



**Erdemann Property Limited v Safaricom Staff Pension Scheme Registered Trustees
(Environment & Land Case 9 of 2019) [2024] KEELC 792 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 9 OF 2019
CA OCHIENG, J
FEBRUARY 20, 2024**

BETWEEN

ERDEMANN PROPERTY LIMITED PLAINTIFF

AND

**SAFARICOM STAFF PENSION SCHEME REGISTERED
TRUSTEES DEFENDANT**

RULING

1. What is before me for determination is an Objection by the Defendant's Counsel on the production of the printed photographs as exhibits in court. He contends that since PW1 Otieno Kenneth Rajwayi did not take the photographs, which relate to ongoing destruction of the suit land, he does not have capacity to produce them as exhibits. He argues that since the photographs touches on the fulcrum of the dispute, PW1 cannot respond to questions raised on them and this will be prejudicial to the Defendant. He explained that the Certificate for production of electronic evidence referred to, had been generated by an employee from the law firm of the Plaintiff's Advocate, a Mr. Edwin Kithinji who confirms that even though he printed the photographs from a specific computer, he was not the one who took them. He relied on Section 78(a) (3) and Section 106(b) of the Evidence Act.
2. The Plaintiff's Counsel insisted that the Plaintiff had complied with Section 106(b) of the Evidence Act since production of the photographs does not touch on admissibility of the documents but the witness can speak to them. Further, as for Section 78(a) of the Evidence Act, probative value can be challenged but not admissibility.
3. As to whether PW1 who was not the maker of the photographs can produce them, I wish to rely on Section 106 B of the Evidence Act which stipulates thus:-
 - (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 electro-magnetic



media produced by a computer (hereinafter 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) ...
- (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.”

4. While 78A of the [Evidence Act](#) provides that:-

- (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—



- (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - (c) the manner in which the originator of the electronic and digital evidence was identified; and
 - (d) any other relevant factor.
- (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

5. In the case of *Mary Wairimu Musindi v Linet Amuli & 4 others* [2022] eKLR it was held that:-

17. My understanding of the objection by the respondent’s is not that the said evidence should not be produced but it ought to be produced by the maker and nobody else. The provisions of section 107 of the *Evidence Act* are clear, thus;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.” 18. It is therefore incumbent upon the applicant to prove her case by calling whoever she deems relevant.

19. Section 78A of the *Evidence Act* on admissibility of electronic evidence states as follows.

Admissibility of electronic and digital evidence

- 1. In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- 2. The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- 3. In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - a. the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;



- b. the reliability of the manner in which the integrity, electronics and digital evidence was maintained;
 - c. the manner in which the originator of the electronic and digital evidence was identified; and
 - d. any other relevant factor.
- (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract. 20. This court is satisfied that the evidence so far marked for identification are clearly electronic in nature and fall within the above description by the Act. 21. Who then ought to produce the same? Clearly it is the maker. The applicant has generally in passing implored the court to take judicial notice of the impact of Covid 19 which disrupted our normal operations. That the maker of the said evidence could not come to court because of the above pathogen.”

See also the case of *Re Estate of Washington Eliakim Olweny (Deceased)* [2021] eKLR.

6. I note the photographs sought to be produced were taken by a party who is not a witness. Further, the person who printed them and prepared a Certificate for Production of Electronic Evidence, is an employee of the Plaintiff's Advocate and not the Plaintiff. Section 106(B) of the *Evidence Act* cannot supersede other provisions of the *Evidence Act* which allows the maker of a document to produce a document. I note in this instance, it is not the maker of the document who has sought to produce it. I have read Section 106(2)(a) - (d) together with Section 78(A) of the *Evidence Act*, and it is clear that the evidence which the witness seeks to produce was taken by a third party. I note the photographs sought to be produced form the fulcrum of the dispute herein. Further, the Counsel for the Defendant has intimated that they seek to field questions to the taker of the said photographs. It is my considered view that since PW1 was not the taker of the photographs, it would be difficult for him to confirm the reliability of the manner in which the said photographs were generated or communicated. Further, it will also be difficult to decipher the reliability of the manner in which the integrity of the photographs was maintained.
7. In the foregoing and in the interest of justice, I find that the maker of the photographs should come and produce them as exhibits so as to respond to any queries that may arise.
8. In the circumstance, I find the objection merited and will allow.



9. I direct the matter to proceed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF
FEBRUARY, 2024**

CHRISTINE OCHIENG

JUDGE

