



Rapando v Ojwang (Sued as legal representative of Oundo Malo - Deceased) & 5 others (Environmental and Land Originating Summons E020 of 2022) [2025] KEELC 996 (KLR) (4 March 2025) (Ruling)

Neutral citation: [2025] KEELC 996 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E020 OF 2022
BN OLAO, J
MARCH 4, 2025

BETWEEN

AMBROSE NDIACHA RAPANDO APPLICANT

AND

ALFRED BARASA OJWANG (SUED AS LEGAL REPRESENTATIVE OF OUNDO MALO - DECEASED) 1ST RESPONDENT
HON OTUOMA PAUL NYONGESA 2ND RESPONDENT
OTUOMA RODGERS 3RD RESPONDENT
RAPHAEL MUSUNGU OJIAMBO 4TH RESPONDENT
DERRICK NAMAINDI OJIAMBO 5TH RESPONDENT
EDINA ADWORI OJIAMBO 6TH RESPONDENT

RULING

1. During the hearing of this case on 19th November 2024, the Plaintiff's attempt to produce as part of his documentary evidence some eight (8) photographs as listed in the further list of documents dated 2nd October 2023 was objected to by Mr Okutta counsel for the Defendant. Mr Okutta's objection was premised on the basis that the photographs listed as "A", "B", "C", "D", "E", "F", "G" and "H" did not bear the certificate as required in law and were therefore inadmissible.
2. Mr Were counsel for the Plaintiff took the view that this being a civil rather than criminal case, the burden of proof is lower and that the certificate is not a requirement. In any event, Mr Okutta would have an opportunity to cross-examine the Plaintiff on the same and also lead evidence to rebut the authenticity of the photographs.



3. Mr Okutta’s response was that the *Evidence Act* is clear on the admissibility of such documents in Sections 37 and 106B and the Plaintiff was not the person who took the photographs in question.
4. Since the objection was raised orally in the course of the trial, I invited counsel to file submissions on the objection which they did. This ruling is therefore on whether or not the Plaintiff can produce as part of his documentary evidence the eight (8) photographs marked A, B, C, D, E, F, G and H which are listed in the Plaintiff’s list of documents dated 2nd October 2023 and filed on 3rd October 2023.
5. In his submissions in support of the objection to the production of the said photographs, Mr Okutta has stated that not only are the said photographs photocopies but that they are also bare as the “Sahara Desert” with no inscription describing what they are, when they were taken and what they relate to. That their intended production offends the Rules of law which counsel identified as follows:
 - a. The source of the photographs would have been disclosed and the same identified as to what they relate to.
 - b. The maker was expected to do a certificate as to when they were taken.
 - c. The maker was required to depone an affidavit as to their reliance on the issues at hand.

The maker of the photograph is un-known and it is not indicated how they were prepared in order for this Court to appreciate them as evidence in this trial. The maker should have been disclosed and a certificate attached thereto. That Section 106B of the *Evidence Act* should have been complied with.

6. In his submissions in support of the production of the said photographs, MR WERE cited the provisions of Section 78 of the *Evidence Act* and stated:

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- (1): “In criminal proceedings a certificate in the form in the First Schedule to this Act, given under the hand of an officer appointed by order of the Director of Public Prosecutions for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.”
- (2) “The Court may presume that the signature to any such certificate is genuine.”
- (3) “When a certificate is received in evidence under this section the Court may, if it thinks fit, summon and examine the person who gave it.”

Mr Were therefore submitted that Section 78 of the *Evidence Act* only applies to Criminal proceedings and that there is no such requirement in Civil procedures as doing so would be setting the standard of proof too high. He urged the Court to overrule the objection and admit the photographs as evidence.

7. I have considered the oral and written submissions by both counsel on the issue of admissibility of the photographs herein.
8. Although Mr Were has extensively relied on Section 78 of the *Evidence Act*, Sections 78A and 106B of the said Act provide that:

78A “Admissibility of electronic and digital evidence:

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.” Emphasis mine.

It is clear from paragraph 78A (1) of the *Evidence Act* that it applies to both Criminal and Civil Proceedings. MR WERE cannot therefore be correct when he submits that it applies to only Criminal cases. That explains the use of the words “in any legal proceedings.”

Section 106 B (4) of the same Act provides that:

“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), 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.” Emphasis mine.



What the Plaintiff seeks to produce herein are photographs which are defined in Section 3 of the same Act as:

“... an image created by light falling on a light sensitive surface, either photographic film or an electronic medium and made visible and permanent by chemical treatment or stored digitally.”

So clearly, photographs fall under the electronic record for which a certificate is required before the same can be produced under Sections 78A and 106 B (4) of the Evidence Act and which must therefore be read conjunctively. There ought to have been availed the requisite certificate indicating the identity of the person(s) who took the photographs.

9. Taking all the above into account, I find that there was no compliance with the relevant law as to production of electronic evidence and in particular the photographs marked as A, B, C, D, E, F, G and H and which are annexed to the Plaintiff's further list of documents dated 2nd October 2023. The same are hereby expunged from the record and returned to the Plaintiff. The oral objection raised by the Defendant's counsel on 19th November 2024 is hereby up-held.
10. Having said so, however, there are six (6) other photographs which were annexed to the Plaintiff's Notice of Motion dated 12th June 2023 in which he was seeking orders of prohibition and of temporary injunction to restrain the Defendants from interfering with the parcels of land subject of this suit. There was no objection to the said photographs being produced. And in my ruling delivered on 27th September 2023 in which I granted the orders of injunction and prohibition, I made reference to those photographs in paragraph 31 and said:

“However, prima facie, the Applicant appears to be the party in occupation of the suit land. If the Respondents have their families numbering 50 on the suit land, nothing would have been easier than at least availing similar photographs as those exhibited by the Applicant.”

Those photographs already form part of the record herein and will not therefore be expunged.

11. The up-shot of all the above is that having considered the oral objection raised on 19th November 2024 towards the production of the photographs filed herein vide the Plaintiff's further list of documents dated 2nd October 2023, I issue the following orders:
 1. The photographs marked A, B, C, D, E, G and H and filed herein on 3rd October 2023 are expunged from the record and the Deputy Registrar to return them to the Plaintiff.
 2. The order in (1) above shall not affect the photographs annexed to the Plaintiff's Notice of Motion dated 12th June 2023.
 3. The Plaintiff shall meet the Defendant's costs of the application.

BOAZ N. OLAO

JUDGE

4TH MARCH 2025

Ruling dated, signed and delivered by way of electronic mail on this 4th day of March 2025.

BOAZ N. OLAO

JUDGE



4TH MARCH 2025

