



**Gatabaki & another v Family Bank Limited & 2 others (Civil Suit
258 of 2016) [2025] KEHC 13499 (KLR) (Civ) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 258 OF 2016

LP KASSAN, J

SEPTEMBER 17, 2025

BETWEEN

HON NJEHU GATABAKI 1ST PLAINTIFF

RACHEL MWIHAKI GATABAKI 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

CECIL MILLER T/A CECIL MILLER & CO ADVOCATES 2ND DEFENDANT

ASHFORD MURIUKI T/A ASHFORDS & CO ADVOCATES .. 3RD DEFENDANT

RULING

1. For determination before this Court is a Preliminary Objection (PO) raised by Ashford Muriuki t/a Ashfords & Co. Advocates (hereafter the 3rd Defendant).
2. The history leading up to the Preliminary Objection (PO) is as follows. By way of a plaint dated 29.09.2016 and amended on 25.02.2022 Hon. Njehu Gatabaki and Racheal Mwihaki Gatabaki (hereinafter the 1st & 2nd Plaintiff/Plaintiffs) filed suit as against Family Bank Ltd, Cecil Miller t/a Miller & Company Advocates and Ashford Muriuki t/a Ashford Muriuki Advocates (hereinafter the 1st, 2nd & 3rd Defendant) seeking special damages to the tune of Kshs. 31,662,715.49/-; general damages; and interest on the above at the Court's rate; costs of the suit; and that the decretal amount and interest be shared equally between the 1st and 2nd Plaintiff. The Plaintiffs cause of action was premised on fraud and negligence as against the Defendants.
3. The 1st & 2nd Defendant filed a defences dated 18.07.2007 and 28.10.2016 respectively denying the key averment in the plaint whereas the 3rd Defendant filed a defence and counterclaim dated 08.11.2016.



Vide a consent judgment dated 02.08.2023, the 2nd Plaintiff claim as against the 1st Defendant was compromised.

4. The suit thereafter proceeded for hearing wherein on 06.03.2025 wherein the 3rd Defendant raised his Preliminary Objection (PO) concerning the admissibility into evidence documents 9, 10, 11, 12 & 13 appearing in the 2nd Defendant's list of documents dated 28.10.2016. The Preliminary Objection (PO) was at the outset orally canvassed by the respective parties with directions further being taken on filing of submissions.
5. That said, the Court has considered the rival submissions, to wit, the Court's postulation that the issues for determination concerns:
 - a. Whether the documents 9, 10, 11, 12 & 13 appearing in the 2nd Defendant's list of documents dated 28.10.2016 ought to be expunged from the record for being inadmissible?

6. As to the nature of a Preliminary Objection (PO), the same has since been settled within our jurisdiction in the celebrated decision of Mukisa Biscuits Manufacturing Company Ltd, which require no further explication. At the outset, the 3rd Defendant's objection was premised on the provisions of Section 118 of the Criminal Procedure Code as read alongside Section 180(1) of the Evidence Act. The former provides that-;

Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.

7. Whereas, Section 180(1) of the Evidence Act provides that-;
 - (1) Where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.
8. The 3rd Defendant has made heavy weather of the fact that the document in question sought to be adduced as evidence by the 2nd Defendant were illegally obtained whereas the unlawful and unauthorized access to the documents in question formed the basis on the 2nd Defendants case. It was further argued that the documents in question contravene Article 50(4) of the Constitution as they were likely to prejudice the 3rd Defendants given the nature in which the said documents were obtained. That the unlawful and unauthorized intrusion into the 3rd Defendant's bank accounts and production of statement thereto violates the 3rd Defendant's right to privacy therefore documents 9, 10, 11, 12 & 13 in the 2nd Defendant's list of documents dated 28.10.2016 ought to be expunged. The decisions in Okiya Omtatah Okioti & 2 Others v Attorney General & 3 Others [2014] eKLR, United Airlines Ltd v Kenya Commercial Bank Limited [2017] eKLR, RC v KKR [2021] eKLR and Hon. Philomena Mbete Mwilu v The DPP & 3 Others; Stanley Muluvi Kiima [2019] eKLR were relied on in the forestated regard.



9. On the part of the 1st Plaintiff, it was argued that the 3rd Defendant's objection is time barred given that it is a well-established principle that an objection to the admissibility of evidence should be raised promptly to avoid unnecessary delays in the administration of justice. It was posted that the document being objected to by the 3rd Defendant witness statement made before the Banking Fraud Investigation Units into specific accounts held with the 1st Defendant as such the said documents were not system-generated statements from the 3rd Defendant account with the 1st Defendant nor are the witness statement propriety to the 3rd Defendant. That in any event the information contained in the statements was not illegally obtained as the same were a recount of the transactions they participated in. Therefore, the statements are independent testimonies of first-hand experiences and cannot be said to be illegally obtained through unauthorized intrusion. In summation counsel for the 1st Plaintiff submitted that no prejudice would be meted on the 3rd Defendant if the impugned documents were to be adduced into evidence as the latter reserves that right to challenge the credibility of the evidence by way of cross-examination. The provisions of Section 35 of the *Evidence Act* and the decision in *Moonglow Assets Ltd V Commissioner of Lands & 4 Others* [2023] KEELC 22062 (KLR) were relied on toward the forestated regard.
10. Meanwhile, on the part of the 2nd Defendant, counsel iterated that objections as to admissibility of evidence ought to be timeously raised to avoid impeding the judicial process. While calling to aid the decision in *Parkar & Another v NQ & 2 Others* [2023] KECA 908 (KLR) it was argued that the impugned documents are relevant to the proceedings meanwhile the provision of Section 35 (1) of the *Evidence Act* concerning admissibility of documents. Penultimately, it was reiterated that the impugned documents constitute witness statements whereas the 3rd Defendant failed to demonstrate how the same were illegally obtained or how their admission would compromise the administration of justice. The decision in *Njenga v DIB Bank Kenya Ltd* [2023] KEELRC 1549 (KLR) was cited in the former regard.
11. With the above in reserve, the Court has keenly examined the impugned documents 9, 10, 11, 12 & 13 in the 2nd Defendant's list of documents dated 28.10.2016, as rightly argued by the Plaintiff and 2nd Defendant, the documents in question constitute witness statements of the 2nd Defendant, Elsie Nyawira Wanjiku, Diana Nyambura Wambugu, Godfrey Githinji Mwai and Stephen Kimani Kangiri, respectively, all purportedly recorded at the Banking Fraud Investigation Unit. Therefore, the portrayal that the same consisted of unlawful and unauthorized intrusion into the 3rd Defendant's bank accounts and production of bank statement does not hold water.
12. As to whether the impugned documents are admissible or inadmissible and whether they ought to be allowed and or expunged, it must be remembered that the said documents constituted statements made in the course of investigations by the Banking Fraud Investigation Unit meanwhile did not constitute statements made before any judicial proceedings which is more or less codified in Section 34 of the *Evidence Act*. Whereas, Section 35 of the *Evidence Act* provides that-
 - (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - (a) if the maker of the statement either—
 - (i) had personal knowledge of the matters dealt with by the statement; or



(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b)

(3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.

13. The latter provision was discussed by the Court of Appeal in *Jubilee Insurance Company v Kiguoya* [2024] KECA 1630 (KLR) wherein it was succinctly put that-;

“Our reading and interpretation of the above provision of the *Evidence Act* is that a document will be admissible if the person making it is dead, cannot be found, has become incapable of giving evidence, their attendance cannot be procured, or even if it can be procured but that would actually occasion expense and delay which, in view of the court, is unreasonable.”

14. Admittedly, the 2nd Defendant has championed the admissibility and relevance of the impugned documents as having being obtained during a legitimate investigation into fraud involving joint accounts where the 2nd Defendant was a complainant. That the 2nd Defendant being the complainant, he was privy to the documents and investigations. The forestated notwithstanding, it is notable that document 9 was a statement recorded by the 2nd Defendant himself whereas document 10, 11, 12 & 13 were statement record by other persons. Palpably, the latter documents constituted statements



made by the respective person concerning their personal knowledge of the complaint lodged by the 2nd Defendant at Banking Fraud Investigation Unit.

15. While the 2nd Defendant may have been privy to the facts of his complaint he was may not have been privy to the specific and special facts relating to his complaint as recorded in the statements captured document 10, 11, 12 & 13 of his list of documents. In any event, the 2nd Defendant has not demonstrated that the persons who recorded the statements as captured document 10, 11, 12 & 13 of his list of documents are either dead, cannot be found, have become incapable of giving evidence, their attendance cannot be procured, or even if it can be procured but that would actually occasion expense and delay that would be unreasonable in this Court view. Thus, while document 9 may be tested through cross-examination given that the 2nd Defendant is a witness before this Court and is the person who wrote the statement in question, by admitting document 10, 11, 12 & 13, the 3rd Defendant would be denied the opportunity to test the statements by way of cross-examination.
16. I believe I have reasonably addressed by myself to the 3rd Defendant's objection. That said, the 3rd Defendant's objection is determined in the following terms-;
 - (a) I will allow the production of document 9 into evidence as (Pexh.9) given that the adverse parties will have an opportunity to cross-examine, the 2nd Defendant, as to the veracity of the said statement.
 - (b) I decline to expunged documents document 10, 11, 12 & 13 in the 2nd Defendant's list of documents dated 28.10.2016 save that I direct they be marked for identification as PMfi 10, 11, 12 & 13 respectively whereas the 2nd Defendant is at liberty to take out witness summons in respect of Elsie Nyawira Wanjiku, Diana Nyambura Wambugu, Godfrey Githinji Mwai and Stephen Kimani Kangiri, if he so intends, to rely on the said statements as evidence before this Court.
17. Orders Accordingly!

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2025

L. P. KASSAN

JUDGE

In the presence of:

Kado holding brief for Kounah for the plaintiff

Akong'a for the 1st Respondent

Sigona for the 2nd Respondents

Ashford for the 3rd Respondent

Court Assistant– Caro.

