



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Suit 420 of 2008

SANJEET THETHY.....PLAINTIFF

VS

PATRICK MUSIMBA.....1STDEFENDANT

MUSIMBA INVESTMENTS LIMITED.....2NDDEFENDANT

RULING

1. Hearing of the above suit was underway on 24th April 2012 when in the course of the Plaintiff adducing his evidence in chief counsel for the Defendant Mr. Wanjohi raised an objection with regard to admissibility in evidence of documents annexed at pages 49 to 64 of the Plaintiff's bundle of documents.
2. The documents whose production is objected are two-fold: firstly, the Defendant objects to production of payment credit advices issued by foreign banks showing transfers of foreign currency from the said foreign banks to the Defendant's account domiciled in a local bank viz. Barclays Bank of Kenya Queensway House Branch and secondly, the Defendant objects to production of print outs of email communication between the Plaintiff and the Defendant.
3. Counsel for the Defendant urged the court to consider whether documents issued by a foreign institution which are not authenticated can be admitted in evidence and, secondly, whether the email print outs are admissible in view of Section 106B of the Evidence Act that requires a certificate to be produced to show, inter alia, how the documents were produced and what devices were used.
4. On his part, counsel for the Plaintiff Mr. Maberu submitted that under Section 106B of the Evidence Act, the email print outs were admissible without further proof of originals. With regard to the documents from the Plaintiff's foreign bankers, Mr. Maberu urged the court to allow the documents as they were addressed to the Plaintiff's banks notwithstanding that the parties were in different jurisdictions.
5. I have considered the objection raised and the rival arguments by counsel for the parties.
6. With regard to admissibility of print outs of email communication, my view is that the court should

determinethe question of admissibility 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”

7. 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 only presumption that the law does not make is that the message was indeed created by the owner of the originating address.

8. In that regard, the burden of alleging that the message was not created by the email account holder lies with the recipient of the message and, short of any proof to the contrary, the message is deemed to have been authored by the email account holder from which it originated.

9. In the present case therefore, the email communication between the Plaintiff and the Defendant and which is evidently interactive is presumed to have been authored by the two email account holders respectively and 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 used by some other person to draft the communication. No evidence in that regard has been placed before this court and the presumption has to prevail that the email communication was between the Plaintiff and the Defendant either way.

10. 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.

11. With regard to the print outs of bank payment credit/debit advices, my take is thateach of the remittances has a nexus to a specific bank account domiciled in a local bank, which bank can verify and certify the authenticity of the advices for purposes of Section 106B of the Evidence Act. The bank can also confirm if each of the credit or debit advices was supported by actual funds transfers commensurate with the amounts set out in the advice slips. It is therefore be necessary for the party relying on these advices to obtain such certification of the credit/debit advices and, preferably, to also arrange a suitable witness from the Bank to tender evidence re-confirming authenticity of such documents.

12. In that regard, I would decline to exclude the credit/debit payment advice documents altogether and evidence touching upon them can be adduced on condition that the documents shall be marked for identification pending certification or proper production by a witness from the bank.

13. For the above reasons, the objection fails and is hereby dismissed. Costs shall be in the cause.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17th DAY OF MAY 2012.

**J. M. MUTAVA
JUDGE**