



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 459 OF 2010**

**JAMES GITINGU WAMAGATA.....1<sup>ST</sup> PLAINTIFF**  
**JOSPHAT MAINA MACHARIA.....2<sup>ND</sup> PLAINTIFF**  
**VERSUS**  
**DAVID MIGICHI KAGENI.....DEFENDANT**

**RULING**

Vide an application dated 2/9/2013 counsel for the Plaintiffs sought orders as follows:

- 1. Spent**
- 2. The Court does order the Defendant to surrender original acknowledgement letter dated 31/3/2008 and the receipt dated 24/10/2008 through his advocates to the document examiner within a time frame to be fixed by the court.**
- 3. The parties herein to supply their specimen signatures to the document examiner within a period to be specified by the Court.**
- 4. A mention date to be fixed by the court to confirm compliance.**
- 5. Costs be in the cause.**

The application is premised on grounds that on 29/1/2013 the court ordered that the said documents be examined by a document examiner but that efforts to expedite the analysis and examination process have been frustrated by the Defendant who has been unwilling to co-operate.

The application was opposed by the Defendant who swore a Replying Affidavit on 7/4/2014. The Defendant deposed that the documents asked for by the Plaintiffs are an attempt to steer of the contentious issue of the forged and/or altered sale agreement by the 1<sup>st</sup> Plaintiff. He deposed that it is the sale agreement that has created confusion as the first page was altered to suit the 1<sup>st</sup> Plaintiff's malicious needs. The Defendant contended that if there was any document to be verified by the document examiner then it is the forged sale agreement by the 1<sup>st</sup> Plaintiff.

The Defendant deposed further that his advocates had not been served with the order dated 29/1/2013, but that nevertheless, there were several copies of the documents requested by the Plaintiff and no reason was advanced for the production of the originals. He deposed further that the said application was an afterthought seeing that it was filed after the pre-trial conference. The Defendant contended that the application was intended to waste the court's time since the 1<sup>st</sup> Plaintiff had never denied the particulars of the Defendant's Amended Statement of Defence that he executed the said documents. The Defendant deposed that there was no justification for the request of a specimen signature since none of the two documents contained his signature. It was his deposition that the outcome of the report on the signatures would be biased and/or manipulated in favour of the Plaintiffs. Additionally that even without the examiner's report, the court upon the hearing the matter on trial will be able to determine whether or not the Plaintiff received the money. The Defendant urged the court to dismiss the application.

The Plaintiff swore a Supplementary Affidavit on 10/4/2014 wherein he deposed that upon serving the examiner the court order dated 29/1/2013, the said examiner notified him that it would not be possible to effect the orders unless the same is amended in terms of Prayers No. 2 and 3. Therefore, that the current application is only intended to help the effective implementation of the Court Order as requested by the document examiner. The Plaintiff contended that without the orders herein being granted, the document examiner may not be able to implement the court order in issue. The Plaintiff deposed further that the Defendant's signature was necessary since he forged his signature as well as the author of the receipt in issue.

The application was canvassed by way of written submissions. Muchagi Nduati & Co. Advocates for the Plaintiffs filed submissions dated 23/4/2014 wherein counsel submitted that the order requiring parties to submit specimen signatures to the examiner was made in the presence of the Defendant's counsel on 29/1/2013 and that he made no objections. Further that it has been impossible for the document examiner to effect the said order which was served upon him on 5/6/2013 hence this application. Counsel submitted that the main issue as to who is the author of the documents can only be determined with the help of the examiner and that pursuant to Order 11 Rule 7 of the Civil Procedure Rules, it is a requirement that issues that require expert evidence be sorted out before the hearing.

Wambo & Co. Advocates for the Defendant filed submissions dated 6/10/2014 wherein counsel recapped the Defendant's deposition that copies of the said documents issued are true copies of the original and therefore there is no need for the originals to be furnished. Further that there was no evidence attached to the application to the effect that the examiner was dissatisfied with the copies issued. It was submitted that the original documents is what the Defendants would rely on in his Defence and in any eventuality of loss, the Defendant would not have original exhibits to rely on. It was further submitted that there was no reason advanced for the defendant to be compelled to give specimen signature. Counsel referred the court to the ruling by Okwengu J. dated 8/6/2011 and submitted that the only remaining issue to be determined is what portion of the land was paid for by the Kshs. 200,000/-. Counsel urged the court to dismiss the application submitting that the same was a waste of the court's time.

I have perused the court record which reveals that the bone of contention is 0.05ha allegedly sold to the Defendant by the Plaintiffs. It is common that the Plaintiff was the owner of a parcel of land measuring 0.15ha. It is also common that the Plaintiff and Defendant entered into an agreement for the sale of 0.10ha out of the 0.15ha and that upon sub-division of the property, the Defendant would re-transfer the 0.15ha back to the Plaintiff. There is an issue with the Sale Agreement in that both parties availed what they contend is the original sale agreement. There are some disparities in the said agreements but both contain clauses that state 0.05 will be retransferred to the Plaintiff.

The dispute however is that the Defendant alleges that just before he effected the re-transfer, the Plaintiff approached him to sell the remainder portion of 0.05ha at a consideration of Ksh. 200,000/-. In support of this averment, the Defendant availed copies of an acknowledgement letter dated 31/10/2008 and a receipt dated 24/10/2008 to show that the Plaintiff received a total of Kshs. 200,000/- for the said portion. This allegation was refuted by the Plaintiff who denied ever approaching the Defendant for the sale of the remainder 0.05ha as well as acknowledging receipt of Kshs. 200,000/-. It was the Plaintiff's contention that if he intended to sale the remaining portion to the Defendant, he would have stated as much in the

agreement.

It is these two documents which the Plaintiff declined to have signed in acknowledgement of the purchaser price for the remainder portion, which the Plaintiff desires that they should be scrutinized by the document examiner. In an oral application in court on 29/1/2003, the court allowed the application and directed that the documents be examined by the document examiner. The Plaintiff now prays that the Defendant be ordered to avail the originals for purposes of examination. The Defendant on his part maintains that the copies available shall suffice and therefore there is no need for the originals.

It is common knowledge that the best evidence for examination purposes is always the original documents. Photocopies typically do not reveal all the evidence found on the original document, significant quality and features of the writing, indentations, outlines, feather strokes, pen stops, alterations, etc. A photocopy can also contain artifacts not on the original-these artifacts may be dirt, dried white-out, or scratches on the glass. There may also be defects on the machine's drum, or some other cause. In regards to the specimen signature, both parties alleged that the sale agreement produced by the adverse party was a forgery. In my view, signatures may be valuable to aid the examiner in coming up with a conclusive report.

In that regard, I allow the Plaintiff's application and direct the Defendant to furnish the original documents as well as the specimen signature to the court within 14 days of the date hereof for onward transmission to the examiner by the Deputy Registrar of this Court.

Dated, Signed and Delivered this 20<sup>th</sup> day of February 2015

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiffs

.....For the Defendant

Kamau: Court Clerk

**L.N. GACHERU**

**JUDGE**