



REPUBLIC OF KENYA



KENYA LAW
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**Ethics & Anti-Corruption Commission v Ahaza & 12 others (Anti-Corruption and Economic Crimes Civil Suit E017 of 2023) [2025] KEHC 9036 (KLR)
(Anti-Corruption and Economic Crimes) (25 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9036 (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 E017 OF 2023

LM NJUGUNA, J

JUNE 25, 2025

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

NATHANIEL MANYEVE AHAZA 1ST DEFENDANT
WILBERFORCE NDULA 2ND DEFENDANT
EMMA MULONGO KISEMBE 3RD DEFENDANT
BEATRICE ALOSA MAKUTI 4TH DEFENDANT
JOHNSON OMBAKA 5TH DEFENDANT
ERNEST AMBAKA LUKAYU 6TH DEFENDANT
VICTOR AYWAH KEYO 7TH DEFENDANT
PETER VULIMU EJIMBA 8TH DEFENDANT
BEATRICE MAKUNGU 9TH DEFENDANT
JOSEPH MALOBA CHITECHI 10TH DEFENDANT
ANTONIA MUYOKA SUNGURA 11TH DEFENDANT
ELIZABETH MASIDZA 12TH DEFENDANT
BOYSE VENTURES LIMITED 13TH DEFENDANT



RULING

1. The 1st defendant herein filed the notice to produce dated the 29th January, 2025 in which he is seeking to have the plaintiff produce the original documents that are listed therein inter alia; the procurement plan, budget allocation for tenders for the supply of computer Stationeries and toners to all newly created wards and sub county offices within Vihiga County, Advertisement for the tenders, the original minutes of the Tender Opening and Evaluation Committees, the audit reports by the Kenya National Audit Office (KENAO) and the Public Procurement Oversight Authority (PPOA) for the financial year 2014-2015 concerning the procurements undertaken by County Government of Vihiga, all the procurement records relating to the contracts awarded to Boyse Ventures Limited, the official records of payments made to Boyse Ventures limited for services rendered or goods supplied under the said contracts, including Bank payment vouchers and approvals from the relevant authorities, any communication between the plaintiff and the County Government of Vihiga, the bank statements and RTGS records related to payments made to the 13th defendant and any record of communication or documentation proving the delivery of Toners or provision of capacity building services.
2. In response to the Notice to produce, the plaintiff filed a replying Affidavit sworn by Caroline Kimathi, an investigator with the plaintiff, on the 22nd April, 2025 and in which she has deponed that the plaintiff wrote the letters dated the 24th September, 2020, 10th February, 2021, 8th July 2021, to the, County Secretary, County Government of Vihiga requesting for the documents that the defendants are requesting the plaintiff to produce. That in response to the above letters, the plaintiff received the letters dated the 16th February, 2021, from the Chief Officer Finance and Economic planning, to the in charge Vihiga County Registry requesting for the release of the file belonging to Boyse Ventures limited, and a response dated 17th February, 2021 indicating that the file does not exist in the County records.
3. The plaintiff also referred to a letter dated 16th February, 2021 from the Chief Officer, Finance and Economic Planning to County Finance Registry in – charge requesting for release of payment vouchers for the supply of uniforms and a response dated 17th February, 2021 from the County Treasury Registry indicating that they were unable to trace the financial documents for the said company.
4. Further, the plaintiff referred to letters dated 17th February, 2022 and 16th July, 2021 from the Chief Officer Finance and Economic Planning to the Commission forwarding letters indicating that they were not able to trace the file related to the tender awarded to Boyse Ventures limited. And also to the letter dated 13th July 2021 from the County Secretary and a memo dated 14th July, 2021 from the Director, Supply Chain Management Services indicating that the documents relating to the supply of uniforms, toners and capacity training services were not in their custody and that their efforts to locate them were futile.
5. The court directed parties to file and exchange submissions in support of, and in opposition to the notice to produce and the parties complied with the said directions.

1st Defendant's/applicant's Submissions

6. The 1st defendant submitted that the documents sought to be produced are within the statutory and administrative custody of the plaintiff and are necessary for all the defendants to properly respond to all the allegations leveled against them, and that, the refusal or failure to produce them amounts to suppression of material evidence. That the plaintiff has already placed on record select payment



vouchers and communication that form part of the same procurement chain and therefore, this undermines their blanket denial and calls into question the sincerity and completeness of their disclosure.

7. The 1st defendant contended that such documents like the audit reports from Kenya National Audit Office (KENAO), budgets, tender committee records and approved procurement plans are official public records and the plaintiff has not explained why the documents were not retrieved or disclosed. That the plaintiff's officials failed to engage with key former officials who remained within Government and relied on the newly recruited officers who were unfamiliar with past procurement events which resulted in a one –sided and potentially misleading investigative narrative, and invited the court to draw an adverse inference that the contents of such documents would have been unfavorable to the plaintiff.
8. That the plaintiff failed or refused to avail other critical officers like Mr. Oyaro who replaced Mr. Ahaza/1st defendant, without due process, and assumed responsibility over procurement records, and their absence from these proceedings creates a vacuum in the chain of custody for public documents and reinforces the 1st defendant's position that the plaintiff has withheld evidence. That the plaintiff's claim of non-possession is implausible and contradicted by the testimonies of its own witnesses, who have admitted handling the records in dispute and the plaintiff therefore, had the means, access and opportunity to produce the records but chose not to.
9. It was also submitted that the plaintiff bears both a statutory and ethical obligation to maintain transparency, accountability, and good record keeping. The 1st defendant contended that under the [public procurement and Asset Disposal Act](#), the [Public Finance Management Act](#) and the County Government's Act, such documents are required to be safely kept and made available when required in legal proceedings.
10. The 1st defendant invited the court to apply Sections 119 and Section 11 of the [Evidence Act](#) and make an adverse inference against the plaintiff for failing to call evidence which is in its possession. Reliance was placed on the cases of Grain Industries Limited v Ali & 6 Others (Civil Case E051 of 2003) KEHC 27009 and that of Nesco Services Limited v CM Construction (EA) Limited (2021) eKLR.
11. The 2nd, 3rd, 4th, 8th, 11th, 12th and 13th defendants in their submissions joined issue with the 1st defendant and seek that the Honourable court finds in their favor and compel the plaintiff to discharge its legal mandate under Section 11 of the [Ethics and Anti-Corruption Commission Act](#) to obtain documents in question from Vihiga County government and cause their production in court.
12. That the averments by the plaintiff's investigator, one Caroline Kimathi are contrary to the evidence that has been presented before the court as some of the plaintiff's witnesses referred to the said documents in their evidence, and asked the court make a negative inference from the inconsistency of the plaintiff's evidence.

Plaintiff's Submissions

13. The plaintiff submitted that the letters they have relied on reinforces its case that no procurement process was undertaken neither were goods supplied contrary to the allegation by the 1st defendant. That a notice to produce under Section 69 of the [Evidence Act](#), gives the applicant an opportunity to lay basis for the production of secondary evidence as they would not be in possession of the primary evidence. Further, that the 1st defendant has not demonstrated that the requested documents exist and are in possession of the plaintiff and that they have not indicated that they are in possession of secondary evidence. That the plaintiff having shown that the documents do not exist and/or are not in their possession cannot therefore be compelled to produce that which does not exist. Reliance was placed on the case of Lunani & another (suing as the executors of the Will of the late Stephan Lunani



Walela) v Carlsberg International Limited & 4 others (2023) KEELC 22190 (KLR) on when a notice to produce can issue.

14. That contrary to the allegation by the defendants, the plaintiff's witnesses did not admit to having the said documents but only testified to what documents are procedurally required when undertaking a procurement process. That the plaintiff's witnesses also testified that they were unable to trace the file related to the transactions, a fact reinforced by the annexures to the plaintiff's replying affidavit.

Analysis And Determination

15. The court has considered the materials placed before it in support of, and in opposition to the notice to produce. The only issue for determination is whether the plaintiff is in possession of the documents requested for, and whether it has made full and honest disclosure in response to the notice to produce.
16. The 1st defendant moved this court by way of notice to produce the documents that are set out in the said notice and has contended that the same are in the custody of the plaintiff. On its part, the plaintiff has denied being in possession of the said documents.
17. Notice to produce is provided for under Section 69 of the Evidence Act which gives the applicant an opportunity to lay basis for the production of secondary evidence as they would not be in possession of the primary evidence. It provides;

“Secondary evidence of the contents of the documents referred to in section 68 (1)(a) of this act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the documents are in, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case;

Provided that such notice shall not be required in order to tender secondary evidence admissible in any of the following cases;

- i. When the document to be proved is itself a notice
 - ii. When from the nature of the case, the adverse party must know that he will be required to produce it;
 - iii. When it appears or is proved that the adverse party has obtained and is in possession of the original by fraud or force;
 - iv. When the adverse party or his agent has the original in court;
 - v. When the adverse party or his agent has admitted the loss of the document'
 - vi. When the person in possession of the document is out of reach of, or not subject to, the process of the court'
 - vii. In any other case in which the court thinks fit to dispense with the requirement.
18. The 1st defendant herein issued the notice to produce to the plaintiff to produce several documents that have been set out in the notice to produce. He has contended that the plaintiff is in possession of the said documents and has argued that the plaintiff has already placed on record select payment vouchers and communication that form part of the same procurement chain, which undermines their blanket denial and calls into question the sincerity and completeness of their disclosure.



19. The defendant has also averred that some of the plaintiff's witnesses have referred to some of the records in question in their testimony in court. He has maintained that documents such as audit reports from Kenya National Audit Office (KENAO), budgets, tender committee records and approved procurement plans are official public records, ordinarily maintained and archived by the County Government. He has asked the court to find that the plaintiff's witnesses and offices had access to or dealt with the requested documents.
20. The plaintiff contends that they are not in possession of the said documents and has referred to the various letters that it wrote to different officers of the county Government of Vihiga requesting for the said documents. It has annexed the letters that the county Government of Vihiga wrote to it by way of response in which they denied being in possession of the said documents or stating that the same were not available and/or they could not be traced.
21. Section 69 of the *Evidence Act* provides;

“Secondary evidence of the contents of the documents referred to in Section 68(1) (a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the other party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case.”
22. In the case of Lunani & another (suing as the Executors of the Will of the late Stephan Lunani Walela v Carlsberg International Limited & 4 others [2023] KEELC 22190 (KLR) the court stated;

“.....it is clear that a Notice to Produce a document is given when the party issuing it has a copy of the primary (or original) documents which happens to be in the possession of the adverse party. Two things must be clear here: that the original exists or existed and there is proof thereof that is needed. Also, the issuer of the Notice to produce cannot through any reasonable and lawful means obtain the original and that original is in the power or possession of the adverse party. If it does not exist, the adverse party cannot be compelled to give it because it is not in existence. He cannot have power or possession of a non – existent document. Again, the law did not contemplate the compulsion of the other party to produce an original: rather the party claiming that the original exists is permitted to produce the secondary document thereof upon satisfaction of Section 68 of the Act.”
23. My understanding of a Notice to produce documents is that it relates to production of secondary evidence in the hands of a party and it has nothing to do with production of primary evidence. A notice to produce documents can only be issued if the party issuing the same is in possession of a copy/copies of the documents that he is seeking to have the other party produce but not the way the 1st defendant is doing it in his Notice to produce.
24. In this case, I note that the documents that the 1st defendant is seeking to have the plaintiff produce are documents that one would expect to be in possession of the County Government of Vihiga and not the Plaintiff and it is for this reason that when the 1st defendant requested for them, the plaintiff wrote to the said County Government requesting for the documents. The plaintiff has annexed letters from the said County Government indicating that the documents are not available.
25. In view of the contents of those letters and in the absence of any evidence from the 1st defendant that the said documents exist and that they are in possession of the plaintiff, I am prepared to find and which I hereby do, that the 1st defendant has not satisfied the court that the plaintiff is in possession of



the said documents. And for that reason, this court cannot compel the plaintiff to produce documents which are not in its possession.

26. I hereby dismiss the request, with no Orders as to costs.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF JUNE, 2025.

.....

L.M. NJUGUNA

JUDGE

In the presence of:-

Miss Wambugu for the Plaintiff

M/s Aiko holding brief for Mr. Echessa for the 7th, 9th and 10th defendants

Mr. Otongo for the 6th defendant

Miss Kibiti for the 2nd, 3rd, 4th, 5th, 8th, 11th, 12th and 13th defendants

M/s Kibiti holding brief for Miss Waweru for the 12th defendant

Court Assistant – Adan/Dyphna

