



Wainaina & another v Ngure & 3 others; Kangethe & 6 others (Interested Parties) (Environment & Land Case 727 of 2017) [2022] KEELC 15606 (KLR) (15 March 2022) (Ruling)

Neutral citation: [2022] KEELC 15606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 727 OF 2017
MD MWANGI, J
MARCH 15, 2022**

BETWEEN

AYUB NJENGA WAINAINA 1ST PLAINTIFF

IRENE WAIRIMU WAINAINA 2ND PLAINTIFF

AND

JOHN EDWARD NGURE 1ST DEFENDANT

MAWEGA COMPANY LIMITED 2ND DEFENDANT

DISTRICT LANDS REGISTRAR NAIROBI 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

AND

STEPHEN NJAU KANGETHE INTERESTED PARTY

BENALD KAMANDE MBUGUA INTERESTED PARTY

ASWANI OBUTABILA PATRICK & 4 OTHERS INTERESTED PARTY

RULING

(In respect of the Notice of Motion Application dated 18th November 2021 by the Plaintiffs/Applicants).

Background.

1. The Notice of Motion application is brought under the provisions of Section 3A and 63 of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010. The Plaintiffs pray for 2 main orders namely: -



- a. That pending the hearing and determination of the suit the Honourable Court be pleased to order the 2nd Defendant to produce the original sale agreement and transfer Documents in his favour regarding this matter to the Director of Criminal Investigations for Document examination.
 - b. That pending the hearing and determination of the suit, the 1st Defendant be ordered to produce his signature as a sample under the supervision of a judicial officer and that the same be forwarded to the Director of Criminal investigations for verification and investigation.
2. The Application is premised on the grounds on the face of it and on the supporting affidavit of Ayub Njenga Wainaina.
 3. The Application is opposed by the 1st and 2nd Defendants, each of whom has filed a replying affidavit in opposition. Both are of the view that allowing the application by the Plaintiffs is tantamount to compelling the Director of Criminal Investigations to institute and conduct investigations into the allegations by the Plaintiffs. They pray for the dismissal of the application which they term as an abuse of the process of court.

Court's Directions.

4. The court's directions were that the Application be canvassed by way of written submissions. The Plaintiffs/Applicants, the 1st and 2nd Defendants filed their respective written submissions. The other parties did not file submissions. The court has had the occasion to consider the submissions.

Issues for Determination.

5. Having perused the application by the Plaintiffs, the responses by the 1st and 2nd Defendants, and the respective submissions filed by the parties, the court is of the view that the only issue for determination is whether the Applicants are entitled to the order sought in their application.

Determination

6. As I had noted earlier on, the application is brought under the provisions of Section 3A and 63 of the *Civil Procedure Act*. Section 3A reserves the jurisdiction which inheres in every court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.
7. Justice Ouko, (as he then was) in the matter of the Estate of George M Mboroki (Meru HCSC No. 357 of 2004) in referring to section 3A stated that the court retains a residual source of power which it may draw upon whenever it is just or equitable to do so. In particular, 'the court will exercise this power to ensure the observance of the due process of law, to prevent abuse of the court process, to do justice between parties and to secure a fair trial.'
8. Section 63 of the *Civil Procedure Act* on the other hand provides that in order to prevent the ends of justice from being defeated a court may issue any of the following orders:-
 - a. Issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance and if he fails to comply with any order for security commit him to prison;
 - b. Direct the Defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order that his property be attached and sold;



- c. Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
 - d. Appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property; and
 - e. Make such other interlocutory orders as may appear to the court to be just and convenient.
9. To my mind, Section 63 is very specific on the kind of orders that the court may issue. The title to Section 63 is, “supplemental proceedings”. The Black’s Law Dictionary, 11th Edition, defines ‘supplemental proceedings’ to mean “a proceeding held in connection with the enforcement of a judgement, for the purpose of identifying and locating the debtor’s assets available to satisfy the judgement”.
 10. Section 63 of the [Civil Procedure Act](#) does not provide for the grant of the kind of orders that the Plaintiffs seek in their application under consideration.
 11. A keen look at the Plaintiff’s application will show that their intention is to use this court’s process to help them gather evidence and compel the Director of criminal investigations to take action against the 1st Defendant.
 12. In their grounds in support of the Application as well as in the supporting affidavits, the Plaintiffs make two averments that in my view bring to the light their real intentions.
 13. First, the Plaintiffs state that, “the Plaintiffs are of the firm believe that 1st Defendant is in possession of forged titled documents.” Secondly, the Plaintiffs state that, “the matter was reported to the Directorate of Criminal Investigations, Land Fraud Unit although action is yet to be taken against the perpetrators of the said fraud”.
 14. The proceedings before this court are civil proceedings. The procedures to be followed in respect of proceedings of a civil nature are provided for under the [Civil Procedure Act](#) and the Civil Procedure Rules. Additionally, we have the practice directions applicable to this court issued from time to time.
 15. The application by the Plaintiffs to compel the 1st Defendant in this case to produce documents to the Director of Criminal Investigations for purposes of inspection finds no anchorage in the [Civil Procedure Act](#). It is not provided for anywhere in the Civil Procedure Rules too. The 2nd prayer in the application by the Plaintiffs to compel the 1st Defendant to produce his specimen signature to the Director of Criminal Investigations for verification and investigation is also not provided for anywhere either in the [Civil Procedure Act](#) or the Rules.
 16. In an adversarial system like ours, the court never goes out to seek facts or evidence. It is incumbent upon the parties to present, adduce sufficient evidence and proof of the facts which they assert before the court. The court remains an impartial arbiter, otherwise as warned by Sir Barclay Nihil in *Jashbbhai C Patel, vs BD Joshi* (1952) EACA, its vision may become clouded by the dust of the conflict.
 17. The office of the Inspector General of Police and the Director of Criminal Investigations are independent in as far as performance of their constitutional and statutory functions is concerned and this court or any other court for that matter cannot purport to direct them to conduct investigations or examine documents as sought by the Plaintiffs in their Application. If the Plaintiffs think that the Director of Criminal Investigations has not attended to their complaint to their satisfaction, there are other appropriate channels provided under the law to have such kind of grievances and complaints addressed.



18. Finally, I feel obliged to add my voice on the subject of the exercise of the discretion of the court under Section 3A of the *Civil Procedure Act*. The discretion of the court is judicial discretion. Judicial discretion must be exercised judiciously on the basis of the law and sound legal principles. It is not an open cheque at the disposal of the court. It is not allowable to the court to issue any order anyhowly.
19. I fully associate with the pronouncement of the Court of Appeal in the case of *Murtaza Hussein Bandali t/a Shimoni Enterprises vs P.A Willis* (1991) KLR, 469, where the court eloquently stated that;-
- “This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously”.
20. The upshot is that the Plaintiffs’ application dated 18th November 2021 has no basis in law and is hereby dismissed with costs to the 1st and 2nd Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Ms Nasamba holding brief Macharia for the Plaintiff

Ms Nganga for the 2nd Defendant

Mr Wachira Micere holding brief for Muindi for the 1st Defendant

None appearance for the 3rd, 4th Defendants and the interested parties

Court Assistant: Hilda

M.D. MWANGI

JUDGE

