



**Ethics and Anti-Corruption Commission v Kidero & 13 others (Anti-Corruption and Economic Crimes Case E008 of 2021) [2025] KEHC 3757 (KLR)
(Anti-Corruption and Economic Crimes) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE E008 OF 2021
LM NJUGUNA, J
MARCH 26, 2025**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

**DR EVANS KIDERO 1ST RESPONDENT
PAUL MUTUNGA MUTUNGI 2ND RESPONDENT
JOHN NDIRANGU KARIUKI 3RD RESPONDENT
GEORGE WAINAINA NJOGU 4TH RESPONDENT
THE CUPS LIMITED 5TH RESPONDENT
JOHN NGARI WAINAINA 6TH RESPONDENT
ADUMA JOSHUA OWUOR 7TH RESPONDENT
HANNAH MUTHOMI KARIUKI 8TH RESPONDENT
PHILOMENA KAVINYA NZUKI 9TH RESPONDENT
NG'ANG'A MUNGAI NG'ANG'A 10TH RESPONDENT
EKAYA ALUMASI GHONZOUR 11TH RESPONDENT
JAMES MIMI MBUGUA 12TH RESPONDENT
ELIZABETH WANJIRU NDERITU 13TH RESPONDENT
ALICE NJERI MUNDIA 14TH RESPONDENT**



RULING

1. The matter herein is part-heard. When it came up for further hearing on the 18th March 2025, Counsel for the 1st Defendant, Miss Julie Soweto objected to the production of a certificate of electronic evidence.
2. The said certificate was prepared by one Jared Mwangi and is dated the 8th of November 2011 and has been filed among documents contained in the Plaintiff's Supplementary List filed on the 3rd day of June 2024.
3. It was the contention by Counsel of the first defendant that the certificate sought to be produced as an exhibit was made by a specific officer in a Bank and its intention is to certify the manner in which the evidence was produced, by whom it was obtained and under what conditions it was obtained.
4. She urged that the person who extracted the evidence is the only one who can certify the production or extraction of Electronic evidence and produce it before the court. She averred that the person who signed the certificate is not known and that PW12, the witness who was purporting to produce the same and who was the investigating officer in the case, did not have the capacity to produce the certificate made by another person. She argued that Section 106 was enacted to ensure the credibility of a certificate by the maker.
5. On her part, Miss Wambugu for the Plaintiff opposed the objection and submitted that the witness (PW12) had laid the basis, on the circumstances under which the bank statements were obtained in that, the same were obtained through warrants to obtain the statements. That it was after the warrants were served on the Bank that it furnished them with the Bank statements and the accompanying certificate of Electronic evidence certifying that the statements that they issued them with were a true reflection of their records.
6. It was her contention that Bank witnesses are not compellable witnesses as long as they have satisfied that the process that they have followed is okay. She further stated that, it is not disputed that the transactions took place but the issue before the court is the purpose for which the money was being paid. She relied on Section 140 of the [Evidence Act](#) in support of her submissions.
7. In rejoinder, Counsel for the 1st Defendant submitted that the Plaintiff has not complied with the law on production of Bank documents and relied on Section 176 of the [Evidence Act](#) and argued that the same is subject to Section 177 of the [Evidence Act](#) and that it is only after the Bank statements have been proved to be such, that a party can then comply with Section 106 (B) of the [Evidence Act](#).
8. This court has considered the objection and the submissions that were made by both Counsel in support of and in opposition of the same.
9. The Plaintiff through PW12 sought to produce electronic evidence. In Section 106 (A) of the [Evidence Act](#), the contents of electronic records may be proved in accordance with the provisions of Section 106(B) of the [Evidence Act](#).
10. Section 106 (B) provides for admissibility of electronic records and it states in part: -
 - “(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.

- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—
 - (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.
- (4) 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.”

11. Counsel for the Plaintiff relied on Section 140 of the [Evidence Act](#) which provides: -

- “(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.”

12. In addition, Counsel for the Plaintiff relied on Section 176 of the [Evidence Act](#) and the mode of proof of entries in Bankers Books and it provides: -

“Subject to the provisions of this Chapter of this Act, a copy of any entry in a banker’s book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.”

13. Section 177 of the [Evidence Act](#) is on proof and verification, of a copy and it provides: -

- “(1) A copy of an entry in a banker’s book shall not be received in evidence under section 176 of this Act unless it be first proved that—
 - (a) the book was, at the time of making the entry, one of the ordinary books of the bank; and
 - (b) the book is in the custody and control of the bank; and
 - (c) the entry was made in the usual and ordinary course of banking business; and
 - (d) the copy has been examined with the original entry, and is correct.
- (2) Such proof may be given by an officer of the bank, or, in the case of the proof required under paragraph (d) of subsection (1), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oaths or a person authorised to take affidavits.”



14. Counsel for Plaintiff in her argument urged the court to allow the production of the documents under Sections 140 and 176 reproduced above. Section 140 makes reference to Chapter VII Part of which comprises of Section 106(A) and 106(B). Section 140(2) creates an exception which is; by order of a judge or magistrate made for special cause.
15. In my considered view, the production of documents stated in Section 140 is subject to a party meeting the requirements set out in Section 106(B) as it expressly makes reference to it.
16. Further, whereas Section 176 is on the mode of proof of entries of bank books, production of such books is subject to the conditions set out in Section 177 of the Act. The proof required under Section 177 may be given by an officer of the bank and in case of proof under Section 177(1)(d), by the person who has performed the examination, and may be given either orally or by an affidavit sworn before a commissioner for oath or a person authorized to take affidavits. In this case, no such affidavit has been filed or produced in evidence
17. In the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others (Civil Appeal Nos.17 and 18 of 2015) eKLR, the Court of Appeal in Kisumu had this to say regarding electronic evidence.
 65. Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”
 66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouch for the authenticity and integrity of the electronic record sought to be produced.
18. This court is alive to the fact that what is sought to be produced is a certificate of electronic evidence and not a DVD as is the case of County Assembly of Kisumu (Supra), but in that case the Court of Appeal emphasized that the provision of Section 106(B) are a mandatory requirement which was enacted for a good reason.
19. Suffice it to say that the requirement for a certificate under Section 106B (4) is mandatory as it is crucial for the authentication not only of the contents of the documents sought to be produced but also its integrity and this certificate can only be produced by the maker as he/she is the only witness who can attest to the requirements under Section 106B (4).
20. The investigating officer through whom the Plaintiff sought to produce the certificate can therefore not be a competent witness to produce the same as she was not the maker of the certificate and cannot be cross examined on it.
21. In the end, I find that the objection has merits and I do hereby allow the same.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 26TH DAY OF MARCH 2025.

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L.M. NJUGUNA

JUDGE

In the presence of:-

Miss Wambugu for the Plaintiff



Miss Kihara holding brief for Dr. Oloo for the 11th defendant

Mr. Opolo for the 12th defendant

Mr. Musa holding brief for Mr. Kithi for the 4th – 6th defendants

Miss Misiati holding brief for Mr. Tom Ojienda and Miss Julie Soweto for the 1st Defendant

Mr. Nyangena for the 3rd defendant

No appearance for the 2nd, 7th - 10th and 13th – 14 defendants

Court Assistant – Adan

