



REPUBLIC OF KENYA



**Ethics & Anti-Corruption Commission v Maitai & 13 others (Anti-Corruption and Economic Crimes Case 8 of 2020) [2025] KEHC 4129 (KLR)  
(Anti-Corruption and Economic Crimes) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4129 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CASE 8 OF 2020**

**LM NJUGUNA, J**

**APRIL 2, 2025**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**CHARLES NDERITU MAITAI ..... 1<sup>ST</sup> DEFENDANT**  
**CHARLES TANUI ..... 2<sup>ND</sup> DEFENDANT**  
**CHARLES OUKO ..... 3<sup>RD</sup> DEFENDANT**  
**FREDRICK OGENGA ..... 4<sup>TH</sup> DEFENDANT**  
**EMILIO MWAI NDERITU ..... 5<sup>TH</sup> DEFENDANT**  
**SAMSON ODOYO MIKWA ..... 6<sup>TH</sup> DEFENDANT**  
**NICHOLAS GITOBU ..... 7<sup>TH</sup> DEFENDANT**  
**PHILIP KIMELU ..... 8<sup>TH</sup> DEFENDANT**  
**BRAMWEL WANYALIKA ..... 9<sup>TH</sup> DEFENDANT**  
**FRANCIS MUTHAIGA MURAYA ..... 10<sup>TH</sup> DEFENDANT**  
**PETER MACHUA ..... 11<sup>TH</sup> DEFENDANT**  
**JANE NAKODONY ..... 12<sup>TH</sup> DEFENDANT**  
**ALLIED INSPECTION & TESTING ..... 13<sup>TH</sup> DEFENDANT**  
**AERO DISPENSER VALVES LIMITED ..... 14<sup>TH</sup> DEFENDANT**



### **Admissibility of criminal court evidence in civil suits due to witness unavailability**

*The Ethics and Anti-Corruption Commission sought to rely on the testimony of two U.S.-based witnesses, previously given in a related criminal case (ACC No. 50 of 2018), citing the difficulty and delay in securing their presence. The court considered whether the evidence could be admitted under section 34 of the Evidence Act. While finding that the requirements were met for most defendants, the court excluded the evidence as against the 12th defendant, who had not cross-examined the witnesses. The application was allowed in part, reinforcing the balance between judicial efficiency and fair trial rights.*

Reported by John Ribia

**Law of Evidence** – *admissibility of evidence – admissibility of evidence from a criminal trial in a civil suit on account of the unreasonable delay and expense likely to be incurred in securing their fresh attendance – where witnesses were US based and it would take over a year to secure their attendance via mutual legal assistance - whether the evidence of witnesses previously recorded in a related criminal proceeding may be admitted in a civil suit on account of the unreasonable delay and expense likely to be incurred in securing their fresh attendance - what were the circumstances that the court must be satisfied with to admit evidence from previous judicial proceedings - whether such evidence would be admissible against parties who did not have an opportunity to cross examine the witnesses - Constitution of Kenya articles 50; Evidence Act (cap 80) section 34; Mutual Legal Assistance Act (cap 75A) section 75A.*

**Constitutional Law** – *constitutional commissions - Ethics and Anti-Corruption Commission (EACC) – mandate to investigate – whether the mandate of the EACC extended to prosecution of anti-corruption cases – Constitution of Kenya article and 157(6).*

#### **Brief facts**

The Ethics and Anti-Corruption Commission (EACC) filed ACEC Suit No. 8 of 2020 against 14 defendants, alleging fraudulent conduct in the procurement of hydrant pit valves by Kenya Pipeline Company Limited. The suit stemmed from investigations also forming the basis of criminal proceedings in ACC No. 50 of 2018. Two American witnesses, David Koebnitz and John Pherrin, testified in the criminal case via video link following requests for Mutual Legal Assistance. In this civil suit, EACC sought to admit their previous testimony, arguing that obtaining their live evidence would incur unreasonable delay. Several defendants opposed, citing lack of opportunity to cross-examine and dissimilarity of issues.

#### **Issues**

- i. Whether the Ethics and Anti-Corruption Commission (EACC), which had the powers to investigate anti-corruption cases, had the powers to prosecute anti-corruption cases.
- ii. What were the circumstances that the court must be satisfied with to admit evidence from previous judicial proceedings?
- iii. Whether the evidence of witnesses previously recorded in a related criminal proceeding could be admitted in a civil suit on account of the unreasonable delay and expense likely to be incurred in securing their fresh attendance; is so, whether such evidence would be admissible against parties who did not have an opportunity to cross examine the witnesses.

#### **Relevant provisions of the Law**

##### ***Evidence Act (Cap 80)***

##### ***Section 34***

##### ***34. Admissibility of evidence given in previous proceedings.***

*(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances*

—



(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.

## Held

1. Section 34 of the Evidence Act outlined circumstances that the court must be satisfied with to admit evidence from previous judicial proceedings:
  1. the witness was dead or could not be found.
  2. the witness was incapable of giving evidence.
  3. the witness had been kept out of the way by adverse party; and
  4. Presence of the witness could not be obtained without an amount of delay or expense.
2. Securing the attendance of the two witnesses required the execution of a Mutual Legal Assistance by the USA, a request which the plaintiff had undertaken unsuccessfully. If the witnesses were unwilling to give their testimonies, it would take the U.S.A Department of Justice approximately 12-18 months to fully execute the Plaintiff's MLA request and therefore their attendance could not be obtained without unreasonable amount of delay or expense. The language of section 34 of the Evidence Act was wide enough to encompass situations where the witness who had already testified and produced exhibits and could not be found, or was incapable of giving evidence or where their presence could not be obtained without any amount of delay or expense which in all fairness would be unreasonable were present in the instant case.
3. Under article 157(6)(a) of the Constitution, the Director of Public Prosecution (DPP) had the sole mandate to institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed. The Constitution did not envision a situation where an investigative agency was to take on the form of a party to a criminal proceeding. The plaintiff, Ethics and Anti-Corruption Commission (EACC), was an independent commission established under the Constitution, with powers to investigate but not to prosecute Anti-Corruption Cases. The EACC and the ODPP work in tandem and are crucial in prosecution of corruption cases and therefore, EACC could not be said to be a stranger in the criminal case ACC 50/2018.
4. The right to cross-examine a witness was a fundamental right firmly embedded in the right to a fair hearing under article 50 of the Constitution with an aim of ensuring fairness in trials. The ability to challenge the credibility, reliability and veracity of evidence provided by the opposing party was vital for the effective administration of justice.
5. All the defendants were accused persons in ACC 50/2018 and were given an opportunity to cross examine the two subject witnesses save for the 12<sup>th</sup> defendant whose case was withdrawn. The 13<sup>th</sup> defendant had not participated in these proceedings and either way, it would not suffer any prejudice. The applicant had not denied that the 12<sup>th</sup> defendant did not cross examine the two subject witnesses but have contended that their evidence will not affect the 12<sup>th</sup> defendant.
6. Admitting the evidence of the two witnesses against the 12<sup>th</sup> defendant would be prejudicial to her and would be a breach of her constitutional right provided for in article 50 of the Constitution.



7. Both cases arose from the same investigations into a transaction of fraudulent procurement of hydrant pit valves by Kenya Pipeline Company Limited, which issues were related as they involved the same property and the manner in which it was procured.
8. The subject matter and the nature of the issues in ACEC Suit No. 8/2020 were different and distinct from ACC 50/2018, as such the applicant was estopped from arguing that the issues are substantially the same. That did not mean that the evidence given in a criminal matter could not be adopted and especially where the issues arose from the same transaction. In any event, adoption of evidence was different from its admissibility. The court would also determine the weight to attach such evidence.

*Application allowed except against the 12<sup>th</sup> defendant.*

### **Orders**

*Costs to be in the cause.*

### **Citations**

#### **Cases**

1. Alphonse Munene Mutinda v Ethics and Anti-Corruption Commission (Civil Appeal 266 of 2018; [2020] KECA 756 (KLR)) — Followed
2. Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita , Monica James , John Mburu & Investments & Mortgage Bank Ltd (Civil Case 423 of 2009; [2013] KEHC 568 (KLR)) — Followed
3. Ethics and Anti-Corruption Commission v Mary Ngechi Ng'ethe (Anti-Corruption and Economic Crimes Case 35 of 2018; [2020] KEHC 4462 (KLR)) — Followed
4. Geoffrey Kinyanjui & another v Republic (Criminal Appeal 144 of 2019; [2020] KECA 342 (KLR)) — Followed
5. Geoffrey Kinyanjui & Peter Kiama v Republic (Criminal Appeal 144 of 2019; [2020] KECA 342 (KLR)) — Followed
6. Harrison Kariuki Mwangi & 3 others v Republic (Criminal Appeal 136,134,135 & 131 of 2011; [2013] KEHC 944 (KLR)) — Followed
7. Hassan v Jaswinder Singh Enterprises & Another (Civil Appeal 384 of 1989; [1992] KEHC 122 (KLR)) — Explained
8. Leonard Maina Mwangi v Director of Public Prosecutions & 2 Others (Criminal Case 57 of 2016; [2017] KEHC 9669 (KLR)) — Followed
9. Republic v Okuku (Criminal Case E012 of 2023; [2024] KEHC 6991 (KLR)) — Followed
10. Serah Njeri Mwobi v John Kimani Njoroge (Civil Appeal 314 of 2009; [2013] KECA 501 (KLR)) — Followed

#### **Statutes**

1. Civil Procedure Act (cap 21) — section 1A,1B,3A — Cited
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — order 51 rule 1 — Cited
3. Constitution of Kenya, 2010 — article 50;157(6) — Cited
4. Criminal Procedure Code Act (cap 75) — Cited
5. Evidence Act (cap 80) — section 34
6. Mutual Legal Assistance Act (cap 75A) — section 75A — Cited

#### **Advocates**

*Miss Wambugu h/b for Mr. Kisaka for Plaintiff*

*Mr. Waudo for 2nd Defendant*

*Miss Misiati h/b fo Prof. Ojiambo for 14th Defendant*

*Mr. Osiemo for 4th & 6th Defendants*

*Miss Nira h/b for Mr. Ogutu for 3rd & 5th Defendants*

*Mr Oonge for 8th Defendant*

*Miss Shamalla h/b for Mr. Odero for 9th Defendant*



## RULING

1. The applicant/plaintiff herein has moved this court by way of the notice of motion dated the January 13, 2025. The same has been brought under section 34 of the Evidence Act, sections 1A, 1B and 3A of the Civil Procedure Act, order 51 rule 1 of the Civil Procedure Rules, 2010. It seeks the following orders: -
  - a) Spent.
  - b) This honourable court be pleased to adopt and admit the evidence of David Koebnitz and John Pherrin given on 30.5.2023 and 05.06.2023 respectively in ACC No 50 of 2018 *R v Charles Kiprotich Tanui & 15 Others*, a related matter to this suit.
  - c) This honourable court be pleased to rely on the extract of the certified copy of the proceedings of the trial court in ACC No 50 of 2018 *R v Charles Kiprotich Tanui & 15 others* on the said dates and to adopt and admit the witness statements of David Koebnitz and John Pherrin in the plaintiff's trial bundle both dated 24/04/2018.
  - d) This honourable court be pleased to mark the relevant and appropriate exhibits as duly produced including documents at pages 289-334 of the Plaintiff's trial bundle."
2. The application is premised on the grounds set out on the body of the same and it is supported by the affidavit of Justus Wangia, sworn on the 13<sup>th</sup> day of January, 2025.
3. Through the application, the applicant has, inter alia, prayed for an order that the evidence of David Koebnitz and John Pherrin given on the May 30, 2023 and June 5, 2023 respectively in ACC No 50 of 2018 (*Republic v Charles Kiprotich Tanui & 15 Others*) be adopted and admitted in this suit.
4. The applicant avers that the two witnesses are based in California in the United States of America and owing to their busy schedules, they cannot be easily available to testify in the case herein.
5. That even when they testified in criminal case ACC No 50 of 2018, there had been numerous attempts via video-conferencing and they were only available via video link from 4.00 to about 10.00 pm Kenyan time. That their attendance was secured pursuant to two (2) Mutual Legal Assistance (MLA) requests made by the plaintiff through the Attorney General which were executed by the US Department of Justice after several months, which, in this case, the Plaintiff has undertaken unsuccessfully.
6. Further, that the plaintiff has been informed by the USA authorities that if witnesses are unwilling to give their testimonies, it will take the USA Department of Justice approximately 12 to 18 months to fully execute the plaintiff's MLA request and therefore, their attendance as witnesses in this case cannot be obtained without unreasonable amount of delay or expense.
7. The applicant avers that the parties in this instant suit and their representatives are the same as in ACC No 50/2018, and the defendants had a right and opportunity to cross examine the said witnesses in



ACC No 50/2018 on the May 30, 2023 and June 5, 2023 and the main issues in question in this suit are substantially the same as those determined in ACC No 50/2018.

8. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants by way of replying affidavits save for the 3<sup>rd</sup> and 5<sup>th</sup> defendants who filed grounds of opposition. Further, the 12<sup>th</sup> defendant filed a supplementary affidavit to respond to the applicant's further affidavit that was sworn by Justus Wangia.
9. I have perused the grounds of opposition and all the replying affidavits and the common dispositions that they have raised are:-
  1. That not all the defendants had an opportunity to cross-examine the two witnesses in ACC No 50/2018.
  2. That the issues in this case are different from the issues that were before the ACC No 50/2018.
  3. The parties in ACC No 50/2018 and the matter herein are not the same.
  4. That admitting the evidence of the two witnesses would render the trial unfair and detrimental to the administration of justice.
  5. There has been no plausible explanation for the delay by the plaintiff to procure Mutual Legal Assistance despite having known that it takes time.
10. The application was disposed of by way of written submissions, with the plaintiff, 2<sup>nd</sup>, 4<sup>th</sup>, 3<sup>rd</sup> and 5<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> defendants complying with the directions on filing of submissions.

#### **Plaintiff's/Applicant's Submissions**

11. The applicant identified the following issues for determination
  1. Whether the witnesses' presence cannot be procured without an unreasonable delay.
  2. Whether the proceedings herein are between the same parties or their representatives in interest as those in ACC No 50 of 2018.
  3. Whether the adverse parties had the right and opportunity to cross-examine the witnesses in ACC No 50 of 2018.
  4. Whether the questions in issue are substantially the same in ACC 50/2018 as in this case.
12. On whether the witnesses' presence cannot be procured without an unreasonable delay, the applicant submitted that both of them are nationals of United States and their testimony can only be procured through Mutual Legal Assistance and/or the necessary diplomatic channels and an acceptable mutual legal assistance has to be definite as to the date and time when the witnesses are required in court and this is dependent on the availability of hearing dates.
13. The applicant further submitted that previous correspondences between it and the U.S Authorities has indicated that the US authorities would require 12 to 18 months to secure the attendance of the witnesses as stipulated in the email correspondence which is marked as annexure "JW4". Reliance was placed on the case of *Geoffrey Kinyanjui & another v Republic* (2020) eKLR Criminal Appeal No 144 of 2019 (COA) and that of *Ethics and Anti-Corruption Commission v Mary Ngechi Ng'ethe* ACEC 35 of 2018. That from the foregoing, it is evident that the witnesses' testimony cannot be procured without unreasonable delay and great expenses. Further reliance was placed on the case of *Captain Moses Kariuki Wachira v Joseph Mureithi Kanyita & 3 others* (2013) KEHC 568 (KLR)



14. On whether the proceedings herein are between the same parties or their representatives in interest as those in ACC 50/2018, the applicant averred that none of the defendants has denied having been a party in ACC 50 of 2018 and that they have retained the same advocates who acted for them in ACC 50/2018.
15. On the contention by the respondents that the applicant was not a party in ACC 50/2018, the applicant submitted that it was always in court watching brief, and that the ODPP represented the applicant's case and the state interest. The case of *Ethics and Anti-Corruption Commission v Mary Ngechi Ng'ethe* (*supra*) was cited to buttress that contention.
16. On whether the adverse parties had the right and opportunity to cross examine the witnesses in ACC No 50/2018, the applicant submitted that the defendants had the right and opportunity to cross examine the two (2) witnesses as is evident from the proceedings annexed as "JW2".
17. As regards the 12<sup>th</sup> and 13<sup>th</sup> defendants' contention that they did not have a right and opportunity to cross examine the two witnesses, the applicant stated that they have not demonstrated the prejudice they will suffer if the application is allowed, and that their evidence is not contested by the 12<sup>th</sup> defendant while the 13<sup>th</sup> defendant has not been participating in this case since its inception and would not be prejudiced in the circumstances.
18. The applicant urged that when balancing the scales of justice between expeditious disposal of the proceedings herein and the 12<sup>th</sup> and 13<sup>th</sup> defendants' right to cross examine the two witnesses, the scales of justice tilts in favour of allowing the application and apportioning the appropriate weight to the evidence against the 12<sup>th</sup> and 13<sup>th</sup> defendants. The case of *Alphonse Munene Mutinda v Ethics and Anti-Corruption Commission* (2020) KECA 756 (KLR) was cited in support of that contention.
19. On whether the questions in issue were substantially the same in ACC 50/2018 as in this case, the applicant contended that they are substantially the same having arisen from the same investigations into a transaction of fraudulent procurement of hydrant pit valves complete with isolation valves.

#### **Defendants'/Respondents' submissions**

20. The defendants made similar submissions on the same issues to wit;
  1. Delay in procuring attendance of the two witnesses.
  2. Not all the defendants had an opportunity to cross-examine the two witnesses in ACC 50/2018.
  3. Right to a fair trial.
  4. Issues between ACC No 50/2018 as being different from those of the case herein.
  5. Doctrine of Estoppel.
  6. The parties in both cases are different.
21. The defendants/respondents submitted that it is almost five (5) years since the suit herein was filed, and over this period, the plaintiff had adequate time to plan for the attendance of the two witnesses. That no explanation has been offered for the belated initiation of these procedures. That the delay is self-induced rather than the product of unavoidable external circumstances and that it falls short of meeting the requirement of demonstrating that the witnesses' attendance cannot be procured without an amount of delay and expense. Further, that caution must be exercised to ensure that the alleged



- witnesses unavailability is not a consequence of inadequate diligence. The case of *Harrison Kariuki Mwangi & 3 others v Republic* (2013) KEHC 944 (KLR) was cited to support that contention.
22. On the Mutual Legal Assistance, the defendants relied on section 75A of the *Mutual Legal Assistant Act* and the preamble to the Act, and submitted that the same does not apply in civil matters arguing that it is mischievous for the Plaintiff to cite reliance on it.
  23. On the issue of not all the defendants had the opportunity to cross-examine the two (2) witnesses in ACC 50/2018, the defendants stated that the 12<sup>th</sup> and 13<sup>th</sup> defendants had no such opportunity as their criminal cases were withdrawn by the prosecution before the cross examination could take place. As a result, if the application is allowed, the defendants' right to a fair hearing provided for in article 50 of the *Constitution* will be curtailed.
  24. It was also the defendants' contention that the issues in the two cases are different. The 3<sup>rd</sup> and 5<sup>th</sup> defendants submitted that they were charged with conspiracy to defraud whereas the suit herein is premised on fraud and breach of trust. The 14<sup>th</sup> defendant averred that the issue before the court in the suit is inflation of costs whereas what was before the criminal court were issues of procurement. On his part, the 11<sup>th</sup> defendant submitted that in the criminal case he was charged with the offence of conspiracy to defraud but the civil case is about theft.
  25. As to whether the parties are same in both cases; it was submitted that according to order 1 of the *Civil Procedure Rules*, a party in the ordinary course of civil matters include anyone whose interests are likely to be affected, including their representatives while in criminal cases there are only two (2) parties, being the prosecution and the accused person. Reliance was placed on the case of *Republic v Okuku* (Criminal case No E012 of 2023 KEHC 6991 (KLR) on the subject of parties to a case/suit. That the only other party in criminal proceedings can only be the victim as the court stated in the case of *Leonard Maina Mwangi v Director of Public Prosecutions & 2 Others* (2017) eKLR.
  26. It was further submitted that the *Criminal Procedure Code* did not envision a situation where an investigative agency shall take on the form of a party to the criminal proceedings. That the fact that the Plaintiff sent representatives to follow the proceedings in ACC 50/2018 did not automatically make it a party to the case. That the plaintiff's involvement in criminal proceedings is often nominal as it is only limited to providing evidence as to the investigations that took place. Reference was made to the case of *Republic v Okuku* (*supra*).
  27. On the doctrine of Estoppel, it was submitted that the plaintiff having previously and successfully opposed an application for stay of proceedings on the ground that the criminal and civil proceedings are distinct, separate and independent, it is estopped from asserting the contrary that the evidence in ACC 50/2018 can be adopted in the case herein. That the plaintiff's contradictory stance undermines procedural fairness and only prejudices the defendants who were led to believe that the matters would be tried on separate tracks and also offends the principle of finality of litigation. The defendants relied on Section 120 of the Evidence Act on the definition of Estoppel and cited the cases of *Serab Njeri Mwobi v John Kimani Njoroge* (2013) eKLR and that of *Thompson v Falmer* (1933) 49 CLR on the object of the principle of Estoppel.
  28. The court has considered the application, the affidavits filed by the respective parties, grounds of opposition and the submissions filed herein.
  29. The application is mainly brought under section 34 of the *Evidence Act*. It states: -
    - “1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for



the purpose of proving the facts which it states, in the following circumstances

—

- a. where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—
- b. the proceeding is between the same parties or their representatives in interest; and
- c. the adverse party in the first proceeding had the right and opportunity to cross-examine; and
- d. the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

- (a) the expression “judicial proceeding” shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and
- (b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.”

30. The High Court in the case of *Harrison Kariuki Mwangi & 3 Others v Republic* (2013) KEHC 944 (KLR) faced with the question of interpretation of Section 34 stated thus:-

“ 13. In this regard, section 34 of the *Evidence Act*, there are outlined circumstances that the court must be satisfied with

1. The witness is dead or cannot be found.
2. The witness is incapable of giving evidence.
3. The witness has been kept out of the way by adverse party; and
4. Presence of the witness cannot be obtained without an amount of delay of expense.”

31. From the application and the submissions, the following are the issues for determination: -

- a. Whether the witnesses’ presence cannot be procured without unreasonable delay.
- b. Whether the proceedings herein are between the same parties or their representatives in interest as those in ACC 50 of 2018.
- c. Whether the adverse parties had the right and opportunity to cross-examine the witnesses in ACC 50/2018.
- d. Whether the questions in issue were substantially the same in ACC No. 50/2018 as in this case.
- e. Whether the Plaintiff is bound by the doctrine of Estoppel.



### **Whether the witnesses' presence cannot be procured without unreasonable delay.**

32. It is the applicant's contention that securing the attendance of the two witnesses requires the execution of a Mutual Legal Assistance, a request which the plaintiff has undertaken unsuccessfully. Further, that the applicant was informed by the USA authorities that if the witnesses are unwilling to give their testimonies, it will take the USA Department of Justice approximately 12-18 months to fully execute the plaintiff's MLA request and therefore their attendance cannot be obtained without unreasonable amount of delay or expense.
33. The defendants have argued that the applicant ought to have made arrangements for the mutual legal assistance early enough considering that the matter herein was filed in the year 2020. According to the Defendants, the applicant's delay in applying for the same in good time was a ploy to delay the hearing of the matter. On its part, the applicant has explained the delay and this court is satisfied that having to wait for a whole year for the two witnesses to be availed in court is unreasonable delay considering that the matter was filed in 2020. In this regard, I find support in the case of *Geoffrey Kinyanjui & another v Republic* (2020) eKLR Criminal Appeal No.p 144 of 2019 in which the Court of Appeal stated:-
- “..... we find the language of section 34 wide enough to encompass situations where the witness who had already testified and produced exhibits and cannot be found, or is incapable of giving evidence or where his presence cannot be obtained without any amount of delay or expense which in all fairness would be unreasonable were present in this case...”

### **Whether the proceedings herein are between the same parties or their representatives in interest as those in ACC 50 of 2018.**

34. On this issue, the applicant submitted that its representative was always present in court watching brief including one M/s Maranga and Ms Matheka and that the DPP represented the Applicant's and State's interest. The case of *Ethics and Anti-Corruption Commission v Mary Ngechi Ngethe* was relied on.
35. On the other hand, the defendants/respondents contended that in ACC No 50/2018 there were only two parties who were the accused persons and the prosecution, and reference was made to the case of *Republic v Okuku* (Criminal Case Number E012 of 2023) in which the court held that in a criminal prosecution there are only two parties.
36. It is trite that under article 157(6)(a) of the *Constitution*, the DPP has the sole mandate to institute and undertake criminal proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed. The Constitution did not envision a situation where an investigative agency shall take on the form of a party to a criminal proceeding. Whereas this may be the case, it is also common knowledge that the Plaintiff, EACC, is an independent commission established under the Constitution, with powers to investigate but not to prosecute Anti-Corruption Cases. I do concur with Achode J, in ACEC No 35/2018 (*supra*) that the EACC and the ODPP work in tandem and are crucial in prosecution of corruption cases and therefore, EACC cannot be said to be a stranger in the criminal case ACC 50/2018.

### **Whether the adverse parties had the right and opportunity to cross-examine the witnesses in ACC 50/2018.**

37. Article 50 of the *Constitution* of Kenya is on right to a fair hearing that grants every person the right to adduce and challenge evidence and this includes cross examination of witnesses. It therefore follows that right to cross-examine a witness is a fundamental right firmly embedded in the Constitution of



Kenya with an aim of ensuring fairness in trials. The ability to challenge the credibility, reliability and veracity of evidence provided by the opposing party is vital for the effective administration of justice.

38. I have read through the responses by the defendants and I have also perused the proceedings in ACC 50/2018. All the defendants were accused persons in ACC 50/2018 and were given an opportunity to cross examine the two subject witnesses save for the 12<sup>th</sup> defendant whose case was withdrawn. The 13<sup>th</sup> defendant has not participated in these proceedings and either way, it will not suffer any prejudice. The applicant has not denied that the 12<sup>th</sup> defendant did not cross examine the two subject witnesses but have contended that their evidence will not affect the 12<sup>th</sup> defendant.
39. In that regard, I hold the view that admitting the evidence of the two witnesses against the 12<sup>th</sup> defendant would be prejudicial to her and would be a breach of her constitutional right provided for in article 50. In saying to, I rely on the case of *Hassan v Jasuinder Singh Enterprises & Another* (1992) KEHC 122 (KLR) where the court when faced with a similar issue stated:-

“I have had to examine the deposition in the previous court and it is obvious to me that the witness was only cross examined by Mr Khanna who sought to establish that it was the plaintiff herein who was to be blamed for the accident. Mr Khanna appeared for the same defendants as in the present case. The record also reveals that Mr Okuthe who had been holding the brief of the Nairobi Bus Union, the present plaintiff’s employer, withdrew from the case before that witness testified and so he never cross examined her. In other words, the plaintiff’s version of the case as presented in this case was never put to that witness so that condition 3 in section 34 remains or becomes unfulfilled.”

I cannot agree more!

**Whether the questions in issue were substantially the same in ACC No. 50/2018 as in this case.**

40. On this issue the defendants/respondents have contended that the issues were different. The 14<sup>th</sup> defendant has submitted that the issue before the ACC 50/2018 was that of procurement and what is before this court are the inflated prices. On the part of the 11<sup>th</sup> defendant it was averred that the issue before ACC 50/2018 was conspiracy to defraud while what is before this court is the issue of theft. This court has perused the charge sheet in ACC 50/2018, and the pleadings in this matter, and what is clear to me, is that both cases arose from the same investigations into a transaction of fraudulent procurement of hydrant pit valves by Kenya Pipeline Company Limited, which issues are related as they involve the same property and the manner in which it was procured.

**On whether the Applicant is bound by the doctrine of Estoppel.**

41. The defendants have submitted that on several instances the plaintiff/applicant has argued that the subject matter and the nature of the issues in ACEC Suit No. 8/2020 are different and distinct from ACC 50/2018, as such the Applicant is estopped from arguing that the issues are substantially the same.
42. In this regard, the court has gone through the proceedings and has noted the context in which this submission was made. This was in relation to an application for stay of proceedings in which the applicant filed grounds of opposition on the ground that “criminal and civil proceedings are distinct, separate and independent. This is, indeed, the correct legal position but this does not mean that the evidence given in a criminal matter cannot be adopted and especially where the issues arose from the same transaction. In any event, adoption of evidence is different from its admissibility. The court will also determine the weight to attach such evidence.



43. In the end, I find that the application has merits as against the defendants save for the 12<sup>th</sup> defendant. The same is allowed except against the 12<sup>th</sup> defendant.
44. Costs shall be in the cause.
45. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 2<sup>ND</sup> DAY OF APRIL 2025.**

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**L.M. NJUGUNA**

**JUDGE**

In the presence of: -

Miss Wambugu holding brief for Mr. Kisaka for the Plaintiff

Mr. Waudu for the 2<sup>nd</sup> Defendant

Miss Misiati holding brief for Prof. Ojiambo for the 14<sup>th</sup> Defendant

Mr. Osiemo for the 4<sup>th</sup> and 6<sup>th</sup> Defendants

Miss Nira holding brief for Mr. Ogutu for the 3<sup>rd</sup> and 5<sup>th</sup> Defendants

Mr. Oonge for the 8<sup>th</sup> Defendant

Miss Shamalla holding for Mr. Odero for the 9<sup>th</sup> Defendant

Mr. Ondieki appearing with Migal Aketch for the 12<sup>th</sup> Defendant

Mr. Osiemo holding brief for Miss Wandegu for the 1<sup>st</sup> Defendant

Court Assistant – Adan

