



**Okelo (In his capacity as Legal Representative of Ochong Okelo - Deceased) v
Aguka & 2 others; Karau & 14 others (Interested Parties) (Environment and
Land Case 48 of 2011) [2025] KEELC 5388 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 48 OF 2011**

**JO MBOYA, J
JULY 18, 2025**

BETWEEN

**BETHWEL KIPCHIRCHIR OKELO PLAINTIFF
IN HIS CAPACITY AS LEGAL REPRESENTATIVE OF OCHONG OKELO -
DECEASED**

AND

**JUDY AKINYI ODUOR AGUKA 1ST DEFENDANT
LAWRENCE ODUOR AGUKA 2ND DEFENDANT
JOAKIM KIARIE KAMERE 3RD DEFENDANT**

AND

**DAVID KARANJA KARAU INTERESTED PARTY
GEORGE NJUGUNA INTERESTED PARTY
DR JOHN KABUTHA MUGO INTERESTED PARTY
SARA JEROP RUTO INTERESTED PARTY
MUTHOGA NGERA INTERESTED PARTY
ROBERT WILLIAMS INTERESTED PARTY
PAULINE NJERI WILLIAMS INTERESTED PARTY
JOHN AUBRAY CHARLES HERBERT INTERESTED PARTY
JOHN MURIMI NJOKA INTERESTED PARTY
JOCELYN WANJIKU MURAYA INTERESTED PARTY
WALLACE NGUGI MBUGUA INTERESTED PARTY**



MARY MUGURE NGUGI INTERESTED PARTY
DR GATHAIYA JUMBL INTERESTED PARTY
REGISTRAR OF TITLES INTERESTED PARTY
HON ATTORNEY GENERAL INTERESTED PARTY

RULING

1. During the cross-examination of PW3 by Mr. Njoroge Regeru, the learned senior counsel for the 1st, 3rd, 6th, 7th, 8th, 9th, 10th and 13th Respondents, an objection was raised as to the production of the report contained in page 377 of the plaintiff's bundle of documents that was sent by email on 3rd November, 2021. In his testimony, PW3 stated that a copy of the email needed to be generated and printed electronically, and that he had not seen a certificate of the person who printed the email. He further stated that the maker of the email is Martin Kimani Gichia, who was the principal legal counsel, commercial.
2. The learned senior counsel contended that only the maker can produce the document, and that no basis has been laid out for another person other than the maker to produce the same. Secondly, he contended that the absence of the electronic certificate which is mandatory under Section 106 B (4) of the *Evidence Act* goes to the root of a fair trial. The learned counsel submitted that the documents should be struck out and rejected by the court.
3. The objection was supported by Mr. Njengo, Mr. Kinyua and Mrs. Wang'ombe. Mrs. Wang'ombe submitted that the date of the email is not indicated, and that the witness is not capable of answering questions on the email.
4. In response, Mr. Motari, the learned counsel for the 14th and 15th Interested Parties submitted that the witness identified the documents which were marked as P. Exhibit number 61 to 68 and that none of his colleagues raised that objection, thus they waived their right. It was submitted that they have cross-examined the witness on the documents that they have not objected to, and having not objected, the witnesses is producing what was forwarded to him. The learned counsel submitted that the witness having laid the basis of the documents in court, being an institution and not an individual and not having gone into authorship, the witness is right to produce the documents.
5. While the learned counsel submitted that the documents are admissible, he urged the court to consider irrelevance, privilege, burdensome, duplication and unfair prejudices, and further submitted that none of the documents has caused the objector those principles.
6. Ms. Samba submitted that the rules of evidence dictate that a person seeking to rely on a certain fact must be the person to discharge the burden. That contrary to the submissions by the learned senior counsel, a person seeking to rely on certain facts has to discharge the fact and that is what the witness was doing. She submitted that a corporate body has its officers, and that the witness before the court is one such officer.
7. The learned counsel submitted that several directions have been issued by the court, chief among them is to exchange pleadings, and the evidence that is sought to be relied on. Further, that the mischief sought be cured is not to ambush any person for purposes of a fair trial, as these documents were exchanged in the year 2021. While placing reliance on Article 159 of *the Constitution*, the learned



counsel submitted that it will be highly prejudicial to her client if the court were to uphold the objection.

8. In reply thereof, the learned senior counsel submitted that the documents were identified and not produced. He reiterated that he was careful to cross-examine the witness but not on page 377 which he did not get into merit for the reason that the maker was not present. With regard to the legal terms submitted by Mr. Motari, the learned senior counsel submitted that unfair prejudice would be occasioned to his clients. It was further submitted that Section 35(1) of the Evidence Act is very clear that in view of the legal principle that a corporate body acts through its agents, the agent who authored the email has not been called. On the authenticity and integrity, the learned counsel urged the court to bear in mind the rationale of Section 106 B of the Act, and submitted that the issues raised are not procedural technicalities.
9. I have considered the objection and the oral submissions made by all counsel.
10. Section 35 of the Evidence Act, provides for admissibility of documentary evidence as to facts in issue. It reads in part as follows:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say –

- a. if the maker of the statement either—
 - i. had personal knowledge of the matters dealt with by the statement; or
 - ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
- b. if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection 1. of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence -



- a. notwithstanding that the maker of the statement is available but is not called as a witness;
 - b. notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.”
11. The document contained in page 377 refer to an email from Martin Kimani Gichia, principal legal counsel, commercial, that responded to enquiries from one Sheila about an email from one Irine regarding records of accounts kept by KCB Bank. The learned counsel argued that PW3 could not produce this document as he was not the maker, and further that he could not be cross-examined on its contents. The documents sought to be produced by PW3 form part of the evidence in support of the plaintiff’s case, and in doing so, PW3 appears to be producing records of documents forwarded to him. In my view, the plaintiff has chosen to prosecute his case in the best way known to him, and perhaps did not find it necessary to seek to have the particular officer produce this email and the report. However, it was incumbent upon the learned senior counsel to object to such production at the earliest, and not during the cross- examination of the witness. Such objection has come late in the day. While PW3 agreed that he was not the maker of the said document, the learned counsel appears to be apprehensive that these documents are prejudicial to his client’s case. No prejudice has been demonstrated as to the production despite the late objection. Also, and in my view, the probative value of this document can only be considered when the court retires to write its judgment, and thus the apprehension by the learned senior counsel is premature.
12. On the production of electronic evidence, the learned senior counsel submitted that the same is in contravention of Section 106 B of the *Evidence Act* and ought to be struck out. The court of appeal in the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR stated that:-

“Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.” In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced...”
13. While I place reliance on the above authority, and being alive to the fact that it is mandatory that any electronic evidence be accompanied by a certificate, it is my view there is room for compliance with this requirement. I say so because the plaintiff is yet to rest his case, and in a bid to balance the interest of justice, it is only fair that he is given time to file the same.
14. Having said the above, the objection raised by the learned senior counsel thus fails. The plaintiff is hereby directed to comply with Section 106B of the *Evidence Act*.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 18TH DAY OF JULY, 2025.

HON. MBOGO C.G.



JUDGE

18/07/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Ms. Samba for the plaintiff

Ms. Kung'u for the 2nd defendant

Mr. Muchiri for the 3rd defendant

Mr. Njoroge Regeru, Mr. Thuo and Mr. Sande for the 1st, 3rd, 4th, 6th, 7th, 8th, 9th, 10th and 13th Interested parties

Mr. Ngure holding brief for Mr. Njengo for the 2nd Interested Party

Mr. Kinyua for the 5th Interested Party

Mrs. Wang'ombe holding brief for Mrs. Ngetho for the the 11th and 12th Interested Parties

Mr. Motari for the 14th and 15th Interestd Parteis – absent

