



**Kahira v Varam & 2 others (Environment and Land Case Civil Suit  
139 of 2019) [2023] KEELC 16287 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16287 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE CIVIL SUIT 139 OF 2019**

**JA MOGENI, J**

**FEBRUARY 21, 2023**

**IN THE MATTER OF THE PARCEL OF LAND KNOWN AS LR NO. 14970/17 NAIROBI**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER  
22 AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES OF THE LAW OF KENYA**

**BETWEEN**

**GEORGE NGIGE KAHIRA ..... PLAINTIFF**

**AND**

**SHARAT VARAM ..... 1<sup>ST</sup> DEFENDANT**

**NANAK SINGH BANSAL ALSO KNOWN AS TONY BASAL .. 2<sup>ND</sup> DEFENDANT**

**RAVINDER KAUR BANSAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling relates to an objection raised by the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on November 23, 2022 during the hearing of this case when the plaintiff was adducing his evidence. When the plaintiff, who is PW1 George Ngige Kahura was giving his testimony, he produced the plaintiff's list of documents dated November 8, 2021 and a further list dated November 16, 2022 with regard to evidence of photographs. It is at this point of production that the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant objected to the production of further list dated November 16, 2022. The further list contained photographs of the suit property.
2. The advocate for the 1<sup>st</sup> defendant aligned herself to the objection raised by the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She further objected to the production of the bundle dated November 16, 2022. She contended that the PTC was conducted, the documents being produced had only been served on them



during the last week before the hearing and they have not been given a chance to look at the documents and therefore her prayer was that the whole bundle be expunged.

3. On the part of the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants he raised objection relating to the production of the photographs by the plaintiff. He 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 production of electronic evidence and that in the absence of a certificate as contemplated under Section 106B of the *Evidence Act*, photographs produced in the supplementary should be expunged from the record.
4. It was also contended by the advocate for the 1<sup>st</sup> defendant that the plaintiff filed a further supplementary bundle on November 16, 2022 without leave of the Court. The further supplementary list is the one that contained the photos. In conclusion the defence counsels stated that there was no certificate covering the photographs which ought to be produced.
5. On his part the plaintiff reiterated that the photographs that he was producing were the same ones he had earlier produced when he filed the bundle dated November 8, 2021. That the first photographs were in black and white format but the same photographs were now being produced but they are in colour form.
6. In his rebuttal, the Plaintiff's counsel stated that the objection by the defense counsels should be overruled as it had been made in bad faith, it should have been raised long before the trial began and that raising the objections at this point was meant to delay justice. It was argued that the objection was raised without prior intimation despite the fact that the defence was aware of the said documents from year 2021 and the matter had also been outlined at the pre-trial conference.
7. He noted that at the pre-trial conference, the Counsel for the Defendants did not indicate that they would object to the production of the photographs and further that the authenticity of the photographs was not in question
8. The advocate said that the purpose of Section 106B (4) of the *Evidence Act* was to ensure that there was no manipulation and the Plaintiff had complied with the legal requirements although he had not filed the certificate as required but that failure to have the certificate is not fatal and if the court ordered he can have the certificate filed.
9. On the issue of filing a supplementary bundle of documents, the plaintiff contended that the documents he was producing are court pleadings which are in the public domain. Further that the defendants in the instant suit were also parties in the matter in the Chief Magistrate's Court and the same Counsels were representing the defendants.

### **Analysis and determination**

10. The issue for determination is: Whether the objection raised by defence counsels relating to Plaintiff's documents (the photographs and the pleadings) is merited.
11. Section 106B (1) of the *Evidence Act* stipulates that any information contained in an electronic record which is printed on a paper produced by a computer (herein referred to as 'computer output') shall be deemed to be also documents if the conditions mentioned in this Section are satisfied and shall be admissible in any proceedings, without further proof or production of the original.



12. The Court of Appeal in the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR held 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.

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. The Applicable law as regards admissibility of electronic evidence is the *Evidence Act*, which in section 2 provides for its applicability as follows:

- ' (1) This Act shall apply to all judicial proceedings in or before any arbitrator.  
(2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.'

14. The provisions of the *Evidence Act* therefore apply to all judicial proceedings, be they criminal or civil proceedings. The only exception are proceedings in Kadhi's Court where Islamic law applies. That being the case, it is my finding that the *Evidence Act* also applies to affidavit evidence adduced in court.

15. As regards admissibility of electronic evidence, section 78 A of the *Evidence Act* provides that electronic messages and digital material shall be admissible as evidence in any legal proceedings. Sections 106A and B of the *Evidence Act* in addition provides for the conditions for admissibility of electronic records. Section 106A of the *Evidence Act* provides that the contents of electronic records may be proved in accordance with the provisions of section 106B.

16. Therefore, in the instant case on the issue of the photographs produced, again the authenticity of the same has not been put to question. The defense counsels have only objected to the production of the photographs contending that the plaintiff has not produced a certificate as required by law.

17. Unlike section 106B, section 78A makes no mention of the requirement to adduce a certificate as to, amongst other things, the provenance of the e-evidence, the integrity of the system, or its functionality. The effect of section 78A is to allow e-evidence into any legal proceeding, and to rely on the judge to determine the weight of the evidence based on relevant factors.

18. Sections 78A and 106B of the *Evidence Act* provide contradicting approaches to the admissibility of evidence. These contradictions have resulted in conflicting jurisprudence. In the conflict, some decisions provide that certification is mandatory whereas others dispense with it, favoring admissibility. The Court of Appeal decision in *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* (supra) stated that the certificate must accompany the electronic evidence. The latter approach is the preferred practice due to, among other reasons, the inability of certificates to guarantee reliability, and the encumbrance placed upon litigants. The interests of justice are better served not by excluding e-evidence through antiquated requirements of certification, but by allowing



a judge to have the discretion to assign weight to all evidence according to their assessment of the reliability of the process the evidence took to reach the court. This would not be a novel approach; it would simply be adhering to the provisions of section 78A.

19. Order 11 of the Civil Procedure Rules, 2010 provides for pre-trial conferences which are meant to inter-alia aid in expeditious disposal of suits. To this end, courts are mandated to uphold the objectives set out under Article 159 (2) (b) and (d) as well as Section 1A , 1B, 3 and 3A of the *Civil Procedure Act* by exploring expeditious ways of introducing evidence upfront hence the trial bundle is usually availed well in advance of the date of the trial. This means that courts are called upon to actively manage cases so as to shepherd the trial in a harmonious and speedy manner.
20. Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes with a view to ensuring that the overriding objective is achieved. This in turn enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts.
21. In the instant case it is obvious that all parties participated in the pre-trial conference and each party knew what documents the other party shall rely on and produce at trial. I am therefore persuaded by the argument of the plaintiff that the objections raised may serve to delay and derail the hearing process.
22. The Plaintiff has sought to produce the list of documents dated November 16, 2021 which are court documents in CMCC Misc 811/2019 and documents from CMCC 895 of 2019. Counsel for the 1<sup>st</sup> defendant has strenuously opposed the production of documents from CMCC 811 of 2019. Counsel for the 3<sup>rd</sup> defendant has equally objected to the production of the pleadings from the two court cases. These pleadings are court documents which are in the public domain.
23. There is no party that has presented before this court the prejudice that their clients will suffer if the court may allow the production of these documents. The court requires that all parties should adhere to proper case management to ensure the disposal of matters is orderly and does not prejudice any party. At the same time though the court is also committed to ensuring that justice is not just done but seen to be done for all parties.
24. Article 50(4) *Constitution* provides that the courts have discretion to determine whether the admission of documents would be detrimental to the administration of justice in the following words:

' Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice' .
25. In the case of *Ntarangwi M'Ikiara v Jackson Munyua Mutuera [2018] eKLR*, another case cited therein is the case of *Evangeline Nyegera (suing as the legal representative of Felix M'Ikiugu alias M'Ikiugu Jeremiah M'Raibuni (deceased) vs Godwin Gachagua Githui, where the Court of Appeal Civil Appeal No 28 of 2016* held that;

' The test for admission of evidence is relevancy. There is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence. We hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that



the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross examine on veracity and legitimacy if it be necessary'.

26. From the foregoing analysis, this court in determining whether expunging the documents in question would be in the interest of justice finds that the said documents are important for the just determination of the dispute and that no evidence has been adduced to indicate that the said documents have been obtained in a manner which violates the rule of law or any right or fundamental freedom in the Bill of Rights. Further, the defence will have a chance to cross examine the witness on their veracity and legitimacy if need be noting that the authenticity of the said documents has not been put into question. Thus the objection is overruled, and the said documents are admitted as plaintiff's exhibits.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS.**

**MOGENI J**

**JUDGE**

In the virtual presence of:

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

.....for the 3<sup>rd</sup> Defendant

