



REPUBLIC OF KENYA



Kinyanjui & 2 others v Kamau & 2 others; Javisapa Enterprises Limited (Interested Party) (Environment & Land Case E060 of 2022) [2023] KEELC 20797 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E060 OF 2022
CA OCHIENG, J
OCTOBER 19, 2023**

BETWEEN

**DANSON NJOROGE KINYANJUI 1ST PLAINTIFF
JOSEPH MUGUCIA KERU 2ND PLAINTIFF
PATRICK KARIUKI KABUBI 3RD PLAINTIFF**

AND

**JACKSON WAINAINA KAMAU 1ST DEFENDANT
NEEMA TRUST COMPANY LIMITED 2ND DEFENDANT
THE LAND REGISTRAR 3RD DEFENDANT**

AND

JAVISAPA ENTERPRISES LIMITED INTERESTED PARTY

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 9th March, 2023 where it seeks the following orders:-
 1. That the Honourable Court be pleased to grant an order directing the Director of the Directorate of Criminal Investigations to conduct a forensic examination of the 1st Defendant's signature(s) as appears on the Replying Affidavit dated 3rd October, 2022, Sale Agreement dated 19th June, 1998, copies of Plot Certificates issued by Neema Welfare Association and copy of Agreement to cooperate dated 8th November, 2019 and issue the attendant report forthwith.
 2. That costs of this Application be in the cause.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Danson Njoroge Kinyanjui who deposes that he has requisite authority from the other aggrieved members of Neema Welfare Association to represent them in this suit. Further, that Joseph Mugucia Keru and Patrick Kariuki Kabubi, his Co-Plaintiffs have consented to and authorized him to swear the Affidavit on their behalf. He explains that the 1st Defendant has unequivocally denied ever being an official and/or member of Neema Welfare Association. He argues that it is critical to demonstrate in evidence that the 1st Defendant was in fact a member and an official of Neema Welfare Association. He contends that the 1st Defendant appended his signature, which they seek to examine, in his official capacity as the treasurer of Neema Welfare Association. Further, that the report from the DCI will simply confirm their veracity/authenticity to the court. He confirms that the respective documents to be examined are the 1st Defendant's Replying Affidavit dated 3rd October, 2022, Sale Agreement dated 19th June, 1998, Copies of Plot Certificates issued by Neema Welfare Association and a copy of Agreement dated the 8th November, 2019. He reiterates that no party stands to be prejudiced in any way if the orders sought are issued by court. He reaffirms that it is in the interest of justice that this Application is allowed as it seeks to assist the court in its fact-finding mission as to the true/rightful owner of the suit property.
3. The 1st Defendant opposed the instant Application by filing a Replying Affidavit sworn by Jackson Wainaina Kamau where he confirms that he is one of the Directors of Neema Trust Company Limited, and is duly authorized by his Co-directors to swear this Affidavit. He contends that the instant Application is unconstitutional and ought to be struck out on a preliminary point of law given that the Applicants are urging the Honourable Court to overstep and act out of its jurisdiction, as the orders sought fall under the mandate of an independent constitutional body, that is the National Police Service established under Article 245 of the *Constitution*. He insists that there is no evidence that the Applicants have requested for forensic audit on the subject documents from the Directorate of Criminal Investigations, whereupon the Directorate of Criminal Investigations has either declined and/or advised the Applicants to obtain a court order. He avers that the Court will be able to make a fair and just finding based on the documents filed by the Applicants hence the issues raised in this Application are unnecessary, irrelevant and waste of judicial time. Further, that the present Application is an abuse of the Court process since the Plaintiffs are purporting to re-open and canvass issues which ought to have been addressed in Machakos Criminal Case No. MCCR 470 of 2019 which was finalized on 5th July, 2022 and no Appeal was preferred. Further, that the Plaintiff is purporting to pre-determine this suit through an Application, when parties have not yet been heard on merits. He insists that the provisions of the law that the Application is brought under do not support the orders sought in the Application. He states that the Plaintiff ought to have sought the orders herein in the aforementioned criminal case where he was the accused person as the criminal court is best placed to canvass and determine the issues raised. He reiterates that prior to his arraignment in court for plea taking and subsequent hearing of the subject criminal case, the Plaintiffs reported and engaged the Directorate of Criminal Investigation (DCI) which conducted a thorough investigation, including obtaining forensic audit reports of all relevant documents hence this Application is superfluous and an attempt at getting a second bite at the cherry. He claims the Applicants are clearly on a fishing expedition and forum shopping given the numerous matters and Applications they have filed over this matter hence he urges the Court to condemn them for being frivolous and exceedingly vexatious.
4. The Application was canvassed by way of written submissions.



Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits as well as the rivaling submissions, the only issue for determination is whether the Plaintiffs' are entitled to the orders as sought.
6. The Plaintiffs in their submissions aver that it is the duty of the court in any proceedings tabled before it to determine the truth and administer justice. They explain that the fulcrum of the dispute herein revolves around the ownership of the suit. They explain that an official, who is the 1st Defendant herein, acted on behalf of the Association in the purchase of the suit property but has denied ever being a member of the Association or purchasing the property on behalf of the said Association. Further, that the current registered owner of the suit property, the 2nd Defendant herein is a Company in which the 1st Defendant is a Director, and this makes it imperative to ascertain whether the signatures attributed to the 1st Defendant in the land transaction documents truly belong to him. They insist that the court will not interfere with the independence of any constitutional body as the carrying out of forensic examination falls under the purview of the DCI and the Orders sought herein are in line with their mandate. Furthermore, the office of DCI required a Court Order in order to conduct the forensic analysis. They argue that the 1st Defendant's argument that all evidence was weighed in the criminal suit simply cannot be sustained as criminal and civil proceedings are separate and both can run concurrently as espoused under Section 193A of the *Criminal Procedure Code*. To buttress their averments, they relied on the following decisions: *Manish Govindji Shah & Another v. Kanwal Sarjit Singh Dhiman & Another* (2018) eKLR and *Nzioka & Company Advocates v. Sarabjit Singh Sehmi* (2018) eKLR.
7. The 1st Defendant in his submissions reiterated his averments as per the Replying Affidavit and made reference to the provisions of Article 245 (2) (b) and (4) (a) of the *Constitution* and Section 35 (G) of the *National Police Service Act*. He insists that the orders sought are unconstitutional since in essence, this would be contrary to the above quoted provisions of law. Further there is no evidence that the Plaintiffs have requested for conduct of forensic audit on the subject documents from the DCI who has either declined and/or directed them to obtain a court order. He contends that the Application herein seeks the Court to overstep its mandate and act out of its jurisdiction, as the orders sought fall under the mandate of an independent constitutional body, that is the National Police Service. He insists that the Plaintiffs should simply make reference to the proceedings and Judgment in the aforementioned criminal case without begrudging this Court and the litigants. He reiterates that the instant Application is incurably defective, misconceived and untenable and should be unfair to grant. To support his arguments, he relied on the following decisions: *Francis Kirimi Nkarichia v David Nkanata Magiri & 7 others* [2022] eKLR; *Republic vs. Commissioner of Police & Another Exparte Michael Monari & Another* [2012] eKLR and *Richard Mubindi Nzyoka & 3 others v David K Langat & 2 others*; Director of Criminal Investigations & 3 others (Interested Parties) [2020] eKLR.
8. The Plaintiffs have sought for an order of the Court directed at the DCI to conduct a forensic examination of the 1st Defendant's signature(s) as appears on the Replying Affidavit dated the 3rd October, 2022, Sale Agreement dated the 19th June, 1998, copies of Plot Certificates issued by Neema Welfare Association and copy of Agreement to cooperate dated 8th November, 2019 and issue an attendant report forthwith. The 1st Defendant has vehemently opposed the Application insisting that the DCI had already investigated the matter, there was the aforementioned criminal matter in which he was cleared by the Court and that this Court is being called upon to step on the mandate of a Constitutional body. From the court record, I note the fulcrum of the dispute herein revolves around ownership of land. It is not in dispute that the current registered owner of this suit property is the 2nd Defendant Company in which the 1st Defendant is a Director. I note in the pleadings the Plaintiffs have



claimed the 1st Defendant participated in the acquisition of the suit property but the 1st Defendant denied being a member of the said Neema Welfare Association that is also claiming suit property or transacting on its behalf. The Plaintiffs have hence sought forensic analysis of the signatures appended on the Sale Agreement and Plot Certificates issued to the members of the aforementioned Association to ascertain whether the same were signed by the 1st Defendant or not. The Plaintiffs and 1st Defendant have relied on various authorities to support their respective arguments which I deem persuasive but not binding on this court.

9. Based on the facts before me, it is trite that the Court's often seek expert evidence to aid in determination of disputes. Further, under Section 48 of the Law of the Evidence Act it allows the Court to seek expert evidence. It is my considered view that it is imperative for this court to confirm the identity of the person who signed the Land Sale Agreement and Plot Certificates in its quest to determine the ownership of the disputed land. Further, I do not see any prejudice if the aforementioned documents were subjected to forensic analysis by the DCI. I opine that by seeking expert services from the DCI, the court is not overstepping out of its jurisdiction by usurping the mandate of Constitutional bodies as claimed by the 1st Defendant. To my mind, I believe the investigation of the purported signatures is crucial.
10. In the foregoing, I find the Notice of Motion Application dated the 9th March, 2023 merited and will allow it.
11. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

