

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E440 OF 2022**

XENOCON CONSULTING ENGINEERS LIMITED.....1<sup>ST</sup> PLAINTIFF  
METROCOM CONSULTANTS LIMITED.....2<sup>ND</sup>  
PLAINTIFF

-VERSUS-

DEBRA LIMITED.....DEFENDANT

**RULING**

1. On 7<sup>th</sup> November, 2022, the plaintiffs filed the instant suit vide a plaint dated 7<sup>th</sup> November, 2022 seeking judgment against the defendant for Kshs.22,920,411.00 being professional fees due to the 1<sup>st</sup> plaintiff, Kshs.9,600,117.37 being professional fees due to the 2<sup>nd</sup> plaintiff, interest on 1(a) & (b) from the date of demand until payment in full and costs of the suit.
2. At the preliminary stage, the defendant vide letters dated 11<sup>th</sup> September 2024 and 25<sup>th</sup> July 2025, lodged an objection to the production of various documents contained in the plaintiffs' list and bundle of documents, as well as its supplementary list of documents. In addition, the defendant raised an objection to the witness statements of the plaintiffs' experts, QS Paul Ngugi and Eng. W. Omari Nyakundi.
3. The issues raised in the said objections were canvassed by way of written submissions. The defendant's submissions were filed on 15<sup>th</sup> September 2024 by the law firm of Rachier & Amollo LLP, whereas the plaintiffs'

submissions were filed on 1<sup>st</sup> October 2025 by the law firm of Githara & Associates Advocates.

4. Ms Maina, learned Counsel for the defendant objected to the admissibility of the plaintiffs' documentary and electronic evidence on several statutory and jurisprudential grounds under the Evidence Act. Counsel contended that the electronic documents contained in the plaintiffs' bundles of documents do not comply with the mandatory certification requirements under Sections 106B and 65 of the Evidence Act. She argued that each computer printout must be accompanied by a proper certificate satisfying the cumulative conditions set out in Sections 106B(2), 106B(4) & 65(8) of the Evidence Act, including identification of the specific document, technical particulars of the device used, proof of proper operation of the computer, and confirmation that the person certifying occupied a position of responsibility over the device. She asserted that the plaintiffs' certificates are fatally defective for lack of specificity, failure to identify devices or technical details, and for purporting to cover multiple documents under a single certificate.
5. Ms Maina relied on the cases of **Republic v Barisa Wayu Mataguda** [2011] KEHC 1481 (KLR), **Nonny Gathoni Njenga & Jane Wambui Odewale v Catherine Masitsa & Standard Group Kenya Ltd** [2014] KEHC 6468 (KLR) and **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others** [2015] KECA 397 (KLR), as well as on comparative academic and judicial commentary on authentication of electronic evidence to underscore the risks of manipulation and the necessity of strict compliance.

6. Counsel also challenged the admissibility of several unsigned documents in the plaintiffs' primary bundle, on the ground that the unsigned documents lack probative value and cannot establish the facts in issue.
7. Citing Sections 5, 35(4) & 70 of the Evidence Act and the case of **Mugo Mungai & 4 others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 others** [2019] KEHC 11476 (KLR), Ms Maina maintained that authenticity requires proof of authorship, usually by signature or acknowledgment.
8. She objected to the admissibility of the plaintiffs' priced bills of quantities (BQs) and related expert opinion prepared during the pendency of litigation, arguing that they fall within the statutory exclusion under Section 35(3) of the Evidence Act, which bars statements made by interested persons when proceedings are pending or anticipated. To buttress these submissions, Counsel referred to the case of **Ruth Njeri Kuniara v Industrial & Commercial Development Corporation & 2 others** [2018] KEHC 6717 (KLR).
9. She asserted that the BQs were created after commencement of this suit and are self-serving documents prepared to advance the plaintiffs' claim. In questioning the independence of the expert witness, Counsel cited the case of **Christopher Ndaru Kagina v Esther Mbandi Kagina & another** [2016] KEHC 3192 (KLR).
10. In regard to the plaintiffs' Notices to Produce, Ms Maina maintained that the signed minutes requested for and project documents are not in the possession of the defendant, but are held by independent consultants engaged in the project, and therefore compliance is not feasible under Section 69 of the Evidence Act.

11. Mr. Githara, learned Counsel for the plaintiffs submitted that the defendant's objections targeted three main categories of documents including electronic records allegedly unsupported by valid certificates under Sections 106B and 65(8) of the Evidence Act, unsigned documents, which include minutes of project meetings and a priced Bills of Quantities appearing in the plaintiffs' supplementary list of documents, which were allegedly prepared by an interested party during the pendency of these proceedings. He stated that the defendant's case is that the plaintiffs' certificates of electronic evidence are defective for failure to specifically identify each electronic record, disclose device particulars, and demonstrate that the deponents thereof hold responsible positions in relation to the devices used.
12. He submitted that Sections 106B(4) & 65(8) of the Evidence Act require compliance with any, not all of the listed conditions. He stated that the plaintiffs' certificates sufficiently identify the printouts, describe the mode of production, confirm the reliability of the devices (including the Kyocera printer used), and are duly signed by responsible Directors overseeing the project. Mr. Githara relied on the Court of Appeal case of **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others** (supra), and argued that the Evidence Act does not prescribe a rigid format and that the purpose of a certificate is to establish authenticity rather than to impose technical formalities. Counsel distinguished the authorities cited by the defendant on the basis that those decisions emphasized the necessity of a certificate, not rigid or cumulative compliance with every statutory criterion.
13. Mr. Githara further invoked Article 159(2)(d) of the Constitution and Sections 1A and 3A of the Civil Procedure Act, and urged this Court to

eschew undue technicalities. In the alternative, he sought leave for the plaintiffs to regularize any perceived deficiency.

14. In regard to the unsigned documents, Counsel conceded that certain documents are unsigned but argued that there is no absolute legal requirement invalidating unsigned minutes, particularly where they were circulated via email and their authenticity is not disputed. He contended that signed versions would ordinarily be in the custody of the defendant or its disclosed agent, Fredmar Quantity Surveyors, and that Notices to Produce were duly issued.
15. Mr. Githara invoked principles of agency law and Section 68(1)(a) of the Evidence Act and argued that a disclosed principal bears the responsibility for documents held by its agent, and that secondary evidence is admissible where the original is in the possession or power of the opposing party.
16. Counsel relied on the Court of Appeal case of the **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another** [2016] KECA 649 (KLR), and asserted that the defendant has neither denied the occurrence of the meetings nor sworn an affidavit disclaiming custody of the documents. In respect to the Bills of Quantities, Mr. Githara stated that the original documents were prepared in 2020 during the subsistence of the project by the defendant's appointed Project Manager and that both priced and unpriced versions existed. He asserted that upon the defendant's failure to produce the priced version, the plaintiffs engaged an independent Quantity Surveyor, Mr. Paul Ngugi, to price the unpriced BQs using the prevailing 2020 rates and to prepare an expert report.
17. Counsel denied any suggestion that the expert is an interested party and submitted that expert-generated valuation documents are admissible when

they are based on primary records and relevant to determining project value and professional fees. Counsel argued that the defendant had not disputed the existence or authenticity of the said documents.

**ANALYSIS AND DETERMINATION.**

18. Upon consideration of the defendant's Notices of Objection and the written submissions by Counsel for the parties, the issues that arise for determination are -

- i) Whether the plaintiffs' electronic evidence complies with the mandatory requirements of Sections 106B and 65(8) of the Evidence Act;**
- ii) Whether the unsigned documents contained in the plaintiffs' list and bundle of documents are admissible in evidence;**
- iii) Whether the plaintiffs' priced Bills of Quantities (BQs) and related expert report are inadmissible under Section 35(3) of the Evidence Act; and**
- iv) Whether the defendant has demonstrated that the documents sought in the Notices to Produce are not within its possession or control.**

**Whether the plaintiffs' electronic evidence complies with the mandatory requirements of Sections 65(8) and 106B of the Evidence Act.**

19. The admissibility of electronic evidence in Kenya is governed by Sections 65(8) and 106B of the Evidence Act, which provide as hereunder –

***Section 65(8)***

*In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say -*

- a) identifying a document containing a print-out or statement and describing the manner in which it was produced;*
- b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;*
- c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate,*

*which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.*

#### **Section 106B**

- 1) 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 "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.*

2) *The conditions mentioned in subsection (1), in respect of a computer output, are the following –*

a) *the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;*

b) *during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;*

c) *throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and*

d) *the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.*

3) *Where over any period, the function of storing or processing information for the purposes of any activities regularly*

*carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether*

–

- a) by combination of computers operating in succession over that period; or*
  - b) by different computers operating in succession over that period; or*
  - c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this section to a computer shall be construed accordingly.*
- 4) 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.***

***5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.***

20. From the foregoing provisions, it is clear that Section 106B(1) renders electronic records admissible if the conditions set out under subsection (2) are satisfied, while subsection (4) requires a certificate identifying the electronic record, describing the manner of its production and giving particulars of the device involved, signed by a person occupying a responsible position.

21. In this case, the defendant contended that there must be strict and cumulative compliance with all the statutory requirements, particularly those set out under Sections 65(8) and 106B of the Evidence Act. The defendant further

averred that the certificates filed by the plaintiffs were defective for lack of specificity and technical detail. The plaintiffs on the other hand maintained that the law does not prescribe a rigid or inflexible format for such certificates and that substantial compliance is sufficient, provided the authenticity of the electronic evidence is established. A careful consideration of Sections 65(8) & 106B(4) of the Evidence Act reveals that the said provisions do not demand mechanical or rigid recitation of every statutory element, provided that the certificate demonstrates compliance with the substance of the conditions set out under Section 106B(2).

22. In the case of **In re Gurumukh Singh Narain Singh Pandahal** [2021] KEHC 9773 (KLR), the Court in considering the import of Sections 106B(2) & (4) of the Evidence Act held that -

*It is therefore incumbent upon the objector to prove that the electronic gadget used in recording the conversation was ordinarily under his control; was serviceable at the time of use, and that he is the one who produced or prepared the CD or that production was done under his supervision. The law therefore require (sic) that all these information be captured in a certificate.*

23. The Court of Appeal in the **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others** (supra), applied its mind to the issue of admissibility of electronic evidence and held as follows—

*In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person's activities using a computer or some*

*other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was 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.*

24. Bearing in mind the foregoing authorities, this Court is of the considered view that the purpose of the certificate under Section 106B of the Evidence Act is to authenticate the electronic record and to assure the Court of its integrity. It does not prescribe a technical or inflexible formula for such certification. What is required is that the certificate identifies the electronic record, describes the manner of its production, and that the certificate is signed by a responsible person.
25. Having perused the certificates filed by the plaintiffs, sworn by Eng. Njau Njoka and Eng. Zachary Macharia on 17<sup>th</sup> October 2024, I am satisfied that they identify the impugned electronic records, describe the process of production and confirm that the devices used were in proper working order. While the certificates may not set out granular technical particulars as expected by the defendant, the statute does not demand exhaustive technical specifications.
26. In the circumstances, this Court finds that the plaintiffs have substantially complied with the requirements of Sections 65(8) and 106B of the Evidence

Act. The electronic documents are therefore admissible, subject to evaluation of their probative value during trial.

**Whether the unsigned documents contained in the plaintiffs' list and bundle of documents are admissible in evidence.**

27. The defendant relied on the provisions of Sections 5, 35(4) & 70 of the Evidence Act and contended that the unsigned minutes and related documents that the plaintiff intends to rely on, in support of its case lack probative value and cannot establish authorship. The said Sections provide that –

***Section 5***

***Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant.***

***Section 35 (4)***

***For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.***

***Section 70***

***If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so***

***much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.***

28. The import of the said provisions is that documentary evidence must not only be relevant but must also be properly authenticated by establishing its maker and verifying the signature or handwriting where disputed. Additionally, it is trite that a document must be proved by its maker or through other admissible means, where its authorship is in dispute. I am however of the considered view that the mere absence of a signature does not automatically render a document inadmissible. A signature is one method of authentication, but not the only one. Authenticity may also be established through oral testimony, surrounding circumstances, conduct of the parties, or admission.
29. Although the plaintiffs admitted to have attached unsigned minutes to their list and bundle of documents, they established through averments that the unsigned minutes were circulated electronically and that the defendant had not denied the occurrence of the meetings. They further claimed that the signed original minutes are in the custody of the defendant or its disclosed agent. It is now well settled that where originals are alleged to be in the possession or control of the opposing party and a Notice to Produce has been issued, Section 68(1)(a)(i) of the Evidence Act permits the production of secondary evidence. It states that –

***Secondary evidence may be given of the existence, condition or contents of a document in the following cases -***

- a) when the original is shown or appears to be in the possession or power of -***

- i) ***the person against whom the document is sought to be proved; or***
- ii) .....

30. Given the circumstances of this case, it is my considered view that as to whether the documents will ultimately prove the facts asserted is a matter of evidentiary weight to be tested during cross-examination. I am not persuaded at this stage that the absence of signatures, without more, renders the unsigned documents inadmissible. They are admissible, subject to strict proof.

**Whether the plaintiffs’ priced Bills of Quantities (BQs) and related expert report are inadmissible under Section 35(3) of the Evidence Act.**

31. The defendant argued that the priced Bills of Quantities and expert report were prepared during the pendency of these proceedings and therefore fall within the exclusion under Section 35(3) of the Evidence Act, which states as hereunder -

***Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.***

32. This Court is of the considered view that the aforesaid provisions are designed to guard against the admission of self-serving statements made by interested persons to advance their cases. Expert reports prepared for purposes of litigation are not *per se* inadmissible. Under the provisions of Section 48(1) of the Evidence Act, expert evidence is routinely procured after commencement of proceedings.

33. The question therefore is whether the plaintiffs' experts are independent and whether their opinions are grounded on primary material. The plaintiffs maintained that the original Bills of Quantities were prepared during the project and that the experts merely priced existing documents using prevailing rates. The defendant on the other hand disputed the experts' independence and their interest in this case, but has not demonstrated that they lack the requisite qualifications or impartiality. Although the evidence of an expert witness must be independent and objective, its weight is subject to testing at trial. In light of the above, this Court is not persuaded that preparation of a report during the pendency of litigation automatically renders it inadmissible.
34. It is therefore my finding that the priced Bill of Quantities and the expert report do not fall within the exclusionary ambit of Section 35(3) of the Evidence Act. The said provision does not extend to bar expert opinion evidence that is otherwise admissible pursuant to Section 48 of the Evidence Act.
35. For this reason, I hold that the Bills of Quantities in issue are admissible in this case as expert opinion evidence, subject to production, cross-examination and evaluation of their probative value at trial.

**Whether the defendant has demonstrated that the documents sought in the Notices to Produce are not within its possession or control.**

36. The defendant maintained that the signed minutes requested for, and project documents are in the custody of independent consultants and not within its possession, and therefore Section 69 of the Evidence Act, which provides for a Notice to Produce precludes compliance.

37. It is however noteworthy that where consultants are engaged by a party in the execution of a project, and the documents relate to that project, the issue of control cannot be determined merely by asserting lack of physical possession. Principles of agency are instructive. In **Anthony Francis Wareheim t/a Wareheim & 2 others v Kenya Post Office Savings Bank**, Civil App Nos. Nai 5 & 48 of 2002 quoted with authority by the Court of Appeal in the case of the **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another** (supra), it was held that –

*It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.*

38. The record clearly shows that the defendant has not placed before this Court any affidavit disclaiming authority over the consultants who are alleged to be in actual possession of the signed minutes and that project documents were requested for, by the plaintiffs. In the absence of such evidence and considering that the said documents relate to the defendants own project, and that the said consultants' services were procured by the defendant, this Court is not persuaded that the defendant has demonstrated that possession, custody and production of the said documents is out of its control.

39. Consequently, this Court is satisfied that the plaintiffs are the entitled, where appropriate, to rely on secondary evidence under Section 68 of the Evidence Act.
40. The law draws a sharp distinction between admissibility and the weight the attached to documentary evidence. This Court therefore finds that the objections raised by the defendant largely concern authenticity, independence and reliability, matters that go to evidentiary weight rather than admissibility and are best tested through cross-examination. Accordingly, in keeping with substantive justice and guided by the principles of Article 159(2)(d) of the Constitution of Kenya, this Court is persuaded that none of the impugned documents are so fundamentally defective as to warrant outright rejection at this stage.
41. It is this Court's finding that the defendant's Notices of Objection dated 11<sup>th</sup> September 2024 and 25<sup>th</sup> July 2025 are devoid of merits. They are hereby dismissed with costs to the plaintiffs.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 20<sup>th</sup> day of February 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of;-**

Mr. Wamai holding brief for Mr. Githara for the plaintiffs

No appearance for the defendant

Ms. B. Wokabi – Court Assistant.