



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION**

**ACEC NO. 35 OF 2018**

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

**VERSUS**

**MARY NGECHI NG'ETHE.....DEFENDANT**

**RULING**

1. The Plaintiff brought an application by way of a Notice of Motion dated 29<sup>th</sup> January, 2019 seeking the statement of Henry Musyoki Kilonzi (deceased) to be admitted as evidence without calling him as a witness and the certified copies of the proceedings and Judgment in Anti-Corruption Criminal Case No. 20 of 2010 to be allowed into evidence. The application was brought under Articles 50(1), 159(2) (d) and 165(7) of the Constitution of Kenya, Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 11 Rule 3(2) (c), Order 51 Rule 1 of the Civil Procedure Rules and Sections 34, 35, 36 and 84 of the Evidence Act Cap 80 of the Laws of Kenya.

2. The application was supported by the affidavit dated 29<sup>th</sup> January, 2019 sworn by Francis Wafula an investigator of the Plaintiff. He deponed that he is one of the investigators in conduct of a series of related matters including the matter herein. He averred that the recovery suit herein arose from a flawed procurement process involving the purchase of land from Henry Musyoki Kilonzi (deceased) who is a key witness in the case. He further claimed that before his demise, Henry Musyoki Kilonzi had signed a statement in the Plaintiff's offices on 22<sup>nd</sup> April, 2009 and duly testified as PW6 in a related case being Nairobi Anti-corruption Criminal Case No. 20 of 2010 on 18<sup>th</sup> November, 2014 where the defendant herein was the 3<sup>rd</sup> accused person.

3. He asserted that the defendant had an opportunity to cross-examine the deceased in the said case and thus the statement and the proceedings before that Court should be admitted into evidence. He averred that the statement of the deceased and the proceedings were crucial to enable him prove his case against the defendant. He further stated that the defendant will not be prejudiced if the orders sought are granted. He urged the court to exercise its discretion as provided under Order 11 Rule 3 (2) (c) of the Civil Procedure Rules in admitting the evidence of the deceased. He affirmed that the application was necessitated by circumstances beyond the plaintiff's control.

4. In opposition to the application the defendant filed a preliminary objection dated 15<sup>th</sup> January, 2019. The preliminary objection is premised on the following points:

i. That the plaintiff's application is an attempt to preempt the merits of High Court Anti-corruption and Economic Crimes Appeal No. 12 of 2018 filed by the Defendant against the Judgment of the Chief Magistrate's Court anti-corruption case no, 20 of 2010 in violation of the defendant's fair trial rights in the Appeal

ii. There are concurrent criminal proceedings against the defendant (Chief Magistrate's Court Anti-corruption criminal case no. 19 of 2019 Republic v Sammy Kipng'etich Kirui, Mary Ngechi and 11 others) which ought to be determined first as there is a risk of prejudice on the defendant leading to injustice and the suit ought to be stayed.

iii. That the orders sought are an infringement and are in violation of the defendant's rights to a fair trial provided under Article(50) (2)(k) of the constitution

iv. That the application if granted would deny the defendant her constitutional right to challenge evidence that would be tendered against her in this suit, in particular the right to cross-examine the credibility and reliability of hearsay statement and evidence based on the circumstances in which the statement was recorded and evidence given.

v. The application exposes the defendant to double jeopardy

vi. The statements and evidence sought to be admitted do not fall within the exceptions in Section 33 and 34(1)(b) & (d) of the

Evidence Act and are inadmissible by virtue of Section 34(2) of the Act

vii. That the plaintiff only intends to selectively use evidence of the said deceased witness and the judgment of case no 20 of 2010 yet the said individual was also a witness in Chief Magistrate's Court Anti-Corruption case No. 44 of 2010 in violation of article 157(1) of the constitution and amounts to material non-disclosure to gain undue advantage.

5. This Preliminary Objection thus forms the subject matter of this Ruling. The matter proceeded by way of written submissions. Learned counsels for the parties made submissions in support of their respective cases. The firm of Nderitu and Partners for the defendant submitted that the orders sought infringe on the defendant's rights to a fair trial as provided for under Article 50(2) (k) of the constitution which right is not limited under Article 25 (c). Further, that the prayers sought violate her right to challenge the conviction against her under Article 50(2) (q), or to challenge the evidence adduced through cross-examination. It was submitted that the prayers sought by the Plaintiff amount to double jeopardy which she should be protected against.

6. The defendant relied on the cases of **Dickson Mbeya Marende alias Dickie & Another vs Republic [2017] eKLR** and **Republic vs David Wanjala Matuba [2018] eKLR** and asserted that the evidence sought to be admitted does not fall within the exceptions of Section 34(1) (b) of the Evidence Act which provides for exceptions where a deceased's statements may be admitted into evidence. Further, that the issues raised were not substantially similar in the criminal proceedings before the magistrate's court as they are in this suit. The defendant further submitted that it would be prejudicial and an abuse of her right to a fair trial for the plaintiff's application to be allowed, which has the effect of admitting a statement and judgment in respect of a matter in which appellate proceedings have been initiated.

7. The plaintiff through counsel Grace Maina submitted that the defendant's preliminary objection raises facts which ought to be ascertained by this Honourable Court including alleged violations of the defendant's constitutional rights, the connection between the instant case and ACEC Appeal 12 of 2018 and the alleged injustices she will suffer. Counsel asserted that the defendant ought to have ventilated her issues in a replying affidavit rather than a preliminary objection.

8. It was further submitted that Section 193A of the Criminal Procedure Code chapter 75 of the Laws of Kenya provides that;

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

Consequently, the prayers sought by the Plaintiff cannot be said to be in violation of the defendant's right to a fair trial. It was further submitted that the defendant had not demonstrated any evidence of malice by the plaintiff in bringing the application, thus this Court ought to dismiss the preliminary objection with costs.

9. Having considered the parties respective pleadings and submissions as articulated above, the key issue that arises for determination is whether the issues complained of can be disposed through a Preliminary Objection. The circumstances in which a preliminary objection may be raised were explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696**, as follows:

**“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

10. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

11. These decisions provide the correct application of Preliminary Objection. The first two issues raised by the defendant are that the application is an attempt to preempt the merits of a criminal appeal between the parties herein in violation of the defendant's fair trial rights in the Appeal and that there are concurrent criminal proceedings against the defendant (Chief Magistrate's Court Anti-corruption criminal case no. 19 of 2019 Republic v Sammy Kipng'etich Kirui, Mary Ngechi and 11 others) which ought to be determined first as there is a risk of prejudice on the defendant leading to injustice and the suit ought to be stayed.

12. The defendant is seeking that the proceedings before this Court be stayed or struck out on account of a criminal proceedings pending before a subordinate court and an appeal pending before the High Court. In **George Joshua Okungu & another v Chief Magistrate's Anti-Corruption Court at Nairobi & another [2014] eKLR** the Court captured the applicable principle as follows:

**“The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.”**

13. From the material on record, there is no basis upon which this Court can find that the concurrent prosecution of a criminal case and a criminal appeal will adversely affect the Applicants ability to defend herself in these civil proceedings. Further, the law does not bar concurrent criminal and civil proceedings where the subject matter is related.

14. Another issue raised is that the application by the plaintiff is in violation of the defendant’s rights to a fair trial provided under Article (50)(2)(k) of the constitution and if granted it would deny her the constitutional right to challenge evidence that would be tendered against her in this suit, in particular the right to cross-examine the credibility and reliability of hearsay statement and evidence based on the circumstances in which the statement was recorded and evidence given.

15. Article (50) (2) (k) of the constitution of Kenya provides for the right to adduce and challenge evidence. The Constitution makes it clear that everyone has a right to have any dispute that can be resolved by the application of law be decided in a fair and public hearing before a court and be allowed to adduce and challenge evidence. The allegation that the defendant’s rights would be infringed is a matter of both fact and law which will require extrinsic evident to prove. Accordingly, I find this objection not to be a true preliminary objection as it is known in law. I reject it as such.

16. The applicant also raised an objected stating that the application if granted would expose her to double jeopardy. Double jeopardy is defined in Black’s Law dictionary (10<sup>th</sup> Edition ) as:

**“the fact of being prosecuted or sentenced twice for substantially the same offense”**

And double jeopardy is prohibited by Article 50(2) (o) of the Constitution when it states that:-

**50 (2) every accused person has the right to a fair trial, which includes the right—**

**(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;**

17. The proceedings before this Court that the defendant seeks to stay are civil proceedings for asset recovery and are not criminal proceedings. The defendant is not an accused person in this cause and the doctrine of double jeopardy does not therefore apply. The plaintiff seeks to recover money from the defendant if it can convince the Court that its source cannot be properly explained. This is immaterial of the outcome of the ongoing criminal trial or appeal related to this suit. Consequently, the Court finds the objection founded on double jeopardy to be lacking in substance.

18. Another ground raised by the defendant is that there is selective use of evidence of the deceased witness to gain undue advantage. The applicant alleges malice on the part of the plaintiff on what she terms as the selective request of statements. Presence or absence of malice is matter of fact to be proved and there is no evidence before the court to support this allegation. As stated earlier, there is no provision of the law that dictates that there be a stay of the present proceedings on account of the ongoing criminal proceedings against the defendant.

19. Lastly, the defendant raised an objection that the statements and evidence sought to be admitted do not fall within the exception of Section 33 and 34(1)(b) & (d) and Section 34(2) of the Evidence Act. Section 33 of the Evidence Act provides for circumstances under which statements of deceased persons are admissible and Section 34 of the Act provides for admissibility of evidence given in previous proceedings. Whether the application achieves the threshold provided under these provisions of the law is a matter to be determined upon the application being heard on merit and not at the preliminary stage. This ground therefore fails.

20. The effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. Such summary dismissal or striking out of a case is a punitive measure that must be exercised with caution and as a last resort and must be predicated on points of law and undisputed facts. It is evident to this court that there are disputed facts between the Plaintiff and the defendant. Upholding the said Preliminary Objection at this stage does not therefore lend itself to the circumstances of this case as there appears to be substantive issues that need to be heard and determined by hearing of the said Notice of Motion application.

21. Consequently it is my considered view that all the points raised in the preliminary objection lack merit and the preliminary objection is therefore unsustainable and is dismissed accordingly. The notice of motion dated 29<sup>th</sup> January, 2019 will proceed on merit.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 8<sup>TH</sup> DAY OF JULY 2020.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Plaintiff**

**In the presence of .....Advocate for the Defendant**