



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 398 OF 2017

FLORENCE MUENI MBUVIPLAINTIFF

VERSUS

FAUSTINA HOLDINGS LIMITED....1ST DEFENDANT

EDWIN NGOMO OTIATO.....2ND DEFENDANT

RULING

1. Coming up for determination is the ruling relating to an objection raised by the Defendant's advocate on 22nd November 2021 during the hearing of the matter. On the said date, the Plaintiff, Florence Mueni Mbuvi was on the dock giving her testimony when she proceeded to produce her 14 documents in the list dated **14.6.2017** as her exhibits. At this juncture the advocate for the Defendant objected to the production of three items with reasons as outlined here below.

i. Item No. 3 to 9- Which are Email correspondences indicating that the draft agreement was part of that chain;

ii. Item No. 10- Which is a Safaricom print out;

iii. Item No. 14- which are photographs to confirm damage and destruction of some structures.

2. The objection was premised on the grounds that all those documents were in the nature of electronic evidence noting that **Section 106B** of the **Evidence Act** had comprehensively set out the procedure of adducing electronic evidence. It was averred that the certificate on page 10 of the Plaintiff's bundle of documents did not have the particulars set out by Section 106B of the Evidence Act. It was argued that there were no particulars of the computer or the procedure used in downloading adding that the document did not refer to anything beyond emails.

3. With regard to the Safaricom print out, reference was made to pages 45-46 of the bundle of documents where there was a disclaimer by Safaricom that *"This record is used for your own use..."* and there was no attempt by the Plaintiff to summon Safaricom.

4. On item 14, it was argued that photographs amounted to electronic evidence.

5. In conclusion the defence counsel stated that the certificate did not cover the items which ought to be produced.

6. In rebuttal, the Plaintiff's counsel stated that the objection should be overruled as it had been made in bad faith, it should have been raised a while back and was meant to delay justice. It was argued that if the objection was raised without prior intimation despite the fact that the defence was aware of the said documents from year 2017 and the matter had also been outlined at the pre-trial conference.

7. Counsel indicated that documents number 3 to 9 were correspondence with regard to the dispute and were not exchanged on a 'Without prejudice' basis adding that the purpose of these documents was to show that the dispute had been settled but the Defendant reneged on the settlement. Therefore, the said documents were relevant and admissible documents. It was argued that if the objection was questioning the truthfulness of the emails, then it would have been a different issue altogether.

8. On item Number 10, it was stated that the account belonged to the Plaintiff which was similar to a Bank account and had also been certified by Safaricom. He noted that at the pre-trial conference, the Defendant did not indicate that they would object to the production of the Safaricom account noting that its authenticity was not in question.

9. Further, it was argued that the certificate signed and executed by Muia relating to the exchange of documents was in compliant with

Section 65 (8) Evidence Act and covered what the Defendant's advocate had referred to as **Section 106B**. He also pointed out that the Defendant had had the said certificate from 15th August 2018 and never raised an issue with it nor gave an indication that they wanted to inspect the apparatus/gadgets used to print out the documents. The advocate said that the purpose of **Section 106B (4) of the Evidence Act** was to ensure that there was no manipulation and the Plaintiff had complied with the legal requirements.

10. On Item 14, it was argued that the Plaintiff was the one who took the photographs and would explain how she did it.

Analysis and determination

11. The issue for determination is: *Whether the objection raised by defence counsel relating to Plaintiff's documents (the emails, safaricom print out and photographs) is merited.*

12. **Section 106B (1) of the Evidence Act** stipulates that **any information contained in an electronic record which is printed on a paper ... produced by a computer (herein referred to as "computer output") ...shall be deemed to be also a documents if the conditions mentioned in this Section are satisfied and shall be admissible in any proceedings, without further proof or production of the original ...**

13. In the Plaintiff's bundle of documents at page 10, there is a *Certificate as to computer print out* pursuant to **Section 65(8) of the Evidence Act**, made by Vincent M. Muia who states that at the time this issue was being discussed between the parties prior to filing of the suit, he was the advocate for the Plaintiff and the emails concerning this matter were between him and the advocate for the defendants at the time. And that the emails were downloaded from his computer **HP Laser jet Printer P1102** where the information was stored and that information was still accessible and all the electronic gadgets used were in good condition.

14. The Court of Appeal in the case of **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR** held that:

Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer."

In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.

...

The Evidence Act does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

15. From the above, this court finds that the emails produced by the Plaintiff and the certificate thereof have satisfied the conditions set out in **Section 106B** of the **Evidence Act**.

16. On the Safaricom print out, the Court of Appeal in **Charles Matu Mburu v Republic [2014] eKLR** (although the issues are significantly different and the evidence produced was call history) stated that such printouts ought to be verified by Safaricom for it to be admissible. This court notes that the print out has a Safaricom Moi Avenue Retail Shop stamp and the disclaimer provides that, *If this record is sought to be produced in court, please contact the nearest retail shop for further guidance.* The bottom line however is that this is the Plaintiff's account as indicated at the top of the document and the authenticity of the same has not been challenged.

17. On the issue of the photographs produced, again the authenticity of the same has not been put to question. It has been explained by Plaintiff's counsel that the Plaintiff was the one who took the said photographs.

18. Order 11 of the Civil Procedure Rules, 2010 provides for pre-trial conferences which are meant to inter-alia aid in expeditious disposal of suits. To this end, courts are mandated to uphold the objectives set out under **Article 159 (2) (b) and (d)** as well as **Section 1A , 1B, 3 and 3A of the Civil Procedure Act** by exploring expeditious ways of introducing evidence upfront hence the trial bundle is usually availed well in advance of the date of the trial. This means that courts are called upon to actively manage cases so as to shepherd the trial in a harmonious and speedy manner. Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes with a view to ensuring that the **overriding objective** is achieved. This in turn enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts.

19. Article 50(4) Constitution provides that the courts have discretion to determine whether the admission of documents would be detrimental to the administration of justice in the following words:

" Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice"

20. In the case of **Ntarangwi M'Ikiara v Jackson Munyua Mutuera [2018] eKLR**, I cited the case of **Evangeline Nyegera (suing as the legal representative of Felix M'Ikiugu alias M'Ikiugu Jeremiah M'Raibuni (deceased) vs Godwin Gachagua Githui**, where the Court of Appeal **Civil Appeal No. 28 of 2016** held that;

“The test for admission of evidence is relevancy..... There is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence. We hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross examine on veracity and legitimacy if it be necessary”.

21. From the foregoing analysis, this court in determining whether expunging the documents in question would be in the interest of justice finds that the said documents are important for the just determination of the dispute and that no evidence has been adduced to indicate that the said documents have been obtained in a manner which violates the rule of law or any right or fundamental freedom in the Bill of Rights. Further, the defence will have a chance to cross examine the witness on their veracity and legitimacy noting that the authenticity of the said documents has not been put into question. Thus the objection is overruled, and the said documents are admitted as Plaintiffs exhibits.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ms Dande h/b for Mukele for the Defendant

Court Assistant: Eddel Barasa