



Jeniffer v Equity Bank of Kenya Limited & another (Environment and Land Case E028 of 2024) [2025] KEELC 5740 (KLR) (28 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5740 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE E028 OF 2024**

**JO MBOYA, J
JULY 28, 2025**

BETWEEN

NKATHA JENIFFER PLAINTIFF

AND

EQUITY BANK OF KENYA LIMITED 1ST DEFENDANT

MALULA CHARLES MÍTHIRIA 2ND DEFENDANT

RULING

1. What is before me is the Notice of Motion application dated 21st July 2025; and wherein the plaintiff/applicant [hereinafter referred to as the Applicant] has sought the following reliefs: -
 - i. That pending the hearing and determination of this suit: -
 - a. The Director of Criminal Investigations [DCI] be ordered to subject the following documents to a forensic document examination by a Government examiner to confirm whether they were signed by Nkatha Jeniffer: -
 - i. Charge dated 9/9/2011 drawn by Kiautha Arithi & Co. Advocates.
 - ii. Guarantee and indemnity joint and several individual Guarantors (undated) witnessed by Kaume Murera advocate.
 - iii. Further charge dated 5/9/12
 - iv. Affidavit of consent to spouse dated 5/9/12.
 - v. Deed of rental assignment dated 5/9/2012.
 - vi. Guarantee and indemnity dated 17/7/2013.
 - vii. The Letter of offer dated 23/9/2022.



- viii. The loan Guarantee and indemnity(undated) for a loan of Kshs: 14,000,000/-
- b. The 1st Defendant [Equity Bank Limited] be ordered to release the Original copies of the documents listed in prayer 1(a) (i)-(viii) to the Directorate of Criminal Investigation [DCI] for investigations on the signatures purported to be by Nkatha Jeniffer.
- c. That the Directorate of Criminal Investigations [DCI] to prepare and file a report on the investigations within a period of 60 days from the date of the orders.
- ii. That the costs of this Application be costs in the cause.
2. The subject Application is premised on various grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit of the applicant Nkatha Jeniffer [Deponent] sworn on even date and to which the deponent has annexed assorted documents which are contended to have been forged by the 2nd defendant/ respondent.
3. The application was duly served upon the respondents. However, neither of the respondents appear to have filed any response thereto. In any event, no response by either of the respondents is traceable to or obtainable from the court tracking system [CTS].
4. The application came up for hearing on 28th July 2025; where upon learned counsel for the Applicant indicated that the hearing date had been taken in the presence of learned counsel for the 1st Respondent. To this end, learned counsel for the Applicant posited that same was ready to proceed. Suffice it to state, that the court ordered and directed that the application does proceed.
5. Learned counsel for the Applicant adopted the grounds contained at the foot of the application and thereafter reiterated the averments in the body of the supporting affidavit. Furthermore, learned counsel sought to highlight and canvass three [3] salient issues, namely; that the court has the requisite jurisdiction to order and direct the Directorate of Criminal Investigation to subject the various documents alluded to in the body of the application to forensic document examination; that the examination of the said documents will enable the court to fully appreciate the issues underpinning the subject suit; and the application before hand is not defeated by the provision of [Access to Information Act](#) [2016].
6. Regarding the first issue, learned counsel for the applicant has submitted that this court is clothed with wide and unfettered jurisdiction to order and or direct the Directorate of Criminal Investigations to subject the documents highlighted in the body of the application to forensic document examination. To this end, counsel cited and referenced the provisions of sections 1A 1B 1C and 3A of the [Civil Procedure Act](#). Moreover, learned counsel contended that the said provisions of the law [which same dubbed as the Oxygen provisions] allow the court to give the orders sought.
7. With respect to the second issue, learned counsel for the applicant submitted that it is in the interest of justice that the orders sought be granted. Furthermore, counsel submitted that the original documents are in the possession of the defendants/ respondents and the said defendant/respondents may not be keen to release and or surrender the documents for purposes of the process of document examination; and necessary investigation[s].
8. To this end, it was contended that the intervention of the court is paramount.
9. Lastly, learned counsel for the applicant has submitted that the requisition of the documents under reference is not defeated by the provisions of [Access to Information Act](#) 2016. In this regard, counsel contended that it was therefore not incumbent upon the Applicant to follow the laid-down procedure



enshrined in the [Access to Information Act](#). Further and in any event, learned counsel added that the application beforehand is not seeking for the provision of the documents in question for perusal.

10. Flowing from the foregoing, learned counsel for the applicant has implored the court to find and hold that the application beforehand is merited. In this regard, learned counsel invited the court to allow the application and to direct the Directorate of Criminal Investigations [DCI] to subject the various documents to forensic document examination and, thereafter, to prepare and file a report on the investigations within a period of sixty days [60] from the date of the orders of the court.
11. I have indicated elsewhere herein before that the respondents did not attend court on the scheduled hearing date. To this end, no submissions were therefore made by and on behalf of the respondents.
12. Having reviewed the application and the supporting affidavit thereto and upon consideration of the oral submissions canvassed by counsel for the applicant, I come to the conclusion that the determination of the subject application turns on three [3] key issues, namely; whether the court is seized of the requisite jurisdiction to direct [command] the directorate of criminal investigations to subject the documents in question to forensic document examination or otherwise; whether the orders sought are tantamount to usurping the powers of the director of criminal investigations or otherwise; and whether the applicant herein has satisfied the statutory threshold provided for under the [Access to Information Act](#) [2016] or otherwise.
13. Regarding the first issue, namely; whether the court is seized of the requisite jurisdiction to direct [command] the directorate of criminal investigations to subject the documents in question to forensic document examination or otherwise, it is imperative to recall and to reiterate that the gist of the application is to compel and or direct the directorate of criminal investigations to subject documents which have been filed before this court to forensic document examination and thereafter to prepare and file a report before this court [sic] within 60 days from the date of the order. Furthermore, the Applicant also seeks an Order that the DCI be directed to undertake investigation[s] on the impugned Document[s] and establish [sic] whether same [Documents] were truly signed by the Applicant or otherwise.
14. The question that does arise is whether the office of the director of criminal investigations and the bearer of the said office [DCI] can be subject to the direction and or instructions of the court as pertains to undertaking its duties. Instructively, the office of the Directorate of Criminal Investigations is a subset; and, in any event, a directorate in the National Police Service. Moreover, it is common ground that the Directorate of Criminal Investigations and in particular, the Director thereof reports to the Inspector General of Police.
15. The Directorate of Criminal Investigations is established vide the provisions of Section 28 of the [National Police Service Act](#) No 11 of 2011. The said provisions state as hereunder:

There is established the Directorate of Criminal Investigations which shall be under the direction, command, and control of the Inspector-General.’
16. Moreover, the structure and command of the National Police Service, including the directorate of criminal investigations, is provided for pursuant to the provisions of Article 245 of the [Constitution](#) 2010. For ease of appreciation, it suffices to reproduce the provisions under reference.
17. Same are reproduced as hereunder:-

Command of the National Police Service.

245.



- (1) There is established the office of the Inspector-General of the National Police Service.
- (2) The Inspector-General—
 - (a) is appointed by the President with the approval of Parliament; and
 - (b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.
- (3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.
- (4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
 - (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.
- (5) Any direction given to the Inspector-General by the Cabinet secretary responsible for police services under clause (4), or any direction given to the Inspector-General by the Director of Public Prosecutions under Article 157(4), shall be in writing.
- (6) The Inspector-General shall be appointed for a single four-year term, and is not eligible for re-appointment.
- (7) The Inspector-General may be removed from office by the President only on the grounds of—
 - (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
 - (b) gross misconduct whether in the performance of the office holder's functions or otherwise;
 - (c) physical or mental incapacity to perform the functions of office;
 - (d) incompetence;
 - (e) bankruptcy; or
 - (f) any other just cause.
- (8) Parliament shall enact legislation to give full effect to this Article.

18. There is no gainsaying that the National Police Service is a creature of the *Constitution*. Furthermore, the mandate and functions of the said service, including the directorate of criminal investigations, are provided for under the *Constitution*. To this end, it then means that the national police service must act and operate within the confines of the *Constitution* and not otherwise.
19. Additionally, there is no gainsaying that the National Police Service, being an independent and constitutional commission, is not subject to the direction and or instructions of any person or body,



save where expressly provided for under the Constitution. For good measure, the limiting provisions are captured vide Articles 157; 245 (4) and 249 (2) of the Constitution.

20. Other than the foregoing, the provisions of Article 249(2) of the Constitution insulate the Inspector General and the Directorate of Criminal Investigations [established vide section 28 of the National Police Service Act] from the directions or instructions of any person or body.
21. The provisions of Article 249(2) of the Constitution, 2010 stipulates thus:-
- (1)
 - (a)
 - (b)
 - (c)
 - (2) The Commissions and the holders of independent offices—
 - (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.
22. Bearing in mind the provisions of the Constitution which have been highlighted in the preceding paragraphs, I come to the conclusion that this court is not seized of the requisite jurisdiction to command, direct and or order the Directorate of Criminal Investigations [DCI] to undertake the forensic examination of the impugned documents. For good measure, any such order and or directions shall run afoul of the provisions of Article[s] 245[4][a] and 249(2) of the Constitution, 2010.
23. To buttress the foregoing holding, it suffices to cite and reference the decision of the Supreme Court of Kenya [the apex Court] in the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment), where the apex court stated thus;
89. The office of the Inspector General of the National Police is established under Article 245 (1) of the Constitution. The power to investigate crimes is vested in the Inspector General by dint of article 245 (4) of the Constitution which provides that:'
- (4) The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-
 - a. The investigation of any particular offence or offences;
 - b. The enforcement of the law against any particular person or persons; or
 - c. The employment, assignment, promotion, suspension, or dismissal of any member of the National Police Service.” [Emphasis added]
91. A review of the constitutional and statutory provisions herein shows without any doubt that the Inspector General and the Director, DCI have the mandate to perform multi-faceted functions as provided under articles 244 and 245 of the Constitution. Accordingly, article 244 provides for the objects and functions of the National Police Services and article 244(c) in particular requires the National Police Services to comply with constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. This is important



because human rights and fundamental freedoms and the rule of law are founding values in our Constitution.

92. A court should only interfere with the powers granted to the Inspector General and the DCI under articles 244 and 245 of the Constitution and under the provisions of the National Police Service Act if the constitutional and statutory provisions are not adhered to or if the actions are illegal and unlawful. The questions that beg answers in the present appeal are whether the Inspector General and the DCI acted within their constitutional mandate and whether their actions amounted to an abuse of office.
24. Moreover, it is important to underscore that this court is called upon to grant orders and or issue directions which do not contradict the Constitution. In any event, this court must be alive to the legal position that the exercise of jurisdiction must be underpinned by the Constitution or the statute or both. Where the Constitution does not grant any such jurisdiction, the court must refrain from arrogating unto itself mandate that lies elsewhere. [See the dictum of the Supreme Court in *Samwel K Macharia versus Kenya Commercial Bank Limited and Another* [2012] Eklr, at paragraph 68 thereof].
25. Turning to the second issue, it is important to observe and underscore that anyone, the applicant not excepted, is at liberty to lodge and or mount a criminal complaint with the Inspector General, Directorate of Criminal Investigations or such other arm of the National Police Service for purposes of investigations and further action. [See the Provisions of Sections 49 and 55 of the National Police Service Act].
26. It is worthy to underscore that were a complaint is lodged with the National Police Service and it becomes apparent that a cognisable offence may [I say, may] have been committed, the police are possessed of the requisite powers to summon the suspect and to take custody of any document that may be the subject of investigations. Furthermore, the police are also at liberty to take and or extract fingerprints if deemed appropriate.
27. Nevertheless, in respect of the instant matter, the applicant herein is before this court and same is seeking to procure orders that would be tantamount to making the court usurp the functions and or powers of the national police service. To my mind, every constitutional body and or institution must be allowed to execute its mandate without unnecessary intrusion by another, the Court[s] not excepted.
28. In short, I hold the humble opinion that the substratum of the application beforehand is intended to drive this court to usurp the powers of the directorate of criminal investigations, which is contrary to and antithetical to the constitutional architecture. Moreover, it is worth recalling that no complaint has previously been lodged with the DCI for purposes of investigation[s] or further action.
29. Next is the issue as to whether the applicant herein has complied with and or satisfied the mandatory/ peremptory provisions of the Access to Information Act 2016. It is instructive to highlight that what the applicant is seeking is the procurement of the documents alluded to at the foot of the application for purposes of information and [sic] protection of her fundamental freedoms and rights.
30. It is common ground that any applicant who is desirous to procure and obtain information [read, Documents] that is held by a state organ, body or such other person is obligated to comply with the provisions of Access to Information Act. Firstly, it behoves the applicant to write to the designated person seeking to be availed copies of the documents and or such other information that is sought. Thereafter, the designated body and or person must be afforded reasonable latitude to avail the documents and or information, subject to the statutory exceptions, provided for and stipulated in Section 9[2] of the Access to Information Act [2016].



31. Where the applicant has made the requisite application to the designated body or person and the person has declined to provide the information and or documents, then the applicant is at liberty to approach a Court of law in exercise of his/her right under the Bill of Rights. Nevertheless, such an applicant must still meet and or satisfy the statutory threshold before an order for the provision of documents and information can issue. I hasten to state that the Documents do not just issue for the mere asking. Some lawful basis must be highlighted and established in accordance with the prescription of the Law. [See the provisions of Section 6 of the [Access to Information Act](#), 2016].
32. The Supreme Court of Kenya in the case of *Dande & 3 others v Inspector General, National Police Service & 5 others* (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) expounded on the parameters to be established and proven by an Applicant seeking to procure information and or documents from a state organ body and or such other persons.
33. For coherence, the court stated and held thus:-
121. In that context, the appellants' arguments were that the information sought was necessary for the exercise of the right to access to justice under article 48 of the [Constitution](#) and that they had sought the information to enable them approach the High Court to quash the criminal investigation and the intended prosecution which, according to them had no factual basis.
- They also submitted that the information was necessary for the protection of the right to a fair hearing and fair trial under Article 50 of the [Constitution](#). Without belabouring the point, we are satisfied that the appellants properly identified the rights that they sought to protect. The next and more fundamental question for us to determine is whether the information they were seeking was required to exercise or protect the identified rights.
122. The Court of Appeal in the instant matter observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested. Once this is done, the onus is on the private person from whom information is requested to show why such information should not be disclosed. Having examined the pleadings and submissions, the appellate court held that the pleadings before the trial court did not meet the standard set for a request for information held by a private person and there was no demonstrable or sufficient connection between the requested information and the exercise or protection of the rights under articles 28, 32(2), 48 and 50 of the [Constitution](#).
123. On our part, we are inclined to agree with the Court of Appeal that the appellants did not establish a demonstrable link between the rights they intended to exercise or protected and the information requested. We have reached that conclusion because firstly, the right to access to information is not an absolute right. Thus, section 6 of the [Access to Information Act](#) provides that:
- (1) Pursuant to article 24 of the [Constitution](#), the right of access to information under article 35 of the [Constitution](#) shall be limited in respect of information whose disclosure is likely to:
- a. Undermine the national security of Kenya;
 - b. Impede the due process of law;
 - c. Endanger the safety, health, or life of any person;



- d. Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
- e. Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
- f. Cause substantial harm to the ability of the Government to manage the economy of Kenya;
- g. Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
- h. Damage a public entity's position in any actual or contemplated legal proceedings; or
- i. Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.'

34. In my humble view, the applicant herein cannot merely walk to a court of law and imagine that same can procure an order for the provision of the documents for the mere asking. Instructively, the right to information is not absolute and therefore the applicant is enjoined to particularize the right that is sought to be protected via the information sought and thereafter demonstrate how the information [document] is intended to be deployed in the protection of that right.

35. Nevertheless, I beg to state that the applicant herein has neither met nor satisfied the parameters that were elucidated by the Supreme Court [the apex court] in the case of Edwin Haron Dande [supra].

36. Before concluding on this matter, there is one more issue that requires mention and short discussion. The issue touches on and concerns whether this court can be deployed as an investigating forum or vehicle by the applicant in an endeavour to procure a report for the purposes of proving her case. It is instructive to underscore that this court is constituted as an impartial arbiter and or umpire. The court cannot be invited to descend into the arena of controversy or the arena of assisting one of the disputants to build his/ her war-chest, whether by directing some investigation[s] or preparation of a [sic] a report.

37. Furthermore, in an adversarial system like ours, the court must not lean towards making an order that may be interpreted by the adverse party as assisting one party to get evidence. However, vide the application under reference, the applicant is essentially seeking to ride on the court to get a forensic document examination report. In my humble view, the kind of order sought by the applicant would be a gross violation of the principles underpinning the adversarial system.

38. The Court of Appeal in the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] KECA 783 (KLR) had occasion to expound on the key tenets of the adversarial system.

39. For coherence, the court states as hereunder:-

83. In civil as in criminal proceedings, the plaintiff (prosecution) is solely responsible for deciding how to present its case and choosing which witnesses to call. In the instant case, the respondent alone bore the responsibility of deciding whether a person will be called as a witness in its case. (See *Dabbah -v- Attorney-General for Palestine (1944) AC 156*; *Whitehorn -v-R*



(1983) 152 CLR 657). A court cannot ordinarily direct a party to call any witness. Save in exceptional circumstance, a trial court cannot call any witness. In the instant case, the appellant's contestation that the respondent should have called Mr. Samuel Gitonga, Evelyn Mwaka and Antony Nganga Mwaura as witnesses has no legal foundation. In law, the appellant cannot compel the respondent to call a witness to support or rebut the respondent's case; all that the respondent is obligated to do is call credible and material witnesses to prove its case to the required standard.

84. We note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (See J. Wigmore, Evidence § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witness may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.
40. In my humble view, directing the director of criminal investigation to prepare and file a report on the investigations attendant to the documents beforehand would be a prelude to the court being deployed to call the DCI as a witness, albeit on behalf of the applicant. I am afraid that such kind of an endeavour does not augur with the right to fair hearing; fair trial; and the due process of the law.
41. Finally, I beg to state that the applicant is seized of various avenues of interrogating the veracity and propriety and validity of the impugned documents. However, deployment of the machinery of this court is not one of the avenues taking into account the adversarial nature of our legal system.

Final Disposition

42. For the reasons which have been adverted to in the body of the Ruling, it must have become apparent that the application by the applicant is not only premature and misconceived, but same is equally untenable. Same constitutes an abuse of the due process of the court.
43. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder:
- i. The Application be and is hereby Dismissed.
 - ii. No orders as to costs.
44. It is so ordered

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF JULY 2025.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Mr Mutuma/Hussein- Court Assistant.

Mr. Waichungo for the Plaintiff/ Applicant

N/A for the Respondents.

