



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. E004 OF 2021**

**FRANCIS KIRIMI NKARICHIA ..... PLAINTIFF**

**VERSUS**

**DAVID NKANATA MAGIRI .....1<sup>ST</sup> DEFENDANT**

**M'IBIRI M'MBOGORI ..... 2<sup>ND</sup> DEFENDANT**

**JUSTICE MURUGA M'IKIUGU ..... 3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR MERU**

**CENTRAL DISTRICT .....4<sup>TH</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR, NAIROBI..... 5<sup>TH</sup> DEFENDANT**

**THE DIRECTOR OF LAND ADJUDICATION &**

**SETTLEMENT OFFICER NAIROBI ..... 6<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND ADJUDICATION &**

**SETTLEMENT OFFICER MERU**

**BUURI SUB-COUNTY .....7<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff through an application dated 4.10.2021 under **Article 47,50 and 159 of the Constitution Sections 1A, 1B, 3 and 3A and 63 (e) of Civil Procedure Act and Sections 48 & 76 of the Evidence Act** seeks for:-

a) **The applicant Francis Kirimi Nkarichia thumb prints (Left and Right) be taken by Meru Police Station DCI officers for purposes of comparison, matching and confirmation as to whether he signed the transfer document dated 19.9.1990 supplied as evidence by the current District Land Adjudication & Settlement officer - Meru Central District one Mr. Justus Levu to this court and which he vehemently denies doing so.**

b) **The court be pleased to make an order that the original objection No. 502 and proceedings of the same containing the said transfer letter/document dated 19.9.1990 be supplied to the Meru police station DCI officers for immediate forwarding to the DCI forensics examination department, Nairobi for purposes of comparison, matching and confirmation as to whether applicant Francis Kirimi Nkarichia signed the transfer letter/document using the alleged left thumb print imposed in the said document.**

c) **The district land adjudication & settlement officer Meru Central District one Mr. Justus Levu be ordered to avail the original objection No. 502 and proceedings concerned with Parcel No. Kiirua/Nkando/417 within 7 days to the Meru police station DCI officers for purposes of forensic examination of the thumb prints impression contained therein.**

d) Upon the grant of prayers above, the court to order and/or direct that the forensic examiner's report duly signed be filed in court as opinion evidence to assist the court unravel this matter expeditiously.

e) The court do make any other order that it deems fit and just to grant in the interest of justice to the applicant Francis Kirimi Nkarichia.

f) Costs be in the cause.

2. The application is supported by plaintiff's affidavit sworn on 4.10.2021 whose basis and grounds are he refutes ever transferring the suit land to the defendant's as claimed or at all and any documents to that effect are forgeries hence the need to be subjected for forensic audit and examination.

3. The application is opposed by the defendants through replying affidavits sworn on 8.11.2021 and 29.11.2021 respectively. The basis of the opposition is that the court should not be turned into an investigative agency; the suspects have not been named; there was no record or a formal report made by way of a complaint and that the application is an abuse of the court process.

4. With directions from court, parties agreed to canvass the application by way of written submissions. The plaintiff relies on his submissions dated 29.11.2021.

5. The 1<sup>st</sup> defendant relies on his submissions dated 8.11.2021 and 8.12.2021 respectively while the 2<sup>nd</sup> defendant relies on his submissions dated 29.11.2021. Lastly the 4<sup>th</sup> – 8<sup>th</sup> defendants rely on their submissions dated 8.12.2021.

6. The plaintiff urges the court to find in allowing the application no prejudice shall be occasioned to the defendants since it will enable each party a fair hearing and the resolving of the matter in a fair manner in line with the law on production of evidence.

7. The applicant relies on Concepta Nyaboke –vs- Peter Muasya Wangaika [2012] eKLR, CD Desouza –v- BR Sharma (1953) 26 KLR 41, Amasom Builders Developers Ltd –vs- Gachie and 2 others [2009] KLR 468, Mutonyi vs. Republic [1982] KLR 2003, Isac Adhiambo Okayo –vs- Kenya Women Finance Trust [2016] eKLR, Republic –vs- District Land Registrar Uasin Gishu & Another [2014] eKLR, Machakos County –vs- Kapiti Plains Estate Ltd & another [2019] eKLR, Thomas K'bahati –vs- Dorothy Seyanoi Moschioni [2020] eKLR, James Gitingu Wamagata & another –vs- David Migichi Kageni [2020] eKLR.

8. The 1<sup>st</sup> defendant submits the court is being asked to move from impartiality to being partisan; that the **Articles** quoted are of no assistance to the applicant; the applicant ought to have done due diligence before filing the suit and seeking to be helped to investigate them; the applicant is coming too late after the close of pleadings and in an adversarial system it would amount to mis carriage of justice and an abuse of court process.

9. Further the 1<sup>st</sup> defendant relies on Anthony Francis Wareham T/A Warehem & 2 Others –vs- Kenya Ports Office Savings Bank Ltd [2004] eKLR on the proposition that in proving a case the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue and as pleaded by respective parties.

10. The 2<sup>nd</sup> defendant submits the application lacks merits, there is no evidence the applicant lodged a police complaint with active investigations under way and hence the application lacks basis or merits.

11. The 4<sup>th</sup> – 8<sup>th</sup> defendants submit the applicant is making a claim of forgery and asking the court to help him prove the same which under **Section 345 of the Penal Code** he ought to have lodged a complaint for criminal investigations to commence hence this being a civil claim, the court lacks jurisdiction as held in Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1.

12. Further the 4<sup>th</sup> – 8<sup>th</sup> defendants rely on M'Bito Ntiro –vs- Mbae Mwirichia & Another [2018] eKLR for the proposition that the burden of proof of any particular fact lies with the person alleging yet the plaintiff seems to be circumventing the rules of procedure by placing the burden of proving an allegation to the court.

13. Third, the 4<sup>th</sup> – 8<sup>th</sup> defendants submit the applicant lacks evidence or legal premise to support this application both in the applications and in his submissions. They rely on **Order 3 Rule 2** and Ahmed Abdullahi Abdille –vs- Abdille Nur Abdi & 3 others [2019] eKLR on the proposition that a party filing a suit must include all evidentiary documents to the suit at the time of filing it and that seeking to procure more evidence thereafter would be prejudicial to the defendants and a court should not aid such a litigant.

14. The plaintiff filed his suit on 18.1.2021 as the owner of **L.N Kiirua/Nkando/417** measuring **12.96 Ha**. His claim was that in 2019 his land was invaded by 50 people thereof. He made a report at Kiirua police station vide OB 36/26/10 2020 and no action was taken. He states upon official search of his land he established the 1<sup>st</sup> and 2<sup>nd</sup> defendants were issued with title deeds in 2014 and 2017 respectively in his place after the demarcation book was crossed over and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants included as co-proprietors. He claims was illegal, fraudulent and wrongful on the part of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to effect such actions which led to the 1<sup>st</sup> defendant being transferred his land as the sole proprietor.

15. Further, the plaintiff blames the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants for the irregularities leading to the issuance of title to 2<sup>nd</sup> and 3<sup>rd</sup> defendant's and the subsequent transfer to the 1<sup>st</sup> defendnat who has now trespassed into the suit land yet he corruptly acquired the land. He prays for the cancellation of the title, permanent injunction, eviction, registration in his favour and general damages plus costs.

16. Alongside the plaint, the plaintiff brought an application dated 15.1.2021 where he sought for an inhibition and temporary orders of injunction on the basis that he had never sold his land, the original adjudication record supplied by the Nairobi District land adjudication and settlement office showed he was still the sole owner but the local demarcation record had been tampered with to include 2<sup>nd</sup> and 3<sup>rd</sup> defendants in a fraudulent manner. He requested the office of DCI to investigate the activities through OB No. 36/26/10/2020 but no action had been taken by the police. He insists and that he has been in occupation of his land throughout.

17. The 1<sup>st</sup> defendant entered appearance and filed a defence dated 22.4.2021 stating he bought the suit land in 2016 and took vacant possession from the 2<sup>nd</sup> defendant. He denied the plaintiff had been in occupation as alleged or at all and denied any fraud, irregularity, illegality or collusion in acquiring the land.

18. The 1<sup>st</sup> defendant filed a list of documents dated 22.4.2021 among them a copy of the adjudication record Serial No. A107917 dated 29.9.98 which showed the name of the plaintiff crossed on 6.11.2011 and replaced with the name M'Mbogori following an alleged objection No. 502 by one Francis Nkarichia dated 5.11.1991.

19. The court on 8.4.2021 issued an inhibition order and by another order dated 29.4.2021 the 4<sup>th</sup> to 7<sup>th</sup> defendants were ordered to avail the requested documents by 11.6.2021.

20. The 4<sup>th</sup> – 8<sup>th</sup> defendant filed their defence dated 20.4.2021. They denied any fraud, illegality, collusion or mistake as alleged but stated they had a statutory mandate to effect the transfers and issue title deeds.

21. The 4<sup>th</sup> to 8<sup>th</sup> defendants filed a list of documents dated 25.6.2021 which included the duplicate adjudication record **No. A107947**, the original adjudication record **No. A1107917** and an adjudication objection proceedings **No. 502 P/No. 417** of 19.9.1990. The proceedings indicate the plaintiff was transferring his whole portion to Justus Murugu M'Kiungu and M'Ibiri M'Mbogori as joint owners. It included his thumb print and a copy of **ID No. 2378000/70**.

22. The 1<sup>st</sup> defendant also filed a further list of documents dated 18.10.2021 which included a copy of the original adjudication record, duplicate, objection proceedings, copy of a register showing the outcome of the objection and photographs showing developments on the land.

23. As regards the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, they filed a defence dated 23.4.2021 denying any illegality, collusion or impropriety on the manner the titles and transfers was effected.

24. On part of the 2<sup>nd</sup> defendant, he averred he lawfully purchased the suitland from the plaintiff in 1980 on a willing buyer willing seller basis and all the procedure to acquire the land from the plaintiff were strictly adhered to at both the committee and adjudication stages.

25. Further, the 2<sup>nd</sup> defendant averred upon purchase, he openly and exclusively grazed his cattle therein and was legally paid a wayleaves compensation by KENTRACO in a widely publicized exercise without any objection from the plaintiff hence insisted the suit was time barred, incompetent, disclosed no cause of action, was scandalous, frivolous, vexatious and an abuse of the court process.

26. The plaintiff did not file any reply to the defences by the defendants. Through a notice dated 2.6.2021 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants brought under **Section 69 of the Evidence Act**, the plaintiff he sought the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to produce for inspection and for provision of certified copies of the items referred in the defence dated 23.4.2021 at paragraph 20 namely:-

**1) Sale agreements of the property in 1980's regarding the suit land.**

**2) Transfer form thereof**

**3) Transfer from where the 3<sup>rd</sup> defendant relinquished his right to property to the 2<sup>nd</sup> defendant.**

## **DISPOSITION**

27. The court has gone through the pleadings, the list of documents attached and the rival submissions. The questions for determination are whether the applicant has made a case for the referral of the disputed documents to the DCI for forensic examination and secondly is whether the court has powers to issue the orders sought and if so on what principles of law.

28. As a starting point, the court record indicates parties have filed and exchanged pleadings together with list of documents in support of each of rival claims.

29. On 29.4.2021, the court issued orders for the discovery and disclosure of documents with set timelines. The parties have not told the court what became of those orders and if upon the exchange thereof, parties were able to agree on the way forward.

30. The plaintiff by a notice dated 10.9.2021, the applicant directed at Justus Levu, the 7<sup>th</sup> defendant sought for the inspection and production of certified copies of the proceedings for the transactions whereby the 3<sup>rd</sup> defendant transferred his ownership rights to the 2<sup>nd</sup> defendant and which were witnessed by the district land adjudication and settlement officer. Secondly, he sought for the production of the transfer forms during the adjudication section signed between 2<sup>nd</sup> and 3<sup>rd</sup> defendants where the 3<sup>rd</sup> defendant relinquished his rights to the 2<sup>nd</sup> defendant.

31. This was on top of a similar notice dated 2.6.2021 directed at the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. None of the parties have submitted or alluded to these notices and their implication in law.

32. With this in mind, the question is whether if the applicant has issued a notice to produce and inspect to the defendants there is still a need to have the court issue prayers No's 2, 3, 4 and 5 of the application.

33. **Section 35 (G) of the National Police Service Act No. 11A of 2011** allows the Director of Criminal Investigation to undertake forensic analysis while undertaking investigations where a complaint has been lodged as provided by law.

34. **Article 245 9 (a) of the Constitution** states no person may give a direction to the Inspector General of Police with respect to investigations of any offence or offences. The Inspector General of Police has constitutionally guaranteed independence to ensure investigations are undertaken independently.

35. Even though the applicant states he made an OB report at Kiirua police station, there is nothing to show he has made a follow-up and or specifically lodged a complaint with the DCI Land Fraud Unit. As stated above, the D.C.I falls under the Inspector General of Police as an independent institution. The Inspector General of Police does not require a court order to undertake its mandate since under **Section 24 of the National Police Service Act**, one of its jurisdiction is to investigate crimes.

36. Similarly, going by the court record, already the applicant has been supplied with all the required documents by the respondents. The applicant which he was vigilance enough he would have by now shared the same with the relevant investigative agencies for whatever investigations and forensic reports he may require. It is not for this court to direct the applicant on what to do and on where to go as regards his Constitutional rights and obligations to lodge a criminal complaint.

37. Further the applicant has a right to be supplied and or to access information held by the state under **Article 35 of the Constitution**. The **Access to Information Act** provides the legal framework for access of information held by a public or private entity so far as the information is required for the exercise or is required for the exercise protection of any of his or her rights.

38. There is no indication that the applicant has invoked that **Act** and the 4<sup>th</sup> – 7<sup>th</sup> respondents have denied him access to that information especially now that he also served a notice to produce the documents for inspection.

39. In my view the applicant seems to be using two similar but parallel processes to achieve the same end. The court has already granted the applicant some orders so as to access the required documents. He has also served a notice to produce and inspect the documents. In these two processes, the applicant has not disclosed how far he has managed to collect whatever information he wanted or needed so as to prosecute his suit. Even with these two avenues, the applicant has filed this application which essentially requires similar orders or outcomes.

40. In ***Shamsher Kenya Ltd. –vs- Director of Public Prosecution & 2 Others [2018] eKLR*** the court held a party making an attempt to pollute the pure stream of justice ought to be denied such a relief especially where he does not make full disclosure or is seen to be out to harass irritate and or annoy the adversary.

41. The court cannot usurp the Constitutional mandate of the D.C.I. If the D.C.I or the Inspector General of Police has failed to act, the applicant has a right to invoke the **Fair Administrative Actions Act** and **Sections 8 and 9** of the Law Reform Act for the orders of mandamus and certiorari to compel the D.C.I or the Inspector General of Police to undertake its Constitutional and statutory mandate as held in ***Republic v-s- Commissioner of Police & Another Exparte Michael Monari & Another [2012] eKLR***.

42. After all, under **Section 194 A of the Criminal Procedure Act**, there is no bar for parallel proceedings either civil or criminal prosecutions. See ***Republic –vs- Attorney General & 4 Others Exparte Diamond Hashim Halji and Ahmed Hasham Halji [2014] eKLR***.

43. Other than the closure of pleadings, the parties herein are yet to comply with **Order 11 Rule 3 (1) Civil Procedure Rules** so as to have case conference.

44. The purpose of a case management conference is to be:-

- a) **Promote expeditious disposal of cases.**
- b) **Afford parties to use alternative dispute resolution.**
- c) **Deal with pretrial applications**
- d) **Identify issues for determination**

45. In ***ABN Amro Bank N.V –vs- Kenya Pipeline Company Limited [2014] EKLR*** the court held the primary devices of discovery are interrogatories a request for admission and inspection of documents.

46. In my view there is always the need to ensure the rights of fair trial under **Article 25 (1), 48 and 50 (1) of the Constitution** was protected for all the parties. A party cannot use every available avenue and make all manner of application's without being mindful of other parties and the court for the expeditious disposal of suits as enshrined under **Article 159 of the Constitution** as read together with **Sections 1A, 1B and 3A of the Civil procedure Act**.

47. The plaintiff did not file a reply to the defences filed by the defendant and refute the issues raised. He has not disclosed in the applications that there is in existence a notice to produce and inspect duly filed and directed against the 2<sup>nd</sup> to 7<sup>th</sup> defendants. **See Tulip Properties Limited –vs- Mohamed Koriow Nur & 6 others [2018] eKLR.**

48. Given the foregoing, it is my conclusion that the application lacks merits. The same is dismissed with costs.

49. Parties to comply with **Order 11** and list the matter for hearing **within 90 days**.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Nyamu Nyaga for 1<sup>st</sup> defendant

Muthomi for 2<sup>nd</sup> and 3<sup>rd</sup> defendants

Kieti for 4<sup>th</sup> to 8<sup>th</sup> defendants

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**