



Kaigi General Contractors Limited v National Irrigation Authority (Civil Case E009 of 2021) [2024] KEHC 6341 (KLR) (3 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E009 OF 2021
MA ODERO, J
JUNE 3, 2024**

BETWEEN

KAIGI GENERAL CONTRACTORS LIMITED PLAINTIFF

AND

NATIONAL IRRIGATION AUTHORITY RESPONDENT

RULING

1. This is a matter in which hearing commenced by way of Vive Voce evidence on 14th March, 2024.
2. However during the testimony of the first witness counsel for the Defendant objected to the production by said witness of photo copies. The Defendant indicated that they had on 13th March, 2024 served on the plaintiffs a Notice to produce the original copies of the documents.
3. Vide a reply dated 14th March, 2024 the plaintiff responded that it was ready to produce original copies of all LPO's issued to it by the Defendant but was unable to produce original copies of invoices, delivery notes, contracts, payment vouchers, certificates of completion, demand letters and photographs etc as all these were in the possession of the Defendants. The plaintiffs therefore sought to rely on photocopies of the said docuemnts.
4. The court directed that the objection be canvassed by way of written submissions. The plaintiff filed the written submissions dated 22nd April, 2024 whilst the Defendant relied upon their written submissions dated 19th March, 2024 and the supplementary submissions dated 24th April, 2024.
5. The Defendant indicated that they had on 13th March, 2024 served on the plaintiffs a Notice to produce the original copies of the Document,



6. The Notice to produce dated 22nd April, 2024 was premised upon Section 69 of the *Evidence Act* Cap 80, laws of Kenya which provides as follows

“ 69 Notice to produce a document Secondary evidence of the contents of the documents referred to in Section 68 (1) (a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case.”

7. The plaintiff submitted that on 15th March, 2023 it had stated that it would produce original copies of all LPO's issued to it by the Defendant however the said original copies were in the custody of the Defendant. The plaintiff further submits that vide a series of letters dated 10th August 2016 and 22nd December, 2016 addressed to the Branch Manager Equity Bank (K) Ltd, Mwea Branch and to the Branch Manager Sidian Bank, Muvea Branch, it was confirmed that the Defendant indeed was in possession of the Original documents.

8. Therefore according to the plaintiff, it has given a reasonable explanation as to why it has been unable to produce the original documents. They urge the court to permit the production of secondary evidence i.e copies of invoices, delivery notes, payment vouchers, completion certificates and delivery confirmation forms as the original copies of said documents are in the possession of the Defendant.

9. On its part the Defendant reiterates that it will be relying on Paragraph 8 of its Defence dated 15th October, 2021 in which it was specifically pleaded that the Defendant shall require the plaintiff to produce the original copies of all the documents to be relied on to substantiate the plaintiff's claim against the Defendant.

10. Further the Defendant submit that they will not accede to the admission of copies of payment vouchers as such documents are internal documents which ought not be in the possession of the plaintiff.

11. Section 65 (1) of the *Evidence Act* provides as follows:-

“ Primary evidence means the document itself produced for the inspection of the court.”

12. Section 67 of the *Evidence Act* provides as follows:-

“ Documents must be proved by primary evidence except in the cases hereinafter mentioned.”

13. Therefore primary evidence is the best evidence to be relied and produced by a party before the Court. However, there are exceptions to the best evidence rule.

14. Section 68 of the *Evidence Act* provides for these exceptions in specific circumstances. This means that a party may rely on secondary evidence in specific circumstances. Secondary evidence is provided for under Section 66 of the *Evidence Act* and includes certified copies or photocopies of the original document. Exceptions to primary evidence rule are as follows:-

- a. When the original is shown or appears to be in the possession or power of –
 - i. the person against whom the document is sought to be proved; or
 - ii. a person against whom the document is sought to be proved; or



- iii. any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;
 - b. when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;
 - c. when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;
 - d. when the original is of such a nature as not to be easily movable;
 - e. When the original is a public document within the meaning of section 79 of this Act;
 - f. When the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;
 - g. When the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection. [Own emphasis]
15. Additionally, Section 68 (2) of the [Evidence Act](#) provides as follows:-
- a. In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.
 - b. In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.
 - c. In the cases mentioned in paragraph (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.
 - d. In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examinations of such accounts or documents.
16. The Defendant states that the photocopies which the plaintiff seeks to rely upon are internal documents which it does not admit. The defendant further claims that it does not have the original copies of said documents.
17. The plaintiff has pointed out two (2) letters written by the Defendants in support of its claim that the Defendant is in fact in possession of the original documents.
- (i) Letter dated 10th August, 2016 written to the Branch Manager Equity Bank (K) Ltd, Mwea Branch. The letter is authored by the General Manager of the Defendant. In said letter the defendant states that the plaintiff has submitted Interim payment certificates to them. That the plaintiff's claim for Kshs. 100 million has not been settled due to lack of Exchequer release from the National treasury.
 - (ii) Letter dated 22nd December, 2016 written to the Branch Manager, Sidian Bank Mwea Branch by the Defendants General Manager. In this letter the Defendants state that the plaintiff's have submitted to them a number of invoices for payment. Once again it is indicated that the payment of Kshs. 100 million have not been settled due to lack of funds from the National Treasury.



18. These two letters referred to above amount to an admission by the defendant that the plaintiff had indeed submitted the original invoices, certificates etc back to the defendant.
19. This is a situation which aligns squarely with one of the exceptions to the Primary evidence rule of Section 66 (b) of the [Evidence Act](#). In such situations secondary evidence is admissible.
20. The Plaintiffs have given satisfactory explanation as to why they do not have the original documents. The originals were handed over to the Defendants and are in the Defendants possession.
21. The Defendants have been reluctant or have refused to produce the original documents. In the circumstances, I find that the plaintiffs are at liberty to produce secondary evidence in the form of photocopies.

It is so ordered.

DATED IN NYERI THIS 3RD DAY OF JUNE, 2024.

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MAUREEN A. ODERO

JUDGE

