



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 330 OF 2009

STEGMA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

VIKTAR MAINA NGUNJIRI.....DEFENDANT

RULING

1. For the determination of the Court is the oral application by the Defendant, opposing and objecting to the production of documents and evidence by the Plaintiff. The objection is premised on Section 106(B) of the Evidence Act. It was averred that the production of the documents listed at pgs. 9,27 and 28 of the Plaintiff's documents, as well as photographs at pgs. 174-184 and item No. 33 was contrary to the provisions of Section 106(B)(4) of the Evidence Act.
2. Further, it was urged that Order 11 Rules 3(1) & (2) of the Civil Procedure Rules does not refer to admissibility of evidence, and that therefore, the practice rules as provided to not override the substantive provisions of the law pursuant to the Evidence Act. As such, the same were inadmissible and should therefore, be struck off the record.
3. In response to the objection, the Plaintiff reiterated that the Defendant had the opportunity to object to such production of the said documents during the case management conference on 3rd March 2015. It was further reiterated that at the case management conference, any objection to the production of the documents was not raised, and that by conduct therefore, it was deemed that the Defendant had waived its objection to the same. The Plaintiff averred that the objection raised at this juncture was an afterthought, and that the same was unsustainable.
4. Under the provisions of Section 106(B)(1) of the Evidence Act referred to by the Defendant on the admissibility of electronic evidence, it is provided that;

Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as a 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.

Further at sub-section (4), where a party seeks to give evidence by virtue of section 106B he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. It is provided that;

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 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.
5. The provisions of Section 106(B) refer to the production of electronic evidence before the Court. In that regard, and in the case of R v Barisa Wayu Mataguda (2011) eKLR, it was reiterated that;

“This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of S. 106B (4). PW11 did not mention any such certificate. Such a certificate must in terms of S. 106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device (in this case the CCTV camera). As Mr. Kirui has pointed out such a person would be PW4 who would sign to certify the validity and correctness of the CCTV footage. Therefore for PW11 to attempt to produce the CD without such a certificate claiming that he watched the CCTV footage with PW4 will not suffice. Without the required certificate this CD is inadmissible as is inadmissible as evidence and I do so rule.”

Further, in Nonny Gathoni Njenga & Another v Catherine Masitsa & Another [2014] eKLR, Ogola, J rendered himself as follows;

“Under sub-section (4), where a party seeks to give evidence by virtue of section 106B he has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

“a) identify the electronic record containing the statement and describing the manner in which it was produced; and

b) give 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.”

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 is appropriate). In the case of REPUBLIC .V. BARISA WAYU MATUGUDA [2011] eKLR the court observed that:

“. . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.”

The court went on that:

“This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate

this CD is inadmissible as evidence.”

In light of the above analysis and having already stated above that the DVDs attached by the Plaintiffs are not accompanied by a Certificate as required under the evidence Act, it therefore follows that the said DVDs are inadmissible as evidence.”

6. In light of the foregoing, the production of the CD and the photographs by the Plaintiff without a certificate in terms of Section 106(B)(4) of the Evidence Act, the Court hereby finds that the same is inadmissible as evidence before the Court.
7. However, and as enunciated and pronounced in **Nonny Gathoni Njenga & Another v Catherine Masitsa & Another** (supra), the Plaintiff is not precluded from tendering the CD and the photographs before the Court as evidence should it find itself in a position of being able to procure a certificate as prescribed under Section 106(B)(4).
8. Costs in the main cause

Dated, signed and delivered in court at Nairobi this 11th day of March, 2016.

C. KARIUKI

JUDGE