



REPUBLIC OF KENYA



KENYA LAW
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**Makenzi v Mutonde & 7 others (Environment and Land Case
E031 of 2022) [2023] KEELC 21828 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21828 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE E031 OF 2022
TW MURIGI, J
NOVEMBER 22, 2023**

BETWEEN

PHILOMENA MUTINDI MAKENZI PLAINTIFF

AND

GEORGE MUTISYA MUTONDE 1ST DEFENDANT

JACKSON MBITHI MBALUKA 2ND DEFENDANT

JEREMIAH MUTISYA THOMAS 3RD DEFENDANT

DANIEL KYALO MULI 4TH DEFENDANT

REUBEN MASAMBA NDAMBUKI 5TH DEFENDANT

GABRIEL MWELE MAINGI 6TH DEFENDANT

TIMOTHY MUOKI MAINGI 7TH DEFENDANT

EUNICE KAMENE MUTHAMA 8TH DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 31st January, 2023 brought under Sections 1A, 1B, 3A and 22 of the *Civil Procedure Act* in addition to Order 28 Rule 7 of the *Civil Procedure Rules* in which the 1st Defendant/Applicant seeks the following orders: -
 1. Spent.
 2. That the sale agreement dated 5th August, 2015, the cash refund agreement dated 1st July, 2015 both between the Plaintiff, her children and the 1st Defendant and the Land Board Forms dated 17th December, 2015 whereof the Plaintiff affixed her thumbprint be subjected to forensic investigations by the DCI Makueni Police Station.



3. That the Court do issue an order compelling the Plaintiff and her children namely; Peter Mutuku Makenzi ID No. 11XXXX18, Stephen Mutinda Makenzi ID No. 234XXXX7, Dominic Musau Makenzi ID No. 22XXXX17 and Anthony Thathi Makenzi to appear before the Makueni Police Station DCI Office to subject their thumbprints/signatures to forensic investigations for purposes of ascertaining as to whether they executed the said documents.
 4. That the DCI do file their report in Court.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of George Mutisya Mutonde sworn on even date.

The Applicant's Case

3. The Applicant averred that in the Plaintiff dated 6th October 2022, the Plaintiff denied selling the suit property to the 1st Defendant. That a sale agreement dated 05/08/2015 was duly executed by the Plaintiff and the 1st Defendant plus their witnesses for all that property known as Makueni/Unoa/2982 at a consideration of Kshs. 563,000/=.
4. The Applicant averred that the Plaintiff acknowledged receipt of the payment and lawfully transferred the suit property to him after due process was followed which included obtaining consent of the Land Control Board. That prior to the sale agreement of 05/08/2015, the Plaintiff approached the Applicant to purchase the property where he paid a deposit of Kshs. 313,000/= but later cancelled the transaction for personal reasons. That on 01/07/2015, both the Applicant and the Plaintiff signed a cash refund agreement for Kshs. 313,000/=.
5. The Applicant averred that he decided to proceed with the sale agreement after the Plaintiff failed to refund the money and in the fear that he would lose his money. That on 19/01/2016, a title deed for the suit property was issued to him and that he has been in lawful possession thereof with the Plaintiff's full knowledge. He further averred that being the registered owner of the suit property, he caused the same to be subdivided and sold the new titles thereof to wit Title Nos. Makueni/Unoa/4559, 4560, 4561, 4562, 4563, 4564, 4565, 4566, 4567, 4568, 4569, 4570, 4571, 4572, 4573, 4574 and 4575 to the 2nd – 7th Defendants herein.
6. The Applicant added that the Plaintiff and her children have all along been aware of the Defendants' occupation of the suit property because they live nearby. That since the Plaintiff has alleged illegality and fraud on his part, it is necessary that the orders for a forensic investigation be issued to enable the DCI to conduct examination on the sale transaction documents.

The Respondent's Case

7. The Plaintiff/Respondent filed a replying affidavit on 20th February, 2023 in opposition to the application. She averred that the Applicant is seeking to turn this Court into an investigation agency as opposed to being a neutral umpire that should not be seen to aid any party in the suit. That the 1st Defendant ought to have obtained his evidence before lodging the defence. She averred that the Applicant has not lodged any formal report with the Directorate of Criminal Investigations and that lodging a report after the present suit was filed is an afterthought.
8. The Respondent contended that the suit property was registered in her name and as such, she is the only person legally capable of selling and transferring and hence subjecting her sons to criminal



investigations is misplaced. She further contended that the Court should not usurp the constitutional mandate of the DCI if at all they have failed to act.

9. The Respondent contended that the Applicant should cease circumventing the rules of procedure by placing the burden of proof on the Court. She added that the application was frivolous and devoid of merit and that it should be dismissed with costs.

The Response

10. The Applicant in a supplementary affidavit sworn on 7th March, 2023, averred that the orders sought herein are in the interest of justice and to enable the parties in dealing with pretrial compliance directions by virtue of Section 22 of the [Civil Procedure Act](#). That the Plaintiff shall not be prejudiced in any way if the orders sought are granted.
11. The application was canvassed by way of written submissions.

The Applicant's Submissions

12. The Applicant's submissions were filed on 14th March, 2023. Counsel reiterated the contents of the Applicant's supporting and supplementary affidavits in support of the submissions. Counsel contended that Section 22 of the [Civil Procedure Act](#) grants the Court power to make orders for discovery either on its own motion or on the application of any party. That the Court is also bound by the provisions of Sections 1A and 1B of the [Civil Procedure Act](#) to facilitate the proportionate resolution of civil disputes with the efficient use of the available judicial and administrative resources.
13. Counsel further submitted that the provisions of Order 28 Rule 7 of the [Civil Procedure Rules](#) mandate the Court to issue a commission to any person to make an investigation and to report to the Court for the purpose of ascertaining any matter in dispute in the suit. Counsel submitted that a forensic report will clear the air on the execution of the said documents and that the application herein is thus in order.

The Respondent's Submissions

14. The Plaintiff's submissions were filed on 21st March, 2023. On his behalf, Counsel submitted that the Applicant's supporting affidavit offends the provisions of Order 19 Rule 3 of the [Civil Procedure Rules](#) as it is not competent for a party to depone to evidentiary facts which are contested. Counsel insisted that this Court is not a criminal court and that pretrial discovery and gathering of evidence must be managed by the parties.
15. Counsel argued that to allow a forensic examination of the disputed documents would amount to the Court descending into the parties' arena of availing evidence in support of their respective cases. Counsel added that the burden of proof of any fact lies with the person who alleges it and that the Applicant should not circumvent rules of procedure by placing his burden on the Court.
16. Counsel contended that having failed to file a complaint for criminal investigations, the application herein lacks merit and that it is an abuse of court process. Urging the Court to dismiss the application, Counsel relied on the following authorities: -
 - i. [M'Bita Ntiro Vs Mbae Mwirichia & Another](#) [2018] eKLR.
 - ii. [Francis Kirimi Nkarichia Vs David Nkanata Magiri & 7 Others](#) [2022] eKLR.



Analysis And Determination

17. Having considered the application, the respective affidavits and the rival submissions, the only issue for determination is whether the sale agreement, cash refund agreement and the Land Board Forms between the Plaintiff, her children and the 1st Defendant should be subjected to forensic investigation by the DCI Makueni Police Station.
18. The Applicant has brought this application under Order 28 Rule 7 of the [Civil Procedure Rules, 2010](#) which provides as follows: -

On the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining:-

 - (a) any matter in dispute in the suit, whether or not the matter is substantially the whole matter in dispute between the parties; or
 - (b) ...
19. Similarly, Section 22 of the [Civil Procedure Act](#) provides as follows:-

Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party:-

 - (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;
 - (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
 - (c) order any fact to be proved by affidavit.
20. From the above provisions of the law, it is undoubtedly clear that it is within the discretion of this Court to issue orders which facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and this is the overriding objective under Section 1A of the [Civil Procedure Act](#).
21. At paragraph 14 of the Plaint dated 6th October, 2022, the Plaintiff pleaded that she did not sell land Parcel No. Makueni/Unoa/2982 to the 1st Defendant and that the suit property was fraudulently transferred and subdivided.
22. In paragraph 5 of the amended statement of defence dated 10th November, 2022, the 1st Defendant pleaded that the suit property was willingly sold to him by the Plaintiff vide the sale agreement dated 05/08/2015 and that consideration was duly paid and acknowledged.
23. The pleadings clearly show that the Plaintiff denies knowledge of the sale agreement dated 05/08/2015. That definitely calls for the scrutiny of the said sale agreement to examine its authenticity or otherwise. Should the sale agreement and the subsequent documents turn out as forgeries, then the Plaintiff's case for fraud will become even more reinforced.
24. The objective of discovery was reiterated in [Concord Insurance Company Limited \(Under Statutory Management\) Vs NIC Bank Limited](#) [2020] eKLR wherein the learned Judge held as follows: -
 - “ 21. One object of this Section is to avoid trial by ambush and to ensure that all material relevant to the just and fair determination of a dispute can be availed



to all parties and the Court in good time. As stated by Gikonyo J in *ABN Amro Bank N.V v Kenya Pipeline Company Limited* [2014] eKLR (a case cited by counsel for Concord), the provisions serve a useful purpose. The Judge held;

“Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the *Civil Procedure Act* and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of *the Constitution*. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that “the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial.” It, therefore, serves a higher objective as the enabler of fair hearing.”

25. Similarly, the Court of Appeal in *Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited* [2019] eKLR aptly held as follows:-

“As stated earlier, discovery is a tool requiring an adverse party to disclose information that is essential for the preparation of the requesting party's case and/or to ascertain the existence of information that may be introduced as evidence at trial. The respondent was well within its rights to request the return of documents given to the appellant, presumably with the intent to introduce the documents as evidence at the trial which was yet to begin.

The test for discovery is proof of possession and materiality of the information sought by the parties. This being the settled legal requirement and having been proved by the respondent in the present case, we find no inclination to interfere with the trial court's decision.”

26. In *Kenya Commercial Bank of Kenya Limited v Kenya Pipeline Company Limited* [2014] eKLR, the court held that: -

“37. Having considered the pleadings herein, the Grounds of Opposition, the affidavit evidence, the written and oral submissions by the parties, the court finds that the Plaintiff has not provided any tangible evidence that it will not suffer any prejudice if it complies with the order for discovery which this court finds, it can grant under Section 22 (a) of the *Civil Procedure Act* or that it will suffer hardship in providing part of the information sought by the Defendant. The court has come to the conclusion that discovery on the terms shown hereunder be done to accord the Defendant an opportunity to present and ventilate its case in a fair manner.”

27. In the present case, there is a controversy over whether the Plaintiff executed the sale agreement and the land board forms. That is a question that is central to the fair determination of the dispute and the orders sought will in no doubt help to clear the controversy. Moreover, the Plaintiff has not provided any plausible explanation as to what prejudice she would suffer if the sale agreement and land control board forms are subjected to the forensic investigation as requested. In the event that the only hardship is costs, those can always be reimbursed accordingly.

28. In the end, I find that application dated 31st January, 2023 is merited and the same hereby is allowed as prayed.



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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF NOVEMBER, 2023.

In the presence of: -

Court Assistant – Mr. Kwemboi.

Muthiani for the Plaintiff/Respondent

