

KENYA / JUDGMENT

Ethics & Anti-Corruption Commission v Mukuria & 7 others [2024] KEHC 11283 (KLR)

[2024] KEHC 11283 (KLR)

COURT

High Court

BEFORE

BM Musyoki

CASE / FILE NUMBER

Civil Suit E001 of 2022

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Ethics & Anti-Corruption Commission v Mukuria & 7 others (Civil Suit E001 of 2022) [2024] KEHC 11283 (KLR) (Anti-Corruption and Economic Crimes) (26 September 2024) (Ruling)

Neutral citation:

[2024] KEHC 11283 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Law Courts)

Anti-Corruption and Economic Crimes

Civil Suit E001 of 2022

BM Musyoki, J

September 26, 2024

Between

Ethics & Anti-Corruption Commission

Plaintiff

and

Patrick Mukuria

1st Defendant

Top Image Media Consultants Limited

2nd Defendant

Jane Wanjiru Mbuthia

3rd Defendant

Francis Mwangi Wa Iria Aka Wa-Iria Mwangi

4th Defendant

Value View Limited

5th Defendant

Jane Waigwe Kimani

6th Defendant

Peter Karanja

7th Defendant

Mlima Kenya Holiday Homes Limited

8th Defendant

Ruling

1. This is a consolidated ruling for the following applications;a.Application dated 15th November 2023 brought by the 5th and 6th defendants;b.The 7th defendant's application dated 17th November 2023;c.The 4th defendant's application dated 15th November 2023; andd.The 4th defendant's application dated 24th January 2024.
2. When this matter came for directions before me on 15th July 2024, I directed parties to file their respective replies and submissions within fourteen days. I further directed that any party who shall fail to comply with the directions would be locked out and the court proceed to write ruling based on the documents already on record. When I made the directions, I made reference to an application by the 1st defendant dated 17-11-2023 but I have been unable to trace such an application either in the court file or the court's Case Tracking System. Again, in the same directions, I referred to the 4th defendant's applications dated 15th November 2023 as been dated 18th November 2023. The error is hereby corrected. The court mentioned the matter again on 29-07-2024 but only the 7th defendant had filed his submissions in respect of his application dated 17th November 2023.
3. All the above-mentioned applications except the 4th defendant's application dated 24th January 2024 have a common prayer which seeks to review and set aside the order of this court dated 8-11-2023 which condemned the defendants to pay adjournment costs of Kshs 20,000. 00 and plaintiff's costs of Kshs 5,000. 00. I will deal with this common prayer first before I deal with the additional prayers in the respective applications.

4. I find it necessary to set out the history of the proceedings in this matter from 5-10-2023 to 24-02-2024. This will set the record straight and protect the integrity of the proceedings as it appears to me that the parties have either lost track of the position and status of the court's directions or some directions were not made known to them.
5. On 5-10-2023, the court directed the parties to comply with pre-trial directions in thirty days. This was after several attendances on 12-04-2023, 25-05-2023, 21-06-2023, 12-07-2023 and 27-07-2023 where the court repeatedly directed the parties to comply. On 8-11-2023, the parties appeared before the Honourable Justice Prof. (DR) Sifuna and again they had not fully complied save for the 8th defendant. The court proceeded to make the following directions; 'The following parties have not filed their trial bundles as ordered by the court; the 4th, 5th, 6th, 7th, 2nd and 3rd defendants shall each pay the court adjournment costs of Kshs 20,000. 00 each and pay to the plaintiff (the EACC) adjournment costs of Kshs 5,000. 00 payable within 7 days, failing which their respective defences shall stand struck out from the court record. After payment, these parties shall file their trial bundles within seven days. Hearing on 5-06-2024 but with a mention on 24-01-2024. '
6. On 16-11-2023, the file was placed before the Honourable Justice Prof (Dr) Sifuna for directions on the 4th defendant's application dated 15-11-2023. After going through the said application, the Honourable Judge directed as follows; 'The 4th defendant's notice of motion dated 15-11-2023 coming up for directions under a certificate of urgency, directions are hereby issued as follows; 1. The application is not urgent. 2. Orders of the court are not made in vain and must be complied with. 3. This application is an instrument to circumvent the court order dated 8-11-2023 after failing to comply with them and their defence standing thereby struck out. 4. A party cannot prosecute an application for review, vary, discharge or setting aside orders that he has disobeyed, as that amounts to impunity. As such this application would have been entertainable if it had been filed before the expiry of the 7 days. 5. For now the application is not only an abuse of the court process, an affront to the integrity of the court proceedings, but he has also been overtaken by events, as the 4th defendant has no defence on record, it having by his non-compliance/disobedience stood automatically struck out. 6. In consequence thereof this application is hereby struck out. '
7. The matter was again placed before the same Judge on 17-11-2023 for directions on yet another application by the 5th and 6th defendants dated 15-11-2023. The Honourable Judge made the following directions; 1. The application is not urgent. 2. The applicants are granted leave to appeal against this court's impugned orders. 3. The application to be served within 7 days from today and be responded to within 7 days from the date it is served. 4. The same shall be heard orally. 5. Parties should within 14 days from the date of service of the response file and exchange skeleton arguments of one page. 6. Oral hearing of the application on 22-02-2024. '

8. On 20-11-2023, Honourable Justice E.N. Maina handled the file in respect of notice of motion dated 17-11-2023 and made the following orders; 'The notice of motion dated 17-11-2023 has been considered. The same is not urgent. Let it be served upon all the parties and listed for mention before Honourable Prof (DR) Sifuna J on 22-02-2024 for his Lordship's directions and/or orders.'
9. Parties appeared before Honourable Justice Prof (DR) Sifuna on 24-01-2024 where it turned out that more applications had been filed and upon hearing representations, the Honourable Judge made the following orders; 1. The 4th defendant's amended notice of motion dated 15-12-2023 is hereby marked as withdrawn with no orders as to costs and with leave to file a fresh one. The same be filed and served and an affidavit of service be filed before the close of business today. 2. For all the other applications, the respective applicants to serve them within 2 days and the respondents to file and serve responses within 7 days from the date they are served. Submissions on all the applications to be filed and exchanged within 7 days from the date of service of the last response. All the applications shall be mentioned on 22-02-2024 on the date of the oral hearing of 5th and 6th defendants' application dated 15-11-2023. The mention shall be to fix a date for ruling which will be delivered the same day as the application of 15-11-2023. '
10. As it would turn out, the file was reallocated to me culminating to the appearance of 15-07-2024. I need to mention as I have done earlier that the parties in this matter have either lost track of the matter or they are deliberately delaying the matter and contemptuously so. None of Justice Sifuna's directions listed above has been complied with. Only the 7th defendant has complied with my directions dated 15-07-2024. Interestingly, the applicants are seeking discretionary orders of the same court they seem to hold in contempt at every stage of the proceedings. Be that as it may, I will handle the applications because that is my duty and somehow this matter must progress.
11. Going by the directions and orders of Justice Prof (DR) Sifuna made on 8-11-2023 and 16-11-2024, the 2nd, 3rd, 4th, 5th, 6th and 7th defendants do not have defence on record. The Honourable Judge reiterated on 16-11-2023 that his orders of 8-11-2023 made striking out of the said defendants' defences automatic in the event of non-compliance with the orders dated 8-11-2024.
12. The applications before me do not seek review of the orders of 8-11-2023 to the extent of striking out of the defences. Even if I were to review the order to the extent that it ordered the defendants to pay adjournment costs, the position would remain that the said defendants do not have defences in this matter. As at now, it is left to the plaintiff to file an application for entry of judgment which has not so far been made. I chose to make this point clear so that the defendants may know the route this matter is taking and to avoid further delays and allow them opportunity to make choices on how they would like to proceed.

13. The order of the Judge dated 16-11-2023 which has not been reviewed or sought be reviewed struck out the 4th defendant's application dated 15th November 2023 which sought review of his orders of 8-11-2023. He gave reasons for doing so. It will be unpalatable for me to revisit the orders which the Honourable Judge declined to revisit. It does not matter whether the same orders are sought by the other defendants. I refuse to be drawn into that conundrum. It will be tantamount to me sitting on appeal of the Honourable Judge's orders of 16-11-2023. The law does not allow me to reconsider an order refusing a review. Order 45 Rule 6 states that; 'No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.'
14. In the circumstances, I will not revisit the application by the 4th defendant dated 15-11-2023 which was struck out on 16-11-2023 or any other prayer in the other applications seeking similar orders. I dismiss the prayers in the applications dated 15-11-2023 by the 5th and 6th defendants and 17-11-2023 by the 7th defendant seeking to vary or review the orders dated 8-11-2023. In any event the Honourable Judge granted leave to the defendants to appeal his impugned orders. The defendants are at liberty to pursue that line.
15. I turn to the 4th defendant's application dated 24-01-2024. This application seeks several declarations in respect of some pieces of evidence allegedly obtained by the plaintiff in violation of his constitutional rights. The effect of the declaration orders sought would be that the identified pieces of evidence shall not be produced as evidence in this suit. I have gone through the application and the supporting affidavit sworn by the 4th defendant. In my opinion, this application has been made prematurely. The matter is still at the stage of pre-trial which has been thrown into murky waters by the defendants' unwillingness to comply with the court's directions.
16. The 4th defendant will have chance to make objections to production of any documents when this court get into dealing with adduction of evidence and identification of exhibits. The plaintiff has not even opened its case and identified the documents it intends to produce. The mere fact that the documents are contained in the plaintiff's trial bundle does not mean that they will have to be produced. The said application is therefore, in my opinion pre-mature and the same is declined. However, this does not mean that the 4th defendant is precluded from objecting to production of the documents he has listed in his application or making a similar application at the appropriate time. Prayers 8 and 9 of the application seek orders which are final in nature and can only be considered after the matter is heard on merits.
17. In conclusion, I make the following orders; 1. The 5th and 6th defendant's notice of motion dated 15th November 2023 is hereby dismissed save for prayer 4 thereof which was granted by Honourable Justice Prof (DR) Sifuna on 17-11-2023. 2. The 4th defendant's application dated 15th November 2023 is not considered as the same was struck out by Honourable Justice Prof (DR) Sifuna on 16-11-2023. 3. The 7th defendant's application dated 17th November 2023 is dismissed in its entirety. 4. The 4th defendant's application dated 24th January 2024 is not considered on merits and the same is struck out. 5. The costs of the

applications shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2024. B.M. MUSYOKI JUDGE OF THE HIGH COURT. Ruling delivered in presence of: Mr. Kamau holding brief for Ng'ang'a Ngige for the 1st defendant. Mr. Kamunda for the 2nd and 3rd defendants. Miss Swaka holding brief for Mr. Njenga for the 7th defendant. Mr. Kamau for the 4th defendant. And in absence of the plaintiff, 5th, 6th and 8th defendants,

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