



**Said v Ebrahim (Environment and Land Case 78 of 2021)
[2023] KEELC 17334 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 78 OF 2021**

LL NAIKUNI, J

MAY 3, 2023

BETWEEN

SAID OMAR SAID PLAINTIFF

AND

FAUZIA MOHAMED EBRAHIM DEFENDANT

RULING

I. Introduction

1. Before this Honorable Court is Notice of Motion application dated 17th June, 2022. The application is brought under the provision of Article 25, 50(2) of *the Constitution* of the Republic of Kenya of 2010, the Order 6 Rules 1 and 7 of the *Civil Procedure Rules, 2010*, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Cap. 21 Laws of Kenya and the provisions from the *Evidence Act* Cap. 80 Laws of Kenya.

II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant sought for the following Orders:
 - a. Spend.
 - b. That the Honourable court be pleased to arrest the ruling scheduled for delivery in the 22nd June, 2022 pending the inter parties hearing of this application;
 - c. That the Honourable court be pleased to issue an order and directives summoning the County Criminal Investigations Officer – Mombasa County to release to the Honourable Court such findings, forensic report (document/ fingerprint examinations report), expert report recommendations, and indictment of Penal charges in respect to the formal complaint filed by the Defendant/Respondent herewith with regards to the sale agreement dated the 20th day of June, 2011 in respect to all that parcel of land known as Plot No. Mombasa/Block XVI/487 pending the hearing and determination of this suit.



- d. That the Honourable Court be pleased to make finding of perjury as against the Defendant/ Respondent on several instances in these proceedings which shall be considered side by side with giving false information to a public officer and direct the Directorate of Criminal Investigations to conduct investigations and appropriate charges proffered by dint of the said perjury.
 - e. That the costs be borne by the Defendant.
3. The application is premised on the grounds, testimonial facts and the averments made out under the 16 Paragraphed Supporting Affidavit sworn on 17th June, 2022 by Said Omar Said together with three (3) annexures Marked as “Sos – 1 to 3” annexed thereto. He deponed as follows:
- a. He was the Plaintiff/Applicant herein and thus competent to swear this affidavit. He was aware of that the Honorable Court had reserved the Ruling in respect of the Application dated the 25th day of November, 2021 hereby states as follows:
 - b. Pertinent herewith, it was imperative to state that the Defendant had been less than candid of the true facts herewith, the Defendant did lodge a Complaint with the Directorate of Criminal Investigations which complaint had been under investigation parallel to the present proceedings, the gravamen of the Complaint by the Defendant being the same as the substratum herein stemming from the agreement dated the 20th day of June, 2011 in respect of Plot No. Mombasa/Block XVI/487.
 - c. The officers from the Directorate of Criminal Investigation did request for the original agreement in respect of Plot No. Mombasa/ Block XVI/487 dated the 20th day of June, 2011, subjected the same for forensic examination, records of statement from both the Defendant and himself.
 - d. He was well aware that the results of the said forensic examination, the investigations thereto have been concluded and forwarded to the Directorate of Public Prosecutions with adverse findings against the Defendant and it is without an iota of doubt that he categorically states, the Defendant has absolutely misrepresented the facts so as to gain the Honourable Courts attention with the sole intention to distort the true and correct facts.
 - e. The findings, recommendations and indictment as against the Defendant was material to the proceedings before the Honourable Court, since adverse allegations had been impleaded as against his person which allegations revolve around the said document that has been subject to concurrent investigations by the Directorate of Criminal Investigations.
 - f. The Defendant had engaged in acts of perjury misrepresentation of facts, hence the said Defendants were absolutely not deserving of any equitable orders especially so in the realm of injunction and/or eviction as envisaged in the application by the Defendant.
4. To fully illustrate and bring to the fore to alert the Honourable Court his interest while Advocates did implead to the existence of the said investigations, further addressed a letter before the Honourable Presiding Judge to arrest the ruling that was scheduled for delivery of ruling. (Annexed herewith and marked as “Sos -1” was a copy of the said letter.)
5. The said application did raise issues that border on Criminal Enterprise especially on his part, the just concluded investigation shed more light on evidentiary matters that will assist the Honourable Court make a conclusive and just decision since the issues of Criminal Enterprise were mere allegations and have since been proven.



6. To fully illustrate the aforementioned assistance to the Honourable Court amongst the said investigations were the expert evidence reports that have pin pointed without any doubt as to the real perpetrators of the forgery, the uttering false documents and all such insinuations as regards the substratum of the present suit.
7. The Honourable Court had the requisite power and jurisdiction to call for the requisite documentation to facilitate the delivery of just and conclusive decision that would be satisfactory to both litigants.
8. His erst while Advocates on record have written to the in charge, the Directorate of Criminal Investigations – Mombasa County to avail the said documentation in respect of the forensic recommendations and it was imperative that the Honourable Court does issue an Order to call for these crucial documents that would assist in the determination of this issue. (Annexed herewith and marked as “Sos – 2” were copies of the said correspondences seeking the said documentations.)
9. More importantly, the Defendant who had been on a war path to address the issue before all and sundry shall have the opportune to put the matter to rest since with all the facts the Court would have an opportunity to deliver an all-encompassing decision. (Annexed herewith and marked “Sos – 3” were copies of the said complaints to various government and quasi-government institutions.)
10. The Directorate of Criminal Investigations had already concluded the said inditement that it was one absolutely imperative that the Honourable Court having been seized of the matter was in the know, and had duly encompassed the said position in its reasoned ruling and decision herewith.
11. To put matters into perspective, he averred to have witnesses who were present at the time of construction of the premises, the Contractor and the suppliers and service providers who could attest to the fact that he single-handedly brought up the storied building consequent to the agreement and at no time had construction been stopped on allegations of any fraud, misrepresentation and deceit on his part. (Annexed herewith and marked as “Sos – 3” were the copies of the said receipts.)
12. All allegations of impropriety such as obtaining by false pretences, forgery and uttering false documents fall in the realm of Criminal jurisdiction, of which must be proven before being alleged as was the case in point herein, the Defendant had made damning allegations that soil his character and reputation but without an iota of evidence which points to only one direction, to obtain orders from the Honourable Court through adverse means other than to state the correct of facts, vindication had been done by the body which was constitutionally mandated to carry on such investigations and issue adverse indictments against the offending party.
13. The damning allegations of having perpetrated forgeries could only be answered by the fact that he was ready to subject himself, the documents in his possession to any such agency for scrutiny to ascertain their veracity, to belittle the Honourable Court and reduce the Honourable Court to an investigative agency is not only uncouth but bad faith and malafides to level such untrue and unsubstantiated claims merely vide affidavit.
14. He invited the Honorable Court to dismiss the allegations that had not been substantiated. Moreover, he has been also advised by his advocates that the maxim “he who alleges must prove” in evidentiary threshold found absolute application case in point herein.
15. It was just and convenient that the Honorable Court arrested the ruling scheduled herewith, since pertinent material facts were yet to be fully presented which was merited since these material facts were presently not before the Honourable Court prior.



III. Analysis and Determination

16. I have considered the Notice of Motion application dated 17th June 2022. Its instructive to note that while the Defendant neither filed any responses, none of the parties filed written submissions. While in the presence of the all the parties the Court scheduled the ruling on the application dated the for the 2nd February, 2023. Unfortunately, the Court was not sitting on that material date and the Ruling was to be delivered by service of notices accordingly. For the Court to reach a reasonable, fair and just decision, it developed the following two (2) issues for its determination. These were:-
- a. Whether the Notice of Motion Application dated 17th June, 2022 by the Plaintiff/Applicant herein had any merit as prayed?
 - b. Who will bear the Costs of the application?

Issue No. a). Whether the Notice of Motion Application Dated 17th June, 2022 by the Plaintiff/Applicant Herein Had Any Merit as Prayed?

17. Under this Sub heading, the Court will deliberate on the factual and legal viability of the prayers sought by the Plaintiff/Applicant. Essentially, this application is brought under provisions of Order 6 Rules 1 & 7 of the Civil Procedure Rules which provides as follows;
- “ 1. Time for appearance Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.
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6. Delivery of documents to address for service
- (1) Documents may either be delivered by hand or by licensed courier service provider approved by the court to the address for service or may be posted to it.
 - (2) Where delivery is disputed a certificate of posting or other evidence of delivery shall be filed.”
18. From the main issues and the previous application, The court directed that the ruling herein would be delivered on 22nd June, 2022. The Applicant asked the court to issue directives summoning the County Criminal Investigations Officer – Mombasa County to release to the Honourable Court findings, forensic report (document/fingerprint examination), expert report recommendations and indictment of Penal Charges in respect to the formal complaint filed by the Respondent herewith with regard to the sale agreement dated the 20th June, 2011 in respect of that parcel of land known as Plot. No. Mombasa/Block XVI/487.
19. All facts remaining constant, it is my view that causing unnecessary delay should not be allowed. In any case whoever loses in the matter will be at liberty to appeal. My strongest institution is that



the Applicant could have organized and had this forensic investigation done by a licensed private investigator.

20. I am compelled to seek refuge from the provision of Article 159 (1) and (2) of *the Constitution* of Kenya, 2010 which describes judicial authority as follows:-
- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
 - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - a. justice shall be done to all, irrespective of status;
 - b. justice shall not be delayed;
 - c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d. justice shall be administered without undue regard to procedural technicalities; and
 - e. the purpose and principles of this Constitution shall be protected and promoted.
 - (3) Traditional dispute resolution mechanisms shall not be used in a way that—
 - a. contravenes the Bill of Rights;
 - b. is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - c. is inconsistent with this Constitution or any written law.
21. By and large, the Objective of *Civil Procedure Act*, Cap. 21 Laws of Kenya is as follows:
- (1) The overriding objective of this *Act* and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this *Act* or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the *Act* and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. [Act No. 6 of 2009, Sch.]
22. The duty of the Court as per the *Civil Procedure Act* and all other Acts of Parliament that guard the functions of this court are as follows:
- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims: -
 - a. the just determination of the proceedings;
 - b. the efficient disposal of the business of the Court;
 - c. the efficient use of the available judicial and administrative resources;
 - d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and



- e. the use of suitable technology.

[Act No. 6 of 2009, Sch.]

23. Upto this juncture, I dare say that Plaintiff/Applicant has not adequately explained why this application is placed before the Honorable Court, and particularly at this time especially when the said application scheduled for the delivery of the ruling is dated 25th November, 2021. The Applicant has tendered no explanation as to why the request for the documents was made at this time. By the time this present application was filed the ruling was ready for delivery.
24. Admission of the said information requested by the Applicant herein entails the rewriting of the ruling and thus adjourning the delivery of the same to the later date. The above will violate the provisions of Article 159 Constitution and Sections 1A and 1B *Civil Procedure Act* above cited.
25. Certainly, I reiterate that the material before the Court is insufficient to persuade the Court to exercise its inherent discretion in favour of the Applicant. I insist, and rightfully so, the application should have been filed earlier. The ostensible reasons to justify arrest of ruling scheduled for 26th June, 2022 are neither cogent, potent nor conceivable. The application by all means must flatly fail on arrival and on its face.

Issue No. b). Who Will Bear the Costs of the Application.

26. It is not well established that issues of Costs are at the discretion of the Court. Costs means any award that is granted to a party at the conclusion of a legal action in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, cap. 27 holds that costs follow the event or results.
27. In the instant case, though the application was never opposed but the Court finds that it has no merit to withstand on itself. But in the interest of Justice, Equity and Conscience, it is just fair reasonable in the given circumstances that each party bear it's own costs.

IV. Conclusion and Disposal

28. In the long run, and following the above detailed analysis of facts and law prefacing of facts and law pertaining to this application, the Honorable Court wishes to make the following Orders.
- a. That the Notice of Motion application dated 17th June, 2022 lacks merit and therefore be and is hereby dismissed in its entirety.
 - b. That the Plaintiff is at liberty to formally move the court without any delay or as they shall deem appropriate on the allegations in this current application.
 - c. That the delayed Ruling scheduled for 22nd June, 2022 is hereby scheduled for delivery on the 31st of May, 2023 and a further mention of the matter on 8th June, 2023 for further direction thereof of the matter.
 - d. That all the parties to be at liberty but within 14 days from this date to fully comply with the orders of this Court.
 - e. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUALLY SIGNED, AND DATED AT MOMBASA THIS 3RD DAY OF MAY, 2023.



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HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

- a. M/s. Gillian, the Court Assistant.
- b. Mr. Egunza Advocate for the Plaintiff/Applicant.
- c. Mr. Muthuri holding brief for Mr. Wachira Advocate for the Defendant.

