



**Nickson v Makhanu & 3 others (Environment & Land Case
E001 of 2024) [2024] KEELC 5688 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E001 OF 2024**

FO NYAGAKA, J

JULY 25, 2024

BETWEEN

AMUHAYA SAGINI NICKSON PLAINTIFF

AND

SAMMY COLLINS MAKHANU 1ST DEFENDANT

TITUS BARAZA MAKHANU 2ND DEFENDANT

EDWIN MULONGO MAKHANU 3RD DEFENDANT

CALEB SIMIYU MAKHANU 4TH DEFENDANT

RULING

1. The plaintiff sued the Defendants on 03/01/2024. Although his written witness statement showed that it was signed on 23/01/2023, those of his three witnesses were dated 03/01/2023 and 23/01/2023 respectively. Be that as it may Plaintiff dated 03/01/2024 was verified by an affidavit sworn by the plaintiff the same date. The Plaintiff was accompanied by Notice of Motion dated 03/01/2024. It was supported by an Affidavit sworn by the plaintiff on the same date.
2. The Application had four annexures serialized as RTA 1(a) - (d). Of relevance to this instant Preliminary Objection was annexure RTA 1(c) which was a set of four (4) photographs which were serialized by the Advocate who commissioned the Supporting Affidavit. This was the set of documents which gave rise to the instant Preliminary Objection.
3. The objection was on only one ground which was to the effect that:

“That the four (4) photographs attached to the Plaintiff’s Application dated 3rd January 2024 and also in support of the Plaintiff’s case, the Photograph of the sale agreement dated 23rd September 2023, and the photograph of the mutation form of Trans-Nzoia/Botwo/496 be



expunged and/or struck off the Court record for want of compliance with Section 106B of the Evidence Act, Cap (sic) 80, Laws of Kenya.”

4. The other ground of the Objection was meaningless because it was futuristic and not specific.
5. The objection was disposed of by way of written submissions. The 1st, 3rd and 4th Defendants submitted that the Plaintiff's documents were not in line with the requirements of Section 106B of the Evidence Act. He submitted that the documents were “Screenshots” taken by a phone hence they were photographs generated as print outs by use of a printer. He submitted that they were therefore electronically generated documents, and without a Certificate in terms of Section 106B (4) of the Evidence Act they are inadmissible. They relied on the decisions of Republic v Barisa Wayu Mataguda [2011] eKLR; Idris Abdi Abdullabi v Ahmed Bashane & 2 others [2018] eKLR; and Bhavna Patel Mandalaya v Chetan Aroon Solanki [2021] eKLR.
6. Further they submitted that their objection met the threshold of a Preliminary Objection. They relied on the landmark case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 and the Supreme Court decision in Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR.
7. On his part the Plaintiff submitted that the Preliminary Objection raised was not one properly so-called, as it was not premised on pure points of law but rather on disputed facts which could only be determined upon production of evidence. He relied on the case of Mukisa Biscuits (*supra*) and that of George Oraro v Baker Eston Mbaja HCCC No. 85 of 1992 and Mehuba Gelan Kellil & 2 others v Abdulkadir Abdilhim and others [2015] eKLR.

Issue, Analysis and Determination

8. I begin by bringing out the meaning of a Preliminary Objection. This would lay the basis on whether the instant objection fits the definition and nature of a Preliminary Objection. A Preliminary Objection was defined by the seminal case of Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, wherein Sir Charles Newbold defined it as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

9. In Bashir Haji Abdullabi v Adan Mohammed Noor & 3 others [2004] eKLR, the same Court held that:

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”



10. Also, in *Susan Wairimu Ndiangui v Pauline W. Thuo & Another* [2005] eKLR, Musinga J as he then was held as follows:-

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

11. It is clear that a Preliminary Objection arises on a point of law only. A deduction of this finding must flow directly from the parties’ pleadings which are then compared with the law. Anything short of pleadings only and therefore calling for an inquiry into facts or the need to clarify the point through an assessment of facts is not a Preliminary Objection. That would mean that the court has to examine the factual merits of point, and that must as of necessity go to the merits of the case or adduction of evidence.

12. Section 106B of the *Evidence Act* which provides for “Admissibility of electronic records” stipulates that:

“(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 (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.”

13. Subsections 2 and 3 give definitions of what would constitute conditions regarding the nature and state of the computer. Then Subsection 4 which is relevant for the Objection raised herein is to the effect that:

“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 sub-section (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.”



14. Thus, this court is of the view that any grounds raised herein which would require evidence of the matters stated would not be a Preliminary Objection within the meaning of the definition of the *Mukisa Biscuits case (supra)*. In the instant objection the 1st, 3rd and 4th Defendants argue that the copies of the Sale Agreement dated 23/09/2023 and the Mutation Form are photographs produced in contravention with Section 106B of the *Evidence Act*.
15. This Court has carefully examined the document that is on the record - the Sale Agreement. It notes that there is no Mutation Form attached to the Application as purported to be stated in the Preliminary Objection. The Court does not find any part of the said document that purports in any way to indicate that is a photograph. Other than the allegation by the Defendants that the document is a photograph there is no deposition I find in the Applicant's Affidavit or a pleading in the Application 03/01/2024 (the instant one) stating that indeed the said document is a photograph. At any rate at paragraph 7 of the supporting affidavit the Applicant describes the document, other than the photographs, as "... copies of ...and sale agreement dated 29/9/2023. And my deep examination of the documents leads me to find that indeed they are copies which were placed on top of white paper and scanned into pdf format. The Defendants would do well to note that during scanning and photocopying of documents some machines may, due to defects in them, distort the color of some documents, including making them look dark. The defendants should eschew splitting hairs over nothing. Therefore, the allegation that the document(s) is a photograph is an issue which requires proof and cannot pass as a Preliminary Objection.
16. In any event Section 106B of the *Act* which the Defendants rely on is clear on the document which it regards as electronic in nature. It is a document which

“an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer.”

To my mind the two documents referred to herein to found the Preliminary Objection have not been proven as electronic record which is printed.
17. This turns me to the four (4) photographs annexed to the Application. It is clear to the naked eye and it goes without saying, that the four are indeed photographs. In any event the deponent describes them at paragraph 7 that they are “photos depicting the damage...” In terms of the provisions of Section 106B (4) for the photographs to be admissible in evidence there ought to be a Certificate which contains the specific aspects detailed in the provision. Thus, I agree with the Defendants that absent of that, the photographs do not constitute admissible evidence and they are hereby struck out.
18. The final conclusion is that the Preliminary Objection succeeds only in part to the extent above. Thus, each party will bear his own costs.
19. Further to the directions given on 16/02/2024, the Application dated 03/01/2024 is hereby fixed for hearing on 08/10/2024.
20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY VIA THE TEAMS PLATFORM THIS 25TH DAY OF JULY, 2024.

**HON. DR. IUR NYAGAKA,
JUDGE, ELC KITALE**

In the presence of:-



1. R. Aswani for the Plaintiff
2. Letaya for the 1st, 3rd and 4th Defendants
3. 2nd Defendant in person

