



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**HCC NO. 23 OF 2011**

**KENYA AGRICULTURAL RESEARCH INSTITUTE .....PLAINTIFF**

**VERSUS**

**FARAH ALI .....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

***(Objection to admission of electronic evidence in the form of a video clip in a compact disk; counsel for the plaintiff objecting on the ground that no certificate under section 106B of the Evidence Act had been produced; held that though a certificate had been produced, it did not specifically refer to the compact disk or the video clip information contained therein and the manner in which it was produced; the certificate did not satisfy section 106B (4) of the Evidence Act; objection upheld)***

1. This matter was partly heard before Munyao J. until 16<sup>th</sup> March 2017 when the learned judge recused himself and forwarded the file to this court to deal further.

2. When the matter was mentioned before this court for directions, parties informed the court that they wished to have the matter proceed from where Munyao J. had left as opposed to starting de novo. Consequently, orders were made on 21<sup>st</sup> April 2017 that the hearing proceeds from where it had reached and that this court delivers a ruling on an issue of admissibility of a Compact Disk (CD) that was pending before Munyao J.

3. The issue of admissibility of the CD arose thus: On 13<sup>th</sup> May 2016 while Samuel Ngugi Nai DW3, was testifying, he sought to produce a video clip in the form of a CD. Mr. Anyona, learned counsel for the plaintiff objected on the ground that no certificate under section 106B of the Evidence Act had been produced. He submitted that though a purported certificate was in court, the certificate was faulty. He further submitted that Section 106B states that the certificate should contain the particulars of the computer used in making the CD. Such particulars would include the name and serial number of the computer for audit purposes. He further submitted that it is easy to manipulate electronic evidence yet it is hard to detect signs of tampering. He thus urged the court to be careful and to uphold his objection. He relied on ***William Odhiambo Oduol –vs- IEBC [2013] eKLR.***

4. Mr. Nguyo, learned counsel for the 2<sup>nd</sup> defendant, also objected to the production of the CD. He submitted that no transcription of what was being said in the video clip was availed and that the CD should only be produced by the person who made the video, that is the person who was in control of the computer.

5. The court then asked the witness to state who took the video and who prepared the CD. The witness responded that he took the video together with another person named Abdigal who was deceased as at the time of the testimony. He further stated that he made the CD using his laptop.

6. In response to the objection, Mr. Athuok learned counsel for 1<sup>st</sup> defendant submitted that the only requirement under section 106B (4) is to show that the computer used has no known defects and that it was in good working condition. That the requirement of certification is to show that the evidence has not been doctored and that the person who produces it needs to show that it has not been altered. He submitted that the certificate in the present case showed that there had been no alteration. He further submitted that the contents of the CD are not independent evidence but had been corroborated by the evidence of DW3 who was present when the events were taking place and who had narrated the events in greater detail than the video.

7. The court then indicated that a ruling on the objection would be delivered later and that in the meantime, cross-examination of the witness on other aspects should proceed. A mention was then scheduled for 7<sup>th</sup> July 2016 for a ruling on the issue of admissibility.

8. The matter appears not to have been dealt with again until 16<sup>th</sup> March 2017 when the learned judge informed parties that he could not trace the certificate on the record and for that reason he had not been able to give a ruling. As already mentioned, the judge recused himself on 16<sup>th</sup> March 2017.

9. It thus falls on me to consider and determine the objection. Ultimately, a copy of a certificate was availed on 21<sup>st</sup> September 2017. For some unclear reason, the original could not be located. Nevertheless, counsel for the plaintiff indicated that they had no objection to the court delivering a ruling on the basis of the copy. It is also worth mentioning that the 1<sup>st</sup> defendant closed his case on 21<sup>st</sup> September 2017, prior to delivery of this ruling.

10. Due to the very real risk of manipulation of computer records, parliament found it necessary to legislate guidelines to give some level of assurance as to authenticity and integrity of any electronic record sought to be produced as evidence in court. Consequently, **section 106B** of the Evidence Act states that an electronic record will be deemed to be also a document, and will be admissible in evidence if the conditions listed in the section are satisfied. The provides as follows:

#### **106B. Admissibility of electronic records**

**(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electromagnetic 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.**

11. Of particular concern is subsection 4 which 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.**

12. In **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR** the Court of Appeal distilled the requirements of the section as follows:

**67. 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.**

**68. 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.**

13. Consequently, for electronic evidence to be admissible it must be accompanied by a certificate in terms of section 106B (4). The provisions do not require the certificate to take any particular format. The contents must however satisfy section 106B (4). Naturally, the certificate must 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 of the computer.

14. In the matter before the court, certificate that was provided states as follows:

**I, Samuel Nai do hereby certify that all the photographs and electronic documents annexed and presented as exhibits number 4 before the honourable court were taken and recorded by me and were regularly fed into my computer in the ordinary course of business. The electronic documents were received and produced in the normal course of business in my computer and that the said computer has no known defects whatsoever and was in good**

**working condition and that the documents so electronically received and produced have not been altered.**

**I make this certificate to the best of my knowledge.**

15. To paraphrase the requirements of section 106B (2) in the context of this case, the CD and its contents would be admissible in evidence if the certificate satisfies section 106B (4) and if; (a) the CD and the information therein were 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 CD 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 CD and its contents or the accuracy of its content; and (d) the information contained in the CD reproduces or is derived from such information fed into the computer in the ordinary course of the said activities. Needless to state, the term “computer” here has the meaning assigned to it at **section 3(1)** of the Evidence Act.

16. The certificate produced herein does not specifically refer to the CD or the video clip information contained therein and the manner in which it was produced. Further, other than merely using the generic term “computer” the certificate does not give particulars of the device that was used to record the video clip and the computer used in the production of the CD. The make, type or model of the devices and their serial numbers are not given. All these are crucial details which are necessary to assure the court of authenticity and integrity of the CD and its contents. I note further that there is some ambiguity as to the identity of the person who operated the computer(s) in issue here. Whereas in the certificate it is stated that the computer was operated by Samuel Nai, the witness told the court in his testimony that the video clip was recorded jointly by him and another person known as Abdigal who was deceased as at the time of his testimony.

17. For all these reasons, I am not persuaded as to authenticity and integrity of the CD and its contents. The certificate does not satisfy section 106B (4) of the Evidence Act. The objection against production of the CD and its contents is thus upheld. I must also mention that the issue of whether or not the CD and its contents can be produced in evidence is now moot since the 1<sup>st</sup> defendant who sought to produce it closed his case before delivery of this ruling.

18. The plaintiff and the second defendant shall have costs of the objection.

**Dated, signed and delivered in open court at Nakuru this 9<sup>th</sup> day of November 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff

Mr. Mugambi holding brief for Mr. Athuok for the 1<sup>st</sup> defendant

No appearance for the 2<sup>nd</sup> defendant

Court Assistants: Gichaba and Lotkomoi