



**REPUBLIC OF KENYA**

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

**ELC NO.649 OF 2012**

**STEPHEN KIBIWOTT CHERUIYOT.....PLAINTIFF**

**VERSUS**

**LUKA CHEMWENO.....1<sup>ST</sup> DEFENDANT**

**PERIS JELAGAT LIMO.....2<sup>ND</sup> DEFENDANT**

**CHARLES KIPROTICH TANUL.....3<sup>RD</sup> DEFENDANT**

**DR. CHOGE BARTUIYOT.....4<sup>TH</sup> DEFENDANT**

**AND**

**THE COMMISSIONER OF LANDS**

**COUNTY LANDS REGISTRAR.....3<sup>RD</sup> PARTY**

**RULING**

**Introduction**

1. This is a ruling in respect of two separate applications which seek similar orders. The first application is dated 23<sup>rd</sup> October, 2020. It is brought by the 1<sup>st</sup> Defendant/Applicant and it seeks stay of further proceedings in this matter and reference of a number of documents signed by the Plaintiff/Respondent in relation to Eldoret Municipality Block 12/343 for purposes of examination of the signatures thereon by a document examiner who should file a report in court within 30 days from the date the order is given or as the court may direct.

2. The second application is dated 28<sup>th</sup> June, 2021. It is brought by the 4<sup>th</sup> Defendant/Applicant and it seeks leave of the court to allow the 4<sup>th</sup> Defendant to re-open his case limited to production of a forensic document examiner's report dated 12<sup>th</sup> June, 2021 as part of the 4<sup>th</sup> Defendant's exhibits.

**Background**

3. This suit was filed by the Plaintiff on 7<sup>th</sup> October 2010. The parties exchanged documents and after interlocutory applications were settled, the case started for hearing on 29<sup>th</sup> November, 2018. The Plaintiff's case closed on 11<sup>th</sup> March, 2020. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants also closed their defence on 11<sup>th</sup> March, 2020. The 4<sup>th</sup> Defendant's case was heard on 12<sup>th</sup> March, 2020. The case was then adjourned to 18<sup>th</sup> June, 2020 to allow the third parties to call the last witness. On 18<sup>th</sup> June, 2020, all parties did not attend court. The court adjourned the case to 29<sup>th</sup> September, 2020.

4. On 29<sup>th</sup> September, 2020 the court allocated the matter for hearing at 11.00am in open court. When the matter was called out at 11.00am, all Advocates for the parties were present. Mr. Wabwire for the third parties indicated to court that he was ready to proceed and that the witness he was to call was going to produce documents in support of the Plaintiff's case. It is at this juncture that all the Defendants Advocates indicated to court that they were not ready to proceed despite their indication earlier on that they were ready to proceed and they had been allocated time for hearing.

**The first Application**

5. The 1<sup>st</sup> Defendant who is the Applicant in this application contends that a perusal of the signatures appended to a lease dated 3<sup>rd</sup> July, 2009 and the signature on undated letter addressed to the Commissioner of Lands as compared to the signature of the deponent to the verifying affidavit dated 14<sup>th</sup> June, 2012 and the signature on the witness statement dated 28<sup>th</sup> March, 2012 shows that the same were not made by the same person.

6. The 1<sup>st</sup> Defendant therefore argues that as neither the court nor the parties herein or their advocates are not handwriting experts, the said documents should be subjected to examination by a document examiner to ascertain whether they were made by the same person. The 1<sup>st</sup> Defendant argues that the document examiner's report will enable the court to determine the authenticity of the contested lease held by the Plaintiff.

### **The Second Application**

7. The 4<sup>th</sup> Defendant contends that he forwarded the Plaintiff's signature on the lease held by him, the signature appearing on the verifying affidavit dated 14<sup>th</sup> June, 2012 and the statement dated 28<sup>th</sup> March, 2021 for comparison with his known signature to the document examiner. The document examiner compared the questioned signature as against the known signature of the Plaintiff and arrived at a conclusion the signatures were not made by the same person. The 4<sup>th</sup> Defendant therefore wants this report to be admitted in evidence as part of his exhibits.

### **Response by the Plaintiff/Respondent**

8. The Plaintiff opposed the application by the 1<sup>st</sup> Defendant based on a replying affidavit sworn on 19<sup>th</sup> February, 2021. The Plaintiff contends that the 1<sup>st</sup> Applicant's application is devoid of merit and is an abuse of the process of the court as the court has no powers to order for investigations in Civil matters. The Plaintiff argues that what the 1<sup>st</sup> Defendant is asking the court to do amounts to the court usurping investigative powers of the Police and that in any case, the application has been made after an inordinate delay. The Plaintiff further argues that this application is meant to delay the conclusion of this case.

9. The Plaintiff opposed the application by the 4<sup>th</sup> Defendant through a replying affidavit sworn on 28<sup>th</sup> September, 2021. The Plaintiff contends that the 4<sup>th</sup> Defendant's application is devoid of merit. He further argues that the 4<sup>th</sup> Defendant has not demonstrated why he did not produce the said evidence during the hearing of the 4<sup>th</sup> Defendant's case. The Plaintiff further argues that a case cannot be reopened in order to fill gaps which have been identified by the Applicant as the case progresses.

10. The Plaintiff further argues that what the 4<sup>th</sup> Defendant intends to introduce was the subject of intense cross-examination and that the application has been made after inordinate delay.

### **Analysis**

11. The counsel for the third parties indicated that he did not wish to participate in either of the two applications. The rest of the Defendants were in support of the two applications. The 1<sup>st</sup> Defendant filed his submissions dated 10<sup>th</sup> May, 2021. The 3<sup>rd</sup> Defendant filed his submissions dated 3<sup>rd</sup> June, 2021. The 4<sup>th</sup> Defendant filed his submissions dated 3<sup>rd</sup> May, 2021. The Plaintiff filed his submissions dated 12<sup>th</sup> April, 2021 and supplementary submissions dated 21<sup>st</sup> June 2021.

12. I have gone through the two applications as well as the opposition to the same by the Plaintiff. I have also gone through the submissions by the parties herein. As the two applications are similar, I will deal with them at the same time. There are two issues for determination in these two applications. The first is whether this court should order that the documents in listed in prayer C (i) to (iv) should be subjected to forensic examination by a document examiner and secondly whether the 4<sup>th</sup> Defendant's case should be re-opened to allow evidence of the report dated 12<sup>th</sup> June, 2021.

13. The documents which are the subject of the two applications were available to the two Applicants as early as 2012. All these documents were served upon all the Applicants. The documents were available even before the two Applicants closed their respective defences. Some of those documents were subject of cross-examination.

14. It is apparent that the issue of examination of those documents was an after thought which only came up after the statement by Mr.Wabwire on 18<sup>th</sup> June, 2020 shortly before the hearing could start. All the advocates had indicated that they were ready to proceed during the virtual mention and had been allocated time for hearing in open court at 11.00am. Despite having confirmed that they were ready to proceed, they suddenly said that they had not been served after hearing what Mr.Wabwire was about to produce in evidence.

15. The two applications were made thereafter and it is not difficult to see that the two applications were not made in good faith. The issue in contention here is on the lease held by the Plaintiff and the one held by the 1<sup>st</sup> Defendant who sold the suit property to the 2<sup>nd</sup> Defendant who in turn sold the 3<sup>rd</sup> Defendant and finally to the 4<sup>th</sup> Defendant. This case will not be decided based on the outcome of the signatures on the documents which have been subjected to forensic examination or are to be subjected to examination as the Applicants are requesting. The suit will be determined based on evidence held by the Ministry of Lands officials who have custody of all records and have elaborate paper trail of all that happened.

16. The Applicants are seeking to subject documents to examination after almost nine (9) years of the said documents being in their possession. I do not think that it will be fair to aid parties who have been indolent to build their case by re-opening the same and allowing adduction of additional evidence. If the Applicants genuinely wanted to have the signatures examined, they should have done so in time and not to wait until they close their respective cases before coming back seeking to re-open the same and adduce additional evidence.

**Disposition**

17. Litigation must come to an end. A party will not be allowed to build his or her case as the hearing progresses. A party is expected to put forth his or her case at the earliest and no court would allow a party to build his or her case when it is apparent that the party is out seal loop holes which have emerged or wants to counter evidence after the opposite party has closed his case. It is on this basis that I find that the two applications have no merit. The same are dismissed with costs to the Plaintiff.

***It is so ordered.***

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11TH NOVEMBER, 2021**

**E.O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Tororei for Plaintiff

Mr. Njuguna for 1<sup>st</sup> Defendant

Mr. Kuria for third Parties

Court Assistant – Mercy

**E.O. OBAGA**

**JUDGE**