



**Inclusive Agencies (Msa) Limited v Co-operative Bank Of Kenya Limited
(Civil Suit 14 of 2020) [2022] KEHC 12296 (KLR) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 12296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 14 OF 2020**

OA SEWE, J

APRIL 21, 2022

BETWEEN

INCLUSIVE AGENCIES (MSA) LIMITED PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED DEFENDANT

RULING

1. Mr Kongere, learned counsel for the defendant, raised an objection to the production of certain documents in the plaintiff's list and bundle of documents. In particular, he objected to the production of documents that purport to have originated from Kenya Airports Authority, on the ground that they are documents peculiarly within the possession of a public body; and can only be produced either by public body concerned; or by certification. He consequently argued that since there is no such certification, the documents are inadmissible. He relied on sections 70 and 80 of the *Evidence Act*, chapter 80 of the laws of Kenya.
2. Regarding the letters that were purportedly signed by persons exercising delegated authority, Mr Kongere submitted that delegated authority cannot be delegated; and therefore, it was imperative to first establish whether the documents truly emanated from Kenya Airports Authority (KAA) in the first place, before ascertaining their probative value. He expressed concern that the sum claimed is a huge amount; and that it is only fair that the makers of the documents be called to afford the defence the opportunity to cross-examine them so as to forestall undue prejudice to the defence.
3. On her part, Ms Rajab for the plaintiff, urged the court to dismiss the objection on the ground that it has been raised too late in the day. She pointed out that the parties had an opportunity to hold a pre-trial conference before the suit was certified ready for hearing; and therefore that Mr Kongere was at liberty to raise concerns about the documents at the time. Regarding the assertion by Mr Kongere that the documents are public documents, Ms Rajab pointed out that they are in fact tender documents that were obtained from KAA for purposes of transparency in public procurement. She pointed out



that the Constitution also allows for access to information. Thus, she urged the court to find that, as the recipient of the documents, PW1 is competent to produce them.

4. In response to the submissions by Ms Rajab, Mr Kongere submitted that the right to information must be exercised within the confines of the applicable law; and therefore that compliance with section 80 of the Evidence Act was imperative in this instance. He insisted that the subject documents are public documents and therefore can only be produced in the manner set out in section 80 of the Evidence Act.
5. I have perused the record and note that the parties were given an opportunity to attend a pre-trial conference on the September 16, 2021. Needless to say that one of the objectives of pre-trial conference is to promote the expeditious disposal of cases by, inter alia, providing an opportunity for the resolution of any interlocutory applications, including objections that may be raised to the production of documents. Thus, order 11 rule 3(1) of the Civil Procedure Rules provides that:

“The purpose of a case management conference shall be to

- (a) Promote the expeditious disposal of case;
- (b) Afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case;
- (c) Afford the parties an opportunity to settle the case;
- (d) Determine any other matter relating to the management, hearing and disposal of the case;
- (e) Deal with pre-trial applications at first instance or formulate a timetable to deal with them as the court may deem fit; and
- (f) Identify the issues for determination.

6. In the light of the aforesaid provisions, it was expected that any objection to the production of the plaintiff's documents, such as have been taken by Mr Kongere, be raised on the September 16, 2021. No such objection was raised. In fact, the record confirms the indication that Mr Kongere would not raise any objection to the production of the plaintiff's documents. In the premises, it is manifest that Mr Kongere's objection is either an afterthought or a deliberate attempt to derail the expeditious disposal of the suit.
7. The foregoing notwithstanding, I have looked at the two bundles of documents and in particular the documents objected to. Mr Kongere. He took issue with the production of document No 6 in the plaintiff's list and bundle of documents dated February 18, 2020 as well as correspondence from KAA filed as documents No 9 in the plaintiff's initial bundle and Nos 2 and 4 in the plaintiff's supplementary list and bundle of documents.
8. There is no gainsaying that KAA is a public body; and therefore that the documents in question are indeed public documents for purposes of sections 79 and 80 of the Evidence Act. Hence, the court was urged to find that their production can only be done by an officer from KAA or by way of certified copies. Mr Kongere relied on section 80 of the Evidence Act which provides that:

- “(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name



and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.”

9. However, it is also true that we now have in place a new constitutional order that places more premium on the right to information as well as transparency in public procurement. Hence in article 227 of the Constitution, it is stipulated that:

“(1) When a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.”

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented...”

10. Parliament has since passed the Public Procurement and Asset Disposal Act, No 33 of 2015; and in section 3 thereof, the guiding principles have been enumerated to include the national values and principles set out in article 10 of the Constitution. Those values include transparency and accountability. And, in section 68 of the Public Procurement and Asset Disposal Act, public entities are mandated to keep records of all procurements undertaken; again for purposes of accountability. In particular, section 68(3) and (4) of the Act stipulates that:

“After a contract has been awarded to any person or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, proposal or quotation, or any interested member of the public where such information held is aligned to the principle of public interest or, if direct procurement was used, a person with whom the procuring entity was negotiating.

(4) The accounting officer of a procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available to any person.”

11. In line with section 7(1) of the transitional and consequential provisions, section 80 of the Evidence Act must be looked at in the light of these legal developments and construed with the alterations, adaptations and qualifications necessary to bring it in conformity with the new constitutional order. In fact, section 5(1) of the Public Procurement and Asset Disposal Act provides that:

“This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.”

12. It is in the light of the forgoing that I find Mr Kongere’s objection misplaced. The plaintiff participated in a procurement and in the process thereof lawfully obtained documents from the procuring entity in respect of the said procurement. In the premises, it is my finding that PW1 is the proper witness to produce the said documents on behalf of the plaintiff. The objection is accordingly overruled.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022.

OLGA SEWE

JUDGE

