



Muchanga Investments Ltd v Habenga Holdings Ltd & 8 others; Barclays Bank of Kenya Limited (Interested Party) (Environment & Land Case 1180 of 2014) [2024] KEELC 78 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEELC 78 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1180 OF 2014
OA ANGOTE, J
JANUARY 18, 2024**

BETWEEN

MUCHANGA INVESTMENTS LTD PLAINTIFF

AND

HABENGA HOLDINGS LTD 1ST DEFENDANT

JINA ENTERPRISES LTD 2ND DEFENDANT

TELESOURCE COM LTD 3RD DEFENDANT

DIRECTOR OF SURVEYS 4TH DEFENDANT

DIRECTOR OF PHYSICAL PLANNING MINISTRY OF LANDS & HOUSING 5TH DEFENDANT

REGISTRAR OF TITLES 6TH DEFENDANT

CHIEF LAND REGISTRAR 7TH DEFENDANT

JOHN MUGO KAMAU 8TH DEFENDANT

JOSEPH KANGETHE WANYOIKE (SUED AS THE LEGAL REPRESENTATIVE OF CARMELINA NGAMI MBURU (DECEASED)) 9TH DEFENDANT

AND

BARCLAYS BANK OF KENYA LIMITED INTERESTED PARTY



RULING

1. Before this court is a preliminary objection raised by Mr. Kago, Counsel for the 3rd Defendant, to the production of an Ethics and Anti-Corruption Commission (EACC) Report by the Defendants' witness, Emmanuel Arunga, DW7.
2. When this matter came up for hearing on September 19, 2023 for further defence hearing, Mr. Kago objected to the production of the EACC Report on the basis that the said report was impeached by the High Court and the Court of Appeal on the grounds that it was illegal. He urged the court to take judicial notice of the decisions of the other courts wherein the document was impeached.
3. Counsel for the Plaintiff, Mr. Weda, argued that the Court of Appeal made a decision stopping the prosecution and charging of persons, and made no declaration with respect to the report; that the said decisions had nothing to do with these proceedings and that the report has been on record and no objections were raised against it. Counsel argued that a Covering report is not a document under the *Evidence Act*.
4. Counsel for the 9th Defendant, Mr. Owuor, agreed with Mr. Kago. He submitted that the production of the report should be suspended until a formal application is made.
5. Mr. Allan Kamau, Counsel for the 4th-7th Defendants, submitted that the date for further hearing was taken by consent in June, 2023 and that the witness had filed his statement on 5th September 2016. He argued that the parties knew that the witness who prepared the Report will be coming to testify in respect of the Report and that it the same.

Analysis and Determination

6. This Court takes due notice that this is not the first instance at which the Counsel for the 3rd Defendant has raised an objection to the documents filed by the 4th-7th Defendants on investigations by the EACC.
7. The record shows that on December 14, 2018, the 3rd Defendant's Counsel at that point in time, Mr. Odera, asked the court to expunge the 4th-7th Defendant's bundle of documents on the ground that the bundle contained documents filed by the Ethics and Anti-Corruption Court, EACC, which were obtained illegally. Counsel relied on the case of *Michael Sistu Mwaura Kamau vs Ethics & Anti-Corruption Commission & 4 Others* (2017) eKLR.
8. In a Ruling dated January 24, 2019, Obaga J considered the 3rd Defendant's application as against the decision of the Court of Appeal in the above-mentioned case of Michael Sistu Mwaura Kamau.
9. The court (Obaga J.) held that the issue before the Court of Appeal was whether the EACC was properly constituted and capable of making a report to the Director of Public Prosecutions, and that it did not make a finding that the evidence which had been gathered was illegally obtained. The court concluded that the objection by Mr. Odera was misconceived and dismissed the same.
10. Unsatisfied with the decision of the court, the 3rd Defendant sought to file an appeal against the decision of Obaga J, and sought for orders of stay of proceedings pending the hearing and determination of the appeal vide an application dated February 12, 2019.
11. In a Ruling dated August 28, 2019, Obaga J declined to issue orders of stay of proceedings and found that the application lacked merit. He was of the view that the Applicant's appeal would not be rendered



nugatory and that the intended applicant had failed to satisfy the court that they had an arguable appeal.

12. This court further takes judicial notice that the 3rd Defendant made an application to the Court of Appeal dated February 12, 2019, seeking to stay the proceedings before this court pending the hearing and determination of the intended appeal.
13. In a Ruling dated May 7, 2021, the Court of Appeal dismissed the said application for stay. In its Ruling, the Court of Appeal observed that the documents sought to be impugned were introduced in this suit by the consent of the parties. The Court of Appeal further found that the Appellant did not have an arguable appeal.
14. Mr. Kago for the 3rd Respondent now seeks to resurrect the issue of the admission of the Report and documents by the EACC, yet this court has already rendered itself on the same. It is clear that the objection raised has been heard and determined by Obaga J in the Ruling dated January 24, 2019. Further, the 3rd Respondent filed an appeal before the Court of Appeal on this same issue.
15. On this basis, it is the finding of the court that the objection raised by the 3rd Defendant is *res judicata*. The objection is therefore dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JANUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Miller for Plaintiff

Mr. Allan Kamau for 4th – 7th Defendants

Ms. Macharia holding brief for Kago for 3rd Defendant

Ms. Maganda holding brief for Owour for 9th Defendant

Court Assistant - Tracy

