



Manchester Outfitters Limited v Galot & 5 others; Manchester Outfitters Limited & 3 others (Plaintiff); Galot & another (Interested Party) (Civil Case 55 of 2012) [2021] KEHC 250 (KLR) (Commercial and Tax) (24 November 2021) (Ruling)

Neutral citation: [2021] KEHC 250 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 55 OF 2012
LN MUTENDE, GWN MACHARIA & JM MATIVO, JJ
NOVEMBER 24, 2021
(FORMERLY CIVIL CASE NO. 63 OF 2009)
TITLE BY WAY OF COUNTERCLAIM

BETWEEN

MANCHESTER OUTFITTERS LIMITED PLAINTIFF

AND

PRAVIN GALOT 1ST DEFENDANT

RAJESH GALOT 2ND DEFENDANT

GANESH GALOT 3RD DEFENDANT

KEVIN GALOT 4TH DEFENDANT

MOHAN GALOT 5TH DEFENDANT

MANCHESTER OUTFITTERS (EAST AFRICA) LIMITED 6TH DEFENDANT

AND

MANCHESTER OUTFITTERS LIMITED PLAINTIFF

PRAVIN GALOT PLAINTIFF

RAJESH GALOT PLAINTIFF

GANESHLAL GALOT PLAINTIFF

AND

MOHAN GALOT INTERESTED PARTY

GALOT LIMITED INTERESTED PARTY



RULING

1. On 23rd November 2021, Mr. Kenyatta, while cross-examining Mr. Yogo, referred him to a document at page 117 of the Original Bundle which is a fee note from Arigem Consultants Limited dated 9th February 2005 addressed to the Managing Director, Galot Group of companies. The fee note is for professional services rendered by Arigem consultants Ltd to said company. Answering a question from Mr. Kenyatta, Mr. Yogo stated that in 2005 he was the company secretary for Galot Industries Ltd for about 6 months. Mr. Kenyatta sought to know from Mr. Yogo whether he prepared any annual returns for any of the other companies and specifically Galot Ltd.
2. At this point Mr. George Gilbert objected to that line of cross-examination arguing that it will open a flood gate of other issues relating to Galot Ltd. Mr. Gilbert's objection is two-fold. One, that a on 23rd May 2017, a 3-judge bench (at page 194 and page 64 of the proceedings) ruled that the court will only be dealing with the directorship and shareholding of Manchester Outfitters Limited. Two, that this court has thrice upheld objections locking out evidence relating to the other companies which falls outside the purview of the instant dispute.
3. To use his own words, this court "gagged" the Plaintiff and his witness from delving into evidence touching on the other companies and as a consequence as counsel they stopped preparing their witnesses on evidence falling within the other companies. Also, he argued that his witnesses did not adduce such evidence. He emphasised that the previous court ruling on the said issue still stands. To him, the Respondents are now sneaking evidence relating to the other companies which he argued would be prejudicial to his client. Mr. Gilbert submitted that the issue is now res judicata, and that it is unfair to his clients to go back to the same documents which have been rejected by this court more than 3 times.
4. Mr. Tiego supported the objection and argued that the intended cross-examination relates to annual returns whose contents include directorships and shareholding of the other companies which falls outside the scope of this dispute. It was Mr. Tiego's submission that the issues Mr. Kenyatta seeks to raise should await determination in the other cases. Mr. Tiego also argued that the mischief is that once the court makes a determination, there is a danger of the determination being used in the other pending cases.
5. In opposing the objection, Mr. Kenyatta submitted that the parameters of this dispute were set by the parties by consent. He submitted that Galot Ltd is a shareholder of Manchester Outfitters Ltd, hence it is inevitable that issues relating to the said company crop up in this case such as movement of shares and directorship. He argued that in the course of Mr. Yogo's evidence in chief he denied signing some annual returns which triggering an objection. He argued that the court allowed him to file a supplementary Witness Statement with leave to the Respondents also to file supplementary Witness Statements. In a nutshell, Mr. Kenyatta argued that their 2 supplementary Witness Statements state that they had an arrangement with Mr. Yogo relating to filing annual returns under Arigem Consultants Ltd. Further, there is evidence that Mr Yogo acted as the company secretary for the other companies. He argued that the line of cross-examination he was pursuing would disclose a common arrangement with Arigem Consultants Ltd. Mr. Kenyatta was categorical that they were not seeking determination of directors or shareholding of the other companies. He submitted that the applicants will have a chance to re-examine the witness. To fortify his argument, Mr. Kenyatta cited section 6 of the *Evidence Act* and *Kinyati v Republic* in support of the proposition that under the *Evidence Act*, facts



- though not in issue are relevant if they form part of the same transaction. He argued that the only test is relevancy. He argued that this is a court of law and it cannot be tied from looking at relevant evidence.
6. Mr. Kaka echoed Mr. Kenyatta's submissions and submitted that at issue is the credibility of the witness if he filed similar documents for the other companies. Mr. Ouma, M/s Omondo and M/s Kogi also supported Mr. Kenyatta's submissions.
 7. In reply, Mr. Gilbert argued that the issue raised in the decision cited by Mr. Kenyatta applies to criminal cases. He essentially reiterated his earlier submissions and urged the court to uphold the objection.
 8. In determining the objection at hand, we are alive to the fact the only issue for determination by this court in this case is the directorship and shareholding of Manchester Outfitters Ltd. The parties have jealously guarded the scope of this dispute as demonstrated by two previous objections touching on the parameters of the dispute. Indeed, in our rulings on the said objections, we restated the scope of the dispute before us and urged parties to confine their respective cases to the set boundaries.
 9. While jealously guarding the scope of this dispute, and bearing in mind that Article 50 (1) of the Constitution guarantees every person the right to a fair hearing, it is also important to bear in mind the established principle of constitutional interpretation which requires provisions of the Constitution governing the same subject to be interpreted together. This cannon of constitutional construction requires the court to bring into view all the provisions of the Constitution which are implicated and to construe them together without lifting one provision above the other so as to get the entire meaning and intention of the charter.
 10. In this regard, it is important to mention that Article 50 (2) (k) of the Constitution guarantees every person the right to adduce and challenge evidence. A careful reading of this Article shows that it invests reciprocal rights in both parties to a dispute to cross-examine opposing witnesses, and to re-examine their own witnesses. The principle discernible from this constitutional provision is that the right to cross-examine is a key component of a fair trial such that curtailing it inappropriately or interfering with it, may render a trial unfair, vitiating the entire proceedings. In *Wigmore On Evidence*,¹ the learned author states: -

“Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovering of truth.

11. At the centre of this objection is the meaning and purpose of “cross-examination.” Appreciating the purpose and meaning of “cross-examination” will go a long way in helping us determine the objection before us. In searching for its meaning, it is inevitable that we will consult dictionaries and judicial pronouncements. The practice of appealing to dictionaries simply as memory aids was deemed a function of judicial notice.² Words must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a

¹ 3rd ed. Vol. V, para 1367.

² See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 270–71 (1999).



- question dictionary are admitted, not as evidence, but only as aids to the memory and understanding of the court.³
12. Dictionaries may also serve an instantiating function, that is, they may be used by the court to confirm that a contested meaning has been employed in either speech or literature, and has thus been recognized as a valid meaning by lexicographers. Of this instantiating function, Professors Hart and Sacks said, “Unabridged dictionaries are historical records (as reliable as the judgment and industry of the editors) of the meanings with which words have in fact been used by writers of good repute. They are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible.”⁴
 13. In using a dictionary to instantiate a contested meaning, a judge searches the dictionary to determine what meanings have attained currency in the language at large and are thus linguistically permissible in a given context.⁵
 14. The “*Concise Oxford Dictionary*”⁶ defines “cross-examine” as, “question (a witness called by the other party) in a court of law to check or extend testimony already given.” Similarly, “*Webster’s Third New International Dictionary (1993)*” defines “cross-examine” as “to examine by a series of questions designed to check the accuracy of answers to previous questions; examine closely or repeatedly; to examine (a witness who has testified for the other side in a legal action) esp. in order to disprove testimony already given.”
 15. The objects sought to be achieved by cross-examination are to impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party. One of the tests for a fair trial under our constitutional dispensation is whether the opposing party was given a full opportunity to test the evidence of the witness.
 16. We may profitably cite Hoffman and Zeffert, *The South African Law of Evidence*⁷:

“If a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for an explanation. Similarly, if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters which will be alleged make his evidence unworthy of credit.”
 17. The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’ attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity whilst in still in the witness-box, of giving an explanation open to the witness and of defending his or her

³ Ibid.

⁴ Henry M. Hart, JR. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375–76 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

⁵ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 13 (1998).

⁶ 10th ed.

⁷ 4 ed at 461



character. If a point in dispute is left unchallenged in cross-examination, the party calling that witness is entitled to assume that the unchallenged witness' testimony is accepted as correct.

18. *H. Daniels in Morris Technique in Litigation*⁸ deals with the objects of cross-examination. Citing previous works on the subject, he states as follows: -

“It should be borne in mind that the objects of cross-examination are three, the first is positive, and the other two negative. They are: to obtain evidence favourable to your client, to weaken evidence that has been given against your client, and finally, if nothing of value which is favourable can be obtained, to weaken or destroy the evidence by attacking the credibility of the witness.”

19. Later on the same page, the learned author also citing other leading authors says:-

“In resolving whether or not to cross-examine a witness, it is necessary to remember that there can be three objects in cross-examination. It is designed to either destroy or weaken the force of the evidence the witness has already given against you, or to elicit something in your favour which he has not stated, or to discredit him by showing to the jury, from his past history or present demeanour, that he is unworthy of belief. Never should you enter upon a cross-examination without having a clear purpose to pursue one or all of these objects. If you have not such, keep your seat.”

20. As observed above, the right to cross-examine is a key component of a fair trial. It cannot easily be taken away. Article 50 rights are non-derogable under Article 25 (c) of the Constitution. The question is whether if Mr. Yogo is cross-examined to weaken or destroy his evidence by attacking his credibility will be prejudicial to the applicant's case. In our view, so long as the cross-examination remains within the scope of the order restricting the dispute to determination of shares and directors of Manchester Outfitters Ltd, it is permissible. If cross-examination seeks to discredit his testimony, it is permissible. The evaluation will best be determined on a question-to-question basis, but the Respondent's counsel is urged to take cue and remain within the ambit of the dispute otherwise the court will not hesitate to stop any questions falling within the prohibited sphere.

21. The other reason why we allow the cross-examination to proceed, albeit, within the permitted scope is that the applicant's counsel will exercise their right to re-examine the witness. The purpose of re-examination is three-fold. One, it is used to clarify any matters which have become unclear during cross-examination; Two, it is used to ask further questions about something which was put to the witness in cross-examination; Three, it is used to ask further questions about an answer given by a witness during cross-examination. With these clear safe guards, we see no prejudice at all. The objection is disallowed. However, the emphasis remains that parties must remain within the scope of the dispute.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2021.

L. MUTENDE

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JUDGE

G. NGENYE

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JUDGE

⁸ 4th edition, Juta & Co. 1993 at p.179.



J. MATIVO

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JUDGE

