

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 311 OF 2016

NELLY SUTER.....PLAINTIFF

VERSUS

MATHEW KIPKOECH CHEMWENO.....1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED....2ND DEFENDANT

RULING

The plaintiff, Nelly Suter prays that the court grants leave to the plaintiff to prepare and put in an independent expert report on handwriting and signatures. Moreover, that time to be enlarged within which to file the documents. The application is based on grounds that the applicant has a good case which raises weighty legal and triable issues for determination and wishes to be heard on it. That the plaintiff wishes to participate and adduce further and sufficient evidence and particulars in this matter to help the court to arrive at a just, fair determination on the issues before it and to do so leave is required for her to prepare and file further list of documents to wit an expert of handwriting and signs report. That no prejudice will be suffered by the defendant herein should the orders sought are issued in the circumstances.

The plaintiff states that the court has power to hear and determine the instant application and grant the orders in the best interest of justice and that this application is made promptly, in good faith and in the interest of justice and fairness. The grant of the orders sought will enable all the parties ventilate their issue before the court freely.

The application is supported by the affidavit of Nelly Suter who states that she is informed by her advocate on record which information she verily believes to be true and sound that she needs leave to prepare and to file further list of documents.

The need to file a further list of documents came into her attention after receiving the 2nd defendant's pleadings and upon engaging the opinion of an expert handwriting and signature to the effect that she is alive to the fact that the documents by the 2nd defendant alluding that she executed and/or appended her signature on, are untrue.

She claims to have good case to the claim and that the claim raises triable issues of law procedural and fact for just determination. That she is ready and willing to justly and fairly participate in these proceedings and ought to be given an opportunity to aptly prepare and to be justly and finally heard and determination made.

That this is the very first application of this nature in this matter on her part requesting for indulgence and the exercise for this court's discretion since the documents indicating and purporting to contain and/or form her signature and/or sign are contested. That no prejudice will be suffered by the other parties if the orders sought herein are granted.

The defendant filed grounds of opposition stating that the application offends and is contra Section 35 of the National Police Service Act and that the application is an attempt to usurp the powers of criminal court to hear and determine allegations of falsification of documents. The application is a ploy to deprive the respondent its legitimate security.

According to the defendant, the application offends Section 4 of the Office of the Director of Public Prosecutions Act and has been made without factual foundation or basis and is suspect for ulterior motives or improper purpose. The application lacks merit and the accuracy and veracity of documentary evidence can only be tested in a trial.

Moreover, that the application offends Section 193A of the Criminal Procedure Code and Sections 72 and 77 of the Evidence Act. The application usurps the powers of the Criminal Court Order Section 345 as read together with Section 349 and the Penal Code, Cap. 63, Laws of Kenya. The application usurps the powers of the Criminal Court as per Section 353 of the Penal Code. That the application is an attempt to amend pleadings by introduction of fraud in pleadings.

I have considered the application, supporting affidavit and grounds of opposition and do find that the plaintiff is entitled to call expert opinion. Order 3, Rule 2(c) envisages an expert witness being called without signing a written statement hence he can be called at any time either by the parties or by the court. However, it is necessary that he files an expert report. Order 7, Rule 5(c) also excludes a statement of the expert when filing defense. My view is that the expert report can be filed at any time before the close of evidence.

I do not agree with the defendants that the application usurps the powers of the Criminal court as per Section 353 of the Penal Code as the Civil Procedure Rules envisage the calling of expert including document examiner and handwriting and signature experts. The upshot of the above is that the application is allowed. Costs in the cause.

Dated and delivered at Eldoret this 26th day of September, 2018.

A. OMBWAYO

JUDGE