



Kamunya (Suing as the administrator of the Estate of Peter David Kamunya Kiboi (Deceased) v Gichuhi; Registrar Kajiado Land Registry (Interested Party) (Environment & Land Case 640 of 2015) [2024] KEELC 6206 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEELC 6206 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 640 OF 2015**

JA MOGENI, J

JULY 8, 2024

BETWEEN

SHELMITH W KAMUNYA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF PETER DAVID KAMUNYA KIBOI (DECEASED)) PLAINTIFF

AND

REV CHRISTOPHER GICHUHI DEFENDANT

AND

THE REGISTRAR KAJIADO LAND REGISTRY INTERESTED PARTY

RULING

1. This application dated 08/04/2024 seeks the following orders:
 1. Spent
 2. That the Land Registrar at Kajiado and or Ngong Land Registry be ordered and or directed to produce for scrutiny and examination in this Honorable Court the 5-titles for the parcels of land, being Land Reference Nos. Ngong/Ngong 7722; 7723, 7724, 7725 and 7726 registered in the name of Peter David Kamunya Kiboialias Peter Kamunya Kiboi, as the same were on the 27th July 1988.
 3. That the said Land Registrar of Kajiado and or Ngong be ordered and or directed to produce for scrutiny and examination in this Honorable Court a title for parcel of land being Land Reference No. 7721 in the name of the said Peter David Kamunya Kiboias the same was on the 19th August 1988 and 9th June 2014.
 4. That if the titles mentioned in paragraph 2 and 3 above exist and or existed at the specified years or time referred to in paragraphs 2 and 3 above, then the Land Registrar be directed to give to



the Honorable Court, the exact measurements in acres for each parcel and or title mentioned in paragraph 2 and 3 above.

5. That in the event that the titles mentioned in paragraph 2 and 3 above do not exist, then, in the alternative and without prejudice to the afore-going, the Land Registrar Kajiado and or Ngong be authorized and or directed to go to the site where the said land parcels Nos Ngong/Ngong 7722; 7723, 7724, 7725, 7726 and 7721 are situate and using the MUTATION SKETCH prepared by and or for Peter David Kamunya Kiboiand registered at Kajiado District Land Registry on the 19th December 1985, measure the area of each one of the above 6 parcels of land in acres and provide the Court with the measurement of each one of the six (6) parcels mentioned in paragraphs 2 and 3 above.
 6. That in the unlikely event that the Kajiado and or Ngong Land Registrar fails to go to the site to measure the 6 parcels as ordered/directed in paragraph 5 above, then the Honorable Court be pleased to appoint, authorize and direct a licensed surveyor whose professional integrity is beyond question, to go to the site where the said 6 land parcels are situate, and measure the area of each one of the said 6 parcels/titles in acres and present the report to the report to the Honorable Court for scrutiny, examination and adoption for use in and as part of the record of evidence in the above suit.
 7. That the Honorable Court be pleased to allow the Plaintiff/Respondent and the Defendant/Applicant herein either alone or in the company of their respective advocates and or surveyors to be at the site where the said 6-titles or parcels are situate, when either the Kajiado and or Ngong Land Registrar or the Court appointed surveyor is measuring the said 6 titles/parcels.
 8. That the Defendant/Applicant herein be provided with the report and or the findings of the Kajiado and or Ngong Land Registrar and or the Court appointed surveyor, for use in his Defence in the above suit.
 9. That this application, its supporting affidavit and the exhibit annexures annexed thereto be declared to be the Defendant/Applicants' further list of documents dated the date of this application (8th April 2024).
 10. That the Honorable Court be pleased to grant any or further orders and or directions as it deems fit and just in the circumstances of this case.
 11. That costs of this application be provided for.
2. This was premised on the grounds appearing on its face and was supported by the affidavit of the advocate of the defendant/applicant sworn on 8/04/2024. I see no need of repeating the grounds here.
 3. The applicant's application was brought on the ground that the exchange of 2½ acres of land that was supposed to be exchanged between the respondent's five parcels Nos. Ngong/Ngong 7722; 7723, 7724, 7725, and 7726 and the applicant's suit property did not materialize as was agreed on 27/07/1988.
 4. It is the applicant's contention that the exchange that was envisaged between the applicant and the respondent required that there should have been an exchange of the parcels before the parties could give possession to each other while the documentation of the exchange was being processed. That unfortunately the respondent died on 21/08/1988 before the identification was complete and execution done.



5. The applicant has brought this application under Order 3 Rule 2(d) and Order 51, sections 1A, 1B, 3, 3A and 63 (e) and Article 159 of the Constitution.
6. By the time of writing this ruling the plaintiff/respondent had not filed any response. Neither has the applicant filed any submissions despite the directions issued by this court to canvass the application by way of written submissions on 13/05/2024.

Analysis and Determination

7. I have considered the application and only one issue arises for determination and that is whether the applicant's application is merited?
8. It is undisputed that –
 - a. The defendant was aware of the case which the plaintiff has brought before the court and it is to be assumed that whereas the plaintiff has evidence to support her case the defendant equally has evidence to rebut the plaintiff's case;
 - b. The defendant at the Pre-trial Conference never raised any issues pertaining to seeking reports of the Land Registrar of Kajiado or Ngong or never enjoined the said officer to the case. Since the issues were not raised at the pre-trial and the suit was certified ready for hearing;
 - c. There is no dispute as to the ownership and location of LR No. Land Reference Nos. Ngong/ Ngong 7722; 7723, 7724,7725 and 7726 registered in the name of Peter David Kamunya Kiboialias Peter Kamunya;
 - d. The defendant if in doubt of the acreage of the parcels of land they exchanged he should have paid for a licensed surveyor to produce a report and wishes to avoid paying survey fees;
 - e. The defendant has not demonstrated what, if any, difficulty or challenge he has experienced in obtaining the information he is now seeking.
9. The High Court in the case of *Tulip Properties Limited v Mohamed Koriow Nur & Four Others* [2007] eKLR, had this to say of interrogatories, Mulla the code of Civil Procedure Act V of 1908 sixteenth Edition. In this text the principles on interrogatories are set out between pages 2120 – 2133. They are not different from those set out in Odgers above. In summary form they are:
 1. The object and purpose of serving interrogatories is to enable a party to require information from its opponent for the purposes of maintaining the case of the adversary.
 2. Answering the interrogatories might often shorten the trial proceedings and save the time of the court and parties besides saving expenses for summoning witnesses. It should be invoked in order to shorten litigation and save the interests of justice. It is to be exercised with great care and caution so that it is not abused by any party.
 3. Every party to a suit is entitled to know the nature of his opponents case but he is not entitled to know the facts which constitute exclusively the evidence of his opponents case to avoid tempering with the opponents witnesses and manufacture evidence in contradiction to shape his cases to defeat justice.
 4. In determining whether leave should be granted, the court should consider whether it is a fit and proper case for administering interrogatories.
 5. Questions that may be relevant during cross-examination are not necessarily relevant as interrogatories.



6. Objection to interrogatories will be upheld on the following:-
 - i. Scandalous interrogatories.
 - ii. Irrelevant interrogatories. No party is to be compelled to produce documents whose relevance is denied.
 - iii. Not exhibited bone fide for the purposes of the suit. This arises where the interrogatory is put to serve an ulterior object beyond the scope of the suit.
 - iv. Not sufficiently material at that stage. This arises where discovery may be injurious to the defendant and will only be useful to the plaintiff if he establishes his title to the relief.
 - v. On the ground of privilege such as communications from a legal adviser for purposes of obtaining legal advice.
 - vi. Or any other ground this. This arises where the interrogatory is prolix, oppressive, unnecessary or scandalous.
 - vii. Fishing interrogatories are not allowed. A fishing interrogatory is one which does not relate to definite existing and relevant circumstances but one made in the hope of discovering some flaw in the opponents case or with the object of finding a loophole.

10. In declining the application for interrogatories before the court in that suit, the court held as follows:

“In conclusion all the interrogatories filed and sought to be served herein have been disallowed because:-

 1. For the reasons indicated against each
 2. Though some were necessary, answering them would not assist in shortening the proceedings and cutting on costs as they require evidence to be adduced on them. where forgeries are alleged they call for expert opinion from 3rd parties.
 3. Most of them could be answered in cross-examination and they will be answered in cross-examination anyway.
 4. Others could easily be answered through discovery by asking the parties to file and serve copies of the documents they intend to rely on both in court and in the opposite party.
 5. Some went to test the credibility of the witnesses which is not allowed.
 6. Others were in criminating in nature.
 7. Those targeting none payment of rent and rates are not relevant as none payment of those dues cannot be used to fault the title being contested over. More so when the Plaintiff is not litigating on behalf of those Agencies. Further those Agencies have their own procedures for recovering them.”

11. In this case, the plaintiff/respondent has failed to file any response to the interrogatories. My reading of the prayers made by the defendant/applicant leaves me with many questions. I cannot fail to see that the applicant is on a fishing expedition which is not helpful at this stage of the case. It seems that the



applicant in this fishing interrogatory hopes to discover some fault in the plaintiff's/respondent's case defendant/applicant's case.

12. The applicant has not demonstrated that he has approached those government offices and they have refused, neglected and/or declined to provide information sought.
13. The court in the case of *Mwahima Mwalimu Masudi v Independent Electoral and Boundaries & 3 Others* [2017] eKLR, in declining to allow an application for scrutiny of votes cited with approval the following cases,

“In the case of *Philip Osore Ogutu vs. Michael Aringo & 2 other*, Busia High Court Election Petition No. 1 of 2013 the court held:

“There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr. K’opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for the purpose of chancing on new evidence.”

“In the case of *Richard Kalembe Ndile vs. Patrick Musimba Mweu*, Election Petition No. 7 of 2013, Majanja J held:

“...all that is necessary is for the petitioner to establish sufficient basis for the court to be satisfied that it must engage time and resources to ascertain the validity of the vote through scrutiny. The scrutiny exercise is part of the forensic process available for the court to do justice in the case.”

14. Similarly, in this case, the defendant/applicant was required to, from the institution of the suit, to be properly seized of the grounds, facts and evidence for questioning the validity of the suit property's acreage and size. He further did not file an application seeking to obtain better and further particulars of the evidence from the plaintiff. He also has not shown, what, if any, steps he had taken to obtain the information he is now seeking to adduce. It is a fishing expedition to see if more evidence to support his claim will emerge.
15. Order 3 Rule 2 does not give the defendant/applicant a right to seek an order compelling the plaintiff to produce before the court for scrutiny any particular documents which the defendant feels is relevant to the suit.
16. Order 3 rule 2, of the Civil Procedure Rules relate to filing of documents which should accompany the plaint, defence, and counterclaim (if any) respectively and persons either or not summoned by court to produce documents and requiring persons in court to produce there and then documents in their possession. Legal Notice No. 5178 (Mutunga Rules) rule 28 also make reference filing of documents in Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts.



17. Thus my reading of Order 3 rule 2 does not indicate that the court can compel a party to produce evidence.
18. I have considered the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. All the authorities are good in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.
19. When a party files a suit, it is expected that the pre-trial conference shall be used by parties to proffer the evidence to support their respective cases. Courts cannot be used to allow the parties to ferret out evidence on their behalf. The way prayers 2, 3, 4, 5, 6, 7, 8 and 9 in the application are crafted, allowing those prayers will amount to the court looking for evidence which the applicant/defendant will rely upon. It is the defendant's responsibility to adduce that evidence orally and through apposite documents. The applicant/defendant is not precluded from calling government officers to give evidence on his behalf.
20. In the circumstances, I find that the best option is to have the suit heard and the parties to call their witnesses and conclude the suit expeditiously. The following orders will issue:
- a. This application is dismissed.
 - b. Costs of the Application to be in the cause.
- Orders Accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF JULY, 2024.

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MOGENI J

JUDGE

In the presence of: -

Mr. Nabutete for Plaintiff/Applicant

Sagina - Court Assistant

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MOGENI J

JUDGE

