



**Eugefreight Travel & Tours Limited v Souza & another (Environment & Land
Case E082 of 2021) [2022] KEELC 3956 (KLR) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E082 OF 2021
EK WABWOTO, J
AUGUST 4, 2022**

BETWEEN

EUGEFREIGHT TRAVEL & TOURS LIMITED APPLICANT

AND

FRANKLIN SUBHAS SOUZA ALIAS FRANKLIN D'SOUZA ... 1ST DEFENDANT

JOHN KIPKOSGEI KORIR 2ND DEFENDANT

RULING

1. In an application dated November 9, 2021, the Applicant sought for the following orders;
 - i. Spent...
 - ii. Spent...
 - iii. That the honourable court be pleased to re-open the discovery process and subsequently call for the file before the High Court of Kenya at Nairobi in Succession Cause No 2751 of 1999.
 - iv. That the honourable court be pleased to issue summons to Brian Charles Cyril D'Souza, currently within the court's jurisdiction, to attend trail, give evidence and produce documents in this matter.
 - v. That the honourable court direct the Director of Criminal Investigations to probe and verify the purported identification document of the 1st defendant herein.
 - vi. That the honourable court grant leave to the plaintiff to file a further bundle of documents and witness statement.
 - vii. That the honourable court be pleased to issue any other orders as befits the ends of justice in the circumstances of this case.



- viii. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and supported by the affidavits sworn on November 9, 2021 and March 4, 2022 by Jackton Nyanungo Ranguma a director of the plaintiff/applicant herein.
 3. The application was opposed by the 1st defendant who filed a replying affidavit sworn on January 31, 2022 by Frankline D'Souza.
 4. The court's directions were issued on February 4, 2022 directing the parties to file their written submissions for subsequent highlighting on June 2, 2022. The applicants filed their written submissions dated March 4, 2022 and further submissions dated May 13, 2022 by M/S Rachier & Amollo LLP Advocates while the 1st defendant's written submissions dated March 22, 2022 were filed by Howard & Kenneth Advocates.
 5. During the highlighting of the parties written submissions on June 2, 2022, learned counsel Ms Maina submitted on behalf of the plaintiff/applicant, she relied on the written submissions and the affidavits on record that were filed in support of the application. Counsel argued that the applicant had purchased the suit property Land Reference 1008/16 from Maria Basilia Nunes and Brain Charles Cyril D'Souza (as executor of the estate of Franklin D' Souza) vide an agreement dated July 26, 2004 where the applicant paid the purchase price of Ksh 28,000,000/-.
 6. It was also argued that the applicant herein was seeking for reopening of the discovery process and call for the file in Succession Cause No 2751 of 1999, together with issuance of summons to one Brain Charles Cyril D'Souza to attend court and testify and further an order directing the Directorate of Criminal Investigation to probe and verify the purported identification documents of Franklin D'Souza.
 7. Counsel contended that the applicant had purchased the suit property on the basis of the documents issued in the Succession Cause No 2751 of 1999 and the matter cannot proceed unless the orders sought are granted. It was also submitted that the suit was yet to be heard and hence no prejudice will be suffered by the defendants should the discovery process be reopened and time enlarged to comply with order 11 of the [Civil Procedure Code](#).
 8. In the written submissions dated March 4, 2022, counsel submitted that the 1st defendant or whoever he may be is masquerading as Franklin D' Souza who died testate with a valid will and hence it is for the interest of justice that this court calls for the file in the succession cause with a view of effectively determining the issues in dispute herein.
 9. The court was also informed that in the succession cause, it is notable that the grant of representation to the estate of the late Franklin D'Souza was issued to Brain Charles Cyril D'Souza on November 24, 2000 following an application determined by Justice Kasanga Mulwa (as he then was) on the suit property which was unoccupied since the deceased passed away.
 10. It was also submitted that the proceedings before this court relate to a man who died testate on August 1, 1999 in Toronto Canada and previously a co-owner of the suit property and that the succession file relates to the distribution. Reliance was made to section 34 of the [Evidence Act](#) cap 80 of the Laws of Kenya on the admissibility of evidence and also a citation from University of *Pennsylvania Law Review and American Law Register Vol 63, No 6 (Apr., 1915) on Evidence Admissibly in a Civil Suit on Testimony Given at a Previous Criminal Trial* at page 557 where the journal refers to the case of *North River Insurance Company v Walker* 170 S W Rep 983 (Ky. 1914).



11. On the issuance of summoning Brian Charles Cyril D' Souza, Counsel submitted that order 16 of the [Civil Procedure Rules](#) provides for the summoning and attendance of witnesses and that this court is clothed with wide discretion to grant orders that meet the ends of justice and ensuring that a fair trial is realized. In this case Brian Charles Cyril D' Souza being the holder of the power of attorney as issued by the beneficiaries of the deceased. Counsel relied on the case of [Frankline Matata Mwagona v Boniface Kalama](#) [2019] eKLR Civil Appeal No 31 of 2016 in support of the said position.
12. On whether the court can direct the Directorate of Criminal Investigations (DCI), counsel submitted that the 1st respondent is a dead man who died testate and his property subject of succession proceedings before the High Court and hence the issue can be resolved through an investigation by the DCI.
13. In opposing the application, learned counsel Mr Kamau relied on the replying affidavit on January 31, 2022 by Frankline D'Souza and the written submissions dated March 22, 2022. Counsel argued that the court should not allow the orders sought since doing so will be rendering the court to engage into the realm of litigation and thus ceasing to be a neutral arbitrator. It was also submitted that a court can only admit previous proceedings of a witness was dead and that all issues in a previous suit were the same which is not the case herein.
14. On a preliminary issue, counsel submitted that the applicant had introduced new evidence in its supplementary affidavit sworn on March 4, 2022 by annexing 5 new annexures of which they would have no opportunity to respond to and as such, the court should disregard the same.
15. It was also argued that the under the applicant has not demonstrated any effort made to seek for the assistance of the DCI before approaching this court since according to him, the court should be the last place of call. Counsel relied on the cases of [Andrew Omtata Okoiti v AG & Others](#) and [Prof Njuguna S Ndungu vs EACC and Others](#) [2014] eKLR in support of the said position.
16. The 1st defendant/respondent's counsel concluded his written submission by urging the court to dismiss the application in its entirety.
17. I have considered the application and written submissions by counsel. The application seeks for various reliefs. In determining the same, I will dwell on the following as key issues for determination;
 - i. Whether the supplementary affidavit dated March 4, 2022 should be expunged from the court record.
 - ii. Whether this Court can re-open the discovery process and call for the succession file in Succession Cause No 2751 of 1999.
 - iii. Whether this summons can issue to Brian Charles Cyril D' Souza.
 - iv. Whether this court can direct the Director of Criminal Investigations to probe and verify the identity of the respondent.
18. Counsel for the 1st defendant argued that the supplementary affidavit dated March 4, 2022 ought to be disregarded for introducing 5 new annexures which they would have no opportunity to respond to. This position was countered by the applicant who reiterated that the supplementary affidavit only introduced correspondence between the applicant's advocate and Brian Cyril D' Souza based on already existing facts and issues as premised on the application dated November 9, 2021.
19. I have keenly perused the annexures that were annexed to the said supplementary affidavit and I note that they include the following; Letter dated September 28, 2021 and emails dated October 13, 2021,



- October 18, 2021, October 19, 2021 and November 4, 2021, power of attorney, which were annexed as annexures JNR 1 - 6. In the eyes of this court, the applicant was granted leave on February 8, 2022 to file a supplementary affidavit and having perused the same, it is the finding of this court that the same does not raise or introduce any new issues as alleged by the 1st defendant and as such the objection by the 1st defendant has no basis since disregarding the said affidavit would be draconian to the applicant.
20. Issue no 2, 3 and 4 will be dealt with together. On whether this court can re-open the discovery process and call for the succession cause file, counsel for the applicant submitted that this matter is yet to be heard and hence no prejudice will be occasion on the defendants should the said prayer be granted. The 1st defendant objected to the same and submitted that there is no basis in calling for the said Succession Cause File No 2751 of 1999 owing to the following reasons; none of the parties in the present suit are parties to this case, the respondents herein never cross-examined any witness in the succession case and that the issues in the succession case are distinct from the issues herein. Counsel also added that the requirements under section 34 of the *Evidence Act* have not been met to warrant the grant of the order sought.
21. Our legal system is an adversarial system where a party is required to avail all the material and evidence relevant to his case before trial. In the instant case, the applicant commenced this suit vide a plaint dated January 15, 2021. Order 3 rule 2 *Civil Procedure Rules* provides the documents to accompany the filing of a suit as follows: The affidavit referred to under order 4 rule 1 (2); A list of witness to be called at the trial; written statements signed by the witnesses excluding expert witnesses; and copies of documents to be relied on at the trial including a demand letter before action. From the provisions of the rules, a claimant who files a suit is required to file his suit accompanied with all the evidentiary documents he intends to rely during the hearing. The application which the applicant has filed seeks to procure more evidence in his favour to the prejudice of the respondent. This court is an impartial umpire and cannot assist one of the parties to procure evidence to his advantage.
22. In view of the foregoing, this court cannot direct the DCI on the investigations to conduct on behalf of the applicant since no proper basis has been laid to warrant the same. The only instance where this court can assist the parties in determination of their disputes is way of issuing summons to enter appearance and witness summons where it is requested by any of the parties. Compelling an entity to prepare investigative reports in a civil suit flies against its mandate as an impartial umpire.
23. In view of the foregoing, the application dated November 9, 2021 partly succeeds and I make the following disposal orders: -
- i. That witness summons be issued to Brian Charles Cyril D' Souza to attend trial and give evidence herein.
 - ii. That the plaintiff be and is hereby granted leave to file and serve a further bundle of documents and witness statements within 30 days from today.
 - iii. That upon service of the further bundle by the Plaintiff, the defendants are equally granted leave to file and serve their further bundle within 30 days of being served.
 - iv. That failure to comply with order (ii) and (iii) above, the parties will be deemed to have waived their right to file additional documents and any documents filed outside the stipulated timelines will be expunged from the court record with further reference to this court.
 - v. That each party will bear their own costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF AUGUST 2022.



E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Maina h/b for Mr. Ligunya for the Plaintiff/Applicant.

Mr. Kamau for the 1st Defendant/Respondent.

N/A for the 2nd Defendant/Respondent.

Court Assistant; Caroline Nafuna

E. K. WABWOTO

JUDGE

