



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL CASE NUMBER 28 OF 2019

PETER NGETHE NGARI T/A P.N.N. FUNERAL SERVICES.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED PLC.....1ST DEFENDANT

NJIRAINI M. MACHARIA2ND DEFENDANT

RULING

1. This ruling is about the objections raised by Ms Alwala for the plaintiff over the production of four (4) documents by the defence.

2. The documents are No. 1, 2, 4, 5, 7 contained in the 2 defendants lists of documents filed with their statements on 3rd October, 2019. According to Ms. Alwala the documents violate the provisions of **Section 106(B)** of the **Evidence Act Cap 80 Laws of Kenya** and under **Section 106 B (4)** the said documents ought to have been accompanied by certificate of electronic evidence. With regard to document No. 7, that the witnesses were not the makers and therefore they cannot produce the same. That since the document was photographed, it was only proper for the author to be availed and a certificate to accompany the same.

3. In opposition to this objection Mr. Limo submitted that there was a reason for **Order 11** of the **Civil Procedure Rules (2010)**. That the counsel ought to have raised these objections upon being served with the documents. In any event the plaintiff's documents were also electronic and the defence raised no objection.

That these documents were about facts, there was no issue of forgery, the authors and recipients of the same were in court. His view was that the plaintiff was both approbating and disapprobating. That these objections were merely side shows.

4. In her rejoinder Ms. Alwala submitted that one document was a photograph of writings. They needed to have the author for examination, the other was about a tweet by the ombudsman, who was not available for examination.

5. These documents are;

- i) A copy of tweeter handle of the ombudsman Kenya
- ii) Email correspondence from the DW2 to pngeri7030@gmail.com
- iii) Email from the 2nd defendant to the 1st defendant
- iv) Photo of both writings, names and figures.

6. **Section 106B** of the **Evidence Act** provides for the admissibility of electronic records. **Section 106 B (4)** provides for;

“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.”

This must be read together with Section 106 B (1)

“Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

7. Though the counsel did not cite any authorities, I looked them up for guidance.

8. The issues for determination are whether the plaintiff is estopped from raising the objection because he did not do so during **Order 11?** And whether the objection is merited.

9. On the first issue, the record will show that when the matter was fixed for mention for directions both parties simply fixed a date for hearing, the assumption was there were no issues raised upon the exchange of the witness statements and documents and in compliance with **Order 11.** Be that as it may the issue never came up. The defence is presumed to have been aware of the nature of evidence it was going to rely on, and was expected to comply with all the legal requirements related to that evidence.

Any party seeking to rely on electronic records evidence must of necessity expect to be asked whether they have complied with the law regarding that evidence. To that end, I agree with Ms. Alwala, there are no two (2) ways about it, the law speaks for itself.

10. So, in this case, do the documents intended to be relied upon fall within the ambit of **electronic records?**

11. The authorities I found MNN vs ENK [2017] eKLR the judge stated at **paragraph 6;**

“The provisions of Section 106B have been tested in a number of cases, the case classicus appears to be Republic v Barisa Wayu Matriguda [2011] eKLR where a compact disc (CD) was made from CCTV footage, and the court said:

The decision in Republic vs. Barisa Wayu Matuguda has been followed in several matters at the High Court. I shall cite only two of them. In William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & 2 others (2013) eKLR, the issue was admissibility of a video recording done on a Nokia phone, which was then taken to Nairobi and the video recording was then developed to CD. The court noted that the video was recorded, saved in the internal memory of the phone, the phone was connected to a computer using a micro-USB data cable, the file was copied to an empty hard disk, an empty CD was then inserted into the computer CD write RAM, the video file was then written on the CD or VCD using a CD writing application. It was emphasized that it was important to trace the devices for audit purposes. It was held that the certificate has 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 was appropriate. In Nonny Gathoni Njenga & anor vs. Catherine Masitsa & anor (2014) eKLR, the court found that DVDs sought to be relied on were not accompanied by a certificate as required by the Evidence Act. Then there is R. vs. Robson & Harris (1972) 1 WLR 651, where the issue was the admissibility of tape recordings of alleged conversations between the defendants and a prosecution witness. It was held that in considering the question of admissibility the court was required to satisfy itself that what the prosecution alleged to be original tapes were shown, prima facie, to be original by evidence which defined and described the production and the history of the recording upto the moment of production in court.

12. The document DMFI 7 is a photo which the 2nd defendant testified was taken by himself with his own phone, and that he forwarded the same to the 1st defendant's witness DW2. It is the photo of a page with numbers and names. The issue with this photographs is not the photo itself, but the source of the names, and figures in that photo. The 1st defendant could as well rely on the image in his own phone. If it had been a different scenario then the position taken by the plaintiff would apply; Clarity comes when I compare this to the scenario in Samwel Kazungu Kambi vs 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.

13. With regard to DMFI 2, the tweeter handle from the Ombudsman, the same does not appear to speak to the facts of this case, and the issue would be relevance. It is not in dispute that the column the 'Defender' existed in the "Nairobi" at all material times. If that is the position of the plaintiff, then his suit would collapse. In my view that objection is superfluous. With regard to DMFI 4 and DMFI 5, the makers of these emails, correspondence were in court. They told the court they are the ones who wrote those emails and verified their contents. The contents of the emails are not in dispute. **Section 106B (1)** provides for such a situation by stating that

“..... If the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof on production of the original, as evidence of the original or of any fact stated therein where direct evidence would be admissible.”

There is room for further proof, and in this case both the makers of these documents are present and testified to the contents of the said emails clearly therefore the objections raised regarding the emails in the circumstances of this case cannot stand.

14. Finally, on the issue of the photograph, as it is, it requires further proof, unless it meets the conditions set out under **Section 106B**. The objection is therefore only sustainable with regard to DMFI 7. With regard to the rest the same is dismissed and they are marked as D. Exhibit 2, 4 and 5.

Dated, delivered and signed at Nakuru this 16th day of January, 2020.

Mumbua Matheka

Judge

In the presence of

..... Court Assistant

Applicant

Respondent