



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 372 OF 2014**

**WILLIAM KAZUNGU SIMBAH ..... PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LTD ..... DEFENDANT**

**RULING**

This is a ruling following an objection that was taken by the counsel for the defendant wherein he objected to the production of the certificate dated 7<sup>th</sup> February, 2017, as an exhibit herein. The objection was made on the grounds that:

1. *The Evidence Act section 106 B (4) requires parties to produce the certificate at the time of filing the pleadings and that the section does not envisage a situation where a party files pleadings and later files a certificate.*
2. *In addition, the pre-trial is over and the plaintiff did not seek leave of the court to file the same.*
3. *Article 159 (2) (d) of the Constitution cannot cure the anomaly in terms of the fact that it is a substantive matter.*

In response, counsel for the plaintiff opposed the objection and urged the court to allow the certificate to go on record. He averred that **section 106 (b)** is not couched in mandatory terms. He submitted that what is important is for a party to file a certificate to authenticate any computer print out. He averred that the objection falls under **article 159 (2) (d) of the Constitution** and he asked the court to dismiss the objection.

The court has considered the objection taken and the arguments by the learned counsels. The relevant section of the **Evidence Act is section 106 A**, which provides that, electronic records may be proved in court in accordance with the provisions of **section 106 b** of the same Act. **Section 106 (b) (1)** provides as follows:

***“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 a 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 106 (b) (2)** provides that:

***“The conditions mentioned in sub section (1) in respect of a computer output, are the following;***

***i. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process the information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;***

***ii. During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in ordinary course of the said activities;***

***iii. Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of the operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and***

***iv. The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”***

**Section 106 (a) and (b)** means that any information stored in a computer which is then printed is ***prima facie*** admissible without necessarily having to produce the computer that was used to generate it. However, **section 106 (b)** also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied, **section 106 (b) (4)** provides:

***“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 sub section (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 sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.”***

This provision is clear that for electronic evidence to be deemed admissible, it must be accompanied by a certificate in line with this provision. The plaintiff herein sought to produce the certificate dated 17<sup>th</sup> February, 2017 which is stated to have been prepared under **section 106 (b) (4) of the Evidence Act**.

Having perused the certificate sought to be produced by PW 1, the only information contained therein is that the email communication print out is from the plaintiff’s office computer and the payslips were printed from the Kenya Airports payroll manager’s computer. No other information is captured in the certificate. Clearly, the certificate dated 17<sup>th</sup> February, 2017 has not met the requirements provided in **section 106 (b) of the Evidence Act** for it to be admitted. In my view, the omission on the part of the plaintiff to include the material particulars under **section 106 (b)** is not just a mere technicality. In addition to the fact that the certificate was filed after pre-trial directions had been given, and without the leave of the court which this court could have excused but for the reason that it has failed to comply with **section 106 (b)**, I find and hold that the same is not admissible in evidence.

Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of April, 2017.

.....

L. NJUGUNA

JUDGE

In the presence of:

.....for the Plaintiff

..... for the Defendant