



**Wadhwa (As the Legal Representative of the Estate of Deshpal Omprakash  
Wadhwa) v Mohamed & 4 others (Environment and Land Case  
51 of 2012) [2023] KEELC 20824 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20824 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE 51 OF 2012  
MAO ODENY, J  
OCTOBER 16, 2023**

**BETWEEN**

**SHAMI DESHPAL WADHWA (AS THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF DESHPAL OMPRAKASH WADHWA) ..... PLAINTIFF**

**AND**

**HABIB ABU MOHAMED ..... 1<sup>ST</sup> DEFENDANT  
ABDALLA MWARINGA MAYE ..... 2<sup>ND</sup> DEFENDANT  
IBRAHIM MUKHTAR ABASHEIKH ..... 3<sup>RD</sup> DEFENDANT  
TAUHIDA TAHIR SHEIKH SAID ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion application dated 15<sup>th</sup> March 2023 by the 1<sup>st</sup> Defendant seeking the following orders:-
  - a. Spent.
  - b. That this honourable court be pleased to direct that the plaintiff do avail to this court the originals of the following documents mentioned in the plaintiff's original list of documents, the plaintiff's additional list of documents dated 30<sup>th</sup> January 2019, and plaintiff's further supplementary list of documents dated 8<sup>th</sup> October 2018, be subjected to forensic examination by a public document examiner;- letter dated 21<sup>st</sup> July 1992 from the commissioner of lands, certificate of stamp duty dated 14<sup>th</sup> July 1992, letter dated 6<sup>th</sup> March 2017 from the ministry of lands, letter dated 22<sup>nd</sup> February 2017 from the ministry of lands and physical planning, letter of allotment dated 19<sup>th</sup> June 1992 and the receipt issued on 27/7/92, the original certificate of



lease for Kilifi/Jimba/441 issued on 27<sup>th</sup> July 1992 in favour of Deshpal Omprakash Wadhwa, the presentation book containing entries for July 1992, and for the period between June 1992 and August 1992, the approved application for lease to be examined by a document examiner.

- c. Further this Honourable Court be pleased to direct that the plaintiff do avail for purposes of forensic examination by a public document examiner the original lease document and the forwarding letter issued in favor of the plaintiff with respect to the property referenced Kilifi/Jimba/441.
  - d. That authors/makers of the above abovementioned documents at paragraph 2 and 3 above be summoned to appear before this court for purposes of cross-examination.
  - e. That costs of this application be provided for.
2. The 1<sup>st</sup> Defendant relied on the grounds on the face of the application together with the affidavits sworn by Mohamed Habib Abu and Abdalla Mwaringa Maye who deponed that the ownership documents produced by the Plaintiff do not exist on the available green cards and that the authors of the mentioned documents have since denied the authenticity of the signatures appended thereon.
  3. The Plaintiff filed a Replying affidavit dated 10<sup>th</sup> May 2023 wherein he averred that the application is an afterthought and meant to revisit the Plaintiff's case through misconceived craft and perceived innovation since the Defendants were in possession of each of the mentioned documents well before the hearing date; and had the opportunity to cross-examine or challenge the same.
  4. Parties agreed to canvass the application by way of written submissions, which were duly filed.

#### **1<sup>st</sup> Defendant's Submissions**

5. Counsel gave a brief background to the case and submitted that the application was made with a view to assist the court adhere to its primary duty which is to unravel the truth in administration of justice as was held in the case of [Daniel Gachanja Gitthaiga v Credit Reference Bureau Africa Ltd & 2 others](#) [2020] eKLR
6. Mr. Matini further submitted on the legal requirements for proof of fraud and stated that that by subjecting the documents to forensic investigation, the court will have an opportunity to rule whether the 1<sup>st</sup> Defendant complied with Section 107-109 of the [Evidence Act](#).

#### **Plaintiff's Submissions**

7. Counsel for the Plaintiff also reiterated what had transpired in the case and submitted that the issues for determination were whether the court can entertain the orders sought by the Applicant and whether it has merit.
8. Counsel relied on Article 162(2) (b) and (3) of the [Constitution](#) of Kenya, 2010 as read with Section 13 of the [Environment and Land Court Act](#) 20111 which establishes the court and legislates its jurisdiction.
9. Counsel further cited Order 14 rule 3 of the [Civil Procedure Rules 2010](#) that provides that every document, which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under Rule 12, shall form part of the record of the suit.
10. Counsel further submitted that Section 84 of the [Evidence Act](#), the mentioned documents form part of the court's record and the presumption guaranteed under Section 84 can only be dislodged through evidence to be led by the Defendants in the course of their case.



11. According to counsel, the orders allowing production of the said documents with no objection from the Defendants was final. That the present application was an invitation of the court to sit on appeal against its own orders.
12. Counsel relied on the case of *Bakari Juma Diwani and 296 others v Carity Wangui Mwangi* [2020] eKLR where the court dismissed a similar application requiring the Plaintiff's documents to be subjected to forensic examination to confirm the authority of the signature appearing thereon.
13. Mr. Karega further cited that cases of *Francis Kirimi Nkarichia v David Nkanata Magiri and 7 others* [2022] eKLR; *Yuda Imunya v Atanasio Kibaara and 2 Others* [2021] eKLR; and *Lilian Sitati v George Wasike* [2020] eKLR, and submitted that in allowing the orders sought, this court will be turning into a criminal court ultra vires the jurisdiction of the court set out under Section 13 of the *Environment and Land Court Act*.
14. Counsel submitted that inviting the court to grant the orders sought amounts to inviting the court to descend into the litigation arena to assist parties in gathering evidence and be a countenance of extreme indolence and laches on the part of the 1<sup>st</sup> Defendant.

### **Analysis And Determination**

15. The issues for determination are whether this court should order that the documents listed in prayer 2 and 3 above be subjected to forensic examination by a document examiner; and whether the court should summon the authors of the said documents for cross-examination.
16. There is no doubt that the documents which are subject to the present application were available to the Defendants as early as 2012, 2016 and 2017 respectively, long before the hearing of the Plaintiff's case in October 2018 and February 2019. The record reveals that the Defendants had the opportunity to cross-examine the Plaintiff's witnesses on the documents, which were produced.
17. It is apparent that the issue of forensic examination of those documents was an afterthought that only came up after the court granted leave to the Plaintiff to introduce another document being the Presentation book, vide a ruling dated 27<sup>th</sup> October 2022.
18. In the case of *Bakari Juma Diwani & 296 others v Charity Wangui Mwangi* [2020] eKLR (*supra*) the court held that :
 

“Evidently, this is not a criminal court and pre-trial discovery and gathering of evidence must be managed by the parties. The applicant has doubts as to the authenticity of the Authority to Appear, Act and plead and the respondents' identity card numbers. The applicant is entitled to do so. However, in expressing her doubts over the authenticity of the said documents, the applicant cannot be allowed to turn the court into an investigative agency. By ordering forensic examination of the disputed documents, the court will, in my view, be descending into the parties' arena of availing evidence in support of their respective cases. In my view, parties must be left to present evidence in support of their respective cases.”
19. This is a case where the Plaintiff had already testified together with his witnesses and produced the documents that he would rely on. DW1 had also testified in the case. The issue in contention is the authenticity of the lease held by the Plaintiff, which the 1<sup>st</sup> Defendant had an opportunity to challenge when they were produced as exhibits at the hearing of the Plaintiff's case. This is an old matter, which was filed in 2012, and the parties went through pretrial and confirmed to the court that the same was



ready for hearing which hearing indeed started and was on course. It seems that the 1<sup>st</sup> Defendant is hell-bent to delay this case further by such applications which amounts to an abuse of court process.

20. The 1<sup>st</sup> Defendant lost and opportunity to challenge the authenticity of the documents and did not object to their production. I do not think that it will be fair to aid parties who have not prepared for their case.
21. The upshot is the 1<sup>st</sup> Defendant's application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF OCTOBER 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

