



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NUMBER 25 OF 2019

PROFESSOR JAMES K. TUITOEK.....PLAINTIFF

VERSUS

DAVID MWERE.....1ST DEFENDANT

NATION MEDIA GROUP LIMITED.....2ND DEFENDANT

R U L I N G

1. The orders at paragraph 19 herein were issued on 12th January 2022. This is the reasoned ruling for the same.
2. The Plaintiff herein Prof. James K. Tuitoek has sued David Mwere, a journalist, and the Nation Media Group Limited for Defamation seeking among other orders, general, exemplary and aggravated damages for libel and defamation.
3. The claim arises from material published on the 2nd defendant's electronic media, described as a link <https://nation.co.ke/news/moi-leaders-may-lose-ADC-land-titles>. It is the plaintiff's case that the story in that link contained the libelous and defamatory material.
4. On 1st November 2021 the plaintiff took the witness box to give his evidence upon adopting his witness statement and he proceeded to state;

“..... I also filed my documents together with my plaint – 5 documents

- i. Excerpt from the Daily Nation
- ii. Excerpt from the Star Newspaper
- iii. Copy of my letter to ADC
- iv. Copy of demand letter
- v. Copy of my letter from ADC

...I wish to produce the 5 documents.”

5. This wish was immediately opposed by counsel for the defendants, Mr. Kagucia, on the grounds that the plaintiff was not the maker of the said documents; that no foundation had been laid by the plaintiff for the production of the documents by himself and not by the makers.
6. That the alleged copy of an excerpt of the Star Newspaper was not even annexed to the list of documents and it was odd for counsel to purport to produce a non-existent exhibit. That these attempts were contrary to the express provisions of **Section 65 of the Evidence Act**.
7. That of great importance was that the plaint at paragraph 5 made reference to and reproduced an electronic link to the material the cause of this suit. That the plaintiff was duty bound to comply with **Section 65(8) as read with Section 106 (b) of the Evidence Act**, by producing a Certificate of Electronic Compliance. To that end Mr. Kagucia urged that the plaintiff's application to produce the said documents be rejected.

8. In response Mr. Kisila urged that the objection raised by Mr. Kagucia was purely technical, and frowned upon by Article 159 of the Constitution, that it was not meant to advance the ends of Justice. He argued that the documents referred to were exchanged at pre-trial stage, and that there was no indication and at pretrial stage that there would be any objection to the production of the said documents. That the defendants had only raised issue with the copy of the Hansard which was uncertified; that these pieces of evidence were not denied by the maker. He submitted that it was not impossible to get these witnesses, that there was no indication that they would need these witnesses to be procured, neither was there any indication that they would have required the electronic certificate, as the plaintiff would have procured it; that the letter from ADC was addressed to the plaintiff, and the contents were not disputed; that the 1st defendant had admitted these things, his defence being that they were true. He urged the court to find that these objections were academic, and to reject them and allow the matter to proceed.

9. In his rejoinder, Mr. Kagucia decried the fact that the first place of refuge for parties who were not prepared was **Article 159 of the Constitution** and urged that this was not cure all. That it was not the place of the defence to counsel to alert the plaintiff's counsel on the need to comply with the law. That plaintiff's counsel had indicated that he would discuss with the defence counsel the issue of documents but that discussion was never had. Further that the **Evidence Act** as currently amended is post 2010, and hence constitutionally compliant. Hence, he argued, the plaintiff is required to comply with the requirements of the law under **Sections 65(1), 65(5), 65(6), 65(7), 65(8), 106(d) of the Evidence Act.**

10. The only issue for determination is whether the objection raised by defence counsel is sustainable.

11. The issue of the production of documentary evidence is governed by the **Evidence Act as set out in Part III of the Act** and for electronic and digital evidence, **Section 78A at part VII of the same Act.**

12. It is argued for the plaintiff that at the pre-trial stage, the issues raised by the defendant were never raised so as to enable the plaintiff to comply. There is also the argument that at the time the documents were exchanged, there was no issue. I doubt that the mere exchange of documents means that the same are agreed on. My understanding is that this exchange is necessary so that neither party is ambushed by the evidence the other party presents at the hearing. The actual production of documents as evidence is another issue, and unless the parties have specifically agreed to put in documents by consent, a party cannot, should not assume that the mere fact of exchanging documents is sufficient. A party intending to rely on those documents ought to comply with any legal and procedural requirements. It is a requirement that the maker of a document produces it, and if the maker is not available, then a basis must be laid for production by any other person. It is also a requirement that electronic evidence must be accompanied by the requisite certificate. A party seeking to rely on such evidence must comply with the law. Such a party ought not to present such evidence without compliance of the law and expect no objection.

13. Hence, I need not go into a long discussion of the issue, yet, it is clear, the argument that this is a technicality cannot stand because these are legal requirements. That the plaintiff ought to have complied with while preparing his case, it cannot be the role of the defence to tell the plaintiff what to do.

14. The letter from ADC was not made by the plaintiff, it was written by another person, and it's production, if by the plaintiff, ought to be preceded by the laying of the basis for the same.

15. The excerpt from the Daily Nation Digital Platform ought to have been accompanied by the requisite certificate.

16. I have checked the record, and it is true that though in the plaintiff's list of documents dated 28th June 2019 the plaintiff lists at No. 2,

“Copy of the Star Newspaper dated 29th May 2019.”

The same is not attached.

17. So, clearly from the foregoing the objections by the defendants are tenable. What should be the remedy?

18. It was submitted by Mr. Kisila that it was not difficult to obtain the witnesses, and the requisite certificate. It is my considered view that it would be in the interest of justice that the plaintiff allowed time to present the author of the letter from ADC as a witness or lay a basis as required by law for not calling him or her, obtain the requisite certificate for electronic or digital evidence, supply the defence and court with the document listed as No. 2 on the list dated 28th June 2019 and since the adjournment was caused by the plaintiff, to bear the costs of the adjournment.

19. In the upshot the following orders issue:

1. That the objection be and is hereby sustained as the plaintiff has not laid a basis for the attempt to produce documents, he is not the maker thereof.

2. That in the interests of justice the Plaintiff be and hereby granted 14 days hereof to;

1. Obtain and serve upon the defendants the requisite certificate with respect to the electronic/ digital evidence he intends to rely on.

2. File and serve a copy of the Star Newspaper referred to in his list of documents and his evidence upon the defendants.

3. File and serve upon the defendant the witness statements for any witnesses he requires to produce the documents objected to.

3. The plaintiff to bear the costs of the adjournment.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 18TH DAY OF JANUARY, 2022

MUMBUA T. MATHEKA,

JUDGE.

In the presence of:

Edna C/A

Sheth & Wathigo Advocates

Kagucia & Co Advocates