



Simon Mwangi Gitata and Others v Nairobi County Government & 4 others (Environment & Land Case 311 of 2010) [2022] KEELC 3885 (KLR) (4 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 311 OF 2010**

JO MBOYA, J

JULY 4, 2022

BETWEEN

SIMON MWANGI GITATA AND OTHERS PLAINTIFF

AND

NAIROBI COUNTY GOVERNMENT 1ST DEFENDANT

HURUMA ISLAMIC ASSOCIATION 2ND DEFENDANT

CABINET SECRETARY FOR LAND 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The Ruling herein is in respect of an Objection touching on and/or concerning the admissibility of Three Documents, namely;
 - i. Internal Memo dated July 4, 2014 from the Director, Urban Planning and Housing to the Chief Officer, Urban Planning and Housing, written by one J K Barreh.
 - ii. A Report dated April 9, 2014 addressed to the Director, Urban Planning Nairobi city county.
 - iii. A Google map in respect of (sic) Kiamaiko Area, within the city of Nairobi.
2. On May 31, 2022, the Plaintiffs herein called and/or summoned a witness, namely, Christopher Otieno, a surveyor who had hitherto worked with and/or been an employee of The City County Government of Nairobi and who in the course of his official duties had been tasked to carryout investigations pertaining to Huruma Kiamaiko Infills plots No's L1 to L30 respectively and thereafter to report back to the director, Urban Planning, Nairobi City County on the status on the said plots.



3. Pursuant to and in line with the instructions that were given to the said officer, same proceeded to and indeed carried out the assigned task and thereafter same prepared a report dated April 9, 2014 which was submitted to the Director, Urban Planning for purposes of in-house use and further consideration.
4. Having prepared the said report, one Christopher Otieno appears to (sic) have retained a copy of the said Report, which came into his possession by virtue of having been an employee and/or officer working with the City county government of Nairobi.
5. On the other hand, another Internal memo dated July 4, 2014 and which was addressed to the Chief Officer, Urban Planning and Housing, Nairobi City County Government, also appears to have found its way to and in the custody of the Plaintiffs herein.
6. Based on the fact that the Plaintiffs had under their custody and/or possession the Internal memo dated July 4, 2014 and the local/internal report dated April 9, 2014, respectively, the Plaintiffs herein applied for and obtained witness summons to call one Christopher Otieno, who appears to have long ceased to be an Employee of Nairobi City County Government to attend court and produce the internal memo and the internal report, as well as a google map attached thereto.
7. In the course of the testimony by the said witness, namely, Christopher Otieno, who was summoned and who testified as PW4, same attempted to produce the impugned documents as evidence in the case, but an objection was taken by counsel for the 2nd Defendant, who contended that the witness could not produce the impugned documents as evidence before the court.
8. Pursuant to and as a result of the intimation that the 2nd Defendant was opposed to the production and admission of the impugned documents as exhibits in the matter, the court directed that the Parties do tender and/or make their respective submissions on the issue of admissibility or otherwise of the impugned documents.

Submissions By The Parties:

(a) :The 2Nd Defendant’s Submissions:

9. The 2nd Defendant herein submitted that the two reports, namely, the internal memo prepared by one Mr J K Barreh and the report prepared by Christopher Otieno were internal communications which were made by employees of Nairobi City County Government to their respective Superiors for purposes of Internal consideration and that same were meant to aid Nairobi City County Government to make a decision on the dispute under reference.
10. Secondly, it was submitted that the two reports whose admissibility is being contested did not constitute final and/or authentic decisions of Nairobi county government or the concerned Departments, as pertains to the decision of Nairobi city county Government over the subject dispute under interrogation.
11. Thirdly, it was submitted that to the extent that the two reports comprised of internal documents, which were for the consumption of the addressees thereof and in particular the Nairobi city county government, same could not be used and/or relied upon in the course of the subject proceedings unless the Plaintiffs herein could authenticate that the impugned documents were lawfully and/or legally procured and obtained, in accordance with the provisions of Articles 35 of the Constitutions 2010, as read together with Section 4 of the [Access to Information Act, 2016](#).



12. In any event, it was further submitted that the two sets of Documents which were objected to having been procured and/or obtained through illegal and unlawful process, same could therefore not be admitted in evidence.
13. In this regard, it was pointed out that illegally obtained evidence ought to be excluded insofar as the admissions thereof would occasion undue prejudice to the adverse party and that same would similarly be contrary to the general administration of Justice.
14. Further, it was submitted that the witness, namely, Christopher Otieno who was hitherto an Employee of Nairobi city county Government was a Public officer, working with Nairobi city county government and to that extent the said witness could not produce before the court any document and/or information that came into his possession by virtue of his employment with the 1st Defendant herein. In this regard, reliance was placed on the provisions of Section 11(2) of the *Public Officers Ethics Act, 2003*.
15. On the other hand, it was also submitted that the two sets of reports, which the witness sought to produce, were also public documents and hence same could only be produced and be admitted in Evidence, if same were duly certified by the officer under whose custody the documents were procured and/or obtained from.
16. Finally, it was submitted that the google map which was also sought to be produced was an electronically generated document and to that extent, it behooved the witness who was disposed to produce same, to avail an electronic certificate pursuant to and in line with Section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya.
17. Based on the foregoing submissions, counsel for the 2nd Defendant implored the court to find and hold that the two reports which were illegally procured and obtained by the Plaintiffs and the witness (PW4), were therefore inadmissible in law.

(b): The Plaintiffs' Submissions:

18. On his part, counsel for the Plaintiffs submitted that the two reports, which essentially constitute internal documents for internal consumption by Nairobi city county government, were indeed admissible before the court. In this regard, counsel for the Plaintiffs invoked and relied upon the provisions of Section 35 of the *evidence Act*, Chapter 80 Laws of Kenya.
19. Secondly, counsel for the Plaintiffs submitted that the witness who was disposed to produce the impugned documents was not an interested Party in respect of the dispute before hand and therefore it cannot be stated that the said witness has an interest in the outcome of the subject proceedings or at all to warrant the non-admission of the intended documents.
20. Thirdly, it was submitted that no evidence has been tendered that the documents, which are sought to be produced, were illegally procured and/or otherwise stolen from the offices of the 1st Defendant herein.
21. Fourthly, it was submitted on behalf of the Plaintiffs that even if the impugned reports, were illegally procured and/or otherwise stolen, same would still be admissible in law, irrespective of how same were obtained and/or procured.
22. For the avoidance of doubt, the Plaintiffs counsel submitted that it is immaterial how the evidence is procured and/or obtained. For clarity, what matters is whether the evidence is relevant to the issues under consideration and/or pending before the court for determination.



23. Further, it was submitted by the Plaintiffs' counsel that the impugned reports, which are the subject of objection herein were indeed copies of reports and/or documents, whose originals are under the custody of the 1st Defendant and hence, the 1st Defendant ought to have availed and/or otherwise produced the original copies thereof.
24. Be that as it may, it was submitted that to the extent that the 1st Defendant had failed to produce and/or avail the original copies of the impugned documents, then it was open and/or available for the Plaintiffs to produce the subject documents before the court, in line with the Provisions of Section 68 and 69 of the Evidence Act, Chapter 80 Laws of Kenya.
25. Finally, it was submitted on behalf of the Plaintiffs that the witness before the court had attended court pursuant to an order of the court which issued a witness summons for the said witness to attend court and to produce the subject documents, which premises the objection herein.
26. In the premises, the Plaintiffs' counsel submitted that it was therefore not open for the Defendants' and in particular the 2nd Defendant, to object to the production of the impugned documents.
27. Owing to the foregoing, the Plaintiffs' counsel therefore contended that the impugned documents, namely, the two reports are indeed admissible, contrary to the position taken by the Defendants.
28. As concerns the google map, counsel for the Plaintiffs conceded that same was electronically generated and hence ought to have been accompanied by an electronic certificate in line with the provisions with Section 106B of the Evidence Act, Chapter 80 Laws of Kenya.

Issues for determination:

29. Having reviewed the submissions that were made and/or rendered by and/or on behalf of the Parties herein, the issues that arise for consideration and determination are as hereunder;
 - i. Whether the two reports, namely, the Internal Memo and the Local Report, which were illegally procured are admissible in law.
 - ii. Whether the Google map without an electronic certificate is admissible despite the provisions of Section 106B of the Evidence Act, Chapter 80 Laws of Kenya.

Analysis And Determination

Issue Number 1

Whether the two Reports, namely, the Internal Memo and the Local Report, which were illegally procured are admissible in law.

30. It is common ground that the two reports, which are the subject of the objection herein, are indeed internal documents which were generated by officers/employees of Nairobi city county government for internal use, consumption and/or consideration.
31. Secondly, it is also important to note that the two reports in question were actually communication to superior officers, who were thereafter obliged to consider the contents of the Reports/internal Memo and upon such consideration to make appropriate decision and/or otherwise advise Nairobi city county government on the way forward as pertains to the subject of the said internal memo/local report.



32. On the other hand, there is also no gainsaying that the contents of the said Reports are not reflective of the official position of the authorized officers and/or departments of the Nairobi city county government.
33. For clarity, it is therefore evident and/or apparent that the impugned reports contained statements of investigations and/or advise to the concerned Departments/officers, who would be called upon to make a decision one way or the other and thereafter approve or disprove of the contents of the impugned reports.
34. Notwithstanding the foregoing, the critical issue that played out and which is essentially the subject of this ruling is whether the impugned reports, which admittedly are internal documents belonging to the 1st Defendant, were lawfully and legally obtained by the Plaintiffs and if not, whether illegally obtained documents are admissible in law.
35. Suffice it to point out, that the Plaintiffs herein, as well as the witness, namely PW4, who sought to produce the impugned documents in evidence, did not state that same applied for the subject documents in accordance with the law and thereafter legally and/or lawfully procured same.
36. To the contrary, it was the Plaintiffs position that to the extent that the impugned documents are relevant to the issues in dispute before the court, same are therefore admissible in law, irrespective of whether same were stolen or otherwise.
37. Simply put, it was the Plaintiffs position that it is immaterial how the impugned documents were obtained whether stolen or otherwise, the court is obliged to consider their relevance to the issue in dispute and that if same are relevant, then the court is enjoined to admit same.
38. To my mind, the position adopted by the Plaintiffs herein, that is, it is immaterial how the evidence is procured and/or obtained is no longer good law in our jurisprudence. For clarity, a Party who is keen to procure and/or obtain any particular document for use in legal proceedings, is enjoined to comply with the provisions of Article 35 of the [Constitution](#) 2010 as read together with Section 6 of the [Access to Information Act](#).
39. For the avoidance of doubt, it is incumbent upon such a person to first and foremost to write to the concerned Officer, Department of Government, State Agency and/or person under whose custody the documents is placed to avail and/or supply a certified copy thereof to the requesting party.
40. Subject to making a written application/request, if the receiving party, person and/or state agency does not avail the requested documents, then the requesting party would be at liberty to approach the court for an order to compel the custodian of the documents sought to avail and/or supply the copy/documents under reference.
41. Suffice it to note, that the court would thereafter consider such a request and make appropriate orders, depending on the nature of the documents requested for and whether the documents under reference are privileged and thus subject to exemption or otherwise.
42. Nevertheless, to contend that any documents, irrespective of how same is procured, is admissible in law is tantamount to sanitizing the production and/or admission of illegally acquired evidence, which would thus constitute and/or amounts to breach of the rights to privacy and protection of property which are duly guaranteed vide the provisions of Articles 31 and 40 of the [Constitution](#) 2010.



43. Be that as it may, the legal position pertaining to illegally acquired evidence and/or obtained documents was the subject of deliberations by the Court of Appeal in the case of *Okiya Omtatah Okiiti & 2 others versus Attorney General & 4 others* [2020] eKLR, where the court sated as hereunder;

82. Although that decision was rendered in the context of a presidential election petition, it is clear from that decision that by dint of Article 50(4) of the *Constitution*, the adage, “it matters not how you get it if you steal it even, it would be admissible in evidence” is not representative of the state of the law in our legal system, irrespective of whether the dispute is of a criminal or civil nature.

83. We reiterate that the appellants claimed to have been supplied with the contentious documents by “conscientious citizens” and “whistleblowers”. Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the *the Constitution*.

It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.

84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the *the Constitution* to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned “conscientious citizens” or “whistleblowers” might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.

44. Other than the foregoing decision, the position of illegally acquired evidence and/or documents and whether same are admissible in law was also considered and addressed by the Supreme Court Of Kenya vide the case of *Njonjo Mue & another versus Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR, where the court held as hereunder;

(22) Again that is the correct interpretation of the issue at of hand generally but in the instant matter, the *Constitution* provides for the right of access to information which has been operationalized through two pieces of legislation, the *Independent Electoral and Boundaries Commission Act* and the *Access to Information Act*. We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

(23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation



would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the *Constitution* and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.

- (24) The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1st and 2nd Respondents, and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of *Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board* (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd Respondent is guaranteed under the *Constitution* and Section 27 of the *IEBC Act*. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us.
- (25) The Court also has to find a balance between the Petitioners' rights to access of information as guaranteed under Article 35 of *the Constitution*, against those of the 1st and 2nd Respondents' rights to privacy and protection of property also guaranteed under Articles 31 and 40 of *the Constitution*. If access was in the instance, obtained through the laid down procedure under Section 27 of the *Independent Electoral and Boundaries Commission Act*, and Section 6(1) of the *Access to Information Act*, then the rights of both the Petitioners and the Respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information. The Petitioners have further been unable to establish that the internal memos obtained from the 2nd Respondent would be used in the protection of fundamental rights or freedoms, or that without such information, they would be unjustly prejudiced. Thus in *Rev. Timothy Njoya v. Attorney General & Another* (supra) at para. 44, the Court held as follows;

“*In Cape Metropolitan Council v Metro Inspection Services Western Cape and Others (2001) ZASCA 56* the Court stated as follows;

“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information...

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right. (Emphasis added)”



The same position was adopted in *Unitas Hospital v Van Wvk and Another*// [231/05] [2006] ZASCA 34 where the Court expressed itself as follows;

"[17] The threshold requirement of 'assistance' has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of 'assistance' will not be enough".

45. To my mind, the jurisprudence flowing from the foregoing decisions is explicit, unequivocal and crystal clear, to the extent that same underscores the position that illegally acquired and procured evidence is inadmissible in law and that the admission of same shall constitute and amount to abrogation of the provisions of Articles 50(4) of the *the Constitution* 2010.
46. In the premises, I come to the inescapable conclusion that the two reports, namely, the Internal memo dated July 4, 2014 and the local report dated April 9, 2014, respectively, which were to be produced by the Plaintiffs' and which were illegally procured contrary to the laid down procedures are inadmissible in respect of the subject proceedings.

Issue Number 2

Whether the Google Map without an Electronic Certificate is admissible despite the provisions of Section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya.

47. The second limb of the objection touched on and/or concerned the admissibility of the google map, which was attached to the report dated April 9, 2014 and which google map, was not accompanied by an electronic certificate in terms with the provisions of Section 106 B of the *Evidence Act*, Chapter 80 Laws of Kenya.
48. There is no gainsaying that a google map is an electronically generated document and to the extent of being electronically generated, it is incumbent upon the originator thereof, to extract and sign an electronic certificate speaking to the authenticity of the resultant google map.
49. Suffice it to note, that until and unless an electronically generated document, the google map not excepted, is accompanied by an electronic certificate, same becomes legally inadmissible in court proceedings.
50. Based on the foregoing, it is clear beyond peradventure that the google map which PW4 sought to produce, albeit without the requisite electronic certificate could therefore not be produced and was hence, rightfully objected to.
51. To buttress the foregoing observation, it is appropriate to restate and endorse the holding of the court vide the case of *Samuel Kazungu Kambi v Nelly Ilongo & 2 Others* [2017] eKLR, where the court said:
 21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.
 22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who



processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

23. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the *Evidence Act* from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the *Evidence Act* is therefore not applicable in the circumstances of this matter.
52. Based on the foregoing decision and coupled with the provision of Section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya, it is apparent and evident that the google map, which was similarly sought to be relied upon is admissible.

Conclusion:

53. Having considered and analyzed the two issues that were outlined herein before and essentially touching on the admissibility on the impugned documents, I come to the conclusion that the objection is merited.
54. Consequently and in the premises, the objection pertaining to the admissibility of the three documents, whose details were synchronized elsewhere hereinbefore be and is hereby upheld.
55. In a nutshell, I underscore the fact that the internal Memo and the Report, which were illegally procured and obtained by the Plaintiffs herein, without due regard to the established procedures, *inter alia*, the Provisions of the *Access to Information Act*, are inadmissible.
56. As pertains to costs of the objection, same be and are hereby awarded to the 2nd Defendant.
57. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2022.

HON JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

Kevin Court Assistant

Mr Gichuki for the Plaintiffs

Ms Oduor h/b for Mr Nyokoe for the 1st Defendant

Mr Osodo h/b for Mr Owino for the 2nd Defendant

Ms Adomeyon h/b for Ms Kerubo for the 3rd Defendant

