



**Kyungu (suing on behalf of the Estate of Daniel Kyungu Muasya) v Kivuva & another
(Environment & Land Case 217 of 2010) [2022] KEELC 14598 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 217 OF 2010
A NYUKURI, J
OCTOBER 26, 2022**

BETWEEN

**REUBEN KAVITHI KYUNGU PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF DANIEL KYUNGU MUASYA**

AND

**JEREMIAH WAMBUA KIVUVA 1ST RESPONDENT
FREDRICK MUINDEE KIIO 2ND RESPONDENT**

RULING

1. *Vide* a notice of motion dated March 10, 2022, the Plaintiff/Applicant sought for the following orders;
 - a. Spent
 - b. That this Honourable Court do issue an order directing the Director of Criminal Investigations to subject the purported signatures of Daniel Kyungu Muasya in the agreement dated February 7, 1977 to forensic examination.
 - c. That costs of the application be in the cause.
2. The application is supported by grounds on its face as well as the supporting affidavit of the plaintiff sworn on March 10, 2022. The applicant's case is that the 1st defendant filed among the documents in support of his case, an agreement dated February 7, 1977 which was allegedly signed by the applicant's father. That the applicant disputes the signature attributed to his late father and alleges that the same is a forgery.
3. The applicant further stated that the Director of Criminal Investigations can only conduct a forensic examination in respect of the disputed agreement upon issuance of a court order to that effect. Further,



that the respondents do not stand to suffer any prejudice as they will have an opportunity to cross-examine on the report.

4. The application was opposed. The 2nd defendant filed a replying affidavit sworn on March 31, 2022 in response to the application. It was the respondent's case that the application herein was incompetent, mischievous and an abuse of the court process, as it sought for orders against the Director of Criminal Investigations who was neither a party nor represented in those proceedings hence allowing the application will render him condemned unheard.
5. The respondent further stated that the consent in issue has filed by a senior advocate of the High Court Kenya, 45 years ago in HCC No 2380 of 1976, which matter was concluded. Further, that the consent was adopted before a judge of the High Court Hon. Masime J and a decree in respect thereof issued. Also, that the decree was enforced by the orders of the court, directing the Deputy Registrar to execute the transfer of the suit property to Monica Kauki, the Plaintiff then.
6. According to the Respondent, the Plaintiff is the administrator of the estate of Daniel Kyungu Muasya who died on April 20, 2001; 27 years after the consent was signed. He also stated that throughout that period, Philip Kivuva Nzioka was exercising proprietorship rights over the suit property on behalf of his mother Monica Kauki, which included the successful litigation against Kenya Posts and Telecommunication Corporation.
7. That the suit is an afterthought having been filed 10 years after the death of Daniel Kyungu Muasya.
8. The respondent took the position that the consent letter cannot be examined in isolation to the exclusion of the entire proceedings and decree in HCC No 2380 of 1976. That the applicant ought to have challenged the consent in the matter where it was adopted as decree.
9. It was further asserted by the respondent that Mr. Odhiambo M.T. Adala who prepared the consent was still an active member of the bar and that the Plaintiff had not attempted to contact him.
10. The application was canvassed by way of written submissions. On record are the defendant's submissions filed on October 18, 2022.

Submissions

11. Counsel for the defendants reiterated the averments in their replying affidavit and submitted that the plaintiff's were abusing the court process in a bid to usurp the powers given to the Criminal Investigations Department.
12. It was argued for the defendant that the plaintiff has never lodged a complaint with the Director of Criminal Investigations as regards the consent letter hence the application was made in bad faith, as the Director Criminal Investigations is a public body that acts on complaints.
13. Further, the defendant's counsel argued that article 159(2), (d) requires that justice be administered without undue regard to technicalities, however article 159(2), (d) is not a panacea to all procedural technicalities.
14. Counsel contended that article 49 of *the Constitution* requires that before a party is condemned, they ought to be given opportunity to be heard and as the Director of Criminal Investigations is not party to this suit, no orders ought to be issued against him, without joining him to these proceedings.



Analysis and Determination.

15. I have carefully considered the application, the affidavit in support, the replying affidavit and the submissions. The sole issue that arise for determination is whether the applicant is entitled to the orders sought.
16. The applicant has sought that the court does issue an order directing the Director of Criminal Investigations to conduct a forensic examination on the purported signatures of Daniel Kyungu Muasya as the Consent dated February 7, 1977.
17. While the Director Criminal Investigations has one of his function as being to conduct forensic analysis(see section 34 of the *National Police Service Act* of 2011), the applicant has only alleged that his request for the forensic analysis have met refusal on grounds that such can only be done after there is a court order.
18. The basis for the application is that the consent letter in issue is a forged document. Forgery is a criminal offence and therefore it would only be fair that as the applicant desires to get a forensic examination of the same from the Director of Criminal Investigations, he must first file a complaint with the said office and seek to have the impugned document examined. The Director of Criminal Investigations is a state officer and his office is an independent office which ought to be operated in accordance with the *constitution*.
19. There is no evidence that the applicant filed a report or complaint at the Director of Criminal Investigation concerning allegations of forgery in respect of the impugned documents. It will not be reasonable for the court to issue orders sought when no formal complaint has been filed.
20. Besides, the Applicant does not dispute the existence of Nairobi HCC No 2380 of 1987; *Monica Kauki v Philip Kivuva Nzioka*. The respondent contended that the consent led to the issuance of a decree which was executed 27 years before the death of the plaintiff's father. The applicant has not sought to examine the decree resulting from the consent. It is my view that as the said document was filed in a matter that was determined, the proper place to seek to invalidate the consent ought to be in HCC no 2380 of 1976.
21. In addition, the assertion that Mr Odhiambo M T Adala advocate who signed the consent for aaathe plaintiff is still active has not been contested. The applicant has not attempted to obtain summons against the said advocate to testify on the circumstances under which the consent was entered.
22. In view of the above reasons, this court is not satisfied that the applicant is deserving of the orders sought. I therefore find and hold that the application dated March 10, 2022 is unmeritorious and the same is hereby dismissed with costs.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Munyao holding brief for Mr. Musya for Plaintiff/Applicant.

Mr. Koyyoko for Respondents.



Court Assistant – Josephine.

