



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 104 OF 2019

LONDON DISTILLERS (K) LIMITED.....PLAINTIFF

VERSUS

MAVOKO WATER & SEWERAGE COMPANY.....1ST DEFENDANT

MACHAKOS COUNTY GOVERNMENT.....2ND DEFENDANT

ERDEMANN PROPERTY LIMITED.....3RD DEFENDANT

REASONS FOR THE ORDER OF 14TH OCTOBER, 2019

1. In the Notice of Preliminary Objection dated 13th October, 2019, the Plaintiff has averred that the contents of paragraphs 6 and 17 of the Supporting Affidavit of the 1st Defendant's Managing Director, Michael Mang'eli together with exhibits marked as MMI be struck out for being contrary to the provisions of Section 78A of the Evidence Act. The Notice of Preliminary Objection proceeded by way of oral submissions.

2. In his submissions, the Plaintiff's/Respondent's advocate submitted that Section 78A of the Evidence Act sets out the issue of admissibility of electronic evidence; that Section 106B prescribes how an electronic document should be produced and that annexure MM1 and MM2 are electronic documents which should be expunged from the court record.

3. Counsel submitted that Section 106B of the Evidence Act is clear that any evidence in electronic form must contain a certificate as set out in the Act; that the absence of a certificate is fatal to electronic evidence and that in the absence of a certificate contemplated under Section 106B of the Evidence Act, annexure MM1, MM2 and MM4 and the corresponding paragraphs in the Supporting Affidavit of Michael Mang'eli should be expunged from the record. Counsel relied on the case of *William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & Others (2003) eKLR* and *Republic vs. Barisa Wayu Mataguda (2011) eKLR*.

4. On his part, the 1st Defendant's advocate submitted that a Preliminary Objection has to be clear and state the law on which it is premised on; that the arguments raised by the Plaintiff are outside the province of a Preliminary Objection; that Section 106B of the Evidence Act only applies during trial; and that the Plaintiff can cross-examine the deponent of the Affidavit in respect of the electronic evidence.

5. The 3rd Defendant's advocate supported the submissions of the 1st Defendant's advocate.

6. In the Application dated 4th October, 2019, the 1st Defendant is seeking to set aside the consent orders issued on 1st October, 2019. In support of the said Application, the 1st Defendant's Managing Director has sworn an Affidavit dated 4th October, 2019. At paragraphs 6 and 7 of his Affidavit, the deponent has stated as follows:

“6. That the above instructions were forwarded to the 1st Defendant/Applicant's former Advocates expressly who expressly acknowledged the same and agreed to execute my instructions. (Annexed hereto and marked “MM-1” is a copy of the screenshot conversation between myself and Mr. Mulekyo, former Advocate on record).

7. That however, to my shock and dismay of the 1st Defendant/Respondent former Advocates forwarded a screenshot of the consent that was recorded in court which had blatantly ignored my express instructions. (Annexed hereto and marked as “MM-2” is a screenshot of the consent order forwarded to me by the former Advocates).”

7. MM1 and MM2 are “screenshots” of the purported telephone conversation between the 1st Defendant's Managing Director and his advocate.

8. A “screenshot”, which is also defined as a print of a screen, is an image of what is displayed on a screen of either a computer or a mobile phone. A screenshot can be treated by either a software program or as a picture. In a nutshell, MM1 and MM2 are pictures that the 1st Defendant’s Managing Director took using his phone showing the purported messages that he exchanged with his advocate viz-a-viz the consent that was recorded in this matter on 1st October, 2019.

9. The Respondents to the Preliminary Objection have not denied that annexure MM1 and MM2 is information contained in an electronic record which was printed on a paper. Section 106A and 106B (1) and (2) of the Evidence Act provides as follows:

“106A. The contents of electronic records may be proved in accordance with the provisions of section 106B.

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.”

10. Section 106B (4) of the Evidence Act provides as follows:

“(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.”

11. Section 2 of the Evidence Act has defined “computer” as follows:

““computer” means any device that receives, stores and processes data, or information applying stipulated processes to the data and supplying results of that data or information; and any reference to information being derived from other information shall be construed to include a reference to its being derived therefrom by calculation, comparison or any other process.”

12. A mobile phone is therefore a computer for the purpose of the Evidence Act.

13. It is obvious from the provision of Section 106B (4) of the Evidence Act that where electronic record which has been printed is to be produced in any proceedings, a certificate identifying the electronic record containing the statement and describing the manner in which it was produced must be prepared and adduced in evidence. The above Section on the production of electronic evidence and the preparation of a certificate is applicable in all proceedings.

14. It is trite that evidence can be adduced either by way of *viva voce* or Affidavit. For the purpose of Section 106B of the Evidence Act, it does not matter whether the electronic evidence that is sought to be adduced is by way of *viva voce* evidence or by Affidavit evidence. In both cases, a certificate identifying the electronic record that produced the printed document and giving the particulars of the device must be prepared and adduced alongside the printed electronic evidence that is to be adduced.

15. In the absence of a certificate contemplated under Section 106B (4) (d) of the Evidence Act, I find that the purported print outs of the screenshots annexed on the Applicant's Affidavit as annexure MM1 and MM2 be struck off from the record. However, the contents of paragraphs 6 and 7 of the Affidavit of the Applicant's Managing Director will remain on record because they are depositions of what the Managing Director says he did.

16. The Notice of Preliminary Objection dated 13th October, 2019 is thereof allowed as follows:

a. Annexure MM1 and MM2 on the Affidavit of Michael Mang'eli sworn on 4th October, 2019 be and are hereby expunged from the record.

b. The 1st Defendant to pay the costs of the said Notice of Preliminary Objection.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE