



**Surtan v Gathuru & another (Environmental and Land Originating Summons E003 of 2024)
[2026] KEELC 311 (KLR) (Environment and Land) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2024
MC OUNDO, J
JANUARY 29, 2026**

BETWEEN

SALLY SURTAN APPLICANT

AND

GEORGE NJOROGGE GATHURU 1ST RESPONDENT

THE LAND REGISTRAR, NAIVASHA 2ND RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated 9th May 2025 brought pursuant to the provisions of Order 57 of the Civil Procedure Rules 2010, Sections 3A, 7A and 78 of the *Civil Procedure Act*, Section 48 of the *Evidence Act* and all other enabling provisions of law wherein the Plaintiff has sought for the following orders:
 - i. That the Honourable Court be pleased to direct the 1st Respondent to submit original documents of the photocopies of their documents filed herein for authentication by a forensic examiner for purposes of confirming if the signature appearing thereon is similar to that of Samson Silong Surtan's signature as appearing on his original documents.
 - ii. That the Honourable Court be pleased to order the forensic examiner to submit a confidential report confirming the findings in relation to the said documents which are:
 - a. Original copy of Agreement for Sale dated 4th September 2002.
 - b. Original copy of acknowledgement of payment dated 29th December 2003.
 - iii. That the costs of this Application be borne by the Respondent.



2. The said Application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by Sally Surtan, the Applicant herein who deponed that she had been the administrator of the Estate of the late Samson Silong Surtan since the year 2008. That the 1st Respondent had produced before the court a copy of a sale agreement dated 4th September 2002 and an acknowledgement of payment dated 29th December 2003 alleging that the same had been signed by her deceased husband.
3. That indeed, she was in possession of the deceased's documents where he had appended his signatures which was different from the said documents wherein the forensic examiner sought to examine the original document.
4. In response and in opposition to the Applicant's Application, the 1st Respondent fled his Grounds of Opposition dated 13th June 2025 and a Replying Affidavit dated 28th July 2025 opposing the Application on the ground that the same was res judicata a ruling in Naivasha CM Criminal Case No. E1061 of 2012 Republic v George Njoroge Gathuru wherein the documents in issue were under the court's evaluation.
5. That the instant Application amounted to an abuse of court wherein the Applicant was out on forum shopping. Lastly that the prayers sought were so substantive that they required a substantive suit.
6. In his Replying affidavit, the Respondent deponed that the Applicant had lodged a complaint at Gilgil Police Station on 31st May 2022 against him wherein a criminal investigation had been completed leading to his arrest on 29th July 2022 and a charge with fraud related offences on 1st August 2022 in Naivasha Criminal Case No. E1061 of 2012 Republic v George Njoroge Gathuru. That during the hearing, the original Sale Agreement dated 4th September, 2002 and an acknowledgement of payment dated 29th December 2003 had been produced as exhibits for evaluation by the court where the prosecutor had made an oral application that the aforementioned documents be subjected to forensic analysis by a document examiner and the matter came up for judgement on the 31st July 2025
7. That the Application herein was res judicata in its entirety since the two documents had been subject of the same Application that had been raised on the 12th May 2025 in the aforementioned Criminal case wherein the court had delivered a ruling upon hearing the submissions of the parties. That the applicant ought to have filed an appeal or revision were she not satisfied with the Ruling of the Court.
8. That however, despite the pendency of the fraud charges against the 1st Respondent on the same matters, the Applicant had clearly exhibited burning desire to unfairly, mischievously and oppressively use the Honorable Court to continue investigations years on end. That the instant Application was thus an afterthought and amounts to abuse of the court process. That further, the same had gone against the nature of the adversarial legal system where parties appear before an impartial judge. That subsequently, asking the court to extend an indulgence to the Applicant, descend to the arena of investigations and seek a confidential forensic should not be allowed.
9. He thus deponed that the instant Application was a classic example of a frivolous, vexatious and unmerited application that had been brought in bad faith since it had only amounted to an abuse of the court process hence the same should be dismissed with costs.
10. The Application was disposed of by way of written submissions as herein under summarized.

Applicant's Submissions.

11. The Applicant, vide her Submissions dated 9th October 2025 in support of her application herein and in opposition to the Grounds of Opposition dated 13th June 2025 framed two issues for determination to wit:



- i. Whether the Application dated 9th May 2025 is res judicata.
 - ii. Whether the instant suit is fatally defective.
12. On the first issue for determination, the Applicant's argument was that the doctrine of Res Judicata did not apply in the circumstance of the present suit because forensic evidence was an evidentiary tool and not a final judgment. That the criminal acquittal was based on a technicality being a defective charge sheet and not on the merits of the evidence. She relied on the decision in Republic v Chief Magistrate's Concert at Mombasa Ex parte Ganijee & Another [2002] 2 KLR 703.
13. On the second issue, she contended that the suit was not defective and neither was it complex. She placed reliance on the provisions of Order 37 Rule 19 (1) of the Civil Procedure Rules, Section 19 (1) of the *Environment and Land Court Act* as well as the decided cases of Kibutiri v Kibutiri (1982) KLR and Emily Chepkor Chepkwony v Paul Arap Chandoek (2021) (sic) and sought that the court treats the Originating Summons as a Plaint if necessary to ensure justice.
14. That the 2nd Respondent (Land Registry) could not trace the transfer records, thus making the authenticity of the Sale Agreement central to the case. The Applicant thus prayed that the Honorable Court allows the application dated 9th May 2025 and dismiss the grounds of opposition dated 13th June 2025.

1st Respondent's Submissions.

15. The 1st Respondent on the other hand vide his submissions dated 19th December, 2025 summarized the factual background of the matter and then framed two issues for determination as follows:
 - i. Whether the Application is res judicata.
 - ii. Whether the Application is fatally incompetent and misconceived.
16. On the first issue for determination as to whether the instant Application is res judicata, he placed reliance on the provisions of Section 7 of the *Civil Procedure Act* and the explanations 1 to 3 therein as well as the decided case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR Finality of Litigation to submit that the criminal court was competent and its refusal to order forensic analysis, on the same application, should have been appealed, not re-introduced in a civil court, the issue having been canvassed and determined in a ruling delivered on 14th April, 2025 after the state prosecutor had been afforded an opportunity to scrutinize and cross examine him on the same and its contents. He argued that the court should not "descend into the arena" of investigations or act as an investigative arm for the Applicant.
17. On the second issue for determination as to whether the instant Application is fatally incompetent and misconceived, the 1st Defendant placed reliance in the decided case of Kosiom vs Matura (Environment & Land Appeal E005 of 2024) [2025] KEELC 5698 (KLR) to submit that the opinion report on the similarity of Samson Silong Surtan's signatures alone was an incomplete opinion on its genuineness and therefore of no value. That in any case he had presented indisputable documents before the Honorable Court including certified copies of the Green Card and Title Deed dated 13th February, 2004, as official public documents bearing entries, signatures, stamps and or official mark(s) and impressions made by the Land Registrar in the course of his/her official duty which evidence had not been impeached.
18. That save for making a blanket allegation of fraud without specific particulars, the Applicant had not provided any evidence and or challenged the validity of the transfer process, the Green Card and entries



- thereon and the Title Deed dated 13th February, 2004 that had been issued to him. That subsequently, delving on seeking and obtaining non-binding opinions from forensic document examiners in regard to the impugned sale agreement amounted to futile sideshows.
19. That considering the evidentiary value of the documentary evidence that had been presented by the 1st Respondent in entirety, the non-binding opinion evidence on the documents in dispute would have no significance at all because it ignored the signatures of the witnesses and the advocate involved. That in the circumstances, the instant Application was totally untenable, an abuse of the Court process and a waste of court's precious time.
 20. That despite the Applicant having used the criminal process to advance a civil dispute, and arm twist and subdue him, she still wanted to cause further investigations through the Honorable Court to gain undue and unjust advantage over him despite having been acquitted under the provisions of Section 215 of the Criminal Procedure Code on the offence of fraudulently procuring registration of Title Deed contrary to the provisions of Section 137 (1)(c) of *Land Registration Act* No 6 of 2012.
 21. That in the cause of the criminal trial, the 1st Respondent had been remanded without bail and/or excessive bail terms, that had been unlawfully increased from Kshs. 2,000,000/= to Kshs. 20,000,000/=, for about two (2) years during which period the Applicant through the Prosecution had sought to have the matter mediated upon. That the Applicant was now seeking to enforce the outcome of a mediation process that had been obtained by way of duress, coercion and/ or undue influence during the criminal trial process.
 22. He placed reliance on the decision in the HC Misc. Civil Appl. 64/2001 Republic v Chief Magistrates Court at Mombasa Exparte Ganijee & Another (2002) 2 KLR 703.
 23. His submission was that whereas courts had wide discretion buttressed by the provisions of Article 159 of the *Constitution* to administer justice without undue regard to procedural technicalities, in applications such as the instant one, courts must exercise its discretion in a manner that takes into account the adversarial nature of our legal system. Reliance was placed in the decided case of *Nkatha Jeniffer v Equity Bank of Kenya Ltd & Another* (Environment and Land Case E028 OF 2024) [2025] KEELC 5740 (KLR) and *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2019] KECA 783 (KLR).
 24. That the substratum of the instant Application was intended to drive the court to usurp the powers of the National Police Service or the Directorate of Public Prosecution which was contrary to the constitutional architecture. That directing a document examiner to prepare or cause the preparation of a report of the investigations to the documents in issue would be a prelude to the court being deployed to call the document examiner as a witness on behalf of the Applicant. That the same did not augur with the right to fair hearing, fair trial and due process of the law. It was thus his submission that the Notice of Motion Application dated 9th May 2025 is incompetent, misplaced, lacks merits, constitutes an abuse of the court process hence the same should be dismissed with costs.

Determination.

25. I have considered the application dated 9th May 2025, the response thereto, the Submissions and Authorities cited as well as the applicable law. The Applicant brings the said application seeking orders to compel the 1st Respondent to produce original documents, specifically a Sale Agreement dated 4th September 2002 and an Acknowledgement of Payment dated 29th December 2003 for forensic examination. The 1st Respondent opposed the application, primarily on the ground that the same was res judicata and an abuse of court process.



26. From the above summation, I find the issues for determination being.
- i. Whether the application is barred by the doctrine of res judicata.
 - ii. Whether the court should exercise its discretion to order forensic authentication.
 - iii. Whether substantive orders can be sought in an Originating summons.
27. On the first issue for determination on whether or not the application is barred by the doctrine of res judicata, the 1st Respondent contends that because the Chief Magistrate's Court in Criminal Case No. E1061 of 2022 declined a similar request, this court is barred from revisiting it. The doctrine of res judicata, is anchored in Section 7 of the *Civil Procedure Act*, and requires the court to always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
28. In this instance, the "parties" in the criminal case were the Republic and the Accused. In the present case, the parties are the Estate of the Deceased and the Respondent. Furthermore, the Applicant depones that the criminal case ended in an acquittal based on a defective charge sheet which was on a technicality, rather than on a merit-based finding on the authenticity of the signatures.
29. It is a well-settled principle that a criminal acquittal does not automatically act as a bar to civil proceedings. The standards of proof "Beyond Reasonable Doubt" in criminal law and "Balance of Probabilities" in civil law are distinct. Consequently, I find that the issue of the signatures' validity was not "finally determined" on its merits. The plea of res judicata therefore fails.
30. On the issue of Forensic Investigation, the 1st Respondent argues that the court should not be used as an "investigative tool." However, Section 48 of the *Evidence Act* recognizes that judges are not experts in handwriting or chemistry and so by allowing an expert to testify, the law prioritizes accuracy over the rigid rule that only eye-witnesses can testify. Article 159(2)(d) of the *Constitution* on the other hand mandates that justice be administered without undue regard to procedural technicalities. on the other hand mandates that justice be administered without undue regard to procedural technicalities.
31. Where there was an admission by the 2nd Respondent (Land Registrar) of missing records, the Sale Agreement then became the root of title wherein if that root was challenged, the court cannot shut its eyes to the truth. Forensic analysis is not a "side-show" but a pursuit of substantive justice.
32. In the end the court finds that the Applicant has made out a prima facie case for the necessity of document authentication because to deny the same would potentially validate an alleged fraud based on a lack of evidence that exists but is being withheld. Further, the authenticity of this documents will determine whether there is even a case to hear and does not amount to 'investigating' but 'ensuring the integrity of evidence'.



33. Lastly on the issue for determination as to whether substantive orders could be sought in an Originating summons, the provisions of Order 37 Rule 19 of the Civil Procedure Rules provide as follows:

Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.

- (2) Where the court makes an order under subrule (1), Order 11 shall apply.
- (3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.
- (4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).”

34. In strict traditional practice, a Plaint is used for contentious matters while an Originating Summons (OS) is applicable whether the matters are non-contentious or straightforward interpretations of documents and or the law. Pursuant to the provisions of Article 159 and the "Oxygen Principle" (Sections 1A and 1B of the *Civil Procedure Act*) the modern-day trend is to prioritize the "merits" over the "form. Under the provisions of Order 37 Rule 19 thereof, if a court finds that a suit started by OS is too complex or involves fraud, it does not have to dismiss but may simply order that the OS be converted into a Plaint. Indeed the Applicant in her application sought that the Originating Summons be deemed the as a Plaint which was a strategic move to cure the procedural defect without losing the case.

35. The Court of Appeal in the case of *Kibutiri v Kibutiri* [1983] KLR 1 held as follows;

“If it appears to a judge that the issues are complex or that there are likely to be several disputes of fact which will require to be determined, he should not dismiss the summons, but should order that the suit be continued as if it had been commenced by plaint, and that the parties should file pleadings accordingly.”

36. To this end I hold as follows;

- i. The Application dated 9th May 2025 is hereby allowed.
- ii. The 1st Respondent shall within 14 days of this ruling deposit the original Sale Agreement dated 4th September 2002 and the Acknowledgement of Payment dated 29th December 2003 with the Deputy Registrar of this Court.
- iii. The said documents shall then be forwarded to a Forensic Document Examiner from the Directorate of Criminal Investigations (DCI) and/or a mutually agreed private expert to examine the signatures against known samples of the late Samson Silong Surtan. The Applicant shall bear the cost of the said authentication.
- iv. A report shall then be filed in this court within 30 days of the submission.



- v. An Order is hereby granted that the Originating Summons dated the 26th February 2024 is herein converted into a Plaint.
 - a. The Supporting Affidavit of the Applicant shall be deemed to be her statement
 - b. The 1st Respondent's Replying Affidavit shall be deemed to be his Statement of Defence.
 - c. The parties are granted leave to file and serve any supplementary Witness Statements and documents within 14 days.
- vi. There shall be no costs of the Application.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 29TH DAY OF JANUARY 2026.

M.C. OUNDO

ENVIRONMENT & LAND COURT – JUDGE

