



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 196 OF 2018

WAINAINA KIRONYO.....1ST PLAINTIFF

MARY WAITHIRA KIRONYO.....2ND PLAINTIFF

NANCY WANJIKU NJENGA.....3RD PLAINTIFF

PETER KINYANJUI KIRONYO.....4TH PLAINTIFF

LUCY NDUTA KIRONYO.....5TH PLAINTIFF

SARAH WAIRIMU.....6TH PLAINTIFF

ANDREW KAMAU KIRONYO.....7TH PLAINTIFF

KIBUI KIRIGI.....8TH PLAINTIFF

(suing as legal representative of PETER KIRIGI MURIUKI)

CAROLINE MUMBI NJENGA.....9TH PLAINTIFF

(suing as legal representative of JOSEPH NJENGA GATHII)

=VERSUS=

NAPHTALI NGUGI MUNYAKA.....DEFENDANT

RULING

1. The plaintiffs initiated this suit through a plaint dated 2/7/2018. Their case was that they were the registered proprietors of the parcels of land surveyed and registered as: (i) Land Reference Number **4886/9**; (ii) Land Reference Number **4886/8**; (iii) Land Reference Number **7842/13**; (iv) Land Reference Number **7842/14**; (v) Land Reference Number **7842/12**; (vi) Land Reference Number **7842/15**; (vii) Land Reference Number **7842/16**; (viii) Land Reference Number **7842/17** and (ix) Land Reference Number **7842/11**. All the nine parcels are located within Kikuyu Area of Kiambu County. The said parcels border a public road. They contended that the defendant had been threatening to move into their parcels of land and clear the area bordering the road under the guise that they had encroached on the road reserve. They added that the defendant was clandestinely trying to encroach onto their parcels of land.

2. Consequently, they sought the following verbatim reliefs against the defendant:

a) A declaration that the defendant's actions are irregular and illegal.

b) A permanent injunction restraining the defendant from encroaching, destroying and trespassing onto the plaintiffs' parcels of land.

c) An order directing the defendant to compensate the plaintiffs for all losses incurred due to the defendant's actions herein.

d) Costs of the suit and interest thereon from the date of filing the suit.

e) Any other relief that the honourable court may deem just and fit to grant.

3. The defendant filed a statement of defence dated 19/10/2018 in which he denied threatening to move into the plaintiffs' parcels of land nor encroaching onto the plaintiffs' parcels of land. He denied clearing any of the plaintiffs' parcels of land. He contended that the plaintiffs' suit was politically instigated so as to tarnish, malign and defame him.

4. On 25/6/2019, parties appeared before the Deputy Registrar and the plaintiffs confirmed that they had complied with the pre-trial requirements. The suit was thereafter set down for hearing. At that point, the plaintiff had listed one witness, **Wainaina Kironyo**, as the only witness to testify. The said witness had signed a one sentence witness statement which reads as follows:

“WITNESS STATEMENT – WAINAINA KIRONYO

I, WAINAINA KIRONYO of Post Office Box 13208 – 00400 Nairobi would wish to state as follows:-

That I reiterate all matters deponed to in the Verifying Affidavit filed herein and adapt (sic) the same as my witness statement.”

5. The verifying affidavit which the said witness adopted as part of his evidence reads as follows:

“VERIFYING AFFIDAVIT

I, WAINAINA KIRONYO of Post Office Box 13208 – 00400 Nairobi

do make oath and state as follows:-

1. That I am a male adult of sound mind and the 1st plaintiff herein hence competent to swear this affidavit.

2. That I have read and understood the content of the plaint herein drawn on my behalf by Messrs Maina Ngaruiya & Co Advocates and after the same being explained to me, I confirm and state that the averments therein are correct.

3. That there is no other suit pending and neither has there been any previous suit in any court between myself and the defendant over the same subject matter.

4. That I swear this affidavit in support of the plaint herein and what is stated herein is true to the best of my knowledge, information and belief.”

6. It is noted that the said verifying affidavit, though signed, was not commissioned and is undated.

7. On or about 22/1/2021, the plaintiffs brought a notice of motion dated 21/1/2021, seeking leave to produce additional evidence in form of what they described as “documentation and electronic format.” The said application was opposed by the defendant and is the subject of this ruling.

8. The application was supported by an affidavit sworn on 21/1/2021 by Wainaina Kironyo. He deposed that he recently obtained video evidence which he was unable to procure at the pre-trial stage. He added that he later submitted the evidence in form of a video to an expert by the name Solomon Mutua Kaminda who verified the authenticity of the video. He added that he had been advised by his advocates that the electronic evidence he sought to produce was to enable the court arrive at a just and expedient determination.

9. The application was opposed by the defendant through a replying affidavit sworn on 15/11/2021. The defendant deposed that the additional evidence would distort the proceedings because he would have to file an amended defence and witness statements. He further deposed that the said video had been distorted and doctored to mislead the court. It was his further contention that this matter had been certified ready for hearing and it was only fair and just that it be concluded. He added that the plaintiffs were his political opponents in the Ward. It was his case that this suit was filed out of malice.

10. The application was canvassed through written submissions dated 17/1/2022, filed through the firm of *Maina Ngaruiya & Co. Advocates*. Counsel for the plaintiffs identified the following as the issues falling for determination in the application: (i) Whether the court should exercise its discretion in allowing the plaintiffs to produce the evidence; and (ii) Whether the defendant will be prejudiced by the admission of new evidence. On the first identified issue, counsel submitted that the plaintiffs' right to be heard would be adversely prejudiced if they were denied an opportunity to produce the said video. Counsel cited the decision in the case of *Johana Kipkemei Too V Hellen Tum (2014) eKLR* and the decision in the case of *Joseph Mumbero Wanyama V Jared Wanjala Lyani & Another (2019) eKLR* to buttress the above point. On the second identified issue, it was counsel's submission that the defendant will not suffer any prejudice during the trial if the said evidence is admitted. Counsel relied on the decision of the *Supreme Court of Kenya in Raila Odinga & 5 others V IEBC & 3 Others (2013) eKLR*.

11. The defendant filed written submissions dated 18/1/2022 through the firm of *J. W Wanjohi & Co. Advocates*. It was counsel's submission that since pleadings had closed, the defendant stood to be prejudiced. Counsel added that there was no proper certificate filed and if the same was filed, it was not compliant as the person who allegedly signed it was not qualified to sign the certificate and that the certificate exhibited did not conform with the requirements of **Section 106B (4) of the Evidence Act**. Counsel urged the court to dismiss the application.

12. The court has considered the application, the response to the application; and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence on the questions falling for determination in the application. Hearing in this suit has not commenced. In the circumstances, ordinarily, the court would at this stage be inclined to allow the plaintiff the opportunity to present additional evidence. The key question falling for determination, in the circumstances, is whether the plaintiffs have satisfied the requirements of **Section 78A** as read together with **Section 106B** of the **Evidence Act**.

13. **Section 78A** of the **Evidence Act** provides as follows:

“(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 the 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 the electronic and digital evidence certified to be 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 a 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.”

14. **Section 106B** of the **Evidence Act** provides as follows:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a 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.

(2) The conditions mentioned in subsection (1), in respect of a

computer output, are the following—

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

(b) 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 the ordinary course of the said activities;

(c) 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 operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) 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.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

a) by combination of computers operating in succession over that period; or

b) by different computers operating in succession over that period; or

c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) 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);

e) 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.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

15. In inviting the court to exercise jurisdiction and allow production of “additional evidence in form of documentation and electronic format”, the plaintiffs exhibited what they described as “a copy of the expert report and curriculum vitae”. Though typed, the said report is untitled and bears handwritten numbers that were inserted after it had been generated. It read thus:

“I, Solomon Mutua Kiminda, a citizen and resident of Kenya National Identification No. 7034434 have am of sound mind at the time of presenting this affidavit

- 1. That the documentary evidence in question was brought to me by the affected part for expert analysis.***
- 2. That I have the expert technical qualifications adequate to examine the provenance of electronic documents regarding their creating and any alteration thereof.***
- 3. That the recording in the video supplied to me carried with it adequate basic metadata regarding time and ownership.***
- 4. That part of the critical evidence established in the footage clip was the Time Stamp and the camera owners (inooro).***
- 5. I have captured some screenshots that I considered in my analysis.***
- 6. I have also attached my professional qualifications that qualify me to carry out a dependable analysis.***
- 7. The above information is accurate to the best of my knowledge and expertise.”***

16. A perusal of the untitled document reveals a lot. First, there is no indication that the untitled document is a certificate as contemplated under Section 106B(4) of the Evidence Act. Second, the untitled document does not identify any particular electronic record which the deponent examined. Third, it does not identify the source of the electronic record. Fourth, it does not give particulars of any device involved in the production of any electronic record. Fifth, it does not specify the circumstances under which any particular electronic record was kept. Generally, the untitled document does not satisfy the requirements of **Section 106B(4)** of the Evidence Act. For the above reasons, the court is not satisfied that there is a compliant certificate as required under Section 106 B of the Evidence Act.

17. A compliant certificate under Section 106B is a mandatory requirement for the admission of electronic evidence [See **(i) Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2018] eKLR**; and **(ii) Kisumu High Court Election Petition No. 2 of 2012 William Odhiambo Oduol v IEBC & 2 others**].

18. Consequently, it is the finding of this court that the plaintiffs’ plea to produce “additional evidence in form of documentation and electronic format” does not meet the criteria set out under **Section 78A** as read together with **Section 106B** of the **Evidence Act**. It is therefore the finding of this court that the applicants have failed to satisfy the relevant statutory requirements. The result is that the notice of motion dated 21/1/2021 is rejected for lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Mura for the Plaintiffs

No appearance by the Defendant

Court Assistant: Lucy Muthoni