



**Ethics and Anti-Corruption Commission v Osiro & another (Anti-Corruption and Economic Crimes Civil Suit 20 of 2018) [2023] KEHC 3164 (KLR)
(Anti-Corruption and Economic Crimes) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 20 OF 2018
EN MAINA, J
APRIL 13, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

STEPHEN OGAGA OSIRO 1ST DEFENDANT

CAROLINE ADHIAMBO OBWA 2ND DEFENDANT

RULING

1. By the Notice of Motion dated January 27, 2023 the Plaintiff seeks the leave of this court to introduce new documents which it alleges it inadvertently left out when it first filed its bundle of documents in support of its claim herein.
2. The application which is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 of the *Civil Procedure Rules* and Section 55(4) of the *Anti-Corruption and Economic Crimes Act* and which is supported by the affidavit of Phillip G Kagucia is premised on grounds that:-
 - i) The Plaintiff, pursuant to its mandate, instituted the instant suit vide Originating Summons dated August 22, 2018 seeking forfeiture against the Defendants of an amount of Kshs 293,842,338/- as well as cited properties purchased from the said funds which investigations established was disproportionate to their known legitimate sources of income, the sources of which was not satisfactorily explained.



- ii. The Originating Summons aforesaid was supported by affidavits of the Plaintiff's investigators, Andrew Lekamparish and Paul Mugwe and bundles of documents annexed to their affidavits.
 - iii. At the hearing of the suit, the Plaintiff noted that it had inadvertently omitted critical annexures from the bundle of documents, which evidence is essential in proving the Plaintiff's claim under Section 55(4) ACECA.
 - iv. The inadvertent omission of the said evidence likely occurred during the compilation of the bundle of documents prepared by the Plaintiff.
 - v. The Plaintiff seeks to leave to file Supplementary Affidavits for purposes of furnishing this Honorable Court with the omitted evidence to enable the Court reach a just determination of the dispute.
 - vi. .. There will be no prejudice occasioned to the Defendants, as they will be given an opportunity to controvert the evidence. Conversely, the Plaintiff will suffer immense prejudice as it may not be able to discharge its burden under Section 55(4) ACECA to adduce evidence to the satisfaction of the Court that the Defendants have unexplained assets. #
 - vii. That it is just, reasonable and in the interest of justice that this application be heard on priority basis noting that further hearing of the Plaintiff's case is scheduled for February 7, 2023.'
3. Copies of the documents sought to be introduced are annexed to the supplementary affidavit of Paul Mugwe filed together with the application. The same comprise copies of the Miscellaneous Criminal applications upon which warrants to investigate the Defendants accounts were issued, certified copies of bank accounts, Notices to the 2nd Defendant, the original handwritten statement of one Millicent Akinyi Obwa, valuation reports and bank records.
 4. The application was vehemently opposed by the Defendants through the replying affidavit of Stephen Ogaga Osiro sworn on February 14, 2023. It is the Defendants'/Respondents' case that the documents were never disclosed to them and this is the first time they shall be having sight of the same and that they stand to be greatly prejudiced should the application be granted.
 5. The application was canvassed through written submissions which I have carefully considered. It is instructive to note that this application was brought after the hearing of the case had commenced and one witness had already testified. Indeed, it was in the course of the hearing that Counsel for the Plaintiff/Applicant came to the realization that the documents in issue were not included in the bundle. The Plaintiff is yet to close its case.
 6. Order 3 Rule 2 of the Civil Procedure Rules dictates that a plaint must at the time of filing be accompanied by inter alia: - a list of witnesses, written statements of those witness (save for expert witnesses) and copies of the documents in support of the case. However, the witness statement of experts may with the leave of the court be availed at least 15 days before the trial conference (see the proviso to Order 3 Rule 2. Whereas Order 3 does not have a provision that expressly permits the court to accept documents out of time Section 95 of the *Civil Procedure Act* gives the court a general power to extend time. That general power is also provided in Section 59 of the *Interpretation and General Provisions Act* which I find may be imported into the Civil Procedure Rules by dint of Section 3 of the *Civil Procedure Act*. Section 59 of the *Interpretation and General Provisions Act* states: -

' Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention



appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.'

7. Order 50 Rule 6 of the Civil Procedure Rules also expressly gives this court power to extend time. The Rule states: -

' Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'

8. The power to enlarge time to file additional documents (evidence) is therefore in the discretion of the court. That discretion must however, as always, be exercised judicially.
9. In the case of *Johana Kipkemei Too v Hellen Tum [2014]eKLR* Munyao Sila J of the Environment and Land court, when determining a similar issue held as follows and I agree with him to a large extent:-

' It will be seen from the above that both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.

There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the *Constitution* under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.

The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos 3,4 and 5 of 2013 (2013) eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such



party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.'

10. The manner in which a court ought to exercise its discretion to admit additional evidence, albeit at the appellate stage, and the principles that govern such applications were laid as follows by the Supreme Court in the case of *Hon Mohamed Abdi Mahamud and Ahmed Abdullahi Mohamed and 3 others Petition No 7 of 2018* cited with approval by the Court of Appeal in the case of *Wadhwa (As Legal Representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 others (Civil Appeal 33 & 148 of 2019 (Consolidated)) [2022] KECA (KLR) (21 January 2022) (Judgment)*

- (79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya 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.'

11. The Court of Appeal then went ahead and stated: -

' 46. From the cited law and cases, it is clear that courts have power to allow adduction of additional evidence, even at the appeal stage. The *Evidence Act* stipulates that the court may in all cases permit recalling of witnesses. It is therefore not too late for the high court and courts of equal status to allow such an application, if in exercise of its discretion it is judicious to do so, even where the case has been concluded but before judgment.'

12. In this case we are still at the stage of hearing the case and the documents and statements sought to be filed were supplied to the Defendants save that the person who compiled the bundle of documents did so using documents that were not certified. If new evidence can be introduced even at the appellate stage it follows that there would be nothing sinister in entertaining the present application which has been brought at a very early stage. It is my finding that the Defendants stand to suffer no prejudice should the application be allowed as they retain a right to have the witnesses recalled for cross examination. They shall also be given an opportunity to produce their own documents to counter those to be introduced by the Plaintiff/Applicant. The issues raised by the Dependents in their affidavit are issues which would be best raised during cross-examination of the witnesses that shall be called to produce the documents. I am persuaded that this application perfectly fits the guidelines laid by the Supreme Court in the case of Hon Mohamed Abdi Mahamud and Ahmed Abdullahi Mohamed and 3 others (supra). The application is accordingly allowed but as provided in Order 50 Rule 6 of the Civil Procedure Rules the costs of this application shall be met by the Plaintiff/Applicant.

Orders accordingly.

Signed, dated and delivered virtually on this 13th day of

April 2023.

E. N. MAINA

JUDGE

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