



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

HCC COMM NO. 536 OF 2011

DRY ASSOCIATES CO. LTD.....1ST PLAINTIFF
HORSE ASSOCIATION OF KENYA.....2ND PLAINTIFF
DAVID GRAY.....3RD PLAINTIFF
DAVID N NTURIBI.....4TH PLAINTIFF

VERSUS

TIMOTHY KARUNGU KARANJA.....1ST DEFENDANT
SIRIUS SOLUTIONS LIMITED.....2ND DEFENDANT
MERIDIAS CAPITAL LIMITED.....3RD DEFENDANT
BLUECREST HOLDINGS LIMITED.....4TH DEFENDANT
DIEFEL INVESTMENT LIMITED.....5TH DEFENDANT
GRAY PROPERTIES.....6TH DEFENDANT
DRY WEALTH MANAGEMENT SERVICES.....7TH DEFENDANT
EQUATORIAL COMMERCIAL BANK LIMITED.....8TH DEFENDANT

RULING

On 18th February 2019, **PW 1**, James Richard Dry in examination in chief, relied on his witness statement of 21st November 2018 filed on 17th January 2019. The Plaintiff relied on List of documents bundle filed on 5th February 2018.

Counsel for the 1st Defendant objected to the admissibility of certain documents in the Plaintiff's Further Bundle of Documents dated 5th February 2018. The evidence in contention was found in pages 6,11,12,20,21,23,28,35,36,37,38,46,44,45,46,47,49,55,56 which consisted of copies of facsimiles and email correspondences by the 1st Defendant.

The Defendant's objection was grounded on **Section 106 (4)** of the Evidence Act which provides that any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer is only admissible as evidence if accompanied by a certificate.

The Plaintiff did not comply by virtue of not producing a certificate detailing the preparation, storage and production of the emails and facsimiles and confirm authenticity of the evidence.

The Plaintiff however, rebutted the objection claiming that the Defendants had the time and opportunity to raise this point of law during pre-trial and case management stage when the Plaintiff filed their 1st bundle of records and correspondence but they decided to sleep on their

laurels.

In reply, Counsel for the Defendant stated that a certificate by the witness to produce evidence where there is production of records, documents and/or correspondence from electronic equipment to confirm authenticity and non-tampering of the same must be produced for the same to be admissible as evidence. The objection can/maybe raised at any stage during Trial.

DETERMINATION

Therefore, the issue to be determined by this Court is whether the evidence in pages 6,11,12,20,21,23,28,35,36,37,38,46,44,45,46,47,49, 55,56 are admissible before this Court without certificate.

Section 106B (1) and 106 B (4) of the Evidence Act provides as follows;

“Admissibility of electronic records

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

Section 106B (4) provides that,

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

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

In **REPUBLIC VS BARISA WAYU MATUGUDA [2011] eKLR**, the court held that;

“...any information stored in a computer...which is then printed or copied...shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.”

The court went on to state that:

“This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4).

Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device....”

The same was reiterated in the cases of **JACK & JILL SUPERMARKET LTD V VIKTAR MAINA NGUNJIRI [2016] EKLR**, and **NONNY GATHONI NJENGA & ANOR VS. CATHERINE MASITSA & ANOR (2014) EKLR**.

This Court refers to SECTION 78 OF EVIDENCE ACT which provides;

“Admissibility of electronic and digital evidence:

1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

2) The Court shall not deny admissibility of evidence under Subsection (1) only on the ground that it is not in its original form.

3) In estimating, the weight, if any to be attached to electronic and digital evidence under Subsection (1) regard shall be had to ;

- a) *The reliability of the manner in which the electronic and digital evidence was generated stored or communicated;*
- b) *The reliability of the manner in which integrity of the electronic and digital evidence was maintained;*
- c) *The manner in which the originator of the electronic and digital evidence was identified; and*
- d) *Any other relevant factor.*

4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from electronic and digital evidence certified correct by a person in the service of such person, is on its mere production in any civil, criminal administrative or disciplinary proceedings under any law, the rules of self regulatory organization or any other law or the Common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

In the instant case the records and documents whose production and reliance is challenged consist of;

1. Copy of letter by facsimile on letterhead of **DRY ASSOCIATES LTD** of 19th March 2009 to Crown Berger Ltd, not signed but by one Timothy Karanja/Program Manager (pg 6 of bundle);
2. Copy of letter by facsimile on letterhead of DRY ASSOCIATES LTD of 19th March 2009 to Crown Berger Ltd, not signed but by one Timothy Karanja/Program Manager (pg 11of bundle);
3. Copy of letter by email from Timothy Karanja Sales & Marketing Manager DRY ASSOCIATES LTD of 20th March 2009 to Aftab Jevanjee Crown Berger copied to Ayub Odero and David Muriithi of Crown Berger (Pg 12 of bundle);
4. Copy of letter by email from Timothy Karanja Sales & Marketing Manager DRY ASSOCIATES LTD of 27th May 2009 to Aftab Jevanjee Crown Berger copied to Ayub Odero and David Muriithi of Crown Berger (Pg 20 of bundle);
5. Copy of letter by facsimile on letterhead of DRY ASSOCIATES LTD and signed by and from Timothy Karanja Sales & Marketing Manager DRY ASSOCIATES LTD of 27th May 2009 to Patrick Mwati Crown Berger Kenya Ltd. (Pg21of the bundle);
6. A Copy of computer generated advice on letterhead of Barclays Bank of Kenya Ltd to Crown Berger Ltd (pg 23 of the bundle);
7. Copy of letter by facsimile on letterhead of DRY ASSOCIATES LTD not signed from Timothy Karanja Program Manager of 28th April 2010 to Patrick Mwati Crown Berger Kenya Ltd. (Pg 28 of the bundle);
8. Copy of letter by facsimile on letterhead of DRY ASSOCIATES LTD not signed from Timothy Karanja Program Manager of 20th April 2010 to Patrick Mwati Crown Berger Kenya Ltd. (Pg 35 of the bundle);
9. Copy of letter by email from Timothy Karanja Manager –Investment Banking & Brokerage, DRY ASSOCIATES INVESTMENT BANK LTD of 3rd October 2010 to Patrick Mwati Crown Berger copied to Ayub Odero and David Muriithi of Crown Berger (Pg 36 of bundle);
10. Copy of letter by facsimile on letterhead of DRY ASSOCIATES LTD not signed from Timothy Karanja Program Manager of 2nd December 2010 to Patrick Mwati Crown Berger Kenya Ltd. (Pg 37 of the bundle);
11. Copy of letter dated 6th January 2011to Fr Anthony Mwituria Trustee of R.S.Ndungu Mwana’a Nzeki Foundation signed by Karanja for and on behalf of DRY ASSOCIATES LTD (Pg 38 of the bundle);
12. Copy of letter by email from Timothy Karanja Manager –Investment Banking & Brokerage, DRY ASSOCIATES INVESTMENT BANK LTD of 13th January October 2010 to Patrick Mwati Crown Berger copied to Ayub Odero and David Muriithi of Crown Berger (Pg 44 of bundle);
13. Copy of letter by facsimile on letterhead of DRY ASSOCIATES LTD not signed from Dry Associates Ltd and Timothy Karanja Program Manager of 7th January 2011 to Patrick Mwati Crown Berger Kenya Ltd. (Pg 45 of the bundle);
14. Copy of letter by email from Timothy Karanja Manager –Investment Banking & Brokerage, DRY ASSOCIATES INVESTMENT BANK LTD of 28th February 2011October 2010 to Ayub Odero and copied to David Muriithi of Crown Berger (Pg 46of bundle);
15. Copy of letter by facsimile on letterhead of DRY ASSOCIATES LTD not signed from Dry Associates Ltd and Timothy Karanja Sales & Marketing Manager of 28th February 2011 to Patrick Mwati Crown Berger Kenya Ltd. (Pg 47 of the bundle);
16. Copy of letter by facsimile on letterhead of OLD MUTUAL signed by authorized signatories but not named to Kenya Commercial Bank (KCB) Ms Jane Mwango (Pg 49 of the bundle);

17. Copy of letter by email from Timothy Karanja Manager –Sales & Marketing Manager DRY ASSOCIATES INVESTMENT BANK LTD of 7th April 2011 to Ayub Odero and copied to David Muriithi of Crown Berger (Pg 55 of bundle);

18. Copy of letter by facsimile from Timothy Karanja Manager –Sales & Marketing Manager DRY ASSOCIATES INVESTMENT BANK LTD of 7th April 2011 to Patrick Mwati (Pg 56 of bundle).

The above documents hereinabove are copies and at this stage alleged to have been authored by 1st Defendant. In the Plaintiff filed on 28th November 2011 paragraph 8 it is deponed;

“The 1st defendant was a long serving employee of the 1st Plaintiff, having served for over 8 years”

By the 1st Defendant’s Replying Affidavit filed on 14th December 2011 at paragraph 3 deponed;

“That I was in the employment of the Plaintiff Dry Associates Limited from 24th April 2003-14th April 2011. I annex hereto and mark TKK1 copies of letters of employment.”

The fact of employment of 1st defendant by the 1st Plaintiff is agreed and therefore, the 1st Plaintiff shall file and serve certificate under **78 (4) Evidence Act in compliance with Section 106 of Evidence Act**. These documents were prepared, stored and produced in the ordinary course of business of the 1st Plaintiff and during the employment period of the 1st defendant by the 1st plaintiff. The 1st plaintiff shall on 1st Defendant’s behalf who is no longer in employment and has access to the said documents prepare, serve and file the certificate.

Section 78 and 106 of Evidence Act are mandatory to admissibility of records and/or documents from electrical and digital devices in Court as evidence. However, there is no time limit and specific stage that the issue maybe raised and similarly no compliance period. Therefore, Counsel for the defendant was within their legal right to raise the question of law and the Counsel for Plaintiff shall on behalf on their client have sufficient period to comply with **Section 106B (4) of the Evidence Act**.

This Court notes with concern that there are copies of Payment advices by banks and instructions from clients. It is advisable that such documents are also confirmed as authentic from the banks, namely Barclays Bank ,NIC and KCB and by the clients.

The court acknowledges emails and facsimiles are from electronic and digital devices and are admissible by virtue of compliance with **Section 106A and 106B (2) of the Evidence Act**. However, currently, the identified documents are not in compliance with **Section 106B (4) of Evidence Act Cap 80**.

Thereafter, the Court may consider and address the issue of authenticity and admissibility of challenged records and documents and the filed certificate with regard to admissibility of the records and documents and their probative value during the trial/proceedings.

DISPOSITION

- 1. The 1st Plaintiff shall furnish the court and serve defendants with certificate in compliance with Section 106B (4) Evidence Act Cap 80 with regard to emails and facsimile documents contained in the Plaintiff’s bundle of documents filed on 5th February 2018**
- 2. within 30 days hereof.**
- 3. The matter be mentioned on a date to be agreed by parties and Court after 1 month and compliance**
- 4. Each party to bear own costs**

DELIVERED, DATED AND SIGNED IN OPEN COURT ON 25TH FEBRUARY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MIS BRENDA MACHASIO H/B MR. WAMBUYE FOR PLAINTIFFS

MR. GICHUGU FOR DEFENDANTS

COURT ASSISTANT - JASMINE