



**Yusuf v Mohamed & another (Environment & Land Case
213 of 2018) [2022] KEELC 2937 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 213 OF 2018**

NA MATHEKA, J

JUNE 29, 2022

BETWEEN

KHADIJA FAMAU YUSUF PLAINTIFF

AND

MOHAMED HAFIDH MOHAMED 1ST DEFENDANT

**REHEMASHEE BIN ALI (AS ADMINISTRATOR OF THE ESTATE OF THE
LATE MAMA KOBANA SALIM KHAMIS K. MTWAFY) 2ND DEFENDANT**

RULING

1. The application is dated January 21, 2021 and is brought under sections 1 A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of the laws of Kenya, order 3 rule 2, order 7 rule 17 and order 51 rule I of the *Civil Procedure Rules*, 2010, articles 50(2)(k) and 159(2)(d) of the *Constitution*, 2010, rule 3 of the High Court practice seeking the following orders;
 1. This honourable court do direct and/or order that the signature appearing on the agreement dated April 28, 2003 be examined by a handwriting expert to verify its authenticity.
 2. Costs of this application be granted to the 1st defendant/applicant.
2. It is based on the grounds that the 1st defendant denies having transferred his house on Plot No 938/III/MN to the plaintiff as alleged or having made any agreement with the plaintiff. Thus the 1st defendant challenges the authenticity of the signature appearing in the agreement dated April 28, 2003 sought to be relied on by the plaintiff. As such, the 1st defendant has suspicion that the said documents may not be genuine. The 1st defendant urges this honourable court to exercise its discretion in favour of the 1st defendant and grant the application herein as prayed by dint of order 3 rule 2 of the *Civil Procedure Rules* which stipulates that statements of expert witnesses need not be filed with the other witness statements and documents. No prejudice will be occasioned to the plaintiff. The 1st defendant will be greatly prejudiced as he stands to suffer irreparable loss and damage as well as be disintitiled of his



property. It will be great injustice if the plaintiff is allowed to rely on the evidence the 1st defendant believes is falsified. It is thus in the interest of Justice that the application herein be granted as prayed.

3. The plaintiff/respondent in opposition stated that, there is no factual foundation or basis for the present application to submit the agreement dated April 28, 2003 for examination by a hand writing expert. That since the agreement is the bone of contention in the suit, its veracity can be tested at the full trial. The present application offends section 72 of the *Evidence Act* as the applicant has not proved that the attesting witness in the agreement cannot be found or that his presence cannot be obtained without an amount of delay and expense. The applicant has not stated clearly whether he shall cater for the expense of the independent hand writing expert to be selected by the court or not. The application lacks merit, is suspect for ulterior motives and improper purpose and the court ought not be used by parties to embark on fishing expeditions with the objective of bolstering their cases. That granting the request is likely to further delay the determination of the matter which was filed in 2018.
4. This court has considered the application and the submissions therein. It is based on the grounds that the 1st defendant denies having transferred his house on Plot No 938/III/MN to the plaintiff as alleged or having made any agreement with the plaintiff. Thus the 1st defendant challenges the authenticity of the signature appearing in the agreement dated April 28, 2003 sought to be relied on by the plaintiff. As such, the 1st defendant has suspicion that the said documents may not be genuine. Hence the applicant seeks for an order that the court do direct and/or order that the signature appearing on the agreement dated April 28, 2003 be examined by a handwriting expert to verify its authenticity. Section 107(1) of the *Evidence Act* (chapter 80 of the laws of Kenya), provides that;
107.
(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
5. There is the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence as ruled in the case of *Isca Adhiambo Okayo vs Kenya Women's Finance Trust* KSM CA Civil Appeal No 19 of 2015 (2016) eKLR. This is captured in sections 109 and 112 of the act as follows:
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
6. The Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* NYR CA Civil Appeal No 342 of 2010 [2013]eKLR stated as follows
7. We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”



8. It is the responsibility of this court to consider the pleadings and the evidence brought before it. It is not for this court to go out looking for evidence for any litigant. If the 1st defendant suspects the document is a forgery, then it is up to him to seek the expert to examine the same at his cost. For these reasons, I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

