



**IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION**



**(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, J & Fakihi
A. Jundu, J)**

APPLICATION NO.17 OF 2014

(Arising from Reference No.2 of 2011)

**ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDAAPPLICANT**

VERSUS

THE EAST AFRICAN LAW SOCIETY.....1ST RESPONDENT

**THE SECRETARY GENERAL OF
THE EAST AFRICAN COMMUNITY.....2ND RESPONDENT**

30TH SEPTEMBER, 2016

JL

RULING OF THE COURT

INTRODUCTION

1. This Application arose from **Reference No.2 of 2011** and has been brought under Rules 1(2) and 21(1) of the East African Court of Justice Rules of Procedure, 2013 ("**The Rules**").
2. The Applicant is seeking the following Orders from this Court:-
 - (a) This Honourable Court be pleased to conduct a *voir Dire* in respect of admissibility of the Affidavit of Mr. James Aggrey Mwamu and the Electronic Digital Video Disk (DVD) evidence submitted therein filed on the 4th day of March, 2013; and
 - (b) This Honourable Court be pleased to find that the said Affidavit and electronic DVD evidence submitted by James Aggrey Mwamu is inadmissible.
3. The Application is supported by the Affidavits deponed by Mr. Denis Bireije and Mr. Sam Rogers Kambere, the Commissioner for Civil Litigation and Information Scientist, respectively, in the Ministry of Justice and Constitutional Affairs of the Republic of Uganda.
4. At the hearing, the Applicant was represented by Mr. Phillip Mwaka (Principal State Attorney), Ms. Charity Nabasa (State Attorney) and Ms. Sandra Mwesige (State Attorney) all of them from the Applicant's Chambers. The 1st Respondent was represented by Mr. Richard Onsongo and Mr. Humphrey Mtuy, learned Counsel while the 2nd Respondent was represented by Mr. Stephen Agaba, Principal Legal Officer of the East African Community.
5. At this juncture, it is important to mention that this Court ("The First Instance Division) had an occasion previously to deal with this

Application and had struck it out on 13th September, 2014. However, the Applicant vide **Appeal No.5 of 2014** successfully appealed to the Appellate Division of this Court which set aside the said Order and restored the Application before remitting it back to this Court “*for hearing and determination on merits*” as we shall later on explain in detail.

THE APPLICANT’S CASE

6. The Applicant, in the supporting Affidavit, Submissions and during oral hearing moved this Court to conduct a *voire dire* in respect of the Affidavit of Mr. James Aggrey Mwamu and the Electronic Digital Video Disk (DVD) evidence filed by the 1st Respondent on 4th day of March, 2013 in support of **Reference No.2 Of 2011**. The Applicant by the present Application also prays to this Court to find that the said Affidavit deponed by Mr. James Aggrey Mwamu and the electronic DVD evidence therein are inadmissible.
7. The Applicant, in the Application and supporting Affidavits thereto, has raised a number of defects or reasons, which were expounded on in his Submissions and during the hearing, in a bid to show that the said Affidavit of Mr. James Aggrey Mwamu and the electronic DVD evidence are inadmissible.
8. At the hearing of the Application aforesaid, the Applicant, through its learned Counsel, Mr. Phillip Mwaka, sought and was granted leave to cross-examine Mr. James Aggrey Mwamu, the deponent of the alleged contested Affidavit which also had the Electronic DVD evidence as an annexure thereto. The purpose of the said cross-examination was to show that the said Mr. James Aggrey Mwamu had admitted alleged defects raised by the Applicant in its

pleadings against the said Affidavit and the said electronic DVD evidence.

9. In submissions after the said cross-examination, the Applicant firstly, asserted that the said electronic DVD allegedly shows recordings of the events that took place around Kampala, Bwaise and Masaka areas on 10th, 22nd and 20th April, 2011 during the now famous "*Walk-to-Work*" demonstrations in Uganda. However, the Applicant argued that Mr. James Aggrey Mwamu, the deponent of the alleged Affidavit, was and is not qualified to depone to any matter in the DVD as he was not in Uganda during the said events as was evident from a perusal of his passport nor was he the author of the DVD neither did he meet one Julius Ssenkadwa, the alleged author of the said electronic DVD, or one Ms. Deborah Gasana, who allegedly transcribed the said DVD. It is also contended that Mr. James Aggrey Mwamu admitted in cross-examination that he obtained the alleged DVD from one Anna Abeja of the Uganda Law Society who was not the author of the DVD.
10. Secondly, the Applicant further asserted that the said DVD does not establish the nature of the device used in recording it and the chain of handling the same nor the storage means of the same. It is further alleged that the DVD is not in original form but contains incomplete chips which do not reveal the entire context of the recordings and cannot be verified as to its authenticity, source and content.
11. Thirdly, the Applicant has contended that the alleged DVD is comprised of videos sourced from "*You Tube*" which have been heavily edited with a number of scenes skipped.

12. Fourthly, the Applicant has made the submission that the Affidavit of Mr. James Aggrey Mwamu does not establish a foundation for adducing the DVD evidence and falls short of the required standards for such electronic evidence and it is his further submission that such evidence is hearsay evidence which this Court should not admit or act upon.
13. The Applicant in his further submission and during the hearing asserted that in principle, electronic evidence is admissible and he cited various provisions of Law relating to electronic transactions and evidence law in Uganda, Kenya and Tanzania, namely Sections 63 and 106 B(1) & (4) of Kenya's Evidence Act, Cap. 80, Revised Edition (2010); Sections 59-60 of Uganda's Evidence Act, Cap. 6 and Section 8 of the Uganda's Electronic Transactions Act No 8 of 2011; Sections 18-20 of Tanzania's Electronic Transactions Act, 2015 and Section 62 of the Tanzania's Evidence Act. Reference was also made to various judicial authorities, to wit, **US Vs. Briscoe, 896 f.2d 1476 at page 1494-95 (7th Cir 1990)**, **Lorraine Vs. Markel America Insurance Co. 2007 WL 13000739 (D.MD May 4, 2007)**. Based on the said provisions of law and Judicial authorities, the Applicant has strongly argued that the Affidavit of Mr. James Aggrey Mwamu and the electronic DVD evidence therein do not qualify as primary or secondary evidence and consequently are inadmissible.. He also contended that the said evidence is hearsay evidence and that the said Affidavit of Mr. James Aggrey Mwamu together with its jurat clause therein are incurably defective and ought to be struck out at this stage of the proceedings.

THE 1ST RESPONDENT'S CASE

14. The 1st Respondent in its response, Submissions and during the hearing maintained that in principle, electronic evidence is admissible. Referring to various provisions of Law related to electronic transactions and evidence law in Uganda, Kenya and Tanzania (i.e. Sections 5 and 8 of the Electronic Transactions Act 2011 of Uganda, Sections 64 of the Evidence Act (Cap. 6 of the Laws of Uganda) and Sections 68(1)(a)(ii) and 106(B) of the Evidence Act (Cap. 80 of the Laws of Kenya) and citing various judicial authorities, to wit, **County Assembly of Kisumu & 2 Others Vs. Kisumu County Assembly Service Board & 6 Others [2015] eKLR; US Vs. Young Bros, INC 728 F, 2d 682, 693-94 (5th Cir, 1984); MacDonnell Vs. Evans, (1852) common pleas 21 L.J.P 141; Aguimatang Vs. California State Lottery; S. Pratap Singh Vs. State of Punjab, AIR 1964 SC 72; Kirenga Vs. Uganda [1969] E.A.C.A. 562; REG. V. Raojibhai Girdharbhai Patel and Another (1956), 23 E.A.C.A. 536**, it argued that the Affidavit of Mr. James Aggrey Mwamu and the electronic DVD evidence qualify as secondary evidence hence admissible in Law.
15. As regards the allegations that the Affidavit of Mr. James Aggrey Mwamu together with its jurat clause are incurably defective, the 1st Respondent called upon this Court to uphold substantive justice rather than technicalities especially where mere “*clerical errors*” are in issue or in case of omissions which do not go to the root of the matter before the Court.
16. The 1st Respondent has therefore called upon this Court to dismiss the Applicant’s Application with costs and admit the impugned DVD evidence and to allow the main Reference to proceed to its full hearing and substantive determination.

THE 2ND RESPONDENT'S CASE

17. The 2nd Respondent chose not to participate in the present Application at all.

COURT'S DETERMINATION

18. We have carefully considered the pleadings, submissions and the rival arguments of the Applicant and the 1st Respondent as advanced during the hearing of the Application. We have also considered and taken into account what transpired during the cross-examination of Mr. James Aggrey Mwamu in pursuance of the requested *Voir Dire* by the Applicant.

19. It is worth recalling that the two issues for consideration in this Application are: (1) whether Mr. James Aggrey Mwamu's Affidavit and the accompanying DVD submitted on 4th March 2013 are admissible in evidence and (2) whether the jurat page of Mr. Mwamu's Affidavit is defective and that the whole Affidavit and annexures to it should be struck off.

20. In addressing those two issues, we had earlier mentioned elsewhere above, that this Court had previously dealt with this Application and after considering it, proceeded to strike it out. The Applicant vide **Appeal No.5 of 2014** successfully appealed to the Appellate Division of this Court as shown in its Judgment dated 15th April, 2015. The Appellate Division had also dealt with the issue of the admissibility of the DVD evidence in **Appeal No.1 of 2013** delivered on 16th January, 2015. In the two decisions, guidance and directions were given to this Division on the way to deal with this Application. In fact, in its Judgment in **Appeal No.5 of 2014**, the Appellate Division of this Court directed as follows:

“The above Application is hereby remitted to the First Instance Division for hearing and determination on the merits; in accordance with the directions contained in the Judgment of this Appellate Division in Appeal No.1 of 2013 namely:

(a) That the additional electronic (DVD) evidence has been permitted to be adduced;

(b) That the Attorney General of Uganda is at liberty to challenge the relevance, accuracy, authenticity, credibility and evidential value of that additional evidence as specified in *inter alia* paragraphs 58, 59 and 97 of our Judgment in Appeal No.1 of 2013.”

21. In line with the foregoing, a hearing was held on 3rd March 2016 whereby the Applicant’s Counsel cross-examined Mr. James Aggrey Mwamu on his additional affidavit together with the accompanying DVD evidence in an aim to demonstrate that the latter should not be admitted in evidence. The same contention was presented by the Applicant and strongly opposed by the 1st Respondent, on 30th June 2016 when parties came for highlighting of their submissions in respect of the present Application.

22. As stated elsewhere above, the Applicant has urged the Court to determine that the electronic DVD is not admissible in evidence because it does not meet the standards for presentation of electronic evidence. In that regard, his main argument is that for electronic evidence to be admitted in evidence, there must be a degree of certainty that the evidence being presented is authentic and was handled in such a way that it has not compromised the integrity of its content.

23. It is indeed admitted that, given the nature of electronic evidence which is subject to manipulation, whenever the admissibility of electronic evidence is called into question, one important requirement is to authenticate the digital evidence. Hence the statement that ***“to a certain extent, the technical focus of proving the authenticity of a digital object is on having checks and balances in place to demonstrate the history of how the data has been managed, which leads to the assertion that the data has not been modified, replaced, and corrupted and must, therefore, be original. (...) Proving the authenticity of a digital object means providing sufficient evidence to convince the adjudicator that the object that has been retrieved is faithful representation of what it claimed to be the ‘original’, or a reliable representation of the object that was relied upon by the originator.”*** (See Mason, Stephen et al., Electronic Evidence: Disclosure, Discovery and Admissibility, Butterworths, 2007, p. 85).

24. Considering the above in the context of the present Application, it is up to the Party offering the electronic evidence, in this case the Respondent, to present sufficient evidence to support a finding that the electronic DVD in question is what the deponent claims it to be. In his pleadings and submissions, the Applicant raised questions as regards the authorship of the electronic DVD, the chain of transmission from the alleged author to the deponent, Mr. James Aggrey Mwamu, whether the electronic DVD was certified by one Deborah Gasana, etc. It is our view that all these questions were not given sufficient answers that can enable the Court have a conclusive opinion on the admissibility of the electronic DVD as evidence in the Reference. We are saying so bearing in mind that one important aspect of the authentication process of electronic

evidence, that is the certification, was hotly disputed. No evidence was adduced to show that the exhibit was what it was claimed to be. This may require for example the testimony of the person who allegedly certified the electronic DVD or to adduce any other relevant evidence, but this was not done.

25. In light of the foregoing and given the nature of the case before us, we find that the test of admissibility of the electronic DVD evidence cannot conclusively be conducted at this stage of the proceedings. We are of the view that this matter should properly be revisited during hearing of the main Reference itself when the Court deals with the totality of the evidence adduced by the Parties before it, rather than by taking a piecemeal approach by singling out one piece of evidence and determining its probative value in an evidential vacuum where all other evidence to be presented by all parties is not before the Court. This finding will not and should not cause any prejudice to the Applicant as his arguments on evidential foundations for adducing the digital evidence into legal proceedings, accuracy, authenticity, integrity, value of the evidence, etc. can still be marshaled and taken up at that time.

26. In stating so, we are alive to the given great effort by the Applicant's Counsel in the *voir dire* or simply the cross-examination of Mr. James Aggrey Mwamu in relation to the various alleged shortcomings and alleged incurable defectiveness of the Affidavit of Mr. James Aggrey Mwamu and the accompanying electronic DVD evidence. Indeed, in some instances, Mr. James Aggrey Mwamu admitted to some of them which are matters now on record. However, as stated above, these matters, along with other alleged inconsistencies and conflicting inferences regarding the authenticity of the electronic DVD evidence will be addressed in the

determination of the merits of the main Reference. That also includes the issue of the jurat page of Mr. Mwamu's Affidavit which is related to the truthfulness of his evidence in totality.

27. We so hold

DISPOSAL

28. In view of our findings above, we make the following orders:

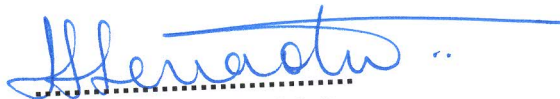
(1) Since Prayer (a) was granted by the *voir dire* proceedings being conducted on 3rd March 2016, the same is now moot.

(2) Prayer (b) cannot be granted at this stage as the issue of admissibility of the DVD evidence will be dealt with when the Court assesses the totality of all evidence to be presented in **Reference No.2 of 2011** and its probative value in the determination of the said Reference.

(3) Costs shall abide the outcome of the Reference aforesaid.

It is so ordered.

Dated, Delivered and Signed at Arusha this 30th Day of September,
2016.



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ISAAC LENAOLA
DEPUTY PRINCIPAL JUDGE



.....
FAUSTIN NTEZILYAYO
JUDGE



.....
FAKIHI A. JUNDU
JUDGE