



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 2021 OF 2001

HARLEYS LIMITED.....PLAINTIFF

V E R S U S

METRO PHARMACEUTICALS LIMITED.....DEFENDANT

RULING

Hearing of this defamation suit was underway when in the course of the Plaintiff's witnesses adducing their evidence in chief, counsel for the Defendant raised an objection with regard to admissibility in evidence of email correspondence containing the defamatory words. He sought authentication of the emails as per the provisions of Section 65 of the Evidence Act (Cap 80 Laws of Kenya).

Counsel for the Defendant urged the court to consider whether the email print outs are admissible in view of Section 65 and 106B of the Evidence Act (*the Act*) that requires a certificate to be produced to show, inter alia, how the documents were produced and what devices were used.

On her part, counsel for the Plaintiff submitted that under Section 106B of the Evidence Act, the email print outs were admissible as long as there is produced a certificate of authentication by the person responsible for the operation of 'the Computer'. She insists that the computer in this case was that in which the email originated and not the one where the email was forwarded.

The court has considered the objection raised and the rival arguments by counsel for the parties.

With regard to admissibility of print outs of forwarded email communication, the court should be guided by Section 106I of the Evidence Act which provides as follows:

"A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent"

The presumption allowed under Section 106I of the Evidence Act is therefore to recognize origination of an email message from the person sending, and receipt of that email message in an untampered form by the addressee of the message. In other words, the law deems the email message as having left the address of the originator and having been received at the address of the recipient in the same form and content. The Defendant has not brought evidence to rebut that presumption. It has not shown that the document

which the Plaintiff seeks admission of is different from the document originally created.

Thus with that presumption in mind, it is the person in charge of the Plaintiff's computers who should produce the certificate of authentication as it will be assumed that the device used to generate the information is that contemplated by Section 65 of the Act.

In the present case therefore, the only basis as to why the email print outs cannot be admitted in evidence is if the Defendant is able to prove to the court that the Plaintiff's email account was in some way tampered with. No evidence in that regard has been placed before this court and the presumption has to prevail that the forwarded email print-out corresponded with the original email.

Given that Section 106B of the Evidence Act already declares print outs of any electronic documents as documents for purposes of the Act, the objection to the production of the print outs must fail on the strength of the presumption allowed under Section 106I of the Act.

For the above reasons, the objection fails and is hereby dismissed. Counsel shall now take hearing dates in the Registry on priority basis so as to complete this trial. Costs shall be in the cause.

Dated and delivered at Nairobi this 19th Day of March, 2015.

A.MBOGHOLI MSAGHA

JUDGE