



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 450 OF 2010**

**JOEL KAIBURI KIBUNJA.....PLAINTIFF**

**VERSUS**

**MARGARET WOTHAYA KIRWEYA.....1<sup>ST</sup> DEFENDANT**

**SARAH WANJIRU NJIRI.....2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF TITLE, MOMBASA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> defendant has moved the Court under the provisions of article 159 (2) (d) of the Constitution, Sections 1A, 1B, 22 & 23 of the Civil Procedure Act Cap 21 and Order 16 Rule 6 & 14 of the Civil Procedure Rules seeking orders:

**i) Spent**

**ii) The Court to be pleased to issue summon to MR. JAMI YAMINA who works as a Senior Prosecuting Counsel at the ODPP or any Officer so authorised by the ODPP to attend Court on 26<sup>th</sup> June 2018 for the purpose of producing the report dated 3<sup>rd</sup> February 2012 which report was made/authored by the Office of the DPP.**

**iii) Costs of this application be in the cause.**

2. The applicant states that as part of her documents, she had attached the report dated 3<sup>rd</sup> February 2012 which was authored by Mr Jami Yamina. The report has been marked for identification, and it is only proper that the maker comes to produce it. That the report clarifies a critical issue in the case relating to signatures and it would assist the Court arrive at a just and fair determination.

3. The application is opposed by the plaintiff via his replying affidavit dated 19<sup>th</sup> July 2018. The plaintiff opposes the production of the report because the matter in issue is still under investigations. Secondly that it would be prejudicial to introduce the ODDP as a witness in this matter and a breach of the provisions of article 157 (4) & (11) of the Constitution. That the present application contravenes the provisions of Order 3 rule 7 and Order 7 rule 5 of the Civil Procedure Rules. He therefore urged the Court not to allow the orders sought.

4. The Attorney General filed grounds of opposition stating that the application is misconceived and an abuse of the Court process. That the grant of the orders sought will prejudice Mr Jami's ability to direct the on-going investigations and conduct any subsequent prosecution. That the document the applicant wishes to produce is a public document by virtue of section 47 as read with section 22 (2) of the ODPP Act thus can be produced under section 82 of the Evidence Act without calling Mr Jami.

5. The advocates tendered oral submissions which I have considered while writing this ruling. In regard to the impugned report, the 2<sup>nd</sup> defendant deposed that together with her defence, she filed her bundle of documents on 23<sup>rd</sup> September 2016 which included the report dated 3<sup>rd</sup> February 2012. These documents were served upon the plaintiff. It is therefore unfounded for the plaintiff to depose that he is being taken by surprise in contravention of the provisions of Order 7 rule 5 of the Civil Procedure Rules.

6. Mr Jami Yamina is a prosecuting counsel and has not denied he made the document dated 3<sup>rd</sup> February 2012 in the course of his duties. This makes the document a public document. Order 16 rule 6 of the Civil Procedure Rules provides thus "Any person may be summoned to produce a document without being summoned to give evidence and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same."

7. The Attorney General has pleaded in its grounds and submitted that the document ought to be produced under the provisions of section 82 of the Evidence Act. The plaintiff has also deposed that Mr Jami ought not be called to testify since there is an on-going criminal case over the same issue and his appearance may thus prejudice the on-going case. The 2<sup>nd</sup> defendant on her part pleaded that she is only interested in having the report produced and not necessarily to have Mr Jami testify. Therefore there being no denial that the report was authored by Mr Jami Yamina in the course of his duty, I find that the report can be admitted in evidence under the provisions of section 22 of the Civil Procedure Act and Order 16 rule 6 of the Civil Procedure Rules.

8. On the submission by the plaintiff that the investigations are still on-going hence the report should not be produced is neither here. I say so because whatever the outcome of those investigations would not change the fact that the report dated 3<sup>rd</sup> February 2012 was authored. The results of those investigations can only contradict or corroborate the content of the report dated 3<sup>rd</sup> February 2012. The plaintiff is the one who moved this Court before those investigations if any were concluded. He cannot therefor refuse a party to rely on documents authored in the course of such exercise. Consequently I do find merit in the motion dated 8<sup>th</sup> June 2018 and allow it to the extent that the report dated 3<sup>rd</sup> February 2012 is admitted as part of the 2<sup>nd</sup> defendant's evidence without causing the attendance of Mr Jami Yamina to this Court. The costs of this application are ordered in the cause.

**Dated & signed at Mombasa this 21<sup>st</sup> September 2018**

**A. OMOLLO**

**JUDGE**

**Delivered by Justice M. Thande on 21<sup>st</sup> September 2018**

**M. THANDE**

**JUDGE**