



REPUBLIC OF KENYA



Ethics and Anti-Corruption Commission v Kidero & 13 others (Anti-Corruption and Economic Crimes Civil Suit E008 of 2021) [2024] KEHC 6159 (KLR) (Civ) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E008 OF 2021

EN MAINA, J

MAY 30, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

DR EVANS KIDERO 1ST RESPONDENT

PAUL MUTUNGA MUTUNGI 2ND RESPONDENT

JOHN NDIRANGU KARIUKI 3RD RESPONDENT

GEORGE WAINAINA NJOGU 4TH RESPONDENT

THE CUPS LIMITED 5TH RESPONDENT

JOHN NGARI WAINAINA 6TH RESPONDENT

ADUMA JOSHUA OWUOR 7TH RESPONDENT

HANNAH MUTHOMI KARIUKI 8TH RESPONDENT

PHILOMENA KAVINYA NZUKI 9TH RESPONDENT

NG'ANG'A MUNGAI NG'ANG'A 10TH RESPONDENT

EKAYA ALUMASI GHONZOUR 11TH RESPONDENT

JAMES MIMI MBUGUA 12TH RESPONDENT

ELIZABETH WANJIRU NDERITU 13TH RESPONDENT

ALICE NJERI MUNDIA 14TH RESPONDENT



RULING

Introduction

1. This is a ruling on the Plaintiff's Notice of Motion dated 18th March 2024 which seeks leave to file a supplementary list and bundle of documents for the purpose of furnishing this court with a duly signed Audit report that had been filed in the original bundle unsigned and certificates of electronic evidence that had been omitted in the original bundle.
2. The application is brought under Section 1A, 1B, 3A and 63 of the [Civil Procedure Act](#), Order 11, 18 Rule 10 and 50 of the Civil Procedure Rules and Section 146 of the [Evidence Act](#).

The Parties

3. The Applicant is a public body established under Section 3 (1) of the [Ethics and Anti-Corruption Commission Act](#), 2011 whose mandate is to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics and anti-corruption.
4. The Respondents are Defendants in the main suit where the Plaintiff Applicant seeks to recover funds allegedly lost in corrupt dealings in the County Government of Nairobi.
5. The gist of the application is that the Plaintiff/Applicant did not notice, until the hearing date, that the audit report it had filed which is authored by Wachira Irungu Associates, is not signed; that the Plaintiff/Applicant has the signed copy of the report in its custody, that it is in the interest of justice that the Plaintiff be allowed to produce both reports, to allow its maker comment on the same. Further, that the Plaintiff has also realized that it omitted to file the certificates of electronic evidence in relation to various bank account statements which it seeks to rely on, which it now seeks to file; that no prejudice will be occasioned to the Defendants as they will have an opportunity to controvert the evidence and cross examine the witnesses of the documents sought to be filed but the Plaintiff will suffer immense prejudice as it may not be able to discharge its burden of proof under the [Anti-Corruption and Economic Crimes Act](#) 2003, Section 11 (1)(d) and (j) to adduce evidence to the satisfaction of the Court, that the Defendants were beneficiaries of proceeds of crime.
6. The application is supported by the affidavit of Mulki Umar, an investigator working with the Applicant, sworn on 27th March 2024 in which he deposes further that the fact that the report is unsigned came to light when its maker was testifying on 5th March 2024; that however, during the investigations, the Plaintiff obtained both a signed and unsigned report from the witness, and they are similar; that the Plaintiff had inadvertently omitted to file Certificates of Electronic evidence in relation to various Bank Account statements contained in its list of Documents dated 13th April 2021. He contended that the Plaintiff had already legally procured the statements, thus it is not new evidence.
7. He further deposed that the error made by the Advocate should not be visited on the client, in this case the Applicant, who would suffer prejudice if the orders are not granted. He urged that no prejudice will be suffered by the Defendants as they will be given an opportunity to controvert the evidence.

The 1st Defendant's Response

8. The 1st Defendant opposed the application through a replying affidavit sworn by himself on 5th April 2024. He deposes that the Applicant has not explained why the report, sought to be produced by



Stephen Tumbo, was denied by him in totality; that the reasons given for filing an unsigned report are misleading and absurd since the witness testified that at the time of recording his statement, the Plaintiff had already obtained the Audit Report from the Nairobi City County; that the witness stated that he did not supply the audit report to the Plaintiff as they already had them in their possession and the report in court could not have been from his office; that the witness also testified that the Plaintiff obtained additional documents for which he had no knowledge of how or from where they were obtained; that the witness contended that the report attributed to him was different from the one that he had signed and further, that parties to litigation are masters of their own cases and have a duty to file proper pleadings and to prepare and to present in court such evidence as they believe would prove their respective claims. He contended that the Plaintiff is seeking to recast evidence that is already on the court record and to launder and sanitize illegally obtained evidence so as to rob the Defendants of their Defense. Further that the issue goes to the root of the Plaintiff's investigations; that the Plaintiff is seeking to redo and correct its unlawful acts to allow the introduction of contradictory evidence which would lead to perjury.

9. On the prayer of re-opening of PW8's evidence in Chief, the 1st Defendant deposes that it would lead to extreme prejudice and it would violate his right to fair trial; that the Plaintiff is estopped from seeking permission to submit a supplementary list of documents due to an act of dire negligence and an attempt to create new evidence and present it to court and that the additional evidence is meant to fill a gap in the Plaintiff's evidence.
10. He deposes that he has perused the certificates of electronic evidence sought to be filed, and it is apparent that they were made after the suit was filed.
11. He deposes that the leave craved is not a right, but an equitable remedy available to a party at the discretion of the court, and such discretion cannot be invoked to aid a negligent party; that since equity aids the vigilant and not the indolent and that the plaintiff failed to exercise due diligence resulting in the witness dissociating himself from the report. He deposes that the application is an afterthought intended to fill in gaps in the Plaintiff's case as demonstrated by the timing of the application and it is not in the interest of justice that this application should be disallowed.

The 3rd Defendant's Response

12. The application was also opposed by the 3rd Defendant who through his replying affidavit sworn on 18th April 2024 deposed that the Plaintiff has been in possession of the audit reports from the initiation of the suit but has never raised an issue; that the witness testified and produced the disputed auditor's report, and never raised the issue of signing until the time of cross-examination when he denied the entire report; that there was no evidence that the signed and unsigned audit reports were forwarded to the County Government; that the issues in the suit being of a serious nature, the claim of error is not tenable as investigations went through various stages before the applicant filed a suit, thus it is inconceivable for the Applicant to claim that it inadvertently filed an unsigned audit report. Further that the prayer to re-open the Evidence of PW8 is an afterthought, meant to fill gaps in the Plaintiff's case.
13. On filing of electronic certificates, the 3rd Defendant contended that it is not fair for the Applicant to be allowed to file documents that were procured after the suit was filed, as the Defendants relied on the documents already filed for their defences and that he would suffer serious prejudice if this court allows the application. Like the 1st Defendant, he contended that there is inordinate and unexplained delay on the part of the Applicant as the evidence sought to be filed could have been obtained at the time of hearing of the case and that he believed that the impugned report was signed during investigations or after the hearing on 5th March 2024 and hence this application should be dismissed with costs.



The 4th Defendant's Response

14. The 4th Defendant opposed the application through a replying affidavit sworn on 22nd April 2024 where he deposes that the prayers sought would be highly prejudicial as it would destabilize his defense that had been formulated based on the documents served at the inception of the suit; further that re-opening PW8's evidence in chief to produce a signed audit report is without basis as all documents shown to the witness were allegedly seized from the County Government's offices and not from private individuals such as the witness, and if allowed, it would amount to passing off documents by private individuals as official County Government's documents. He also deposes that he had perused both the signed and unsigned report and noticed glaring differences. He contended that the Plaintiff's prayer to file other documents this late amounts to trial by ambush as the defendants based their defence on documents filed at the beginning. He added that the intention of the Plaintiff is to fill the gaps brought out by the defense during cross-examination and if allowed, it would be highly pre-judicial as it would shift goal posts for the Defense; that the witness had disowned the report and that is not curable by filing a substantially different report and lastly that the suit is far gone with some witnesses having testified and documents produced and the Applicant should have corrected the anomaly before the witnesses testified. He contended that it is unfair for a party to be allowed to correct its pleadings after cross-examination as it would amount to stage managing how witnesses testify and that the application is an abuse of the court process, lacks merit, and ought to be dismissed.

The 11th Defendant's Response

15. Like the 1st, 3rd and 4th Defendants through his affidavit sworn on 27th March 2024 the 3rd Defendant deposes that allowing the application would be prejudicial to him as the Plaintiff seeks to file the signed audit report to fill the gaps raised during cross-examination; that the witness disowned the report and that the signed audit report is different from the one produced by the witness. He contended that the application is intended to delay the suit, given that the Plaintiff could not explain why it omitted the evidence in the first instance. He asserted that the additional evidence is not credible as it has material alterations, which if admitted, will call for a fresh start of the case. He deposed that to allow the application would be unjust, unreasonable and against the interest of justice.

The 12th Defendant's Response

16. The 12th Defendant opposed the application through the replying affidavit sworn on 3rd April 2024 where he deposes that the Applicant wishes to remedy its short falls by introducing new evidence through the back door as the signed report is different from the filed one in form and content, and amounts to introduction of new evidence; that none of the Partners of Wachira Irungu & Associates had appended their signature on the report; that there was no trail of the signed report from the auditors to their clients, like a forwarding letter or receiving stamp, indicating the date of the document; that it was absurd to refer to the report of 9th July 2021 as "final" as there was an amended report dated 5th October 2012 on page 600.
17. He further deposed that it was absurd for the auditor to have continued discharging its obligations to the City Council of Nairobi to the extent of verification, approval and payment of vouchers, after issuance of the purported signed Final Forensic Audit Report; that this application is an afterthought meant to delay and defeat the ends of justice and that he shall be prejudiced if the Plaintiff is allowed to sneak in evidence that has already been disowned, and that it is in the interest of Justice that the application be dismissed.



The 7th Defendant's Grounds of Opposition

18. The 7th Defendant filed Grounds of Opposition, dated 10th April 2024.
He asserted that the filed Audit report cannot by law be substituted as that would offend Order 11 Rule 8 of the Civil Procedure Rules.
19. He contended that the application is a back-door attempt by the Plaintiff to fill the gaps created in its case through cross-examination and hence an attempt to steal the match from the Defendants.
20. He further asserted that this court should ensure that there is a fair trial in this case and dismiss the application as it will unjustly tilt the scales of justice in favour of the Plaintiff and hence dismiss the application because it was also made too late in the day.
21. The application was canvassed by way of written submissions.
The Issues for determination
 - i. Whether the signed Audit report ought to be allowed after cross-examination; and, whether PW8's evidence in Chief ought to be re-opened.
 - ii. Whether the additional evidence in form of Certificates of Electronic Evidence under Section 106B of the *Evidence Act* ought to be allowed.
 - iii. Who should bear the costs of the Application.

Issue (i) - Whether the signed Audit report can be allowed after cross-examination;

22. The Plaintiff Applicant avers that it only noticed that the audit report filed in Court was not signed during the hearing and as both the signed and unsigned reports have been in their custody since the inception of the suit are identical and have been in their custody and as the omission was inadvertent the application should be allowed: That the mistake of Counsel should not be visited upon the Plaintiff. On the other hand, the Defendants argue that allowing substitution of the unsigned audit report with the signed one after cross examination has taken place would be prejudicial to them; that it is akin to allowing the plaintiff to fill in the gaps that arose in their case during cross examination of the witness. The Defendants also aver that the contents of the two reports are not the same; that the Plaintiff has not given a plausible explanation for the delay in filing the document once the hearing commenced. They also argue that the instant application is but an afterthought. The Defendants also argue that the signed report is irrelevant since the witness already disowned it during his testimony.
23. I have considered the application, the affidavits, the grounds of opposition, the rival submissions and cases cited as well as the rules governing the application and the law. I am not persuaded that the application for substitution of the audit report should be allowed. Each case is determined on its own merit and in this case it is my finding that the application is intended to fill in gaps in the Plaintiff's case which came to light during cross examination of their witness. The witness disowned the report put to him by Counsel for the Plaintiff and even though the other report was in Counsel's possession it was not put to the witness. It is instructive that that was not the first time the case had come for hearing so the omission cannot be described as inadvertent. Further my perusal of the two audit reports reveals that the font is different; that the unsigned report does not have Appendix 1.6 and the whole of Appendix 2 and 3. The Report sought to be produced includes a forwarding letter dated 9th July 2012, signed by PW8 which was also not there in the other report hence making the two reports totally different even apart from the fact that one is signed and the other is not.



24. On the issue of delay, the Plaintiff averred that the signed Audit report was in its custody since the inception of the suit, but it escaped the notice of the Counsel dealing with the matter until the matter came up for hearing. The Defendants argue that the delay was occasioned by the lack of due diligence on the part of the Plaintiff's Counsel, which the Court should not visit upon the Plaintiff.

25. In the case of on the case of Moses Mwangi Kimani v Shammi Kanjirapparambil Thomas & 2 Others (2014) eKLR the Court defined inordinate delay as follows: -

“There is no precise measure of what amounts to inordinate delay as that would differ from case to case depending on the circumstances and facts of each case; for instance, the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.”

26. In the circumstances of this suit, it is my finding that the delay in seeking leave to file the signed audit report is inexcusable, since counsel concedes that the report has been in the Plaintiff's custody since inception of the suit, and no plausible explanation has been given for its omission save that it was inadvertent. The Applicant's failure to disclose that the Audit Report sought to be filed introduces extra Appendices that were not included in the filed report is also a demonstration of bad faith. The application is therefore rejected and I need not go into the question of whether or not the witness should be recalled or whether the same can be produced by the investigating officer.

Issue (ii): - Whether the Certificates requisite for admissibility of the electronic evidence ought to be allowed.

27. The Applicant's Supplementary List and Bundle of documents sought to be filed includes six Certificates of Electronic Evidence dated diverse dated between 7th April 2019 and 21st July 2023. The Plaintiff explained that it inadvertently omitted to file the certificates. The Plaintiff averred that the certificates related to bank statements that are already on the court record and which were served upon the defendants and thus do not introduce new evidence.

28. The Defendants opposed the prayer arguing that the certificates were procured after the inception of the suit and are thus inadmissible. The Defendants also argued that allowing the prayer for filing of the certificates would prejudice them.

29. It is my finding that in regard to the certificates no prejudice shall be occasioned to the Defendants as they shall have an opportunity to test the veracity of the same during cross examination. The evidence contained in the bank statements shall then be determined on the merits.

30. The Plaintiff's application dated 18th March 2024 succeeds partially and is disposed as follows:-

- a. The application to substitute the audit report with one that is signed is dismissed.
- b. The prayer to file and serve the certificates for electronic evidence is allowed.
- c. The certificates be filed and served upon Counsel for the Defendants before the next hearing date.
- d. The costs of the application shall be in the Cause.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MAY, 2024.

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E. N. MAINA

JUDGE

