



Allan (Suing as the Administrator of the Estate of Haran Njue Rubichi alias Njue Rubichu) v Ndima Tea Factory & 2 others (Environment & Land Case 215 of 2014) [2025] KEELC 3880 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 215 OF 2014**

JM MUTUNGI, J

MAY 15, 2025

BETWEEN

KARIUKO ALLAN (SUING AS THE ADMINISTRATOR OF THE ESTATE OF HARAN NJUE RUBICHI ALIAS NJUE RUBICHU) PLAINTIFF

AND

NDIMA TEA FACTORY 1ST DEFENDANT

JOSEPH MWANIKI MUCHIRA 2ND DEFENDANT

FRANCIS GACHOKI MUCHIRA 3RD DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff's Notice of Motion application dated 8th July 2024 brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure act*, and Articles 48, 50(1), and 159 (2) (d) of *the Constitution* of Kenya 2010. The Plaintiff seeks the following substantive orders:
 1. That this Honourable Court be pleased to issue an Order to the Director of Criminal Investigations Kirinyaga Central, subjecting to forensic examination the undated application to withdraw caution by Harun Njue Rubichu (deceased) against his verifying affidavit and witness statement both dated 15th July 2014, with a view to establish whether the said application was executed by Harun Njue Rubichu (deceased).
 1. The Applicant also prays for costs.
2. The application is premised on the grounds set out in the face of the application as well as the Supporting Affidavit sworn on 8th July 2024. The Plaintiff, suing as the administrator of the estate of the late Harun Njue Rubichu, avers that the Defendants intend to rely on a document purporting to be



an application by the deceased to withdraw a caution placed on Title No. Kirinyaga/Gathigiriri/259. It is alleged that the document was executed by the deceased and witnessed by the Defendants' advocate. However, the Plaintiff contends that the document is a forgery, possibly executed by an imposter, and that the deceased never expressed any intention to withdraw the caution during his lifetime. She asserts that forensic examination of the thumbprint on the document is necessary to verify its authenticity.

3. In opposition, the 2nd and 3rd Defendants filed a Replying Affidavit sworn on 26th October 2024. They contend that the application is an abuse of the Court process aimed at delaying the suit, which has been pending since 2014. They point out that the Plaintiff closed her case on 8th March 2023 and had knowledge of the impugned document as early as 10th May 2022. They argue that the application is being brought too late in the proceedings, and the forensic analysis would serve no useful purpose.
4. The Plaintiff filed a Supplementary Affidavit on 31st October 2024, reiterating that she is entitled to request the Court's assistance in presenting evidence necessary to support her case and ensure justice is done.
5. The Court on 6th November 2024 directed that the application be canvassed by way of written submissions.
6. The Applicant filed her submissions dated 18th December 2024. She relied on Articles 50(1) and 159(2) (d) of *the Constitution*, arguing that a fair hearing and substantive Justice can only be achieved by establishing the authenticity of a document suspected to be fraudulent. She emphasized that forensic verification is crucial as it would assist the Court in arriving at a just and informed determination. The Applicant contended that the Respondents have not demonstrated any prejudice they would suffer if the forensic examination is allowed. She relied on the case of *Continental Butchery Limited v Nthiwa* [1978] eKLR, urging that justice must not be sacrificed on the altar of procedural technicalities. She also invoked Section 48 of the *Evidence Act*, which permits the Court to admit expert evidence on matters such as the genuineness of fingerprints.
7. The 2nd and 3rd Respondents filed their submissions dated 28th February 2025. They submitted that there was a lapse of nearly ten months between the time the impugned document was served and the commencement of the hearing. They argued that the Plaintiff failed to utilize that opportunity to raise the issue or seek forensic assistance. They further contended that the Director of Criminal Investigation (DCI), being a non-party to the proceedings, cannot be compelled to act through orders of this Court except in limited circumstances, and no such exceptional circumstances have been demonstrated. The Respondents maintained that the Applicant had already testified and closed her case, and that the authenticity of the document can be adequately challenged during cross-examination of the Defendants' witnesses.
8. The 2nd and 3rd Respondents further argued that Section 48 of the *Evidence Act* is irrelevant since it applies to the admissibility of expert opinion evidence in court and not to the power to compel investigations by the DCI. Regarding the *Continental Butchery Limited v Nthiwa* case (1978) relied on by the Applicant, the Respondents asserted that the Applicant had misrepresented its holding.

Analysis and Determination

9. I have considered the application, Replying Affidavit, Supplementary Affidavit, and the parties' submissions. The issue for determination is whether the Court should grant an order directing forensic examination of the impugned document by the Director of Criminal Investigations.
10. By seeking this order, the Applicant is essentially seeking to reopen her case and introduce new or additional evidence.



11. Order 11 Rule 5 of the Civil Procedure Rule, 2010 states that;

“Where orders or directions are given at a case management conference -

- (a) The Judge or Deputy Registrar or Magistrate or Case Management Officer shall record the orders or directions and inform the parties thereof; and
- (b) Where necessary, the Judge or Deputy Registrar or Magistrate or Case Management Officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the Judge or Deputy Registrar or Magistrate or Case Management Officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit.”

12. The above provisions clearly state the requirement for parties to file documents within certain parameters. If documents are not available at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. Similarly, any party wishing to introduce new or additional evidence must, in similar light, seek leave of the court to file such statements and/or documents before the hearing of the Plaintiff’s case. The purpose of the Case Management Conference is to facilitate the expeditious disposal of cases by ensuring proper management of cases before the Courts. This was aptly put by H.P.G Waweru J. in the case of P.H. Ogola Onyango t/a Pitts Consult Consulting Engineers vs. Daniel Githegi t/a Quantalysis [2002] eKLR when he stated as follows:

“Indeed, discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial has begun, it is another thing for a party to seek to introduce documents once the opposing party has closed its case. The present suit was filed way back in 1999. The Defendant filed his defence in January 2000. He had more than ample time to make discovery before the trial commenced. To allow him to introduce documents after the Plaintiff has closed his case will occasion the Plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party to be permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.”

13. The hearing of this suit commenced on 8th March 2023 when the Plaintiff testified and closed her case. The suit was adjourned for defence hearing to 30th May, 2023; however, the hearing did not take place on the date owing to the bereavement of the Plaintiff’s Counsel. The matter was rescheduled for a hearing on 16th October 2023, when the Respondent’s Advocate made an application to introduce additional documents. This application was granted by the Court on 22nd November 2023.

14. The Applicant has made a serious allegation of fraud and impersonation. In such circumstances, forensic authentication is both appropriate and necessary to establish whether the deceased genuinely executed the document in question or did not execute the same.

15. I have considered the various principles developed over time that govern the reopening of ongoing cases to present and accept further evidence. The position of the English Courts has been as follows:

In *State v Hepple*, 279265, 271 {1977}:



“the Judge must consider whether the party deliberately withheld the evidence proffered in order to have it presented at such time as to obtain an unfair advantage by its impact on the trier of facts.”

16. The dictum in the Case of *Cason v State* 140 MD App 379 {2001} espouses the principles such as:

“Other factors which have been identified as important to the assessment of the propriety of the Trial Court's exercise of discretion to vary the order of proof include:
Whether good cause is shown, whether the new evidence is significant; whether the jury or Judge would be likely to give undue emphasis, prejudicing the party against whom it is offered; whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or Judge or a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony...” (underlined emphasis mine).
17. The Court's inherent powers under Section 3A of the *Civil Procedure Act*, coupled with the overriding objective under Sections 1A and 1B, empower Courts to make orders necessary to do Justice and prevent abuse of the Court process.
18. The Court has inherent powers to give orders which are necessary to meet the ends of Justice. Section 3A of the *Civil Procedure Act* provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
19. Similarly, Article 159(2)(d) of *the Constitution* enjoins Courts to administer Justice without undue regard to procedural technicalities. Where the authenticity of a material document is in question, and its resolution may aid the court in arriving at a just outcome, Courts ought to err on the side of caution and allow mechanisms that promote truth-finding.
20. While the Respondents argue that the application was made late, the document in question goes to the heart of the dispute and has the potential to impact the entire case. While the delay in raising the issue is regrettable, it is not so inordinate as to override the need for the truth and to do Justice to the parties.
21. Most Courts, when deciding whether to admit additional evidence, generally focus on whether doing so would serve the interests of Justice, even if the request is made late in the process.
22. In the case of *Raindrops Limited v County Government of Kilifi* [2020] eKLR, the Court in a Ruling where the Applicant sought the admission of additional evidence stated thus:

“The question that the calling of additional evidence would not have been probably obtained without exercise of due diligence does not necessarily apply to the instant application. It was held in *Risoro v State Farm Mutual Automobile Insurance Co* {2009} 70 CPC Out Div CL that:
“An orderly system of litigation requires that each party put his or her best foot forward.”
In the same breadth, my observation is that the applicant has a legitimate expectation from this Court to be granted leave to factor in the additional evidence to clarify contentious issues to the claim. This is an application in which the mover has sought leave and discretion



of the Court before Judgment and the test is whether the evidence if presented would clarify issue and buttress the position taken by the Plaintiff.

23. In the Case of Odoyo Osodo –vs- Rael Obara Ojuok & 4 Others (2017) eKLR the Court stated as follows in regard to exercise of discretion by a Court to reopen a case that has been closed:-

“The Court’s discretion in deciding whether or not to reopen a case which the Applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised Judiciously and in favour of an Applicant who had established sufficient cause to warrant the orders sought.”

24. In determining whether or not to reopen the case and admit additional or new evidence, the Court ought to consider whether or not such re opening and admission of new evidence will alter the character of the case and/or will prejudice the opposite party. In the instant case the Applicant seeks to have a document tendered in evidence subjected to forensic examination to authenticate its execution. In the Further Amended Plaint the deceased original Plaintiff, had denied executing the contested document as per the particulars of fraud attributed to the Defendants in the Plaint. The authentication of the execution of the contested documents would without doubt assist the Court in reaching a just determination.
25. The Respondents in my view have not demonstrated they would suffer any prejudice that would outweigh the probative value of establishing the truth about the document’s authenticity and ultimately enable the Court to reach a just determination of the dispute.
26. The Respondent raised the issue of the Director of Criminal Investigation being a non-party to the case and therefore was not compellable to do the report sought by the Applicant. The Court’s position is that although the DCI was not a party to the proceedings, courts have, in appropriate circumstances, issued orders directing Public Investigative Agencies to conduct forensic analysis. Given that the DCI has the technical expertise and statutory mandate to carry out fingerprint analysis, an order to that effect is both lawful and appropriate and it would be in the interest of Justice to have the report availed.

Conclusion

27. Having considered the pleadings, affidavits, submissions, and the applicable law, I find that the application dated 8th July 2024 is meritorious. The forensic examination of the impugned document will assist the Court to reach a fair and just resolution of the dispute.

Final Orders

1. The Notice of Motion dated 8th July 2024 is hereby allowed.
2. The Director of Criminal Investigations, Kirinyaga Central, is hereby directed to forensically examine the thumbprint appearing on the undated application to withdraw caution and compare it with the thumbprints on the verifying affidavit and witness statement dated 15th July 2014.
3. The DCI shall file a forensic report in this court within sixty (60) days from the date of this Ruling.
4. The Applicant shall pay to the 2nd and 3rd Respondents, jointly, costs assessed at Kenya Shillings Ten Thousand (KES 10,000/-) within thirty (30) days from the date hereof.
5. Matter to be mentioned on 29th September 2025 for further directions.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 15TH DAY
OF MAY 2025**

J. M. MUTUNGI

ELC - JUDGE

