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**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)



**2022/HP/1791**

BETWEEN:

**DA-CHENG WOOD PROCESSING COMPANY LIMITED**

**PLAINTIFF**

AND

**PEREKA NYIRENDA**

**DEFENDANT**

(Sued as Administratrix of the estate of the late  
Patricia Ruth Myepa Nyirenda)

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 4<sup>th</sup> DAY  
OF JULY, 2024**

For the Plaintiff : Ms. M.G Mbewe and Mr. M. Ntanda, Messrs Reagan  
Blankfein Gates Legal Practitioners.

For the Defendant : Mr. N. Ngandu, Messrs Shamwana & Company.

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## **R U L I N G**

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CASES REFERRED TO:

1. *OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited and Amanita Milling 2011 Vol 1 ZR*
2. *Kajimanga v Chilemya Appeal No 50 of 2014*

LEGISLATION REFERRED TO:

1. *The Evidence Act Chapter 43 of the Laws of Zambia*
2. *The Evidence (Bankers Books) Chapter 44 of the Laws of Zambia*
3. *The Electronic Communications and Transactions Act No 4 of 2021*

### **1. INTRODUCTION**

1.1 This matter came up for continued trial on 6<sup>th</sup> June, 2024 with the first witness for the Plaintiff, Da-Cheng Wood Processing Company Limited, Chisiki Matafwali being

recalled to testify, following an adjournment of the matter on 20<sup>th</sup> March, 2024.

## 2. OBJECTION RAISED

### OBJECTION BY COUNSEL FOR DA-CHENG WOOD PROCESSING COMPANY LIMITED

- 2.1 During cross examination of Chisiki Matafwali, Counsel for Da-Cheng Wood Processing Company Limited objected to Chisiki Matafwali being referred to an Account Statement which was at page 25 of Pereka Nyirenda's bundle of documents, on the basis that it had not been certified in line with the provisions of the ***Electronic Communications and Transactions Act***.
- 2.2 In response, Counsel for Pereka Nyirenda stated that ***Order 19 Rule 3 (3) of the High Court Rules***, provides that an interlocutory application should be brought not less than Fourteen (14) days before trial. Therefore, Da-Cheng Wood Processing Company Limited had opportunity to object to the document, and there was as such, no objection before the Court.
- 2.3 It was stated that secondly, Da-Cheng Wood Processing and Company Limited had opportunity to inspect the documents. Therefore, the application had come too late in the day. The case of ***Kajimanga v Chilemya*** <sup>(2)</sup> was relied on, as having held that at the point of filing the bundles of documents, the said documents become part of evidence. Therefore, the objection should not be entertained.

**REPLY BY COUNSEL FOR DA-CHENG WOOD  
PROCEESING COMPANY LIMITED**

- 2.4 In reply, Counsel stated that a reading of **Section 9 (4) of the Electronic Communications and Transactions Act** was clear, that a data message shall only be admissible in evidence, if it is certified by an officer where the document is coming from. It was stated that the Accounts Statement at page 25 of Pereka Nyirenda's bundle of documents had not met the requirements of **Section 9 (4) of the Electronic Communications and Transactions Act** and it could therefore not be relied upon, irrespective of how or where the objection was raised.
- 2.5 In reply to the submission that the application to object should have been lodged not less than Fourteen (14) days before the trial, Counsel's submission was that what had been raised was an objection, and an application had not been made. Counsel acknowledged the decision in the case of **Kajimanga v Chilemya** <sup>(2)</sup>, but contended that it did not proscribe the raising of objections at trial.
- 2.6 The case of **OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited and Amanita Milling** <sup>(1)</sup> was stated as having held that such objection, although it ought to have been raised during inspection, could be raised at trial, as it related to the authenticity of documents.
- 2.7 Further reference was made to **Section 3 of the Evidence Act** as making provision that a document is only admissible

in evidence, if it is produced by the maker or author, with the exception being where the author is dead or they are not in Zambia.

### **3. DECISION OF THIS COURT**

- 3.1 I have considered the objection. It was in relation to the reference to the Statement of Account from the Bank, on the basis that it was not certified. The opposition to the objection, was that it had come too late in the day, as there was discovery and inspection in this matter, at which stage, the said objection could have been raised. The argument was that once the documents were produced in the bundle of documents, they became part of the evidence.
- 3.2 The case of *Kajimanga v Chilemya* <sup>(2)</sup> was relied on, and it was further submitted that moreover, the application to object should have been made at least not less than Fourteen (14) days before the trial date.
- 3.3 In reply, it was stated that while the decision in the *Kajimanga v Chilemya* <sup>(2)</sup>, was appreciated, it did not proscribe the raising of objections at trial. Counsel further submitted that the case of *OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited and Amanita Milling* <sup>(1)</sup> Limited held that objection could be raised at trial to documents.
- 3.4 ***Order 5 Rule 21 of the High Court Rules Chapter 27 of the Laws of Zambia*** provides that:

***“21. In every case, and at every stage thereof, any objection to the reception of evidence by a party***

*affected thereby shall be made at the time the evidence is offered:*

*Provided that the Court may, in its discretion, on appeal, entertain any objection to evidence received in a subordinate court, though not objected to at the time it was offered."*

- 3.5 In the case of *Kajimanga v Chilemya* <sup>(2)</sup>, the Supreme Court stated as follows:

*"The kernel of the arguments by Counsel for the Appellant, Mr. Silwamba SC, on the first, second, third and sixth grounds of appeal, is that in his evidence before the lower Court, the Respondent did not make any reference to, or produce any of the documents contained in his bundle of documents. Further, that the Respondent did not tell the Court that he was generally going to rely on documents contained in his bundle of documents.*

*Therefore, the Judge misdirected herself when she relied on documentary evidence contained in the Defendant's bundle of documents. A look at the Respondent's evidence before the lower Court indeed establishes that in his testimony, he did not make reference to any of the documents contained in his bundle of documents. However, in our view, this cannot be taken to mean that the*

*Respondent abandoned all the documents contained in the bundle of documents.*

*The procedural rules relating to documentary evidence in civil matters is different from those applicable to criminal matters. This is essentially because the standard of proof in criminal matters is beyond all reasonable doubt while proof in civil matters is on a balance of probabilities. For this reason, the rules relating to documentary evidence in criminal matters require that each document must be specifically identified and produced by the relevant witness during trial before its' contents can be publicised and relied upon to support a party's case.*

*It follows that the criminal case of R v Holly Trinity Hull which Counsel for the Appellant relied upon, is not applicable to the facts of this case."*

3.6 The Supreme Court went further to state that:

*"In addition to the above, it is trite law that there is no discovery and inspection of documents and the filing of bundle of documents in criminal matters, unlike the position in civil matters where civil procedural rules provide for parties to have access to all documents in the possession of their opponent and raise any objections that they may have to such documents.*

*According to Order 19 of the Supreme Court Rules, the Court or trial Judge, should not later than Fourteen days after appearance and defence have been filed, give directions to among others, discovery of documents and inspection of documents. Discovery of documents enables a party to see all material documents in the possession of his or her opponent if need be, and to take copies of the documents. The authors of Odgers on Civil Court Actions have said at page 277-*

*Such disclosure is obtained by the process- formerly only available in equity, but now freely used in all divisions of the High Court and the County Court-called discovery of documents. Two stages are involved: the disclosure of what documents exist (coupled with any claim that any of them are privileged from production) and the inspection of those documents as the opponent is entitled to see.*

*Order 24 Rule 16 of the Rules of the Supreme Court of England 1999 Edition, stipulates the consequence of failure to comply with the requirement for discovery. It states:*

*"If any party who is required by any of the foregoing rules, or by any order made*

*thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose or to supply copies thereof fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3 (2) and 11 (1) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.”*

3.7 The Supreme Court also stated that:

*“The above elaborate procedures of discovery and inspection of documents allow a party to know in advance which documents are with the opponent, and to raise objections if necessary. In the case of OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited and Amanita Milling, Mutuna J (as he then was) said the following:*

*“The application before me is an interlocutory application which arises from the defendants' notice to object to documents filed on 4th September, 2009. It comes in the wake of failure by the parties to convene for*

*inspection of documents, at which stage the defendants would have raised the objection. It has become common practice now for counsel to ignore or neglect to inspect documents, and proceed straight to filing bundles of documents.”*

*From the above, it is clear that in a civil matter, a party is provided with an opportunity to object to any document which is intended to be brought before Court by the opposing party. We must add here that an objection to a document should be made timely to allow to allow the other party to respond, and if possible to make a relevant application. In our opinion, an objection cannot validly be made after the trial of the matter has closed.*

*The facts of the present case establish that the Appellant did not raise any objection to the documents contained in the Respondent's bundle of documents during discovery and inspection or at any other time before the conclusion of trial. The objection was only raised in the Appellants written submissions which were filed after the close of trial. In our view, the Appellant's objection was not timely as there was no opportunity for the Respondent to respond to the objection and if*

***possible make any necessary application to make amends.”***

- 3.8 In the case of ***OTK Limited v Amanita Zambiana Limited, Diego Gan-Maria Casilli, Amanita Premium Oils Limited and Amanita Milling*** <sup>(1)</sup> Mutuna J, as he then was, noted as follows:

***“This is what happened in this case and the practice is not only wrong, but is frowned upon by the Courts. Further, the fact that the parties have deliberately ignored taking certain steps set out in the order for directions, does not take away a party's right to object to certain documents that are included in the bundle of documents. I therefore find that the defendants are on firm ground in moving this motion at this stage of the proceedings, and for the purpose it is sought to achieve.”***

- 3.9 My understanding of Mutuna J's reasoning, was that where the Orders for Directions have not been complied with, in terms of the parties conducting discovery and inspection of documents, the parties may still raise objection to documents that are included in the bundle of documents at trial. Further, from the case of ***Kajimanga v Chilemya*** <sup>(2)</sup> the Supreme Court guided that objection may be made to documents during discovery and inspection, and at any time before trial closes.

- 3.10 They also stated that the other party should be given opportunity to respond to the said objection, and where possible, make amends.
- 3.11 In this matter, from the submissions which were made by Counsel for Pereka Nyirenda, there was inspection of documents which was conducted in this matter, and therefore Da-Cheng Wood Processing Company Limited was put on notice as to what documents Pereka Nyirenda would rely on at trial, having inspected the documents. In her List of Documents to be relied on at trial, Pereka Nyirenda listed the Accounts Statement as one of the documents that she would rely on at trial.
- 3.12 Therefore, the Accounts Statement was one of the documents that was available for inspection, which the parties did conduct in this matter.
- 3.13 Consequently, the question that arises is whether by making the objection to the Accounts Statement at page 25 of Pereka Nyirenda's bundle of documents at trial, and not during inspection, the objection was made timely?
- 3.14 The provisions of **Order 5 Rule 21 of the High Court Rules** have been reproduced above. That Rule allows a party to object to evidence at the time that it is presented. However, the rule does not clarify in terms of when objection can be made in a criminal or civil trial, regard being had to the rules that govern production of documents in relation to the same.
- 3.15 From the case of **Kajimanga v Chilemya (2)**, it can be seen that even where there has been discovery and inspection of

documents, objection to evidence that is contained in documents will still be allowed, if it is made at trial and the other party has opportunity to respond to the same.

3.16 **Section 2 of the Electronic Communications and Transaction Act No 4 of 2021** defines *data* and *data message* as:

***“data” means an electronic representation of information in any form;***

***“data message” means data generated, sent, received or stored by electronic, optical or similar means and includes, but is not limited to electronic data interchange (EDI), voice, stored record, electronic mail, mobile communications audio and video recordings;”***

3.17 The provisions of **Section 8 and 9 of that Act** are:

***“8. (1) Where a law requires information to be presented or retained in its original form, that requirement is met by a data message if—***

***(a) the integrity of the information from the time when it was first generated in its final form as a data message, or otherwise, has passed the assessment specified under subsection (2); and***

***(b) that information is capable of being displayed or produced to the person to whom it is to be presented.***

(2) For the purposes of subsection (1)(a), the integrity of any information is assessed—

(a) by considering whether the information has remained complete and unaltered, except for the addition of any endorsement and any change which arises in the normal course of communication, storage and display;

(b) in the light of the purpose for which the information was generated; and

(c) by having regard to other relevant circumstances.

9. (1) In any legal proceedings, the rules of evidence shall not be applied so as to deny the admissibility of a data message in evidence —

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original format provided the substance is the same.

(2) Information in the form of a data message shall be given due evidential weight.

(3) In any legal proceedings, when assessing the evidential weight of a data message, regard shall be had to—

*(a) the reliability of the manner in which the data message was generated, stored or communicated;*

*(b) the reliability of the manner in which the integrity of the data message was maintained;*

*(c) the manner in which its originator was identified; and*

*(d) any other relevant factor*

*(4) A data message made by a person in the ordinary course of business, or a copy or printout of, or an extract from, the data message certified to be correct by an officer in the service of that person, shall on its mere production in any civil, criminal, administrative or disciplinary proceedings under a written law, be admissible in evidence against a person and rebuttable proof of the facts contained in a record, copy, printout or extract."*

3.18 The Accounts Statement at page 25 of Pereka Nyirenda's bundle of documents is a Bank document. ***The Evidence (Bankers Books) Chapter 44 of the Laws of Zambia*** in ***Section 2 of that Act*** defines a *Bankers Book* as:

***"'banker' book" includes ledgers, day books, cash books, account books and all other records used in the ordinary business of the bank, whether such records are in form or in microfilm, magnetic tape***

*or any other form of mechanical or electronic data retrieval mechanism.”*

3.19 **Sections 4 and 5 of the said Act** provide that:

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

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

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

*(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner for oaths or person authorised to take affidavits.”*

3.20 Therefore, an Accounts Statement being a document that is used the Bank's ordinary course of business, and is a Bankers' book, a copy of it can only be used in evidence, where the copy has been examined with the original entry

and certified as correct. Such proof shall be given by some person who has examined the copy with the original entry, and the proof may be given either orally or by an affidavit sworn before any commissioner for oaths or person authorised to take affidavits.

3.21 Thus, the law relating to the admissibility of copies of bankers' books is that they have to be certified by the person who examines them with the original, and such proof may be given orally or by affidavit.

3.22 Therefore, the document at page 25 of Pereka Nyirenda's bundle of documents, apart from being a Bankers Book, whose copy can only be used in evidence if it is certified, it is also a data message having been electronically generated. It consequently has to further satisfy the requirements of **Section 9 of the Electronic Communications and Transactions Act No 4 of 2021** whose provisions have been seen above.

#### **4. CONCLUSION**

4.1 The Accounts statement at page 25 of Pereka Nyirenda's bundle of documents, being one whose copy is only admissible in evidence, if it is certified, and it not having been certified, the objection to its' use during trial, was timely, as Pereka Nyirenda had opportunity to respond to the same at trial when the objection was raised.

4.2 This is more so as the document is inadmissible in evidence, as it was not certified before it was filed as evidence before this Court. Further, what was raised was an objection to the

evidence, and not that an application was made, which had it been an application, it would have resulted in the provisions of **Order 19 Rule 3 (3) of the High Court Rules** being invoked, on when an application could be made.

- 4.3 In view of the above, page 25 of Pereka Nyirenda's bundle of documents is accordingly expunged from the bundle of documents. The matter shall come up for continued trial on 6<sup>th</sup> November 2024 at 14:30 hours. Costs shall be in the cause and leave to appeal is granted.

**DATED AT LUSAKA THE 4<sup>th</sup> DAY OF JULY, 2024**

