



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 285 of 2013

MANISH GOVINDJI SHAH.....1ST PLAINTIFF

SHAILESH GOVINJI SHAH.....2ND PLAINTIFF

=VERSUS=

KANWAL SARJIT SINGH DHIMAN.....1ST DEFENDANT

TONNY DHIMAN.....2ND DEFENDANT

RULING

1. The first Defendant /Applicant filed a Notice of Motion dated 15th September 2017, in which he seeks an order directed at the Government Document Examiner to examine a Vesting Deed dated 28th June 2010, which was allegedly executed by him for purposes of ascertaining whether he is the one who signed it. The applicant contends that the vesting deed is among the documents which were used to transfer the property which is the subject of this suit to the plaintiff. The respondents had omitted to include this document in their bundle of documents.

2. The applicant had earlier on applied for examination of another contested document which request was granted but at that time this particular document had not come to the applicant's knowledge. He came across it during routine investigations at the Lands Registry and later served notice to produce it upon the Respondents. The document is now among the documents in the defendant's bundle.

3. The respondents opposed the applicant's application based on grounds of opposition dated 3rd November 2017, and filed in court on 27th November 2017. The respondents contend that there is no provision in the Civil Procedure Rules that permit the applicant to file documents outside the timelines provided in Order 7 Rule 5; that the government document examiner is not a party to this suit and therefore no orders can issue without affording him an opportunity to be heard ; that granting the orders will amount to assisting a party to build up his case; that forensic examination of documents is foreign to civil proceedings and that the Civil Procedure Rules do not allow admission of evidence not disclosed earlier on as provided in Order 11 of the Civil Procedure Rules.

4. I have considered the applicant's application as well as the opposition thereto by the respondents. I have also considered the submissions by the counsel for the parties herein. The only issue for determination in this application is whether the vesting deed signed on 28th June 2010, should be sent for document examination. The gist of the plaintiff's claim is that Habib Bank Limited together with the applicant and another who is now deceased sold their respective un-divided share in the suit property to the respondents. The applicant contends that the documents which were used to transact the business were not signed by him and that they were forgeries.

5. On 28th January 2014, the applicant had made a similar application in which he wanted a power of attorney subjected to examination by a Government document examiner. This application was allowed by consent on 2nd April 2014. Parties were allowed to file their own independent reports but the respondents later stated that they did not wish to file any report.

6. The applicant has explained why he did not ask the court to subject the present document to the same process. This he said was because the document came to his knowledge later. The document sought to be examined is mentioned in the body of the respondents' statement of claim. The applicant had issued notice to produce to the respondents.

7. The applicant has pleaded that he did not sign the document in question. There is no way he would prove that he is not the one who signed it unless the same is subjected to examination by a document examiner. A document examiner need not be made a party to a suit in order for him to be asked to prepare a report after examining a document. When the respondents were conceding to a power of attorney being subjected to examination on 22nd April 2014, the issue of the document examiner not being a party did not arise. I do not see why that issue should now be raised.

8. By ordering a contested document to be subjected to examination does not amount to a court assisting a party to build up his case. The concern of the court is to allow each party an opportunity to fairly urge his case. Document examination is not foreign to civil proceedings. Document examiners have routinely been called to give evidence in Civil Proceedings and once a party shows that there are grounds for such an order, the court cannot hesitate to do so as that is one way of ensuring that justice is done to all parties in civil disputes.

9. M/s Aisha for the respondents argued that the document sought to be examined is not contained in the bundle of the applicant. I have looked at the bundle of documents by the 1st defendant who is the applicant herein. The document sought to be subjected to examination is document number 19. This bundle was filed in court on 17th March 2017. The present application was made on 15th September 2017. It is therefore not correct that the document is not in the applicant's bundle of documents. To this extent, the decision by justice Munyao in Eldoret ELC 975 of 2012 between Johana Kipkemei Too and Hellen Tum is distinguishable.

10. The Respondents having conceded to one document being subjected to examination cannot turn around and reject that another one cannot undergo such process. I therefore find that the applicant's notice of motion has merits and I allow it in the following terms:-

1. The vesting deed dated 28th June 2010 shall be submitted to the Government examiner for purposes of confirming whether or not the same was signed by Kanwal Surjit Singh the first defendant herein.

2. The first defendant to avail himself before the Government document examiner to give samples of his signature and or any other documents as may be required for purposes of the examination.

3. The Government document examiner to file his report in Court within 60 days from the date of this order.

4. Costs of this application be in the cause.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 19th day of February 2018.

E.O.OBAGA

JUDGE

In the presence of :

Mr Gikunda for Mr Nduati for 1st Defendant

M/s Angwenyi for Aisha for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE