



**Gathungu v Ernst & Young LLP (Commercial Case E419 of 2018)
[2024] KEHC 13074 (KLR) (Commercial and Tax) (28 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E419 OF 2018
JWW MONG'ARE, J
OCTOBER 28, 2024**

BETWEEN

LABAN GATHUNGU PLAINTIFF

AND

ERNST & YOUNG LLP DEFENDANT

RULING

Introduction and Background

1. The Defendant has filed the Notice of Motion dated 9th July 2024 made under section 63 (e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and the Inherent Power of the court where it seeks to be allowed to adduce additional evidence in this matter and that it be granted leave to file a second supplementary list and bundle of documents as per the second supplementary list and bundle of documents dated 9th July 2024. The application is grounded on facts set out on its face and the affidavit sworn on 9th July 2024 by the Defendant's Associate Director, Legal, Roy Gathecha. It is opposed by the Plaintiff through his replying affidavit sworn on 29th July 2024. In addition to their pleadings, the parties also rely on written submissions which are on record.
2. The Defendant avers that on 26th June 2024, the World Bank Group published its decision on the audit it had undertaken of the four projects where the Defendant was an implementation agent and announced that it has debarred the defendant for a 30-month period due to sanctionable practices. That the decision of the World Bank Group to sanction the Defendant is relevant to this case as it involves the same issues that led to the expulsion of the Plaintiff as a partner in the Defendant. The Defendant contends that this information is relevant and will help the court determine the issues in dispute in the present case and that by the time the World Bank Group announced its decision to debar the Defendant on 26th June 2024, the hearing in this matter had commenced.



3. The Defendant states that it could not have filed the additional evidence it intends to file before the hearing commenced, that no prejudice will be suffered by the Plaintiff if this application is allowed and that the defendant's sole witness is yet to be cross-examined. That the Plaintiff will have an opportunity to cross-examine the Defendant's witnesses on the additional evidence adduced, the application has been made without delay and that unless the application is allowed, the court will not be able to meet the overriding objectives of justice and will be hamstrung in its determination of the matter having not had the benefit of considering all the relevant evidence before the court. As such, the Defendant states that it is in the interests of justice that the application be allowed as prayed.
4. In response, the Plaintiff states that in the Defendant's the Statement of Defence filed on 5th February 2019, it pleaded at para. 36 that: "overall, the Defendant's brand has been damaged and has resulted in the defendant being subjected to further audits by donors and other stakeholders. The World bank has undertaken an extensive audit of four projects where the Defendant was an implementation agent at great expense to the defendant." That this averment clearly demonstrates that as at the said date, the Defendant had the audit report undertaken by World Bank but elected not to file the same in court at the time neither has it ever considered filing the same in court during the numerous appearances that the matter has proceeded both before court and the various deputy registrars for pretrial directions.
5. The Plaintiff avers that the failure by the Defendant to present the said report in good time to enable the Plaintiff have a chance to interrogate the same and present its case in court having factored the said report therefore extremely prejudices the Plaintiff, who has already testified in full and closed his case. He claims that the Defendant is misusing court process to patch holes in its Defence using a media report/press statement when it has always had the primary evidence in the form of the Audit Report from which the media report was extracted from as far back as 2019 when it referred to the said audit report in its Defence as quoted above. That the said press statement mentions of a settlement agreement under which the company accepts liability meaning that the Defendant had always had the full report which had never been presented to court for the Plaintiff's interrogation. The Plaintiff states that the said debarment relates to the Defendant and not the Plaintiff and his name has not been mentioned anywhere on the press statement and therefore the said additional evidence is remote to this matter.
6. The Plaintiff advances that the application herein has been brought extremely late in the day, and the same is not brought in good faith but only for purposes of antagonizing the Plaintiff, who has repeatedly insisted his desire to have his case determined expeditiously to enable him pick his career back up once more. He claims that he was interviewed by World Bank in the build up to the Audit that is now subject to the media report herein, and it is important that if any evidence is to be admitted in court relating to the said audit, then the actual audit report should be the one to be adduced in evidence, so that the court benefits from the comments made in the audit with respect to the Plaintiff as well. The Plaintiff states that the press statement does not imply in any way that there is any wrongdoing on his part and hence it would only be fair that the primary audit report is produced. He claims that the Defendant has in its possession the full audit report by the WORLD BANK, and it is not logical for them not to adduce the same in its original form and dwell on a media report, unless the said report has information that is favourable to the Plaintiff's case and which they want to conceal from court
7. The Plaintiff further claims that the Defendant has on numerous occasions failed to disclose material documents necessary for enabling the court arrive at an impartial determination of the case before it and that this is despite the Plaintiff having raised notices to produce, and the objections by his counsel for production of partial documents in evidence. That further, the Plaintiff is a member of ICPA-K in good standing and that if at all he would have suffered any culpability as alleged by the Defendant, then not only would he have been equally debarred as was the Defendant, he would not be a member in good standing. For these reasons the Defendant urges the court to dismiss the application with costs.



Analysis and Determination

8. I have gone through the application, the response and submissions of the parties. The main issue for the court's determination is whether the Defendant should be allowed to adduce additional evidence in this matter. The parties have rightly submitted that the Supreme Court has since set out the test to be applied on an application to adduce additional evidence in the decisions of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad, Ahmed Muhumed Abdi, Gichohi Gatuma Patrick & Independent Electoral and Boundaries Commission* [2018] KESC 71 (KLR) and *Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 1 (KLR). In *Mohamed Abdi Mahamud*(supra) it was stated as follows:

- “(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) the evidence must be credible in the sense that it is capable of belief;
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other”.

9. In *Odinga & 7 others v Independent Electoral and Boundaries Commission*(supra) the apex court stated as follows:



28. The parties have a duty to ensure they comply with their respective time-lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.
29. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.
10. Going through the evidence that is sought to be produced and the circumstances of this case, I am inclined to allow the Defendant's application to produce the same for the following reasons. One, the parties both agree that the import of the audit is directly relevant to this matter and as such, I am of the view that it will be in the interest of justice if the same is presented for the court's determination. Two, since the parties agree that the import of the audit is relevant in this matter, it also follows that the same would influence or impact upon the result of the court's determination, although it would not necessarily be decisive. Three, whereas the Plaintiff states that the said evidence sought to be adduced was with the Defendant before and during the trial, I note that the evidence sought to be produced is a press release dated 26th June 2024. It is therefore not possible for the Defendant to have had this evidence earlier than this date. Four, I note that the said press release is not that voluminous for the Plaintiff not to respond or cross-examine it effectively. Lastly, I find no prejudice that will be occasioned on the Plaintiff as he will have a chance to respond to them and cross-examine the Defendant's witness on its veracity and probative value.
11. Ultimately, I find that the additional evidence sought to be produced will assist the court in making a determination on the dispute of the parties and that it will be in the interest of justice that the same is produced. It is the duty of this court to accord all the parties' full opportunity to be heard to ventilate their grievances and in this regard, to file the documents that they intend to rely on during the hearing and which will assist the court determine the parties' dispute with finality.

Conclusion and Disposition

12. In the foregoing, the court in exercising its discretion and pursuant to the overriding objective of the law in civil cases and that of the court as stipulated in sections 1A,1B and 63(e) of the *Civil Procedure Act* I allow the application by the Defendant to file a second supplementary list and bundle of documents as per the second supplementary list and bundle of documents dated 9th July 2024. The Plaintiff is simultaneously allowed to recall his principal witness, if need be to testify on the new documents so introduced. Since the matter is still ongoing, I hold that it is not appropriate at this stage to make any order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 28TH DAY OF OCTOBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Eredi for the Plaintiff.

Mr. Lawson Ondiek for the Defendant.

Godfrey - Court Assistant

