



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 18 OF 2016

BINTEX COMPANY LIMITEDPLAINTIFF

VERSUS

BOLLORE AFRICA LOGISTICS KENYA LTD.....DEFENDANT

RULING

1. The defendant, through DW2 wishes to produce a forensic audit report dated 12th October, 2016 as defence exhibit in support of his evidence.

2. The plaintiff's counsel Mr Lijodi has objected to the production of pages 16,17,18 and 19 of the said report on the ground that the documents displayed on the said pages are computer generated and a certificate of authenticity has not been attached to show which machine or computer the said documents were extracted from as required by the provisions of section 106 B of the Evidence Act.

3. The defendant's counsel has not denied the omission and request that his witness, Dw 2 be stood down to enable them comply with the formality required by section 106 B of the Evidence Act in the interest of justice and in observance of the overriding objective.

4. In considering this objection, I wish to restate the provision of section 106 B of the Evidence Act. The section provides that;

(1) " Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper , store , recorded or copied on optical or electro magnetic media produced by a computer (herein referred to as computer out put) shall be deemed to be also a document, if 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".

5. It is worth noting that Dw 2 is an expert witness in the case. For this reason, section 106B of the Evidence Act in these circumstances ought to be read with section 78 a (4) of the Evidence Act which provides that

“ Electronic and digital evidence generated by a person is the ordinary course of business, or a copy or print out of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person is on its mere production in any civil, criminal , administrative or disciplinary proceedings under any law, the rules of self regulatory organization or any other law or the common law admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy print out or extract”.

6. In the case of **REPUBLIC VRS MARK LLYD STEVESON (2016) e KLR** it was held that

“ This section, in essence provides for a route for print outs of electronic documents to be admitted as evidence where such documents are produced in the course of business and are accompanied by certification by a person in the employment of the business in question. That the document was indeed, generated in the instant case, Dw2 is an accountant/auditor and the nature of this work requires that he relies on documents, other than those he has prepared in preparation of this report.

7. In the instant case Dw2 is an Accounts /auditor and the nature of his work requires that he relies on documents, other than those he has prepared in preparation of his report

8. The pages in the forensic Audit report which Dw2 wishes to produce and whose production the plaintiff's counsel has objected to are the basis upon which the said report was prepared. They are therefore, as attachments , part and parcel of this report as they support the same. The said documents are therefore admissible and rebuttable evidence in the defendant's case.

9. However, under section 78 A (4) of the Evidence Act, there are conditions which have not been complied with. Such documents must be accompanied by a certificate of authenticity which needs to satisfy the following three conditions:

- (a) it must identify the electronic record and production process.
- (b) it must show the particulars of the producing device, and
- (c) it must be signed by the responsible person.

10. It is not denied that in filing the Forensic Audit report as part of the defendants list of documents, the certificate of authenticity was not attached to the said report. However, having found that the pages whose production as exhibits has been objected to are part of the evidence upon which the report is based and, therefore admissible and rebuttable, the same cannot be locked out for failure to attach such certificate. In any case, the certificate of authenticity will not add any new evidence or change the defendants evidence to prejudice the plaintiff case. After all, under Article 159 (1) (d) of the Constitution of Kenya, this court is mandated to administer justice without undue regard to procedural technicality. And by virtue of the overriding objective pursuant to section 1A and 3A of the Civil Procedure Act, the court is clothed with inherent jurisdiction to administer justice regardless of procedural technicalities.

11. Further, it is the duty of a court in adjudicating over cases between parties to be mindful of the fact that justice can only be realized and seen to be done when a party is allowed a chance to ventilate its case with all the evidence available to it and as it deems fit, with regard to the circumstances of case.

12. Therefore, the application by the defendant's counsel is allowed to enable them file a certificate of authenticity with regard to the electronically generated evidence on pages 16,17,18 and 19 of the Forensic Audit Report dated 12th October, 2016 in the following terms.

- (a) Dw2 is hereby stood down.
- (b) the defendant be and is hereby granted 7 days leave to file and serve a certificate of authenticity in support of the documents on pages 16,17,18 and 19 of the Forensic Audit Report dated 12.10.2016.
- (c) hearing is adjourned to 26.11.2019 at 2.30 pm with no orders as to costs.

Ruling delivered this 5th day of November, 2019.

D.O .CHEPKWONY

JUDGE