



REPUBLIC OF KENYA



KENYA LAW
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**In re Gurumukh Singh Narain Singh Pandahal (Succession Cause
347 of 2008) [2021] KEHC 9773 (KLR) (5 February 2021) (Ruling)**

Neutral citation: [2021] KEHC 9773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 347 OF 2008
JN ONYIEGO, J
FEBRUARY 5, 2021**

BETWEEN

JAGIT SINGH GURUMUKH PANDHAL OBJECTOR

AND

PRITAM KAUR PANDHAL & ANOTHER PETITIONER

RULING

1. This ruling revolves around an objection against production and admission of electronic evidence recorded in CD format by the objector herein one Jagjit Singh Gurmukh. While testifying in respect of an application for revocation of the confirmed grant herein, the objector raised three grounds in support of his prayer for revocation of the grant. Firstly, he claimed that the will executed by the deceased on June 12, 2007 did not provide for him. Secondly, the will was not counter signed on every page by the deceased as per his known practice whenever he signed documents. Thirdly, that the appointment of his mother as the sole executrix was irregular as the mother was not mentally fit having suffered loss of memory otherwise known as dementia hence not fit to administrator the estate.
2. To prove the assertion that the mother was not mentally fit to administer the estate, the objector claimed that he had recorded a conversation between himself and his mother which according to him reflects the mother as a person of unsound mind. It is this CD conversation recorded by the objector that he attempted or wants to produce in evidence to serve as proof that the executrix was not a fit person as at the year 2018 to administer the estate.
3. In opposing the application, M/s Wanjiku for the petitioner (Executrix) submitted that the objector had not attached a certificate pursuant to Section 106 B of the *Evidence Act* to confirm that the recording was in conformity with the requirements set out under that section. She also argued that the court is not competent to assess the petitioner's mental status using the content of a conversation recorded between her and the objector.



4. In his rejoinder, Mr Ngonze for the objector submitted that there was a certificate attached to a supplementary affidavit hence due compliance with the law.
5. I have considered the objection herein, grounds relied upon and the response thereto. Two key grounds have been raised in opposition to the production of the CD conversation. The first ground is the allegation that this court is not competent to determine the mental status of the petitioner. In my view, that is an issue to be determined at the end of the hearing or close of proceedings. To make a determination on that aspect at this stage will be premature. For the reason stated, that ground fails.
6. The second main ground which is contested is non-compliance with the rules governing production of electronic evidence pursuant to Section 106 B of the *evidence Act*.
7. Although M/s Wanjiku did not particularize the specific conditions that were not met, I will decipher the same from the law. Section 106 B (2) provides conditions precedent before electronic records or evidence can be admitted as evidence as follows;
 - a. the author or maker of such evidence should prove that the information contained in the computer was produced by a person having lawful control and use of that computer.
 - b. that the information in the computer was regularly fed into the computer in the ordinary course of the said activities.
 - c. that throughout the material time, the computer or gadget was operating properly or recording was not affected;
 - d. that the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of such activities.
8. Section 106 B (4) further provides;

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, 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 the 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 conversation mentioned in sub section (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 purposes of this sub-section it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
9. It is therefore incumbent upon the objector to prove that the electronic gadget used in recording the conversation was ordinarily under his control; was serviceable at the time of use, and that he is the one who produced or prepared the CD or that production was done under his supervision. The law therefore require that all these information be captured in a certificate.



10. In the case of *Samuel Kazungu Kambi Vs Nelly Ilongo and 2 others* (2017) e KLR the court had this to say;

“para 21 – sub section (4) of section 106 B requires a certificate confirming the authenticity of the electronic record. Such 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. See also *William Odhiambo Oduol Vs Independent Electoral and Boundaries Commission & 2 others* (2013) e KLR .

11. In the instant case, the objector has mentioned in the certificate that he is the one who captured the conversation in his I-phone 5SE on 28th March, 2019 and subsequently transferred “AS,IS” into the said compact disk without any alteration whatsoever. From this certificate, the gadget is known; the author is known and that, it was recorded in the ordinary manner using his regularly used gadget which is his phone. For purposes of satisfying the requirements under section 78A & 106B (1) and 4 of the *evidence Act*, I am satisfied that the objector is entitled to have the CD played and produced as evidence before court.

DATED SINGED, AND DELIVERED IN OPEN COURT AT MOMBASA THIS 5TH DAY OF FEBRUARY 2021.

J. N. ONYIEGO

JUDGE

