



Kayugira & another v Musyoka & another (In their Capacities as Administrators to the Estate of Henry Musyoki Kilonzi – Deceased) (Environment & Land Case E001 of 2020) [2022] KEELC 3159 (KLR) (13 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3159 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E001 OF 2020
CA OCHIENG, J
JUNE 13, 2022
IN THE MATTER OF FAILING TO COMPLETE TRANSFER OF LR.
NO. 12715/12393 (12715/174/6) (SYOKIMAU-MAVOKO
MUNICIPALITY) AND IN THE MATTER OF SECTION 98 OF THE
CIVIL PROCEDURE ACT AND ORDER 37 RULES 1, (F) & 3 OF THE
CIVIL PROCEDURE RULES 2010

BETWEEN

BETWEEN

PETER KAYUGIRA 1ST APPLICANT

SCHOLASTICA NDUKU MUNYAO 2ND APPLICANT

AND

MESHACK MWAKA MUSYOKA 1ST RESPONDENT

CHRISTOPHER MUUO MUSYOKI 2ND RESPONDENT

IN THEIR CAPACITIES AS ADMINISTRATORS TO THE ESTATE OF HENRY MUSYOKI KILONZI – DECEASED

RULING

1. What is before court for determination is an objection by the respondents' counsel's made on 12th may, 2022 in respect to the production of emails annexed to the applicants' supporting affidavit which were marked as annexures 'SNM 9 - SNM 15', as exhibits. The respondents' counsel contended that production of the same was contrary to the provisions of section 106B of the *Evidence Act* as there was



no certificate produced to authenticate that the documents are downloaded by its maker. He argued that section 106B is couched in mandatory terms and hence the said documents are inadmissible.

2. The applicants' counsel argued that the parties undertook pretrial directions on November 29, 2021 and the respondents' Counsel never raised any objection in respect to the impugned emails. He referred to the respondents' replying affidavit and insisted that they never controverted the production of the said emails as exhibits. Further, there is no notice to produce served upon the applicants, as per section 69 of the *Evidence Act*. He explained that the emails sought to be produced are communication between the applicants and the respondents. Further, that the objection is brought in bad faith and should be struck out.
3. Upon consideration of the aforementioned objection and the oral submissions from the respective Counsels, the only issue for determination is whether the applicants annexures 'SNM 9 - SNM 15' being emails generated from the computer, should be produced without a Certificate.
4. On production of evidence generated from a Computer, section 106B of the *Evidence Act* provides that:
 - “(1) 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.
 - (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 there 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.
- e. 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.”

5. In this instance, I note the respondents are objecting to the production of emails annexed to the applicants’ supporting affidavit, as there was no Certificate annexed to authenticate them. I have had a chance to peruse the said emails and I note they were communication between the applicants and respondents in respect to the transaction herein that forms the fulcrum of the dispute. It is trite that justice is supposed to be seen to be done and each party should be accorded a chance to present their case irrespective of the circumstances. It is my considered view that the applicants should be granted a chance to ventilate their claim and in the interests of justice, I will grant them leave of fourteen (14)



days to file a supplementary affidavit and annex a certificate in support of the email correspondence sought to be produced.

6. In the circumstances, I decline to uphold the objection and direct that the hearing shall proceed once the said certificate is filed and served as directed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF JUNE, 2022

CHRISTINE OCHIENG

JUDGE

