



REPUBLIC OF KENYA



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**Ethics and Anti-Corruption Commission v Kidero & 13 others (Anti-Corruption and Economic Crimes Civil Suit E008 of 2021) [2024] KEHC 12622 (KLR)
(Anti-Corruption and Economic Crimes) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12622 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E008 OF 2021

EN MAINA, J

OCTOBER 17, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

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



RULING

1. This is a ruling on the 1st Defendant's Notice of Motion dated 12th August 2024 filed herein on 13th August 2024, by which he seeks leave to file a supplementary list and bundle of documents so as to introduce the Makadara CMs Court Misc. Criminal Application No. 38 of 2016 file/record and some correspondences relating to the warrants to investigate the 1st Defendant's Account No. XXXXXXXX domiciled at Family Bank so as to aid in the Defendant's case.
2. The application which was filed under a certificate of urgency under Section 10 of the *Judicature Act*, Part 1 Rule 2(2) of the High Court Practice Rules and Section 3A of the *Civil Procedure Act*, and all other provisions of law more particularly seeks orders as is herein below reproduced verbatim: -
 - "i. Spent
 - ii. That this Court be pleased to grant the 1st Defendant leave to file the Annexed Letter dated 20th February 2023 from Soweto & Company Advocates to the Office of the Judiciary Ombudsman.
 - iii. The Court be pleased to grant the 1st Defendant leave to file the annexed certified copy of the record in Criminal Application No.38 of 2016, Ethics and Anti-Corruption Commission v Evans Odhiambo Kidero (Ex Parte).
 - iv. The Court be pleased to grant the 1st Defendant leave to file the annexed copy of the Warrant to Investigate Accounts dated 19/01/2016.
 - v. The Court be pleased to grant the 1st Defendant leave to file the annexed letter dated 13/2/2023 from Soweto & Company Advocates to the Chief Executive Officer, Family Bank Kenya Limited.
 - vi. The Honourable Court be pleased to grant the 1st Defendant leave to file the annexed letter dated 16/2/2023 from Family Bank Kenya Limited to Soweto & Company Advocates.
 - vii. The Supplementary List and Bundle of Documents be deemed as duly filed upon leave being granted.
 - viii. That costs of the Application be in the Cause."
3. The application is based on the following grounds: -
 - "i. That the Supplementary list and bundle of documents related to events that transpired after close of pleadings thus the 1st Defendant could not avail them during the said period.
 - ii. That during the filing of the Defense, the Applicant was unaware that warrants issued to the Plaintiff's investigator to investigate the Applicant's account held at Family Bank were irregularly and illegally procured and never implemented.
 - iii. That the warrants issued go to the route of the Plaintiff's case as the moneys allegedly paid to the Applicant corruptly were allegedly paid into the Family Bank Account.



- iv. That legality and implementation of the warrants is a pertinent question that shall provide insight into the suit.
- v. That the Court ought to have access to all relevant evidence.
- vi. That no prejudice shall be suffered by the Plaintiff and the 1st Defendant's case is yet to begin, so the Plaintiff shall have an opportunity to cross examine on the same and rebut the evidence.
- vii. That the Applicant stands to suffer extreme prejudice in the event that the said documents are not admitted in evidence.
- viii. That it is in the interest of justice and fairness that this court grants the applicant leave to file the Supplementary List and Bundle of Documents to allow him to present his best defense as prescribed under Article 50 of *the Constitution* of Kenya 2010.”

4. The application is supported by the affidavit of Evans Odhiambo Kidero, the 1st Defendant, sworn on 12th August 2024 in which he reiterates the grounds upon which the application is brought and further deposes that whereas directions issued on 25th July 2024 were that this application was to be filed within 14 days of that date, he was indisposed and unable to sign the affidavit in good time; that the Plaintiff seeks to rely on statements of his account No. 068000004475 at Family Bank and warrants to investigate in Makadara CM's Applc. No. 38 of 2016 yet there was no warrant or court order served upon the bank to supply those statements; that this came to his knowledge after his advocates in this case, Soweto & Co. Advocates, wrote to the bank; that the bank's response to his advocate's letter inquiring into that matter is contained in a letter dated 16th February 2023. He deposes that upon perusal of the Makadara CM's Court file where the warrants were allegedly issued, there were no proceedings for the day the court issued the warrants although there was an order to investigate the account dated 19th January 2016; that following the discovery he filed a complaint against the Makadara Law Courts, at the Judiciary Ombudsman; that the Judiciary Ombudsman communicated to his Advocate through an email and stated that although there were no proceedings in the file, nonetheless the orders granted were authentic and also that the Judicial Officer who had granted them had since resigned. He avers that the question of the validity of the warrant to investigate and whether the bank statements/records the Plaintiff seeks to rely on were legally obtained is pertinent to his defence and relevant in this case and it is on that basis that he seeks to file the supplementary bundle of documents.
5. The Plaintiff/Respondent vehemently opposed the application through a replying affidavit sworn on by MULKI UMAR, where she deposes that there is inordinate delay in bringing this application noting that the impugned documents were obtained over a year and a half before this application was filed and hence it serves no other purpose than to scuttle the scheduled hearing of this matter. Mulki Umar deposes that the warrants to investigate the 1st Defendant/Applicant's account were obtained regularly as was confirmed by the Office of the Judiciary Ombudsman; that the order was served on Family Bank as evidenced by the bank's receiving stamp thereon and that the bank went ahead to furnish the Plaintiff with the statements and a certificate of electronic evidence on 1st March 2018; that the said certificate was prepared by one John Muchiri, an employee of the bank; that the said John Muchiri recorded a statement with the Commission from one John Muchiri on 24th September 2018 and set out his position and duties in the Bank, acknowledged that he received the warrants to investigate and that he furnished the Plaintiff with the bank records. Mulki Umar further deposes that the demise of the said John Muchiri necessitated the preparation of another Certificate of Electronic Evidence by Kipkorir M. Kosgey on 19th August 2022. She also avers that he is aware that the warrants



issued in Makadara CM's Court Misc. Crim. Appl. No. 38 of 2016 were challenged in High Court Const. Petition No. 30 of 2019; that a petition was dismissed by that court in a judgment delivered on 24th February 2023 for reason that no violation of the rights of the Petitioner had been found. Further that the Plaintiff established that the Applicant is a significant shareholder at Family Bank with 14,213,334 shares purchased at Kshs. 35,533.350 paid from the impugned account in 2014.

6. She contends that the letter from Family Bank dated 16th February 2023 having been written on a "Without Prejudice" basis it cannot be produced in evidence unless the author waives its rights and that the letter is inadmissible under Section 23(1) of the *Evidence Act*. She also prays that should this court allow the 1st Defendant's application then it should grant the Plaintiff leave to file additional documents relating to the 1st Defendant/Applicant's account.

Submissions

7. The application was canvassed by way of written submissions.
8. Julie Soweto, Learned Counsel for the 1st Defendant/Applicant, submitted that this Court has discretion to receive further evidence, taking into consideration the principles laid by Lord Denning LJ, in the case of *Ladd v Marshall* [1954] 1wlr 1489 at 1491 which are:
 - a. The evidence could not have been obtained with reasonable diligence for use at the trial,
 - b. The evidence must be such that, if given, it would have an important influence on the result of the case, though it need not be decisive;
 - c. The evidence must be presumably believed, apparently credible though it need not be incontrovertible.
9. Counsel submitted that, despite due diligence, the evidence sought to be adduced could not have been discovered earlier as the irregularity of the warrants only came to the realization of the 1st Defendant/Applicant after close of pleadings. On the question of the relevance of the warrants to this case, Counsel submitted that the bank statements adduced by the Plaintiff, having been illegally obtained they are not properly before this Court and hence are inadmissible in evidence under Article 50(4) of *the Constitution*. Counsel also argued that should the application be allowed, no prejudice will be suffered by the Plaintiff as it will have an opportunity to cross-examine on the additional evidence and that the documents are not bulky hence the Plaintiff will suffer no difficulty in responding to the same.
10. On the issue of the letter having been written on a "Without Prejudice" basis, Counsel submitted that the phrase "without prejudice" simply underscores that the admissibility of the contents of the letter is subject to the letter being accepted by Soweto & Co. Advocates, who is the Applicant's Advocates hence the same is admissible. Counsel contended that the Applicant will suffer irreparable damage to his reputation and standing if he stands trial for illegitimate charges and it is in the interest of justice the new evidence be adduced for a just and fair determination of this case.
11. In support of their submissions Counsel for the 1st Defendant/Applicant relied on the following cases: -*Mzee Wanjie and 93 Others v A. K. Saikwa & Others* [1982-88] 1 KAR 462Hon Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed and 3 others [2018] eKLR*Raila Odinga & 3 Others v IEBC & 3 Others* Supreme Court of Kenya Presidential Petition Nos 3, 4, 5 / 2013 [2013] eKLR*Geology Investments Ltd v Behal t/a Krishan Behal & Sons* [2002] 2 KLR 447 as cited in *Cordisons International Kenya Limited v Innovation and Growth Academy BV (Civil Appeal E014 of 2020)* [2022] eKLR.*Mumias Sugar Co. Ltd & another v Beatrice Akinyi Omondi* [2016] eKLR



12. On his part Mr. Ruto, Learned Counsel for the Plaintiff/Respondent, submitted that parties have a duty to comply with procedural timelines and that the court too must adhere to its own timelines. Counsel stated that the 1st Defendant/Applicant obtained the documents, sought to be introduced, in February 2023 but is only seeking leave to file them now. Counsel averred that the purpose of this application is merely to delay the hearing and determination of this matter; that in any event the issue of the legality of the warrants to investigate 1st Defendant/Applicant's account was litigated and determined in HC Const. Petition No. 30 of 2019 and is hence *res judicata*.
13. In regard to the admissibility of the "without prejudice" letter, Counsel submitted that the same is not admissible merely by virtue of the acceptance of its contents by the recipient, given that there is ambiguity as regards the intent of that letter; that it is not clear from the correspondences between the parties whether the information obtained through that letter was to be used as evidence in this case. Counsel asserted that should this application be allowed, it would occasion prejudice to the Plaintiff as Family Bank is not a party to these proceedings and that as the author of the letter is not a witness for the defence the Plaintiff shall not have an opportunity to cross-examine him.
14. Counsel for the Plaintiff/Respondent relied on the following cases:-Supreme Court decision in Raila Odinga and 2 others v IEBC and 3 Others [2013] eKLR.H.C. Petition No. 3 of 2019 Evans Odhiambo Kidero v EACC & 3 Others: Wachira, Mburu, Mwangi & Company Advocates & 15 Others *Heineken East Africa Import Company Limited & another v Maxam Limited (Civil Appeal E403 & 404 of 2020 (Consolidated) [2024] KECA 625 KLR (24 May 2024) (Judgement)*

Analysis and Determination

15. I have carefully considered the application, the grounds thereof, the supporting affidavit, the annexures thereto, the replying affidavit, the rival submissions, the cases relied on and the law. The issue for determination is whether or not the 1st Defendant/Applicant should be granted leave to file the additional documents as prayed.
16. The Applicant contends that revelation concerning the validity of the warrants came to him long after pleadings had closed; that he discovered that the file in which the warrants to investigate the Applicant's account were obtained did not have proceedings, only the order and that neither the Plaintiff/Respondent nor the Office of the Judiciary Ombudsman afforded an explanation as to why those proceedings were missing.
17. Be that as it may it is uncontroverted that upon investigating the 1st Defendant/Applicant's complaint the office of the Judiciary Ombudsman established that the warrants had been procedurally issued in an *ex parte* application. It is also uncontroverted that being aggrieved by the warrants, the 1st Defendant/Applicant challenged their regularity and legality in HC Const. Petition No. 30 of 2019: Evans Odhiambo Kidero v EACC & 3 Others; Wachira, Mburu, Mwangi & Company Advocates & 15 Others (Interested Parties) and a determination was made against him by the court. Before that the validity and legality of the warrants had been litigated and determined by a three-judge bench of the High Court in the case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 Others [2018] eKLR (HC Petition No. 109 of 2016)*, (Odunga, Mwita, Mativo, JJ) and subsequently by the Court of Appeal in the case of *Kidero v Attorney General & 6 Others (Civil Appeal 413 of 2018) [2024] KCA 1192 (KLR) (20 September 2024) (Judgment)*, (Musinga, Makhandia, Kantai, JJA). In the premises it is my finding that admitting the documents is intended only to re-open the arguments in regard to the legality of the warrants. This court cannot sit on appeal against a decision of a court of co-ordinate jurisdiction or by the Court of Appeal and in the premises the legality and validity of the warrants having already been litigated and determined and the 1st Defendant/Applicant having not



demonstrated to this court any other novel ground for admitting the contents of the file, other than to challenge the legality of the warrants, I find that there would be no justification to allow introduction at of the Makadara file.

18. Moreover, the Applicant has not challenged the veracity of the bank statements, the evidence of the bank officials who in compliance of the warrants supplied those statements or the certificates of electronic evidence adduced. The statements made by the bank officials confirm that the warrants were served upon the bank and in turn the bank supplied the bank records as directed.
19. The Applicant also seeks to introduce the letters by Soweto & Co. Advocates dated 13th February 2023 to Family Bank inquiring whether the bank received the warrants to investigate the 1st Defendant/Applicant's account; the letter written by the bank on 16th February 2023 in reply and which was written on a "Without Prejudice" basis and Soweto & Company Advocates' letter a letter 20th February 2023 which is a complaint to the Office of the Judiciary Ombudsman regarding the issuance of the warrants. All these letters relate to the legality and validity of the warrants to investigate, which as I have already stated have been litigated by a court of co-ordinate jurisdiction and the Court of Appeal hence cannot be re-litigated in this case. I shall therefore not go into the issue of their admissibility as evidence in this case.
20. The upshot is that I find no merit in this application and hence it is dismissed but with an order that costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF OCTOBER, 2024.

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E. N. MAINA
JUDGE

