



REPUBLIC OF KENYA



**Ethics and Anti-Corruption Commission v Testimony Enterprises Limited  
& 7 others (Anti-Corruption and Economic Crimes Civil Suit 1 of 2020)  
[2025] KEHC 9156 (KLR) (Anti-Corruption and Economic Crimes) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9156 (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 1 OF 2020**

**LM NJUGUNA, J**

**JUNE 25, 2025**

**BETWEEN**

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

**AND**

**TESTIMONY ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LUKA MWANGI WAHINYA ..... 2<sup>ND</sup> DEFENDANT**

**ZACHARIA NJENGA MBUGUA ..... 3<sup>RD</sup> DEFENDANT**

**JOYCE NGINA MUSYOKA ..... 4<sup>TH</sup> DEFENDANT**

**SIMON KABOCHA KANG'ETHE ..... 5<sup>TH</sup> DEFENDANT**

**ANSELM GACHUKIA WANJIKU ..... 6<sup>TH</sup> DEFENDANT**

**SAMUEL MUIGAI MUGO ..... 7<sup>TH</sup> DEFENDANT**

**FERDINAND NDUNG'U WAITITU ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> defendant/applicant has moved this court by way of an application dated the 2<sup>nd</sup> April, 2025 under Section 3A of the *Civil Procedure Act*, Order 50, Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law seeking the following Orders;

- 1) Spent



- 2) The 2<sup>nd</sup> defendant/applicant be granted leave to file further documents in the subject matter Namely typed proceedings in Chief Magistrate's Anti- Corruption *Case No. 22 of 2019* and a further witness statement.
  - 3) That on granting of the said leave as per prayer (2) herein above, the 2<sup>nd</sup> defendant/ applicant annexed further supplementary list of documents. The document specified and further witness statement therein be deemed as duly filed and served.
  - 4) The costs of this application do abide the outcome of the suit.
2. The application is based on the grounds set out on the body of the same, and it's supported by the annexed affidavit sworn by Luka Mwangi Wahinya in which he avers that he was a co-accused in Nairobi Chief Magistrate's Anti- Corruption *Case No. 22 of 2019* and whose appeal on conviction and sentence is now pending before the High court. That the facts and issues relating to the said Anti- Corruption case are inter-related to the facts and issues in the subject matter.
  3. That in the course of the hearing of the said Anti- Corruption case, the evidence of some of the witnesses who testified in the case is crucial to his defence in the matter herein, and it will also assist the court in determining the issues in dispute.
  4. That the proceedings could not have been filed earlier as the same were only available in March, 2025 after the conclusion of the Anti-Corruption case.
  5. That the interest of justice as enshrined under the provisions of Article 50 of the Constitution dictates that the prayers sought be granted and that since the hearing of the case is not yet closed, parties including the plaintiff will be able to cross examine him and in that case, no party is bound to suffer any prejudice if the Orders are granted.
  6. The plaintiff filed a replying affidavit to the application sworn by Diana Kenduiwa in which she states that the application is prejudicial, devoid of merits, ambiguous and an abuse of the judicial process. That the instant suit was filed on the 20<sup>th</sup> January, 2020 and it commenced on the 2<sup>nd</sup> March, 2022 upon multiple applications having been prosecuted by the defence in the intervening period.
  7. That the plaintiff concluded examination of 10 witnesses and closed its case on the 11<sup>th</sup> July, 2024. The matter was then fixed for defence hearing on 2<sup>nd</sup> and 10<sup>th</sup> October, 2024 when the 3<sup>rd</sup> to 7<sup>th</sup> defendants closed their case. That the 2<sup>nd</sup> defendant/applicant sought to introduce new documents when the matter came up for hearing of the 1<sup>st</sup>, 2<sup>nd</sup>, and 8<sup>th</sup> defendants' respective cases, namely proceedings in the related criminal matter for the purposes of the court adopting the evidence of PW1 and PW15 in the said case.
  8. The applicant/respondent avers that allowing the application shall be prejudicial to the plaintiff and a violation of Article 50 of the Constitution as the plaintiff has closed his case and this will occasion serious prejudice that cannot be cured by cross examination.
  9. The applicant/respondent further depones that there had been no earlier notice of the supplementary list of documents, and the circumstances would not allow for the new evidence to be introduced as a reasonably lengthy time has lapsed since PW1 and PW15 testified in the criminal matter, and to introduce the said proceedings at this juncture is not justified.
  10. Further, that the plaintiff shall be deprived of the opportunity to subject the said witnesses to cross-examination as the applicant merely seeks to introduce into evidence the criminal proceedings containing the testimony of PW1 and PW15 which in essence would offend the rules of natural justice and the plaintiff's right to a fair trial.



11. The applicant/respondent also states that Section 34 of the *Evidence Act* provides that such evidence is inadmissible where the plaintiff was not a party to the criminal proceedings and did not have the opportunity to cross-examine the witnesses as is in this case.
12. The applicant/respondent avers that the evidence the 2<sup>nd</sup> defendant/applicant intend to introduce lacks probative value in the instant matter as the evidence recorded in the criminal proceedings was intended for different matter to which the standard of proof is different from the one herein and also the parties are different.
13. That the defendants have persistently employed delaying tactics by filing numerous applications from the time the suit was filed and the instant application is yet another attempt to delay the expeditious disposal of this matter. That it is also unclear when the typed proceedings in the related criminal matter will be availed, thereby frustrating the expeditious disposal of this matter.
14. The 8<sup>th</sup> Defendant filed a replying affidavit supporting the 2<sup>nd</sup> defendant's application to introduce the typed proceedings as prayed, stating that during his defence hearing he would also like to rely on the same. He further stated that part of the basis for his reliance on the said proceedings is captured in his further supplementary affidavit that he swore on 25<sup>th</sup> April, 2025 in support of his application for bail pending appeal. That according to the impugned judgment, the co-appellants and himself were convicted partly on the grounds that the prosecution and testimonies of the prosecution witnesses showed that the tender process was undertaken unlawfully and that public money was unlawfully paid to the contractor who proceeded to spend the same in violation of the law, but this finding was not supported by evidence.
15. That he is convinced that the cumulative effect of the evidence tendered by the prosecution and the testimonies of the key witnesses, the conviction was not based on credible evidence and that the evidence was mischaracterized, misconstrued, marinated and panel- beaten by the Trial court in order to secure a conviction.
16. The application was disposed of, by way of written submissions and all the parties who participated in the application filed their respective submissions.

## **2<sup>nd</sup> Defendants/applicant's Submissions**

17. The 2<sup>nd</sup> defendant identified two issues for determination as follows;
  - a) Whether the application is meritorious?
  - b) Who is to bear the costs of the application?
18. On the 1<sup>st</sup> issue, reliance was placed on the case of *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR in which the Supreme Court set out the principles applicable regarding additional evidence and submitted that his application has met the threshold as per the said judgment. He states that he does not seek to make a fresh case or fill evidential gaps but rather, the additional evidence is sought to contextualize and corroborate existing facts already pleaded.
19. It was also his submission that, allowing the additional evidence would not occasion any prejudice to the respondent but on the contrary, it enhances the integrity and fairness of the trial by ensuring that all the relevant and material evidence is considered by the court. Reliance was placed on the cases of *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014] eKLR and that of *Nuthu v Karanja* (Civil appeal 263 of 2023) [2024] KEHC 10181 (KLR) both of which talks to the spirit of Article 159 of the *Constitution*.



20. On the part of the plaintiff, it was submitted that it would be prejudicial to the plaintiff to allow the 2<sup>nd</sup> defendant to introduce new evidence and documents after the plaintiff and the 3<sup>rd</sup> and 7<sup>th</sup> defendants have closed their respective cases as they shall be denied the opportunity to rebut the said evidence and it's a violation of Article 50 of the Constitution and the same will occasion the plaintiff serious prejudice that cannot be cured by cross examination. The plaintiff made reference to the case of Alloys Oceano D'sumba Narshi Shah & another [2017] eKLR and that of Too v Tum (Environment & Land Case 975 of 2012) [2014] KEELC512 (KLR) wherein in both cases the courts declined introduction of new documents after the plaintiff's case was closed.
21. That the application is merely a delaying tactic by the applicant to delay the expeditious disposal of this matter and it is also unclear as to when the typed proceedings in the related criminal matter will be availed.

### **Analysis And Determination**

22. The court has considered the application and the supporting affidavit, the replying affidavits and the submissions filed by the plaintiff and the defendants. The only issue for determination is:-

#### **a) Whether the application is meritorious.**

23. The 2<sup>nd</sup> defendant has sought leave to file further documents namely the proceedings in the Chief Magistrate's Anti-Corruption *Case Number 22 of 2019*. He has also sought leave to file a further supplementary list of documents and a further witness statement. He states that he was an accessed person in the aforesaid criminal case whose appeal on conviction and sentence is pending before the High court Anti- Corruption and Economic Crimes Division.
24. He contends that some witnesses who testified for the prosecution in that criminal case, their evidence is crucial to his defence and the proceedings will also assist the court in determining the issues in dispute.
25. He avers that the said proceedings could not have been filed earlier as the same were only available in March, 2025 after the conclusion of the Criminal case. The other defendants who were co-accused persons in the Criminal case have supported the application and they state that they will also rely on the proceedings in their defences.
26. The plaintiff has opposed the application and has contended that allowing the application will be prejudicial to the plaintiff as the application has been made too late in the day when it has already closed its case, and so is the case for the 3<sup>rd</sup> and the 7<sup>th</sup> defendants. The plaintiff also contends that it was not a party in the Criminal case.
27. This is an old matter and the same is part-heard. However, I have perused the documents that the 2<sup>nd</sup> defendant seeks to have produced; namely criminal proceedings in the Chief Magistrate's Anti-Corruption *Case Number 22 of 2019* in which the 2<sup>nd</sup> defendant was one of the accused persons. It is his case that the criminal case was finalized in the month of March, 2025. I take judicial notice of the fact that he did not have control over the matter or the speed at which it was being prosecuted and he, therefore cannot be blamed for its delay.
28. The 2<sup>nd</sup> defendant depones that the proceedings contain crucial evidence by some of the prosecution witnesses which will not only help to unravel the issues in controversy in the matter herein, but will assist him in his defence.
29. This court has weighed the prejudice that the plaintiff alleges it will suffer *vis-a-vis* the 2<sup>nd</sup> defendants right to a fair trial guaranteed under Article 50 of the Constitution. In my considered view, the



defendant's right to a fair trial outweighs the prejudice that the plaintiff can suffer. In any event, the plaintiff shall reserve the right to recall any witness (es) for cross- examination, if need be, on any new issue that may arise from the evidence contained in those proceedings.

30. In the end, I do allow the application and make the following orders;
- a. The 1<sup>st</sup> defendant is hereby granted leave to file further documents but only limited to the typed proceedings in the Chief Magistrate's court Anti- Corruption *Case Number 22 of 2019*.
  - b. The 2<sup>nd</sup> defendant's supplementary list of documents and the further witness statement both dated the 2<sup>nd</sup> April, 2025 are deemed as duly filed.
  - c. Costs of the application shall be in the cause.

31. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25<sup>TH</sup> DAY OF JUNE, 2025.**

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**L. M. NJUGUNA**

**JUDGE**

In the presence of:-

Miss Wambugu holding brief for Miss Kenduiwa for the Plaintiff

Mr. Njenga Jeremy for the 2<sup>nd</sup> Defendant

Mr. Issac Amor for the 3<sup>rd</sup> – 7<sup>th</sup> Defendants

No appearance for the 1<sup>st</sup> defendant

Mr. Muturi holding brief for Mr. Kibe Mungai for the 8<sup>th</sup> defendant

Court Assistant – Dyphna/Adan

