

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CORAM: R. MWONGO, J.**  
**CRIMINAL APPEAL NO. E025 OF 2025**

TISIANO COSMAS MUGOH.....APPLICANT  
-VERSUS-  
REPUBLIC.....RESPONDENT

**R U L I N G**

**The Application**

1. The applicant filed a notice of motion dated 23<sup>rd</sup> May 2025 premised on the grounds on its face and in the supporting affidavit thereof, seeking the following orders:
  - 1) Spent;
  - 2) That pending hearing and determination of the appeal of even date, this Honourable court be pleased to order stay of proceedings in Embu MCCR E012 of 2022 which dismissed the applicant's prayers for stay of proceedings;
  - 3) Costs of the application be provided for; and
  - 4) Any other order as the court shall deem fit.
2. The applicant stated that the trial court, without jurisdiction, allowed production of inadmissible evidence by a witness lacking locus standi under section 67 of the Evidence Act. That PW5, not being the maker of the documents marked as MFI-5(a)-5(g), MFI1-6 and MFI 7, thus contravening section 33 of the Evidence Act. That contrary to section 80 of the evidence Act, the documents were not certified and they were not authenticated as required under section 106(b)(4) of the same Act.
3. He stated that his rights under Article 50(2)(j) were violated when PW5 was allowed to testify and produce documents when this witness was not in the list of witnesses provided to him. That the evidence produced by this witness was illegally obtained thus violating his right to fair trial under Articles 31 and 50(4) of the Constitution. The applicant stated that when he raised an objection regarding production of the exhibits, the trial court on its own motion, stated that the matter was *res judicata* yet it had not been raised earlier in the hearing. That the trial court fell into error in invoking sections 140 and 178 of the Evidence Act without an

application for the order by the prosecution. That no such application was made or canvassed. He stated that on this basis, an order for stay of proceedings is necessary.

### **Grounds of Opposition**

4. The respondent filed grounds of opposition stating that the application should be found unmeritorious because the case is old and it is necessary that it be concluded as soon as possible. That most of the prosecution's testimony has been heard and only the investigating officer's testimony is yet to be taken. It stated that the applicant brought a similar application before this court and the same was dismissed. That the pending appeal will not be rendered nugatory if the orders sought are denied and, in any event, the impugned evidence is admissible. It stated that after PW5 testified, the applicant was accorded ample time to cross-examine and he did. Referring to Article 159(2)(b) of the Constitution, it urged the court to ensure that justice is not delayed.

### **Written Submissions**

5. The applicant filed his written submissions raising arguments on the basis of the averments made in the notice of motion. He relied on the case of **Joseph Lendrix Waswa v Republic [2020] eKLR** and argued that the High Court has jurisdiction to order stay of proceedings in the subordinate court. He challenged the fact that the trial court *suo moto* raised the issue of *res judicata* indicating that the application had already been determined. Relying on the case of **Wainaina v Republic [2025] KEHC 4817 (KLR)**, he urged the court to consider and determine the constitutional violation arising from the matter. He also prayed for damages for violation of his constitutional rights. On this, he relied on the case of **Ngethe v Ethics and Anti-Corruption Commission & another [2024] KECA 1174 (KLR)**.
6. The Respondent's submissions were filed out of time, and on the insistence of the applicant, the said submissions were struck out by the Court.

### **Issue for Determination**

7. The issue for determination is whether the application has merit.

### **Analysis and Determination.**

8. The applicant's case has been going on at the trial court since 2022. Vide amended notice of motion dated 18<sup>th</sup> November 2022, the applicant challenged the testimonies of PW1 and PW2 on various grounds. He sought for an order of stay of

proceedings and challenged the partiality of the trial magistrate at the time. He raised some constitutional issues on violation of his rights under Article 50 of the Constitution. Njuguna, J. (as she then was) rendered her ruling on the matter, dismissing the application and finding no fault in the proceedings. It was ordered that the proceedings and taking of evidence continues by the same trial court.

9. The trial court continued hearing the matter and, in the process, PW5 testified. She was Lucy Mugeru, a customer service officer at Bank of Africa Embu Branch. She produced a bank account opening form from Premier Commodities, KYC for account opening and a statement of account for the period January 2014-December 2015. She stated that the account was opened by the applicant and Margaret Migwi in December 2014. She also testified that the documents were certified by the bank and marked as MFI 5 (a-g), MFI 6 and MFI 7. They were produced as evidence and marked as PExh 5-7.
10. The applicant raised an objection against production of these documents as evidence, on the grounds that PW5 was unauthorized to produce them by virtue of sections 140 and 178 of the Evidence Act. That whilst the bank was not a party to the proceedings, on her part, she was not authorized to produce the bank documents unless the court had so ordered authorizing her to produce them. No such order was sought even then. The applicant's objection was based also on the fact that under section 33 of the Evidence Act, documents ought to be produced by their maker and in this case, PW5 did not meet that requirement. That the documents were electronically printed and not authenticated, there being no relevant certificate accompanying them. Additionally, the documents were not certified as true copies.
11. The prosecution countered this application stating that PW5 is an officer of the bank whose branch in Embu was closed, hence it was not possible that she would have made the document. That the same documents were used in Embu Misc. MCCR 18 of 2020 where the applicant was the complainant, and there the investigating officer used the same documents as evidence being accompanied by the relevant certificate. In rebuttal, the applicant stated that PW5 did not have power to authenticate the documents and that the relevant certificate was not produced as evidence, or it did not comply with the Evidence Act. It was at this point that he raised the issue of violation of his rights under article 50 of the Constitution for not being served with the certificate.
12. The trial court found that the issue had been determined earlier in its ruling delivered on 18<sup>th</sup> December 2024. The determination was made after an objection

had been raised by the applicant challenging the production of MFI 3 and MFI 4 as evidence because they were uncertified bank account opening forms and bank statements from Sidian Bank that were being produced by persons other than their makers. The documents were merely stamped and not certified as required. In that ruling, the trial court isolated the issue for determination thus:

*“The issue before this court for determination is whether the documents were illegally obtained, whether the witness is the maker and whether they comply with section 80.”*

13. The trial court went on to find as follows:

*“The accused alleges that the documents before court were illegally obtained. He does not provide any leading evidence to show that the document was illegally obtained. The documents were part of the prosecution documents that were obtained vide court orders.*

*On whether the prosecution witness is the maker, the accused states that she is not the maker and should not produce. The witness is an employee of Sidian Bank and states that she is the manager securities and investigations. She testified in her capacity as the authorized representative of the bank.*

*On whether the document was certified as a court document, it is required that the document be certified. I agree with the accused that the documents only have the stamp of the bank and not the certification one, which states the person so certifying. The objection is sustained.”*

14. Regarding the objection raised as to the testimony of PW5, the trial court dismissed it, stating that the privilege arising from the witness's professional capacity was waived and that the documents could be produced as evidence.

15. The applicant has now filed the notice of motion herein challenging the admissibility of the evidence produced by PW5 on various grounds. He is also seeking stay of proceedings on this basis of alleged illegality as to the admitted evidence and he has raised constitutional violations. Clearly, the matter is not *res judicata* as the documents refer to a different bank altogether and they were produced by a different witness. He has deposed that his bank statements produced were obtained unprocedurally and that the evidence did not comply with provisions of the Evidence Act on certification and production.

16. The prosecution stated and the trial court noted that the maker of the documents could not be availed to produce them because the Embu Branch of Bank of Africa has since been closed. Consequently, MFI 5 (a-g), MFI 6 and MFI 7 are marked as

certified in Meru. However, the law on admissibility of these documents relied on the bank being a party to the proceedings. That the only basis upon which an officer of the bank may testify on the bank books where the bank is not a party, is only if a special order is made by the trial court. Sections 140 and 178 of the Evidence Act provide:

**140. Bankers' books.**

***(1) A bank, or officer of a bank, shall not, in any legal proceedings to which the bank is not a party, be compelled to produce any banker's book the contents of which can be proved under the provisions of Chapter VII.***

***(2) No bank or officer of a bank shall be summoned or called as a witness to prove any matters, transactions or accounts recorded in a banker's book except by order of a judge or magistrate made for special cause.***

**178. Restriction on compelling production of banker's book.**

***A banker or officer of a bank shall not, in any proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Chapter of this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court made for special cause.***

*[Emphasis added]*

17. In her ruling, the trial Magistrate stated that:

*"...The accused raises concerns on privileges as to bank documents. This being a criminal case, the privilege is waived and the same should be brought to evidence. The accused was given the said documents and had sufficient time to interrogate. These are documents that were supplied by the parties to the investigating officer during the course of investigations as submitted. The court finds the application unmerited and consequently disallowed."*

## **Conclusion and Disposition**

18. It is clear in this case, that the trial court waived the requirement for privilege, thus making the documents admissible. PW5, as an officer of the named bank was, therefore competent to testify and produce the documents. This finding by the trial

court confirms that due attention was paid to the provisions of the law on admissibility of evidence before the evidence was allowed. The court also noted that the said documents were given to the applicant long before the hearing. As such, his rights under Article 50 of the Constitution were duly upheld by the trial court.

19. In light of the foregoing, I find that the application lacks merit and it is hereby dismissed.

20. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 29<sup>th</sup> day of April, 2026.**

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**R. MWONGO  
JUDGE**

**Delivered in the presence of:**

1. Appellant Present in Court
2. Tisiano Mugo Present in Court
3. Ms. Mwaniki for the Respondent
4. Francis Munyao - Court Assistant