



REPUBLIC OF KENYA



Obado v Anayo (Civil Suit E005 of 2022) [2024] KEHC 17038 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 17038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL SUIT E005 OF 2022**

RPV WENDOH, J

MAY 30, 2024

BETWEEN

HON. ZACHARY OKOTH OBADO PLAINTIFF

AND

EDDY ANAYO DEFENDANT

RULING

1. By a Notice of Motion dated 15/11/2023, Hon. Zachary Okoth Obado (the plaintiff) seeks the following orders:-
 - a. Spent;
 - b. That this court be pleased to issue an order directing that the expert affidavit attaching print out of the communication between the plaintiff's witness called Scarlet Susan Okoth containing the images of WhatsApp and Short Messages Services (SMS) printed from the witness Mobile Handset stored through Telephone No. 0723XXXX724, Model No. SM - GXXXX5F IMEI No. 3524XXXX589 Serial No. RF8KXXXXA2V being communication from 11/6/2019 to 30/8/2021 be filed in court and be part of the court record;
 - c. Costs be in the cause.
2. The application is based on the grounds found on its face and is supported by the affidavit of the plaintiff dated and sworn on 15/11/2023. It was deposed that the evidence the plaintiff seeks to produce is relevant and forms the substratum of this case since the issues are already raised in the plaint; that the said evidence shall help the court in determining the real issues in controversy in this case; that no prejudice will be suffered by Eddy Anayo (the defendant) in the event the prayers sought are granted.
3. The application was further supported by the affidavit of Derrick Omondi dated and sworn on 15/11/2023 an Oracle Database Administrator in Information and Communication Technology. He deposed that he was approached by the plaintiff to print the information contained in the images of



WhatsApp and Short Messages Services (SMS) contained in the plaintiff's witness called Scarlet Susan Okoth Mobile Handset Telephone No. 0723XXXX724, Model No. SM - GXXXX5F IMEI No. 3524XXXX589 Serial No. RF8KXXXXA2V being communication between the plaintiff's witness and the defendant from 11/6/2019 to 30/8/2021; that he printed out the same without alterations as per the print appearing in the plaintiff's documents.

4. The defendant opposed the application by filing grounds of opposition dated 14/12/2023. The grounds of opposition are as follows: -
 1. The documents being introduced are not relevant to the suit and have no probative value;
 2. There is nothing to suggest that the originator of the content and the manner it was generated, stored and communicated complied with any known Rule in the Civil Procedure Rules, for production of the document at trial;
 3. The document sought to be produced and to form part of the record is neither a witness statement nor a document to be relied on in evidence;
 4. There is nothing to connect the plaintiff, his witness Scarlet Susan Okoth and the defendant, assuming it is electronic evidence;
 5. The affidavit sought to be introduced and its contents do not comply with the provisions of Section 106B of the Evidence Act, Cap 80 and therefore, it has no probative value;
 6. The integrity of the annexures to the affidavit of Derick Omondi is suspect and inadmissible.
5. Both parties filed their respective submissions. The plaintiff filed his written submissions dated 14/3/2024 while the defendant filed written submissions dated 28/3/2024.
6. The plaintiff submitted that the evidence he proposes to introduce shall assist the court in determining the issues in controversy; that the said evidence is relevant as the issues are already raised in the plaint; that this application meets the requirement set out in the governing principles on allowing additional evidence in courts on the principles that the additional evidence must be directly relevant to the matter before the court, it would influence the result of the verdict although it not be decisive, it is shown that it could not have been produced at the time of filing the suit by the party seeking additional evidence, the additional evidence will remove any vagueness or doubt over the case and the evidence must be credible in the sense that it is capable of belief.
7. It was further submitted that this court has residual jurisdiction to grant the orders being sought as it is necessary to achieve justice as it was held in the case of Meshallum Wangubu vs Kamau Kania Civil Appeal No. 101 of 1984 and Civil Appeal No. 132 of 2014 KPLC VS Benzene Holdings Limited T/ A Wyco Paints (2016) eKLR.
8. On the admissibility of electronic and digital evidence, it was submitted that Section 78A of the Evidence Act provides for the same and Section 2 of the Evidence Act provides that the Evidence Act shall apply to all judicial proceedings before any court other than Kadhi's Court. The plaintiff urged that no prejudice will be suffered by the defendant in the event the prayers are granted.
9. The defendant submitted that Order 3 Rule 2 (d) requires and places an obligation on the plaintiff to file as part of the requirements copies of the document to be relied on at the trial; that the documents sought to be produced cannot be documents contemplated under Order 3 Rule 2 (d); that the affidavit and the attachment introducing the digital extracts are not contained in the list of documents required as per Order 3 Rule 2 (d) of the Civil Procedure Rules; that in the vent the court is inclined to consider the documents, they should be subjected to production during trial as contemplated by law.



10. It was further submitted that litigation by instalments ought to be discouraged and there is no reason why the documents are being produced now after pleadings have closed; that having the material since 30/8/2021, no explanation has been given why the same were not availed and filed together with the plaint; that the plaintiff is seeking to rely on hearsay evidence as he has not demonstrated how he came across the said messages; that the alleged electronic evidence has not been availed in accordance with Section 106B of the Evidence Act; that the said Scarlet Susan Okoth has not stated in her witness statement that she gave her phone and its records to her father.
11. The defendant stated that the evidence would be of useful purpose if Scarlet Susan Okoth, the person who is alleged to have communicated with the defendant, produced the said evidence or swore an affidavit stating that the conversations took place; that there is no nexus and relevance between the purported electronic evidence as the plaintiff never spoke to such evidence during his evidence in chief, cross examination and re-examination and no useful purpose will be served by introducing the evidence late.
12. It was further stated that the conditions attendant to the admissibility of information on the printout and the computer in question and the printer has not been given, thus the provisions of Section 106B (4) (a) - (d) have not been complied with; that the process used to deliver them to court is suspect and so is its reliability and integrity. The defendant asked that the motion be dismissed.
13. I have carefully considered the application, the grounds of opposition the rival submissions of the parties together with the case law cited. The two issues for determination which shall be addressed interchangeably are: -
 - a. Whether the proposed evidence should be admitted.
 - b. Whether the production of the proposed electronic evidence meets the evidentiary standard required under Section 106B of the Evidence Act.
14. The court has the discretion to allow re - opening of a case in appropriate circumstances. However, in exercising such discretion the same should be exercised judiciously with a view of doing justice to the parties. The person seeking this equitable relief, must do so with clean hands. The plaintiff testified and he was subjected to both cross and re - examination. What the plaintiff is now seeking is to adduce additional evidence. The respondent took the diametrical view on two fronts; that the plaintiff ought to have outlined the intended documents he seeks to produce as per Order 3 rule 2 (d) of the Civil Procedure Rules and the purported electronic evidence does not meet the standard set out in Section 106B (4) (a) - (d) of the Evidence Act.
15. Order 3 Rule 2(d) of the Civil Procedure Rules provides as follows: -

All suits filed under Rule 10 including suits against the government, except small claims, shall be accompanied by-

 - (a) the affidavit referred to under Order 4 Rule 1 (2);
 - (b) a list of witnesses to be called at the trial;
 - (c) written statements signed by the witnesses excluding expert witnesses; and
 - (d) copies of documents to be relied on at the trial including a demand letter before action.
16. The purpose and import of Order 11 of the Civil Procedure Rules is for the court and parties to set the ground rules to facilitate a smooth and expeditious hearing to its logical conclusion with minimal interruptions. Another school of thought of the importance of Order 11 is to give parties an



opportunity to give full disclosure and the other party is given time to prepare to meet the case before it. In *Nakuru Automobile House Ltd vs Lawrence Maina Mwangi & another* (2017) eKLR the Learned Judge was of the view that:-

...Order 11 of the Civil Procedure Rules 2010 has elaborate provisions aimed at preparing suits for trial. The whole idea is that each party should approach litigation with full disclosure such that the opponent knows the exact case that they will meet. Our system of litigation no longer has room for the old practices where litigants would hold their cards close to their chests only to spring a last minute surprise on the opposite party. An application to re-open a case so as to adduce additional evidence must now be viewed against the new regime requiring full disclosure...”

17. The court has to further investigate the reasons why the evidence was not earlier adduced. Kasango J in the case of *Samuel Kiti Lewa vs Housing Finance Co. Of Kenya Ltd & Another* (2015) eKLR considered a similar application for re - opening a case for purposes of submitting fresh evidence and quoted with approval the Ugandan Case of *Simba Telecom vs Karuhanga & Another* (2014) UGHC 98. The Ugandan Court also referred to an Australian case *Smith vs New South Wales* (1992) HCA 36; (1992) 176 CLR 256 where it was held: -

If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case *Simba Telcom* (supra) held thus: -

“I agree with the holding in the case of *Smith Versus South Wales Bar Association* (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

19. In his affidavit, the plaintiff does not bring out clearly the reasons why he seeks to produce the electronic evidence at this stage and why the delay in producing the said evidence earlier on. The plaintiff simply states that the evidence is relevant to the issues raised in his plaint and it will assist the court in solving the controversy between the parties. The plaintiff must have known the relevance of the evidence and hence the need to adduce it at the hearing.

20. Another factor which the court has to consider is the relevance of the evidence to be adduced in line with the pleadings. The Court of Appeal in the case of *Chase Bank (Kenya) Limited vs Cannon Assurance (K) Limited* (2019) eKLR while addressing itself on the importance of the evidence being aligned with the pleadings, referred to the Indian decision of *Union of India vs Ibrahim Uddin & Another* Civil Appeal No. 1374 of 2008 where the Supreme Court stated: -

No evidence is permissible to be taken on record in absence of the pleadings in that respect. No party can be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. It was further held



that where the evidence was not in the line of the pleadings, the said evidence cannot be looked into or relied upon.”

21. The gist of the suit by the plaintiff is that he had allegedly advanced some money to the defendant for the purposes of purchasing some items for hire out during social events.
22. Having read and understood the trajectory of the attached conversations by one Okoth Sr and the defendant herein, I deduce that the conversation was centred around purchasing items for an events company, the clearing of the goods at the Port and delivery of the agreed items. I have also perused the witness statement of Scarlet Susan Okoth and indeed her statement is similar to the conversation with the defendant. In my opinion, this is information which aligns with the plaintiff’s case. The relevance thereof will be subjected to the rules of evidence when the said Scarlet Susan Okoth takes the stand to testify.
23. On whether the proposed evidence meets the requirements under Section 106B of the [Evidence Act](#), the law provides for the admissibility of electronic records as follows: -

“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.”

24. This must be read together with Section 106 B (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.”

25. A certificate for production of electronic evidence must bear the following: -
 - a. Identification of the electronic record containing the statement and describing the manner in which it was produced;



- b. Particulars of the device involved in the production of that electronic record as may be appropriate;
 - c. Signature of the person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities.
26. In *Samwel Kazungu Kambi vs Nelly Ilongo & 2 Others* (2017) eKLR the court held that: -
- "Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities."
27. There is a requirement that production of electronic evidence must be accompanied by a certificate confirming the authenticity of the electronic record. The certificate should identify the particulars of the electronic device, the manner in which the electronic information is derived and the signature of the person managing and/or operating the relevant activities of the device.
28. No explanation why it was quote of the evidence available. In the affidavit of Derric Omondi who claims to be a qualified Oracle Database Administrator in Information and Communication Technology, he has very well outlined the features of the phone where the information was printed from and the person to whom the phone belongs to. However, I am hesitant to agree that the affidavit is an equivalent of a certificate of electronic record.
29. A certificate of electronic record should accompany the printed out electronic information for the information to be admissible in court. it is therefore an independent document signed by the person who manages the device and in this case, the said Scarlet Susan Okoth.
30. Therefore, in as much as the evidence which the plaintiff seeks to adduce is relevant to his case, failure to properly adduce it, the evidence cannot be termed to be admissible in court. In addition, I have observed that no reason was given for failure to include this evidence during pre-trial
31. Consequently, this court does not find merit in the plaintiff's application dated 15/11/2023. It is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF MAY, 2024

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Plaintiff.

Mr. Odero for the Defendant.

Emma & Phelix - Court Assistants.

