronic documents such e-mail, which may carry electronic information capable of being stored on computers and generated by being printed out. It is for this reason that this Court feels very strongly to extend the definition of a "*document*" under section 3 of the Evidence Act by interpreting it broadly to cover evidence generated by computers including e-mail subject of

"There is a document whenever there is writing or printing capable of being read, no matter what the material may be upon which it is impressed or inscribed."

According to the above illustration, documents cover any record of evidence or information and are not limited to pieces of paper. In terms of section 3 of the Tanzania Evidence Act, 1967 [Cap.6 R.E. 2002], a "*document*" means:

*"any **writing**, handwriting, typewriting, printing, photostat, photograph and **every recording upon any tangible thing**, **any form of communication** or representation by letters, figures, marks or symbols or by more than one of these means, which may be used for the purpose of recording any matter provided that such recording is reasonably permanent and readable by sight; (the emphasis is of this Court).*

And according to section 4 of the *Interpretation of Laws Act* [Cap.1 R.E. 2002], a "document":

*"includes any publication and any matter written, expressed, or described upon any substance by means of letters, figures, or marks, or **by more than one of those means**, which is intended to be used or may be used for the purpose of recording that matter..."*

It is interesting to note however, that whilst the form of words may have changed over the years, the description of a "*document*" given in the old English case of **R. V. DAYE (1908) 77 LJK8 659** (supra) has not really changed over the decades. Our Evidence Act, 1967 which we received by way of India was promulgated in 1875, long before documents

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and
"public authority" includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.
(5) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or description of documents or records."

The English law which His Lordship Nsekela cited in **Commercial Case No.4 of 2000 between TRUST BANK TANZANIA LTD AND LE-MARSH ENTERPRISES LTD,** unreported) has since undergone some further development in England as evidenced by the provisions of the English Civil Evidence Act of 1995, which I have cited above. Although this case has yet to be affirmed or reversed by the highest court of the land, the Court of Appeal of Tanzania, it forms an illuminating example of how a court can embark on what has come to be popularly known as judge-made law. It is encouraging to note however, that following the decision of Justice Nsekela, the legislature in Tanzania embarked, albeit on a piecemeal basis, on a course of amending the Tanzania Evidence Act, first in 2006, vide the *Written Laws (Miscellaneous Amendments) Act [Act No.2 of 2006]* by allowing in evidence in civil proceedings "*a print out of any entry in the books of a bank*", and through the *Written Laws (Miscellaneous Amendments) Act [Act No.15 of 2007*] by allowing in evidence "*an information retrieved from computer systems, networks or servers*" among others, in criminal proceedings. Despite this piece meal approach to legislating, the law on admissibility of electronic evidence in

book under the Evidence Act, 1967. In that case issues of hearsay, authenticity, relevancy, unfair prejudice, and whether the emails are original documents or duplicates did not arise and there are no standards which were set by the court in that regard. The two amendments to the Evidence Act did not touch on the issue of authenticity either. There is therefore lack of set standards in that regard in our law. His Lordship Justice Nsekela in that case having cited with approval section 5 of the ***English Civil Evidence Act*** of 1968 on admissibility of statements produced by computers, took a very bold step of allowing in evidence a computer print-out as part of a banker's book in the Evidence Act, 1967. Section 5 of the English Civil Evidence Act, 1968 in addition to widening the admissibility of hearsay evidence in documents produced by a computer, also made specific provision for computers. It is worth noting however, that in England, the Civil Evidence Act of 1995 has greatly simplified and relaxed the law as found in the English Civil Evidence of 1968, by encompassing electronic documents without mentioning either "*documents*" or "*computers*", under its section 13 which stipulates that:-

> *"13. In this Act–*
> ...
> *"document" means anything in which information of any description is recorded, and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;"*

in respect of criminal proceedings." The Defendant's Counsel on his part however, seems to entertain a totally different view. Picking a leaf of advice from Fitzgerald, *Salmond on Jurisprudence* (12th Edition) (1966) reproduced in *Introduction to the Legal Systems of East Africa*, the Defendant's Counsel is of the strong view that if this Court feels inclined to develop this particular area of the law, the rules to be applicable in the present case should be those found in the existing law under the Evidence Act, 1967 [Cap.6 R.E. 2002]. The Defendant's Counsel further insisted that the e-mail statements intended to be tendered in evidence by the Plaintiffs in this suit should not be admitted, but the Court may proceed "*to set down new rules for establishing the validity of electronic documentation, or electronically stored information in view of the growth in the creation, storage and sharing of documents electronically.*" The Defendant's Counsel however, wonders whether our Courts are well equipped to handle electronic evidence in view of absence of rules and procedures for the admissibility of such evidence. The Defendant's Counsel is also worried if our courts, in the absence of any express statutory enactment, can take the bold leap and exercise their powers to mould the law by taking into account technological advancements. The Defendant's Counsel insisted that there has to be specific rules and procedures enacted by the legislature to be followed by courts in admitting electronic evidence. The Defendant's Counsel cited some examples from other jurisdictions including Kenya, the United States of America, the Philippines and the United Kingdom where such rules already exist. The Defendant's Counsel attached to his submissions a web article by Cathy Mputhia titled "***When Digital***

In his bid to show that under the existing law the admittance of electronic evidence in civil proceedings is still a raw issue posing unanswered questions not only in our courts but also in courts in other jurisdictions in countries endowed with more technologically advanced legal systems than ours, the Defendant's Counsel in his submission travelled as far as to the United States District Court for the District of Maryland, where through web search managed to unearth an article discussing a legal opinion rendered by Hon. Paul W. Grimm, Chief United States Magistrate in May 2007 in the case of **JACK R. LORAINE AND BEVERLY MACK VS. MARKEL AMERICAN INSURANCE COMPANY Civil Action No.PWG-06-1893.** The Defendant's Counsel however could not provide this Court with a full report of that case. In its efforts to get to the substance of the said opinion this Court managed to uncover the web report of that case at http://indianalawblog.com/documents/Lorraine v Markel.pdf, which is a 101 page "***MEMORANDUM OPINION***" handed down by Judge Grimm. This case although it dealt with arbitration matters it involved an issue of admissibility of e-mail in evidence, which is similar to the issue we are dealing with presently. In that case Judge Grimm however dismissed both parties' motions without prejudice for their failure to properly establish the ***authenticity of e-mail documentation as evidence to support their case.*** Judge Grimm however, seized the occasion to put together a comprehensive opinion on the evidentiary hurdles to be overcome in getting electronically stored information into evidence in a court of law. According to Judge Grimm, it is critical for Counsel to be p*repared to* recognize and appropriately deal with the evidentiary issues associated

similarity. The Defendant's Counsel however, appreciated the approach His Lordship Nsekela adopted in that case, who oblivious of the fact that the Tanzania Evidence Act by then was silent on the issue dealt with in the case before him, commented that "*the law must keep abreast of technological changes as they affect the way of doing business.*" The Defendant's Counsel very strongly maintained however that in that case His Lordship Justice Nsekela still confined himself to technological changes that affect the banking industry, and remarked obiter that, "I*t would have been much better if the position were clarified beyond all doubt by legislation rather than judicial intervention.*" As it turned out, the Defendant's Counsel further argued, the legislature in 2006 heeded to the judicial call by His Lordship Nsekela and effected the necessary amendments to the Evidence Act, 1967 to provide for admissibility of computer print-out in evidence as part of banker's books.

The ruling of this Court in that case, as the Defendant's Counsel correctly submitted, and the subsequent amendment to the Evidence Act, 1967 only cured the particular issue of admissibility of electronic records in relation to the banking business, but not in all other scenarios of admissibility of electronic evidence in civil proceedings. It seems to me however that both learned Counsel for the parties share the same sentiments on the role of our courts, which is not to develop a new area of the law of evidence. The Plaintiffs' Counsel however is of the opinion that courts should see to it indeed if there is any legal logic why our law provides expressly on admissibility in evidence of computer print-outs in relation to the banking business and in criminal proceedings, but is silent in

about by the *Written Laws (Miscellaneous Amendments) Act [Act No.15 of 2007],* amending section 40 of the Evidence Act, 1967 by adding section 40A relating to "*admissibility of electronic evidence in criminal proceedings*", which he contends that the Defendant's Counsel overlooked in his submissions. The Defendant's Counsel however, annexed to his submissions the *Written Laws (Miscellaneous Amendments) (No.2) Act* [Act No.15 of 2007] which amended section 40 of the Evidence Act, 1967 by adding section 40A which provides as follows:

> *"40A. In criminal proceedings-*
> *(a) An information retrieved from computer systems, networks or servers; or*
> *(b) The records through surveillance of means of presentations of information including facsimile machines, electronic transmission and communication facilities.*
> *(c) The audio or video recording of acts or behavior or conversation of persons charged*
> ***Shall be admissible in evidence.**" (emphasis supplied by Plaintiff's Counsel).*

The argument by the Defendant's Counsel that the 2006 amendment to the Evidence Act, 1967 effected through the *Written Laws (Miscellaneous Amendments) Act [Act No.2 of 2006]* is confined only to electronic records in relation to the banking business is also shared by the Plaintiffs' Counsel. However, even after the most current amendment to the Tanzania Evidence Act, 1967 (which is the 2007 amendment), the Defendant's Counsel contend that the Evidence Act, 1967 still does not provide for the admissibility or the receiving in evidence in civil proceedings of electronic records including e-mails except in the course of banking

in civil proceedings is concerned. This is the reason why this Court requested Counsel for the parties to address it on the subject in order to come up with a meaningful decision, which may set a direction for course of action in the future.

The e-mail the Plaintiffs sought to be admitted as evidence to support their claim is central to the preliminary objection. This Court however, is being called upon to consider the admissibility of electronic evidence in civil proceedings generally, which admittedly is not yet covered under our laws of evidence or civil procedure. There is however some limited sphere in admissibility of electronic evidence in certain specified matters in civil proceedings as well as in criminal proceedings. This Court therefore in dealing with the matter before it is doing so without the benefit of any express enactment on admissibility of electronic evidence generally in other civil proceedings, and without any precedent from our courts on admissibility of e-mail to fall back on.

In the course of their submissions, the learned Counsel for the parties have brought into the fore what in my view seems to be two schools of thought on the matter before this Court. The first school of thought is that of "***timid souls***" shared by the Defendant's Counsel and the other school is that of "***bold sprits***" shared by the Plaintiff's Counsel.

The Defendant's Counsel has framed a broad issue ***whether or not electronic documents/records may be admitted as evidence in proceedings of civil nature.*** This issue does not lend itself easily of any quick and straightforward answer. It must be appreciated however, that in this country, aside from certain restrictive amendments to the law of

from Counsel, directed them to conduct further research on the issue of admissibility in evidence of electronically stored information in civil proceedings and address this Court accordingly, a task they carried out with great zeal and industry for which this Court highly commend them. Their submissions and cited authorities in not a small measure have contributed towards the preparation of this ruling.

Before I traverse the arguments of the learned Counsel on the preliminary point of objection, a brief background to the matter is apposite. Central to the preliminary objection are statements in an e-mail the Plaintiffs claim the Defendant sent to the Financial Manager of ***Rockjumper Birding Tours of Worldwide Birding Adventure*** of South Africa on the 26th day of June 2008, informing that Manager that in the year 2007 the said South Africa tour company had made double payments to the Plaintiffs. The Plaintiffs allege further that in the said e-mail text the Defendant demanded a reward for revealing the fact about the alleged double payments to the South African Tour Company, and further that the Defendant had asked the South African Tour Company not to reveal the Defendant's name to the Plaintiffs' company as this may cost the Defendant, who was an employee of the Plaintiff's company, his job. The 2nd Plaintiff maintains further that anyone reading that e-mail text will inevitably understand that the 2nd Plaintiff and its Managing Director as well as that Managing Director personally knew of the entries of the double payments, and that the said Plaintiffs had deliberately kept quiet about that information with the view to retain excess payments, and further that the Plaintiff would punish any of its employee who would reveal the double

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO.42 OF 2011

1. DODSAL HYDROCARBONS
& POWER (TANZANIA) LIMITED.....1ST PLAINTIFF/APPLICANT

2. DODSAL RESOURCES & MINING
ITILIMA BUSILI (TANZANIA) PVT.....2ND PLAINTIFF/APPLICANT

3. DODSAL RESOURCES & MINING
ITINGI (TANZANIA) PVT LIMITED.....3RD PLAINTIFF/APPLICANT

VERSUS

HASMUKH BHAGWANJI MASRANI.....DEFENDANT/RESPONDENT

Date of last order: 16/08/2011
Date of oral hearings: 4th and 16th of August 2011
Date of ruling: 29/08/2011

RULING

MAKARAMBA, J.:

This is a ruling on preliminary objection on the regularity and/or competence of the pleadings and affidavits filed by the Plaintiffs/Applicants.

Briefly, on the 20th day of May 2011, the Plaintiffs/Applicants, limited companies registered in Tanzania, lodged a suit in this Court against the Defendant/Respondent, a natural person residing in Dubai, the United Arab Emirates (UAE) and having commercial and business interests in Dar es Salaam as well as in the United Arab Emirates, India, United Kingdom and

Uganda, for a Declaratory Order that the Defendant's removal from the Plaintiffs' Companies was legal and that the Defendant be permanently restrained from acting for and on behalf of the Plaintiffs purporting to be the Director of the Plaintiffs' Companies.

On the 23rd day of May 2011, the Plaintiffs/Applicants also lodged in this Court application by way of Chamber Summons under sections 68(e), 95 and Order XXXVII Rule 1(a) of the Civil Procedure Code, Cap.33 R.E. 2002 and *"any other enabling provisions of the law"* for an interim injunction order against the Respondent from acting as director of the Plaintiffs' Companies pending final determination of the final suit. The application is supported by the affidavits of RAJEN A. KILACHAND, Director of the Applicants' Companies resident of Dubai, UAE.

On the 27th day of June 2011, in his written statement of defence accompanied by the counter-affidavit of HASMUKH BHAGWANJI MASTRANI, the Defendant/Respondent in response to the affidavit of Mr. RAJEN A. KILACHAND filed in this Court on the 20th day of May 2011 the Defendant denied all the allegations by the Plaintiffs/Applicants. On the 15th day of July 2011, the Plaintiffs/Applicants lodged in this Court their reply to the written statement of defence together with the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH and the witness statement of Mr. ABHIMANYU JALAN as basis for refuting the Defendant's allegations in the written statement of defence.

On the 3rd day of August 2011, the Defendant/Respondent filed a Notice of Preliminary Objection that at the hearing the Defendant will raise preliminary objections on the regularity and/or competence of the

pleadings and affidavits filed by the Plaintiffs and shall seek the orders for their striking out and/or removal from the court record. It is this Notice of Preliminary Objection that forms the basis of this ruling.

On the 4th day of August 2011, this Court after hearing Mr. Kibuta, learned Counsel for the Plaintiff's/Applicants accompanied by Mr. A. Mgongolwa, learned Counsel, on his concern over the general nature of the preliminary objection raised by the Defendant/Respondent's Counsel Mr. Kesaria, this Court permitted Mr. Kesaria, to address it on the substance of the contents of the Notice of the Preliminary Objection. At the close of his submissions, Mr. Kibuta prayed for a shorter adjournment to enable him prepare his reply, which prayer there being no objection from Mr, Kesaria, this Court duly granted. On the 16th day of August 2011, Dr. Ringo Tenga, learned Counsel accompanied by Mr. Kibuta, learned Counsel, made his reply submissions on the submission in support of the preliminary objection which was followed by rejoinder submissions by Mr. Kesaria, learned Counsel for the Defendant/Respondent.

The points of preliminary objection which Mr. Kesaria, learned Counsel for the Defendant/Respondent raised in his Notice of Preliminary Objection as amplified in his submissions in support thereof are two pronged. The first limb concerns defects in the pleadings and the accompanying affidavits. The second limb concerns the written witness statement.

Mr. Kesaria argues that the Plaintiff's reply to the written statement of defence filed in this Court on 15th day of August 2011 bears a **scanned signature** on behalf of the 1st, 2nd and 3rd Plaintiffs and the original

signature of the advocate, **MR. ALEX MGONGOLWA**. Pleadings bearing scanned signatures is something unheard of in our law and this Court ought to have been rejected them in the first place instead of admitting them, Mr. Kesaria argues. Further, the Plaintiff's Reply to the written statement of defence does not bear a verification clause at all and hence equally defective, Mr. Kesaria further submits.

The defective pleadings make cross-reference to the equally defective affidavits of **Mr. RAJEN A. KILACHAND** and **Mr. MANAN SHAH** which bear scanned instead of the original signatures of the deponents, Mr. Kesaria further submits. The jurat of attestation on both affidavits does not bear the date but only the place where they were sworn, Mr. Kesaria points out. An affidavit being a substitute for oral evidence if it bears a defective jurat is incurably defective and has to be struck out, Mr. Kesaria further submits supporting this contention by the decision of the Court of Appeal of Tanzania in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47, which** deliberated on section 8 of the Notary Public and Commissioners for Oath Act, [Cap.12 RE 2002] by holding that the requirement in that section as at what place and on what date the oath or affidavit is taken or made are mandatory.

The documents bearing scanned signatures should be expunged from the court record. The defective affidavits for want of proper jurat of attestation and for bearing scanned and not original signatures should also be struck out. Similarly the reply to the written statement of defence lacking verification clause and bearing scanned signatures should also be

expunged from the court record. The witness statement, something unheard of in our law should also be expunged from the court record. These are the prayers by Mr. Kesaria.

In reply, Dr. Ringo Tenga, learned Counsel for the Plaintiffs/Applicant argues that the decision of the Court of Appeal of Tanzania in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) Mr. Kesaria the Defendant's Counsel relied upon is distinguishable in that nowhere in that decision it says that the date at which the oath was taken is mandatory. Since the place where the oath was taken is shown in the two affidavits, which is Dubai, then the jurat of attestation is proper Dr. Ringo surmised.

The defects in the affidavits are curable, Dr. Ringo pointed out citing the case of **OMARI MGENI VS NBC HOLDINGS & 2 OTHERS** where a preliminary objection to strike out notice of motion despite amendment was rejected; also the case of **Civil Application No.19/1993 TRANSPORT V. VALAMBIA** where an affidavit with errors (affirmative clause) was held not to be fatally defective; and the case of **Civil Application No.141/2002 DT DOBIE V PHANTOM** where Lugakingira J. (as he then was) found absence of verification clause in an affidavit not to be fatal and capable of being amended. On the basis of these authorities, the absence of date in the jurat of attestation is not that fatal and that it was an oversight which can be overlooked by this Court, Dr. Ringo submits.

As regards the witness statement by Mr. ABHIMANYU, Dr. Ringo submits that a jurat is not necessary since Order XIX Rule 3 of the Civil

Procedure Code does not create a necessary consequence that fatal for date missing thereat. Witness statements are yet to be recognized under our law Dr. Ringop concedes. However, it is not that fatal to the defendant's case and in fact it is advantageous to the Defendant that the Plaintiffs have opened up in answer to the counter-claim, Dr. Ringo reiterates, making reference to paragraph 13 of the Plaintiffs' reply where the affidavits and the written witness statements are being referred to.

As to the affidavits bearing scanned signatures, Dr. Ringo concedes that it is not a usual practice since it goes to the authenticity of the documents filed in court. However, Dr. Ringo further argues citing the decision of this Court in **Commercial Case No.10 of 2008 between LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported)** giving guidance on admission in evidence of EIS that since the affidavits were sent electronically they should be accepted. The original affidavits sent by EMS are with them and upon court direction of this Court they can produce properly signed affidavits Dr. Ringo reveals. Irregularity in signatures is merely procedural and hence not prejudicial as it does not affect jurisdiction Dr. Ringo contends citing the Indian decision of **SINGH V. HIRALAL** cited in Mulla dealing with section 19 of the Indian Code of Civil Procedure, which is pari materia with section 73 of our Civil Procedure Code.

On the affidavit in rejoinder lacking original signature, Dr. Ringo submits that affidavit is part of evidence but rejoinder is part of pleadings and so far there is no clear decision by this Court on scanned signatures.

Dr. Ringo cites the decision of the Court of Appeal of Tanzania in COGECOT making a finding that an arbitral award brought by mail as being other means of communication and argues that it can be extended to include electronic communication.

In rejoinder Mr. Kesaria submits that Dr. Ringo has conceded that scanned signatures and witness statement are not a usual practice and further that there is no clear decision on scanned signatures, but has proceed to pray to amend which amounts to pre-empting the preliminary objection. Dr. Ringo ought to have applied for amendment before the preliminary objection being raised Mr. Kesaria points out. As per the decision of the Court of Appeal of Tanzania in **DB SHAPRIYA AND CO. LTD. vs BISH INTERNATIONAL BV** (supra), which is binding on this Court, both the date and the place of swearing of the affidavit is mandatory and therefore the other decisions Dr. Ringo has cited are not relevant to this case as they have nothing to do with jurat, but relate to contents of affidavits Mr. Kesaria insists.

Mr. Kesaria further insists that the witness statement is misplaced since it can be raised at the trial stage but cannot be introduced at the stage of pleadings as it tends to embarrass and prejudice the proceedings given that no scheduling order has yet to be given by this Court and that the procedure is unheard of in our law. Mr. Kesaria submits further that the provisions for taking commission under the Civil Procedure Code or statement by person who cannot be called as witness under Part IV of the Tanzania Evidence Act [Cap.6 R.E. 2001] make it possible for such statements to be given instead of oral testimony of witness. The witness

statement is not sworn and cannot be cross-examined but the witness can come and give testimony under oath, Mr. Kesaria further submits and insists that rules of procedure allow for a rejoinder as pleading not statement.

As to the argument that scanned signatures amount to electronic document Mr. Kesaria wonders under which provision of the law this contention is being made. Mr. Kesaria distinguishes the decision in the case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported) (supra)** relied upon by Dr. Ringo which relates to admissibility of electronic evidence at trial. Mr. Kesaria further submits that he has failed to understand how an e-mail communication which was the subject of controversy in that case could be stretched to incorporate a scanned signature. In the opinion of Mr. Kesaria, a scanned signature is not that different from a photocopy or a fax, and therefore does not qualify as an electronic document generated from a computer data base such as an e-mail.

Mr. Kesaria also distinguishes the Indian decision in **SINGH V. HIRALAL** cited in Mulla dealing with section 19 of the Indian Code of Civil Procedure, which is pari materia with section 73 of our Civil Procedure Code Dr. Ringo cited in his submissions on the ground that in the present case there is no decree to be reversed/varied which is the subject of that section, and therefore that case has been misapplied. Mr. Kesaria also distinguishes the case of **COGECOT** cited by Dr. Ringo as having no bearing on scanned signature since that case relates to the mode of

delivery of document under the Arbitration Act which was not posted but couriered and it was held not to be fatal.

Mr. Kesaria reiterates that once an objection is taken one cannot seek to amend the very document being objected to but can apply for leave to file new pleadings and prayed that the preliminary objection be upheld and the Defendant to have his costs.

Clearly, the submissions in support and rival raise some interesting legal issues particularly pertaining to pleadings and affidavits bearing scanned signatures and the witness statement. I propose to address first submissions relating to the defects in the pleadings and the affidavits before addressing issues relating to the scanned signatures and the witness statements.

I am alive to the authorities contained in the decision of the Court of Appeal of Tanzania in **LALAGO COTTON GINNERY AND OIL MILLS COMPANY LIMITED VS. LART (Civil Application No.8 of 2003); PHANTOM MODERN TRANSPORT (1985) LTD. V.D.T. DOBIE (TANZANIA) LTD. Civil Reference No. 15 of 2001 and No.3 of 2002;** and **MANORLAL AGGARWAL vs. TANGANYIKA LAND AGENCY LTD. & OTHERS Civil Reference No.11 of 1999 regarding** the position of the law on affidavits which I can safely summarize as follows:

> *"As a general rule a defective affidavit should not be acted upon by a court of law, but in appropriate cases, where the defects are minor, the courts can order an amendment by way of filing fresh affidavit or by striking out the affidavit. But if the defects are of a substantial or substantive nature, no amendment should be allowed as they are a nullity, and there can be no amendment to a nothing."*

The first limb of the preliminary objection is that the jurat of attestation in the affidavits Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH is defective as they only show the place at which they were sworn but not the date on which they were sworn. The related objection is that the two affidavits contained scanned but not original signatures of the deponents.

In the words of Katiti, J. (as he then was) in **Misc. Civil Application No. 15/97 – OTTU VS AG AND OTHERS** (HCT at Dar) *"despite its being a lawyers' everyday tool, unfortunately is not defined by any statute."* The term affidavit *is* expressed in Order XIX of the Civil Procedure Code, 1966 as follows:

> *"1. A court may at any time for sufficient reason order that any* ***particular fact or facts may be proved by affidavit****, or that the* ***affidavit of any witness may be read at the hearing****, on such conditions as the court thinks reasonable:*
>
> *"3. Matters to which affidavits shall be confined*
>
> *(1)* ***Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove****, except on interlocutory applications on which statements of his belief may be admitted:*
> *Provided that the grounds thereof are stated."*

According to Katiti, J. (as he then was) in **Misc. Civil Application No. 15/97 – OTTU VS AG AND OTHERS** (HCT at Dar):

> *"... the lexicon meaning of the expression "affidavit" is that* ***it is a sworn statement in writing, made especially under oath, or***

affirmation before an authorized Magistrate or Officer." (the emphasis is of this Court)

I also join hands with His Lordship Ramadhani JA (as he then was) who stated in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47** at page 48 that:

> *"An Affidavit has been defined as a written document containing material and relevant facts or statement relating to the matters in question or issue and sworn or affirmed and signed by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit."*

As per Hon Ramadhani JA (as he then was) in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV (supra):**

> *"It follows from this definition that an affidavit is governed by certain rules and requirements that have to be followed religiously."*

In my view, among the rules and requirements governing affidavits His Lordship Ramadhani had in mind in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV (supra)** which in his view are "to be followed religiously" are derived from section 8 of the *Notary Public and Commissioner for Oaths Act,* which stipulates that:

> *"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."*

Among the person or *officer duly authorized to administer an oath or affirmation recognized by the law* who in terms of section 8 of the *Notary Public and Commissioner for Oaths Act* is mandatorily required "*truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made*" is a Notary Public and Commissioner for Oaths. The provision of section 8 of the *Notary Public and Commissioner for Oaths Act* has been a subject of judicial interpretation in a number of decisions from this Court and the Court of Appeal of Tanzania, the most recent one being **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47,** which Mr. Kesaria cited in his submissions.

In **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) the controversy revolved around an affidavit in a notice of motion for stay of execution which did not indicate the **place** where it was sworn. The Respondent's Counsel Mr. Kilindu, raised an objection that the omission to indicate the place the affidavit was sworn contravened the mandatory provisions of section 8 of the Notaries Public and Commissioner for Oaths Ordinance (now the Act), which require a jurat to show the place at which an affidavit was sworn. The affidavit in question in that case did not disclose the place where it was sworn but only bore a rubber stamp impression of the advocate before whom it was sworn which had the name "Dar es Salaam" on it. The Respondent's Counsel, Mr. Kilindu, contended that the rubber stamp impression containing the name Dar es Salaam was not enough and does not comply with the law, and as such the affidavit was defective and ought to be struck out because there was nothing to

amend, citing the case of the High Court of Kenya in **NAROK TRANSIT HOTEL LTD AND ANOTHER V BARCLAYS BANK OF KENYA LTD [2001] LLR 852 (CCK).** In that case an affidavit which was found to have contravened section 5 of a similar law in Kenya, which section is in pari materia with section 8 Notaries Public and Commissioner for Oaths Ordinance (now the Act), was struck out.

In **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) Professor Fimbo, the Applicant's Counsel argued that the omission to state where the affidavit was sworn is remedied by the rubber stamp impression. Professor Fimbo contended further in that the Kenyan case of **NAROK TRANSIT HOTEL LTD AND ANOTHER V BARCLAYS BANK OF KENYA LTD** cited by Mr. Kilindu is bad law because it did not discuss the purpose of section 5 of the Kenyan law (which is in pari materia with our section 8), which is to authenticate that the deponent was actually sworn, which could be achieved by the rubber stamp impression. His Lordship Ramadhani, JA (as he then was) disagreeing with the submission of Prof. Fimbo stated at pages 48-49 of the decision in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV East Africa Law Reports [2002] 1 EA 47** as follows:

> *"I am unable to agree with Professor Fimbo's submission. The section categorically provides that the place at which an oath is taken has to be shown in the jurat. The requirement is mandatory: notary publics and commissioners for Oaths "shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made." The use of the word "truly" in my considered opinion underscores the need to follow the letter of the provision. This*

provision is not a sheer technicality as Professor Fimbo want this Court to find."

The ratio decidendi of **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) in my view, is that the requirement that the jurat of attestation in an affidavit to show the place at which an oath is taken is mandatory and therefore an affidavit which does not show where it was sworn or an oath taken is fatally defective. The case of **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) also dealt with the issue of rubber stamp impression which the Court found not to be a substitute for the mandatory requirement to show the place the affidavit or oath was taken or made.

In the present case, the **place** at which the affidavits of MANAN SHAN and RAJEN A. KILANCHAND respectively were taken is shown to be Dubai in the UAE but the **date** is not shown, but only the month of July and year 2011 are shown. The issue is whether the jurat of attestation in the two affidavits should have shown both the place and the date it was taken or made. On his part Mr. Kesaria, argues very strongly and supports his contention by **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) that it is mandatory that both the place and the date the affidavit was taken or made should be shown. Dr. Ringo Tenga, on his part has a contrary view arguing that provided the place at which the affidavit/oath is taken or made has been shown the requirement as to the date can be dispensed with.

As I intimated above going by the ration decidendi in **DB SHAPRIYA AND CO LTD V BISH INTERNATIONAL BV** (supra) one cannot

conclusively argue that the case decided that both the place and the date are mandatory. That case decided that the requirement that the jurat of attestation in an affidavit to show the place at which an oath is taken is mandatory. However, considering the powerful statement by Hon. Ramadhani JA (as he then was) in that case that, "*...notary publics and commissioners for Oaths shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made*" and further that "*The use of the word "truly" in my considered opinion underscores the need to follow the letter of the provision*", it is my considered opinion that the jurat of attestation must show both at what place and in what date the oath or affidavit is taken or made. The twin mandatory requirements namely, the place and the date the oath is taken or affidavit is taken or made go to the authenticity of the affidavit itself. As such it is not therefore open for a deponent to pick and choose what is and what is not important. Considering that the jurat of attestation has to comply with the mandatory statutory requirement in section 8 of the Notaries Public and Commissioner for Oaths Act as regards at what place and on what date the oath or affidavit is taken or made, an affidavit which shows only where it was sworn or an oath taken without showing on what date the oath or affidavit is taken or made is fatally defective. It is mandatory that both the place at which and the date on which an affidavit is sworn or oath is taken has to be shown in the jurat of attestation. The affidavits of **MANAN SHAN and RAJEN A, KILANCHAND** show only the place they were taken to be Dubai in the UAE but without the date, which is shown only by the month of July and year 2011. As such the two affidavits by showing only the

placer they were sworn or made without showing the date when they were sworn or taken make them fatally defective. In the eyes of the law the two affidavits are not affidavits and therefore the only assistance this Court can provide as rightly submitted and prayed by Mr. Kesaria is to strike out the affidavits of **MANAN SHAN and RAJEN A, KILANCHAND**.

In the course of making his reply submissions, Dr. Ringo Tenga cited a number of decisions establishing the principle that defects in the verification clause of an affidavit are curable, including the decision of the Court of Appeal of Tanzania in **Civil Application No.8/01 – DDL E. INTERNATIONAL LTD vs THA AND OTHERS** quoting from **SALIMA VUAI, THE UNIVERSITY OF DAR vs MWENGE LUBOIL LTD.** where it was held that errors in the verification clause of an affidavit are curable by order of amendment. However, with due respect to Dr. Ringo and as correctly submitted by Mr. Kesaria, learned Counsel for the Respondent in rejoinder, the authorities Dr. Ringo relied upon concern contents of affidavits particularly defects in the verification clause which are curable while the matter before this Court concerns defects in the jurat of attestation which are incurable by amendment. Defects in the jurat of attestation in my view fall within the ambit of defects of substantial or substantive nature, which are not amenable to amendment as they are a nullity, and as such there can be no amendment to a nothing. On the other hand defects as to the contents of affidavits and the verification clause fall within the ambit of minor defects which can be amended by order of the court by way of filing fresh affidavit.

It is for the foregoing reasons that the preliminary objection that the affidavits of Mr. Manan Shah and Mr. Rajen A. Kilachand are defective for want of proper jurat of attestation is upheld. This essentially would have disposed of that preliminary objection. However, Mr. Kesaria has also raised an objection that the affidavits of Mr. Manan Shah and Mr. Rajen A. Kilachand Mr. Kesaria bear scanned signatures. Mr. Kesaria also raised an objection that the Plaintiff's reply to the written statement of defence bears a **scanned signature** on behalf of the 1st, 2nd and 3rd Plaintiffs and the original signature of the advocate something which is unheard of in our law of procedure.

Mr. Kesaria contends that the affidavits of **Mr. RAJEN A. KILACHAND** and **Mr. MANAN SHAH** by bearing scanned instead of original signatures of the deponents are defective. In his reply submissions Dr Ringo conceded that the affidavits bear scanned signatures which is not a usual practice since it goes to the authenticity of the documents filed in court. Dr. Ringo however, cites **Commercial Case No.10 of 2008 between LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported)** and argues that since the affidavits in question were sent electronically they should be accepted since as the original affidavits which they now are in possession of and which were sent by EMS bear the original signatures of the deponents. Mr. Kesaria on his part argues that scanned signatures do not amount to electronic document and as such there is no provision in our law in that regard. The case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA**

TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported)(supra) cited by Dr. Ringo relates to admissibility of electronic evidence at trial which in principle needs to be authenticated, Mr. Kesaria points out. An e-mail communication, which was the subject matter in that case does not incorporate a scanned signature, something which is akin to photocopy or a fax and not an electronic document generated from a computer data base, Mr. Kesaria points out.

The submissions of Counsel on affidavits and pleadings bearing scanned signatures bring to test yet for another time our law on electronic documents and electronic signatures in particular. I wish to point out here that there is a marked difference between what is called electronic signatures and scanned signatures transmitted by electronic means. The mere fact that the affidavits and the pleadings in question were transmitted by electronic means does not necessarily make the signatures affixed on them electronic signatures. As rightly pointed out by Mr. Kesaria, a scanned signature or document does differ that much from a photocopied document or signature or a faxed document bearing signature. The scanned or faxed documents or signatures in my view both reflect the original documents or signature from which the scanned or faxed documents derive. As Dr. Ringo rightly conceded, the original affidavits bearing the original signatures of the deponents were sent by EMS and they are in their possession and if so ordered by this Court they can produce them. In my considered view, the issue of electronic signatures mistakenly referred to as "digital signatures" does not arise in the present

case. I am therefore at one with the submissions of Mr. Kesaria that the case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported) (supra) D**r. Ringo cited in support of his contention that the decision in that case on admissibility of e-mail could be stretched to incorporate documents bearing scanned signatures as is the case presently, is not relevant to the present case. As submitted by Mr. Kesaria and rightly so in my view, the case of **LAZARUS MIRISHO MAFIE and M/S SHIDOLYA TOURS & SAFARIS vs. ODILO GASPER KILENGA Alias MOISO GASPER (Arusha sub-registry) (unreported) (supra)** dealt with the admissibility in evidence at the trial of electronically information system (EIS) to wit, an e-mail. It cannot therefore be stretched to incorporate documents bearing scanned signatures be at the pleading or the trial stage.

I wish, for purposes of putting the record straight, state here that whereas "***electronic signatures***" are the electronic equivalents of written signatures which allow businesses to sign documents and carry out business transactions electronically, they are not a picture of the handwritten signature as is the case for scanned signatures. A scanned signature or a photocopied signature or a faxed signature for that matter is therefore a picture of the handwritten signature whose original can be produced on demand as verification for authenticity of the signature contained thereat. Electronic signatures are therefore not merely convenient alternatives to written signatures. In any event contrary to what most people expect, a digital or electronic signature alone doesn't

display an image of someone's signature or a mark to illustrate one's consent regarding a document, nor is it part of the document at all. Instead, the digital or electronic signature is often linked to a document by a database application that a business enterprise or company typically creates to store it.

Both Counsel for the parties concede that in Tanzania there is as yet no law providing specifically for electronic signatures. In the United Kingdom and the USA different perhaps from Tanzania and many other countries, electronic signatures add to the list of possibilities of conducting business electronically. In the United Kingdom, the **Electronic Communications Act of 2000** has made it clear that electronic signatures are admissible in evidence about the authenticity or integrity of a communication or data (see Section 7(1) of the Act). A European directive has ensured the effectiveness of electronic signatures across Europe. Legislation in the USA particularly the Government Paperwork Elimination Act ("GPEA"), the Uniform Electronic Transactions Act ("UETA") , and some sections within the Code of Federal Regulations ("CFR"), as well as the Electronic Signatures in Global and National Commerce Act ("ESIGN"), and in many other countries has done the same elsewhere. So what exactly is an electronic signature? Here are the definitions from laws important laws and government agencies. In the USA, **the ESIGN Act Sec 106 definitions**:

> *"(2) ELECTRONIC- The term `electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.*

(4) ELECTRONIC RECORD- The term `electronic record' means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.
(5) ELECTRONIC SIGNATURE- The term `electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

GPEA Sec 1710 definitions:

"(1) ELECTRONIC SIGNATURE.—the term "electronic signature" means a method of signing an electronic message that—
(A) identifies and authenticates a particular person as the source of the electronic message; and
(B) indicates such person's approval of the information contained in the electronic message.

UETA Sec 2 definitions:

"(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.
(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.
(8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Federal Reserve 12 CFR 202 definitions: refers to the ESIGN Act Commodity Futures Trading Commission 17 CFR Part 1 *Sec. 1.3 definitions:*

"(tt) Electronic signature means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Food and Drug Administration 21 CFR Sec. 11.3 definitions:

"(5) Digital signature means an electronic signature based upon cryptographic methods of originator authentication, computed by using a set of rules and a set of parameters such that the identity of the signer and the integrity of the data can be verified.
(7) Electronic signature means a computer data compilation of any symbol or series of symbols executed, adopted, or authorized by an individual to be the legally binding equivalent of the individual's handwritten signature."

I wish to take this opportunity to call upon the concerned authorities in Tanzania to think seriously about putting in place a law addressing issues pertaining to electronic information systems (EIS) generally and specifically for electronic or digital signatures, now so common particularly in the banking industry, so as to ensure that Tanzania is not left behind but matches ahead with the rest of the world in the digital age. The Government through Parliament should therefore consider seriously putting in place a law to among other things define the liability and validity of an electronic signature, and help the courts answer the questions about enforceability, which are bound to arise in the future since this country is already doing e-commerce with other countries. as well as from other countries which have in place such kind of legislation. I wish also to allay the fears some "*electronic age doubting thomases*" might be entertaining over the use of electronic signatures that in actual fact there is far less fear than initially thought of on the use of electronic or digital signature in

business transactions, which has become so popular and is of wider use in most of Europe, USA, Asia, and Australia. It is quite relieving however to learn that over 100 years ago, people were using the Morse code and the telegraph to electronically accept contracts before the development of facsimile or fax machine. An early validation of electronic signatures came from the New Hampshire Supreme Court in 1869 in **HOWLEY V. WHIPPLE, *48 N.H. 487*** where it was stated that:

> *"It makes no difference whether [the telegraph] operator writes the offer or the acceptance in the presence of his principal and by his express direction, with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office." See* http://www.isaacbowman.com/the-history-of-electronic-signature-laws

In the present case, the scanned signatures appearing on the Plaintiffs' plaint, the plaintiffs' reply to the written statement of defence and in the two affidavits cannot therefore by any stretch of imagination be said to have been produced by a "*more subtle fluid known as electricity.*" The scanned signature in the pleadings and the affidavits originally were affixed by a signature "*by the use of the finger resting upon the pen*", of the signatories, and then the documents bearing the original signatures which Dr. Ringo informed this Court that they have them, were then scanned. If it is the case for the Plaintiffs/Applicants as conveyed to this Court by Dr. Ringo in his own words while making his submissions that now they have

with them the pleadings and the affidavits bearing the original signatures of the deponents then this Court does not find any valid reasons for admitting and entertaining pleadings and affidavits bearing the scanned signatures. In any event, the law as it currently stands does not yet allow documents bearing scanned signatures for use in court.

An affidavit is part of evidence but a rejoinder is part of pleadings as Dr. Ringo Tenga rightly pointed out. As I intimated to above however, so far there is no clear decision by this Court on scanned signatures, which as I have said cannot be equated to electronic or digital signatures. The ***COGECOT case*** cited by Dr. Ringo, as rightly submitted by Mr. Kesaria has no bearing at all to scanned signature let alone being relevant to the present case since in that case what was under consideration was the mode of delivering a document under the Arbitration Act, which was couriered and the Court in that case took it as being another mode of communication.

In the course of making his submissions, Dr. Ringo implored upon this Court to consider the irregularity in the signatures as being merely procedural, citing the decision of **SINGH V. HIRALAL** cited in Mulla dealing with section 19 of the Indian Code of Civil Procedure, which is pari materia with section 73 of our Civil Procedure Code. I am at one with Mr. Kesaria that section 73 which bars reversal or varying of decree or remand of case on appeal, on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the court that it is inapplicable to the present case. However, the irregularity in signatures in

the pleadings is a procedural matter which does not affect jurisdiction and can be cured with leave by the Applicants presenting properly signed pleadings.

In my considered view however, the defects in the pleadings in so far as they bear scanned signatures are concerned, namely, the Plaintiff's reply to the written statement of defence which bear a **scanned signature** on behalf of the 1st, 2nd and 3rd Plaintiffs can be cured simply by way of amendment upon leave of the court. This equally applies to the objection that the Plaintiff's Reply to the written statement of defence does not bear a verification clause, which defect is curable by amendment. This however cannot be said of the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH, which not only bear scanned instead of original signatures of the deponents but lack proper jurat of attestation thus making them fatally defective and hence incurable by amendment and hence liable to be struck out and expunged from the court record.

I shall now turn to consider the preliminary objection as regards the witness statement of Mr. ABHIMANYU JALAN dated 13th day of July 2011. Mr. Kesaria contends that witness statement is not known in our law and prayed to this Court to make an order expunging it from the court record. Mr. Kesaria argues further that the witness statement is misplaced since it can only be raised at the trial stage not at the stage of pleadings as it tends to embarrass and prejudice the proceedings. The gist of the objection by Mr. Kesaria to the witness statement is that the procedure is unheard of. Mr. Kesaria points out that our law recognizes the taking commission or producing witness statement under Part IV of the ***Tanzania***

Evidence Act *[*Cap.6 R.E. 2001]. Witness statement is given instead of oral testimony and is not sworn and hence cannot be cross-examined Mr. Kesaria points out. In any event the witness can come and give testimony under oath. Further, that rules of procedure allow for a rejoinder as pleadings not witness statements. As Mr. Kesaria stated and rightly so in my view to which view Dr. Ringo conceded, the procedure for witness statements is unheard in our law. The Civil Procedure Code only recognizes the proving of fact or facts by affidavits or viva voce through witness testimony as stipulated under ORDER XIX thus:

> "1. *A court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:*
>
> *Provided that where it appears to the court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."*

In my considered view, the gist of Rule 1 of Order XIX of the Civil Procedure Code is that the court has discretion upon sufficient reason to order particular fact or facts to be proved by affidavit or that *the affidavit of any witness may be read at the hearing.* In terms of the proviso to Rule 1 of Order XIX of the Civil Procedure Code however, where it appears to the court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, the Court does not have to make an order authorizing the evidence of such witness to be

given by affidavit. In my view, proving of any fact or facts by affidavit is an exception to the general rule that facts are to be proved *viva voce* through witness testimony is subjected to cross-examination. If anything then if we may venture to equate the witness statement with an affidavit as envisaged under Rule 1 of Order XIX of the Civil Procedure Code, it could then only be produced by order of this Court and upon sufficient reasons given and subject to "*such conditions as the court thinks reasonable.*" This is the case presently. The Plaintiffs'/Applicants of their own volition have elected to prepare a witness statement which they lodged in this Court without any order of the court as required under the law. And this without even without assigning any reason as to why they elected to resort to such course of action. Furthermore, the learned Counsel for Plaintiffs/Applicants has not informed this Court whether or not they desire to have the maker of the witness statement available for cross-examination at the trial. In any event and as rightly submitted by Mr. Kesaria, where the maker of the statement will be available for cross-examination there would not be any need to have his witness statement, which in any case is not recognized under our law. In any event much as the witness statement has been to the advantage of the Defendant as argued by Dr. Ringo, the law does not allow for such course of action. However, with due respect to Mr. Kesaria, there is nothing in the law to suggest that prove of facts by affidavit can only be done at the stage of trial but not pleadings. The law categorically stipulates that the "*court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit.*" Much as the witness statement does not in any way embarrass or prejudice the

opposite side, this Court does not find any provision of the law for their admittance. I very much appreciate the adage that rules of procedure are handmaidens of justice, but all in all rules of procedure are geared at putting in place an orderly conduct of the business of litigation with a view to eliminate elements of bias and surprises. Unfortunately, the existing law of procedure does not allow for witness statement. In fine the witness statement can safely be expunged from the court record.

Mr. Kesaria raised a further objection that the Plaintiff's Reply to the written statement of defence does not bear a verification clause at all and therefore it is equally defective. As I intimated to earlier since I have held that the procedure for admitting witness statement is not recognized in our law, it will be academic to explore the effect of lack of verification clause in the witness statement. In any event had the witness statement been admitted, lack of a verification clause is not that fatal as it could be amended.

In fine, the preliminary objection that the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH are incurably defective for want of proper jurat of attestation is hereby upheld. Accordingly, the affidavits of Mr. RAJEN A. KILACHAND and Mr. MANAN SHAH are hereby expunged from the court record.

The affidavit of Mr. RAJEN A. KILACHAND in support of the application is defective for bearing scanned signatures, which defect with leave of this Court is curable by amendment with leave of this Court.

The defects in the Plaintiff's reply to the written statement of defence, to wit, lack of verification clause and for bearing scanned

signatures and not original signatures, which defects also appear in the Plaint which does not also have a verification clause and bears scanned signatures on behalf of the 1st, 2nd and 3rd Plaintiffs and not original signatures are curable by way of amendment with leave of this Court.

The witness statement of Mr. ABHIMANYU JALAN is unknown in our law. It is hereby expunged from the court record.

The defendant shall have his costs, which costs shall be in the cause. Order accordingly.

R.V. MAKARAMBA

JUDGE

29/08/2011

Words account: 8,864

Ruling delivered this 29th day of August 2011 in the presence of:

For the Plaintiffs/Applicants: Dr.Tenga, Mr.Kibuta, Mr. Cuthbert and Mr. Biseko

For the Defendants/Respondents: Mr. Kamala.

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R.V. MAKARAMBA

JUDGE

29/08/2011