



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO. 30 OF 2011**

**IBRAHIM J. ONYINKWA ..... 1ST PLAINTIFF**

**DENIS O. ONYINWA ..... 2ND PLAINTIFF**

**EVALYNE B. ONYINKWA ..... 3RD PLAINTIFF**

**VERSUS**

**ROYAL MEDIA SERVICES LIMITED ..... DEFENDANT**

**RULING ON OBJECTION TO ISSUE NOTICE TO PRODUCE MFI - 2(A), 2(B) AND 3 BY  
THE DEFENDANT**

Mr. Omusundi for the Plaintiff recalled PW1 to give further evidence and produce as exhibits some documents. PW1 then identified MFI-2(a) and 2(b) which were receipts issued to him upon purchase of the video clip (MFI-3), the latter comprising the basis of the alleged defamatory broadcast.

Mr. Omusundi then moved the court pursuant to amendment No. 9 of S. 65 of the Evidence Act as read with sub-section (6) thereof to allow the witness (PW1) to produce MFI.2(a), 2(b) and 3 as exhibits.

He further submitted that the Plaintiffs had issued a Notice to Produce MFI-3 and that therefore, if the defence would object to the production of MFI-3 as an exhibit by PW1, the court should compel them to produce it in this respect.

Mr. Gacheru, advocate for the Defendant strongly objected to the request made and focused specifically on MFI-3. According to him, MFI-3 is secondary evidence and counsel for the Plaintiffs had not laid basis upon which MFI-3 should be produced as an exhibit as provided for by Sections 68 and 69 of the Evidence Act. He submitted that Mr. Omusundi ought to have made a formal application. He further submitted that at no time had the Defendant admitted that he was in possession of MFI-3 and in any event, it was clear the said video clip (original) was always in the possession of the Synovate Group, its maker.

Accordingly, Mr. Omusundi ought to apply for a warrant of arrest to compel Synovate Group to come to court to produce the Video Clip. In this regard, he submitted that, pursuant to Section 69 of the Evidence Act, the Notice to Produce ought to have been served upon the maker of the video clip.

In response Mr. Omusundi submitted that it was doubtless the original video clip was in the hands of the Defendant. That having summoned Synovate Group (I opine its representative) as Plaintiffs'

witness and upon their failure to honour the summons, it was up to the Plaintiff to choose who and how to call its evidence. He further submitted that the Defendant had not demonstrated what prejudice it would suffer if PW1 produced MFI-3 as an exhibit.

Mr. Omusundi made his application both under S. 65 and 69 of the Evidence Act. Section 65 defines primary evidence as the document itself produced for the inspection of the court. Section 69 deals with Notice to produce issued by the party proposing to produce secondary evidence to the party it believes is in possession or power of the original document. It also gives provisos to issuance of the Notice to Produce which I will address myself to hereafter.

Secondary evidence on the other hand is defined under Section 66 of the Evidence Act as:-

**"66. Secondary evidence includes -**

- (a) certified copies given under the provisions hereinafter contained;**
- (b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;**
- (c) copies made from or compared with the original;**
- (d) counterparts of documents as against the parties who did not execute them."**

Primary document must be produced by either its maker or the person to whom it is issued. As regards the receipts (MFI-2(a) and 2(b), they are original in form and were personally issued to PW1 upon purchase of the video clip. In this respect, PW1 is a competent witness to produce them as exhibits if he is the recipient, as in any event, their source is not contested.

However, taking note that the Notice to Produce dated 3rd June, 2013 and filed in court on 4th June, 2013 is issued under S. 69 of the Evidence Act places a presumption that MFI-3 is secondary evidence. That is why in the alternative to objection to its production by PW1, counsel for the Plaintiffs has issued the said Notice to Produce.

Interestingly, Mr. Gacheru on the other hand, while denying that the Defendant possesses the original clips submits the same (original video clip) is in the possession of the Synovate Group and that it is the only body competent to produce it.

Proviso (ii) of Section 69 is to the effect that the Notice to Produce shall not render secondary evidence admissible **"when from the nature of the case, the adverse party must know that he will be required to produce it"**.

Therefore, by virtue of the defence counsel's admission that Synovate Group is in possession of the original video clip which the Defendant allegedly broadcast, the Defendant is estopped from producing the same video clip as an exhibit.

I have also looked at the list of documents of the Defendant dated 16th April, 2013 and filed on 17th April, 2013 and the alleged video clip is not one of the documents sought to be produced by the Defendant.

In this regard, I concur with Mr. Gacheru that only the maker of MFI-3 is a competent witness to produce it. I further concur with him that the Plaintiffs have not done enough or exhausted all avenues in ensuring that the maker of the document is availed in court to produce it. Moreso, nothing has been tendered to demonstrate that the maker of the document is out of reach of the court's jurisdiction as stipulated by Section 68 (1) (a) (ii) of the Evidence Act.

Further, it is my view from the foregoing that exceptions to Section 68 thereof have not been

sufficiently invoked or applied by the Plaintiffs to warrant the court to grant the request made. I accordingly uphold the objection by Mr. Gacheru in the terms I have enunciated herein above.

**DATED** and **DELIVERED** at **ELDORET** this 2nd day of October, 2013.

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

No appearance for Mr. Omusundi for the Plaintiffs

Mr. Gacheru for the Defendant