



**Gathiya v Ecobank Kenya Ltd & 3 others (Civil Case E066 of 2021)  
[2026] KEHC 1536 (KLR) (Civ) (12 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1536 (KLR)

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

**CIVIL**

**CIVIL CASE E066 OF 2021**

**JN MULWA, J**

**FEBRUARY 12, 2026**

**BETWEEN**

**PETER NDEGWA GATHIYA ..... PLAINTIFF**

**AND**

**ECOBANK KENYA LTD ..... 1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Peter Ndegwa Gathiya (hereafter the Plaintiff) filed this suit against Ecobank Kenya Ltd, Director of Public Prosecution, Inspector General of Police and The Hon. Attorney General (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendant/Defendants) on a cause of action founded on malicious prosecution wherein he sought judgment as against the Defendants by way of;
  - a. Special damages to the tune of Kshs. 162,500,000/- being a total of the Kshs. 630,000/- per month plus Kshs. 2,000,000/- per annum for a total of 17 years, as per the contract of employment plus the legal fees to be adduced at the hearing.
  - b. General and exemplary damages.
  - c. Compensation of Kshs. 50,000,000/- for suffering, loss, stress and mental anguish, character assassination, wrongful arrest and malicious prosecution.
  - d. Liability be apportioned in the ratio of 70:30, 70% against the 1<sup>st</sup> Defendant and 30 % against the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants jointly.



- e. Costs.
  - f. Interest on (a), (b), (c) and (e) above at Court rates.
2. The Defendants filed a statement of defence denying the key averments in the plaint meanwhile put the Plaintiff to strict proof of the averment in its plaint.
  3. The suit proceeded for hearing of the Plaintiff's case on 19/03/2024 and 31/07/2025 wherein the Plaintiff testified as PW1.
  4. On the latter date, testifying on behalf of the 1<sup>st</sup> Defendant was Joel Kiarie as DW1. In the course of his testimony, the Plaintiff's counsel raised an objection towards the production of Document No. 4 appearing in the latter's List & Bundle of documents dated 15/12/2021 - being a Copy of the 1<sup>st</sup> Defendant's Group Credit Policy & Procedure Manual and a Letter from Ericsson Kenya Ltd dated 28/03/2017 - appearing in the 1<sup>st</sup> Defendant's Further List & Bundle of documents dated 08/11/2024.
  5. It was the Plaintiff's counsel oral submission that the letter dated 28/03/2017 had not been addressed to the 1<sup>st</sup> Defendant or authored by the 1<sup>st</sup> Defendant therefore DW1 cannot answer questions as pertains to the letter, stating that the said letter constitutes hearsay evidence. With respect to the 1<sup>st</sup> Defendant's Group Credit Policy & Procedure Manual, counsel posited that the said document would add no value to the case as the same is neither dated nor signed, as it is a draft.
  6. In riposte, counsel for the 1<sup>st</sup> Defendant argued that the objections raised by the Plaintiff's counsel are procedural and ought to have been raised at pre-trial stage. She argued that the letter dated 28/03/2017 is admissible whereas the Plaintiff's objection consists of an ambush at trial. That the preliminary issues ought to have been dealt with at pre-trial conference, as such the Court ought to dismiss the Plaintiff's objection.
  7. On behalf of the 2<sup>nd</sup> to 4<sup>th</sup> Defendants, counsel concurred with the 1<sup>st</sup> Defendant, that the Plaintiff's objection ought to be dismissed having not been raised at pre-trial. He posited that Procedure Manuals are not ordinarily executed whereas the letter dated 28/03/2017 is a public document that ought to be admitted.
  8. In rejoinder, counsel for the Plaintiff asserted that the letter was filed after pre-trial directions and in particular when the suit had been partly heard and therefore the 1<sup>st</sup> Defendant is estopped from arguing that the said letter can be admitted into evidence.
  9. Upon consideration of the above submissions, this Court observed that the 1<sup>st</sup> Defendant's Group Credit Policy & Procedure Manual is admissible whereas the letter dated 28/03/2017, is not. Counsel for the 1<sup>st</sup> Defendant thereafter emphasized on crucially towards admission of the latter and besought the Court to accord her leave to file submissions on the matter with corresponding leave to counsel appearing for the other parties.
  10. The parties duly complied with directions on filing of submissions, which I have duly considered. Consequently, having set out the above the Court postulates that the singular issue for determination as can be garnered from the rival material concerns -:

**a. Whether the Letter dated 28/03/2017 is admissible into evidence?**

11. To contextualize the issue, it necessitates mentioning that ex facie, the above document constitutes a letter from the Managing Director of Ericsson and is addressed to the Director of the Banking Fraud Investigations. At the outset, it is noteworthy that the said document did not consist of a witness statement made in the course of investigations or statement made before any judicial proceedings as



provided for in Section 34 of the [Evidence Act](#). The latter deduction is premised on the backdrop of the Plaintiff's cause of action as against the Defendants.

12. That said, the gist of the 1<sup>st</sup> Defendant written submissions, is, that the issue concerning admissibility of the said letter was Res Judicata; that the objection as to admissibility of the letter ought to have been raised at pre-trial and not at the hearing of the suit; and that the letter was not obtained fraudulently or in a manner that undermines constitutional principles whereas the letter is relevant to the facts in issue therefore it is admissible. The decisions in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR), Mary Maina Nandeka (suing as the Legal Rep. of the estate of the later George Nzuiko) v Monicah Mwenga Manthi & 3 Others [2022] KEELC 982 (KLR), Mubea v Waudo & 2 Others KEELC 18675 (KLR) and Nicholas Randa Owano Ombija v Judges and Magistrates vetting Board [2015] KECA 129 (KLR) were cited in the forestated regard.
13. On the part of the Plaintiff, while citing Section 35 of the [Evidence Act](#) and the decision in Mwige v Kiguta & 2 Others [2015] KECA 334 (KLR), counsel posited that admissibility and proof of a document can only be determined at the time of production of the said document as an exhibit and not at the point marking the same for identification. While further calling to aid the decision in Kenya National Highways Authority v Adbullahi [2022] KEHC 10344 (KLR), it was posited that by dint of the latter provision of the [Evidence Act](#) it is a legal requirement that a document ought to be produced by the maker therefore the 1<sup>st</sup> Defendant's witness cannot adduce the impugned letter. The Court was urged to sustain the objection.
14. With above rival arguments in reserve, as to the question of admissibility of documentary evidence as to facts in issue, the same is codified in Section 35 of the [Evidence Act](#) which 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 initialed 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.
15. The above provision was discussed by the Court of Appeal in *Jubilee Insurance Company v Kiguoya* [2024] KECA 1630 (KLR) wherein it was succinctly stated 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.”
16. Admittedly, the 1<sup>st</sup> Defendant has championed the admissibility and relevance of the impugned letter on grounds earlier set out in this ruling whereas the Plaintiff’s retort is resolute on the fact that the author and or maker of the document ought to adduce the letter in question.
17. Palpably, the letter appears to be a request for information relating to Banking Fraud Investigation Unit inquiry that seems to have eventually led to the prosecution of the Plaintiff and made by the respective person concerning their personal knowledge of the matter. While DW1 may be privy to the facts leading up to the matter he may not have been privy to the specific and special facts relating to the contents of the said letter.
18. In any event, the 1<sup>st</sup> Defendant has not demonstrated that the person who wrote the said letter is either dead, cannot be found, has become incapable of giving evidence, their attendance cannot be procured, or even if it can be procured would actually occasion expense and delay that would be unreasonable, in the Court’s view.
19. Therefore, I am inclined to agree with the Plaintiff that admission of the said document would deny it an opportunity to test its contents thereof by way of cross-examination of the maker who has specific and special knowledge of the facts contained therein.
20. Consequently, having reasonably addressed myself to the Plaintiff’s objection, the same is sustained, in the following terms-;
- a. The Letter from Ericsson Kenya Ltd dated 28/03/2017 - appearing in the 1<sup>st</sup> Defendant’s Further List & Bundle of documents dated 08/11/2024 is Marked for Identification.
- b. The 1<sup>st</sup> Defendant is at liberty to take out witness summons in respect of the author of the said letter - Mr. Aakaash Sehgal -, if it so intends, to rely on the said statements as evidence before this Court.



**DELIVERED DATED AND SIGNED AT NAIROBI THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2026.**

.....

**JANET MULWA.**

**JUDGE**

