



Musau & 2 others v Independent Electoral and Boundaries Commission & 2 others (Petition 2 of 2013) [2025] KEHC 9980 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

PETITION 2 OF 2013

RC RUTTO, J

JULY 4, 2025

BETWEEN

THOMAS MALINDA MUSAU 1ST PETITIONER

STEPHEN NDAMBUKI MULI 2ND PETITIONER

JOHN NTHULI MAKENZI 3RD PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

LEONARD OKEMWA (RETURNING OFFICER) 2ND RESPONDENT

STEPHEN MUTINDA MULE 3RD RESPONDENT

RULING

1. Before this court for determination is the 1st petitioner Notice of Motion Application dated 22nd July 2022. The application brought under Order 40 Rule 1, Order 51 of the *Civil Procedure Rules* and Section 1A, 1B, 3A of the *Civil Procedure Act* seeks two primary prayers;
 - a. That an order do issue for the Directorate of Criminal Investigation to investigate who signed the documents filed in court allegedly signed by the 2nd and 3rd Petitioners
 - b. That the 2nd and 3rd petitioners to appear before the investigating officer at the Directorate of Criminal Investigation to give their specimen signature to aid the said investigations
2. The application is grounded on the assertion by the 2nd and 3rd Petitioners that they never signed any documents filed in court, alleging that the purported signatures are forgeries. The 1st Petitioner argues that these assertions are intended to mislead the court and prejudice the case, potentially leading to



- irreparable damage if the petition is declared a nullity or documents expunged. It is argued that the requested investigation will aid in upholding judicial integrity and ensure justice is done.
3. The application is further supported by an affidavit sworn by Francis Mugambi, advocate for the 1st Petitioner, on 22nd July 2024. He deponed that the 2nd and 3rd Petitioners' denial of signatures prompted the 1st Petitioner to write to the DCI for a handwriting and signature analysis. A forensic analysis, he argued, would enable the court to make an informed and impartial decision on the matter. They urged the court to allow the application.
 4. As at the time of writing this ruling the 2nd and 3rd petitioners had not filed their respective responses and hence did not oppose this Application.
 5. The Application is vehemently opposed by the 3rd Respondent, through his counsel Geoffrey Muriungu Kiugu, who filed a Replying Affidavit sworn on 20th November 2024. The 3rd Respondent contends that the application is fatally defective, lacks merit, is misconceived, frivolous, and constitutes an abuse of the court process.
 6. The crux of the 3rd Respondent's opposition lies in the Court of Appeal judgment delivered on 31st January 2024 in Nairobi Civil Appeal No. 219 of 2013, *IEBC & Another v Stephen Mutinga Mule & 3 others*. In this judgment the Court of Appeal set aside the High Court's decision, dismissed the Petition, and ordered the 2nd, 3rd, and 4th respondents (who are the 1st, 2nd, and 3rd Petitioners herein) to pay costs of the appeal and the High Court petition.
 7. The 3rd Respondent argued that the Court of Appeal's decision can only be challenged via a Reference to the Court of Appeal or an appeal to the Supreme Court. It was deponed that the 2nd and 3rd Petitioners have not challenged the order for costs and are now attempting to evade payment by alleging fraudulent filing by Laichena Mugambi & Co. Advocates.
 8. It was the 3rd Respondent submissions that this court lacks jurisdiction to determine criminal matters of alleged forgery of signatures, particularly in a matter already fully determined and closed by a higher court. That the application, is a waste of judicial time, an abuse of process, and purely intended to delay execution of the order for costs. The 3rd Respondent sought dismissal of the application with costs.
 9. The application was canvassed by way of submissions.
 10. The 1st Petitioner, in his submission criticized the 3rd Respondent's replying affidavit for being sworn by counsel on record on matters not within their personal knowledge.
 11. It was submitted that no prejudice would be occasioned to the 3rd Respondent if the application were allowed; instead, a positive forensic report confirming the signatures would aid in recovering the awarded costs. The 1st Petitioner emphasized the necessity of a forensic examination, especially since the 2nd and 3rd Petitioners have denied their signatures and even filed an expert report to that effect. Reliance was placed on *Kinyanjui & 2 others v Kamau & 2 others; Javisapa Enterprise Limited (Interested Party)* Environmental & Land Case E060 of 2022 (2023) KEELC 20797 KLR (19 October 2023), arguing that the court can seek expert evidence to aid in dispute determination.

3rd respondent submissions

12. The 3rd Respondent vehemently opposed the application. It set out the sole issue for determination as whether the 1st Petitioner/applicant is entitled to the orders sought. It reiterated that the application is fatally defective and an abuse of process, as this Court lacks jurisdiction to interfere with the Court of Appeal's order of 31st January 2014 issued in Court of Appeal Nairobi Civil Appeal No 219 of 2013 *IEBC & Another v Stephen Mutinga Mule & 3 others*.



13. The 3rd Respondent submitted that any grievance with the Court of Appeal's order should have been addressed through a review or reference to the same court, or an appeal to the Supreme Court. It urged that the issue of whether the 2nd and 3rd Petitioners signed the documents, should have been raised before the Court of Appeal, as it was the court which made the order for costs. It was contended, that the High Court lacked jurisdiction to review or set aside such an order made by the Court of Appeal.
14. It was further submitted that the current matter before this court is for the purpose of executing the Court of Appeal judgment, with costs already taxed. Thus, the High Court cannot determine the validity of the signature at this stage. Reference was made to *Thomas Malinda Musau & 2 others v Independent Electoral and boundaries Commission & 2 others* to support these assertions.
15. Finally, the 3rd Respondent argued that the High Court lacks jurisdiction to delve into criminal issues of alleged forgery in a closed and a fully determined matter. That the 2nd and 3rd Petitioners, if truly aggrieved, should report the alleged forgery to the police for investigation in the normal criminal process. The 3rd Respondent urged that the Application be dismissed with costs.

Analysis and Determination

16. I have carefully considered the Notice of Motion application, the affidavits sworn by Mr. Francis Mugambi and Mr. Geoffrey Muriungu Kiugu, and the detailed submissions by both parties.
17. The central issue for determination is whether this High Court has the jurisdiction and discretion to grant the orders sought by the 1st Petitioner, particularly an order for the DCI to investigate allegations of forgery related to documents in a case already dismissed by the Court of Appeal.
18. In this case, the Court of Appeal, delivered a definitive judgment on 31st January 2024, setting aside the High Court's judgment, dismissing the Petition, and awarding costs. That judgment effectively brought the petition to an end.
19. The High Court is subordinate to the Court of Appeal. It is a well-established principle of law that a High Court cannot review, set aside, or in any way interfere with a judgment or order of the Court of Appeal. Any party aggrieved by a decision of the Court of Appeal must seek recourse within that court through review or appeal to the Supreme Court.
20. The 1st Petitioner relies on Sections 1A, 1B, and 3A of the *Civil Procedure Act* to justify the grant of the orders sought. While these sections grant the court broad powers to ensure justice and prevent abuse of process, these powers must be exercised within the confines of the court's jurisdiction and the established legal framework.
21. Notably, allegations of forgery are criminal in nature and if proven constitute a criminal offence. In this instance while the applicant informs court that he has made a report to the DCI he does not disclose the action taken and or status of the report. Besides while a civil court, in the course of its proceedings, may make findings of fact regarding whether a document is forged for the purpose of determining the civil dispute before it, it cannot blindly order a criminal investigative body like the DCI to conduct an investigation. The DCI operates under its own statutory mandate for criminal investigations. If a party believes a criminal offence has been committed, the proper procedure is to report the matter to the police for investigation, which would then proceed independently under criminal law. A civil court compelling a criminal investigation would improperly blur the lines between civil and criminal jurisdictions and potentially interfere with the independence of investigative agencies.
22. The argument that a forensic analysis would aid the court in making an informed decision, while true in principle, is secondary to the fundamental question of jurisdiction. This Court cannot grant an



order that essentially re-opens a concluded matter or usurps the role of criminal investigative bodies, especially when the purpose is to challenge an order from a higher court.

23. The fact that the 2nd and 3rd Petitioners have filed an expert report denying their signatures suggests they have already taken steps to address the issue. If they genuinely believe the documents were forged and filed fraudulently, their recourse for criminal investigation lies with the appropriate law enforcement agencies, not via an order from this Court in this cause. The application, if granted, would lead to an abuse of the court process.
24. The upshot of the above is that 1st Petitioner's Notice of Motion Application dated 22nd July 2022 is hereby dismissed. Costs of this Application are awarded to the 3rd Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 4TH DAY OF JULY, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Petitioners

.....Respondents

