



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 889 OF 2017

(Formerly Kisii ELCC No. 758 of 2016 & KISII HCC Case NO. 82 of 2012)

FLORENCE MUMBI NJINE.....PLAINTIFF/RESPONDENT

VERSUS

KEFA OKETCH MUINDE.....DEFENDANT/COUNTER CLAIMER

RULING

1. This ruling is in respect of an oral application by Mr. Oguttu Mboya, learned counsel for the plaintiff, **FLORENCE MUMBI NJINE** that a witness, **JOSEPH CHACHA NYAMURIBA** (DW3) for the defendant be referred to the office of the Director of Public Prosecution (ODPP) for appropriate action against him. The application was expressed to be made for the purposes of **Sections 4 and 7 of the Penal Code (Cap 63 of the Laws of Kenya) and Section 26 of the Environment and Land Court Act, 2015 (2011) (ELC Act)**. Counsel made the application **immediately** after DW3 testified and the defendant. **KEFA OKETCH MUINDE** (DW1) closed his case on 20th September 2018.
2. The plaintiff's counsel alleged that following the testimony of DW3, offences namely forgery, uttering false document and impersonation were notable against DW3. That the offences are cognisable as DW3 gave evidence of oath.
3. Counsel submitted that just like **Section 87 (2) of the Election Act**, this court has discretion to make a reference for investigation. He urged the court to allow the application to enable extraction of orders for service accordingly.
4. Mr.G.Nyambati,learned counsel for the defendant opposed the application. He termed the application ill informed, an afterthought and meant to intimidate witnesses in this suit. That in Migori Principal Magistrate's Court criminal case No. 777 of 2004, DW3 was treated as state witness and decision was not challenged by way of a Judicial Review or an Appeal. That a stranger cannot purport to lodge a complaint against DW3 through the court.
5. Counsel submitted that the jurisdiction of the court is well captured in the **Constitution of Kenya, 2010 and the Environment and Land Court Act 2015 (2011)**. That the Sections cited by the plaintiff counsel were irrelevant.
6. Counsel further submitted that a person is at liberty to lodge a complaint with the police for appropriate action. He urged the court to reject the application.
7. By a plaint dated 6th March 2012, the plaintiff has sued the defendant for, inter alia, permanent injunction and an order of eviction to issue against the defendant from the suit land, **LR NO. BUKIRA/BUHIRIMONONO/2022**. The defendant denied the plaintiff's claim in his statement of defence dated 21st March 2012 and he has counterclaimed against the plaintiff, inter alia, for a declaration that the suit land was fraudulently registered in the name of **JAMES NJINE NDIGIRIGI** (Deceased).
8. I have carefully considered the entire application, the opposition thereto, evidence of DW 3 and pleadings in this suit. The issue for determination is whether this court can make orders or reference as sought in the application.
9. I note the **Sections of the Penal Code (Cap 63)** which create, the alleged offences and also Sections cited in the application. Quite clearly, the matter does not relate to the sittings of this court for **Section 26 ELC Act 2015 (2011)** to apply herein nor is this court an election court for **Section 87 (2) of the Election Act** to be invoked in the circumstances.
10. During cross examination by plaintiff's counsel, DW 3 admitted to have recorded a statement and he maintained so in re-examination. He stated that he knew the offence of impersonation and not the offence of uttering false document. Counsel for the plaintiff acknowledged that this court has the discretion to grant the orders sought in the application.

11. From the evidence of DW3, I am unable to hold any iota of evidence that the alleged offences are notable and to do so would enhance the risk of injustice. In **Films Role International Ltd –v- Cannon Film Sales Ltd (1986) ALL ER 772**, Justice Hoffman held that it is a fundamental principle that the court should take the lower risk of injustice in such circumstances.

12. The Director of Public Prosecutions is empowered to direct the Inspector General of Police Service to investigate any information or allegation of a criminal conduct and the Inspector General shall comply accordingly under **Article 157 (4) of the Constitution of Kenya, 2010**. Furthermore, **Article 157 (10) of the same Constitution** anchors the independence of the Director of Public Prosecutions.

13. The defendant alleged fraud against the plaintiff at paragraphs 11,12 and 13 of his counterclaim. In Civil cases, the standard of proof of fraud is not beyond any reasonable doubt but higher than a balance of probabilities; see **Koinange & other –v- Koinange (1986) KLR 23**. In the instant application this court is aware of the standard of proof as provided for under **Section 107 of the Evidence Act (Cap 80)** and the standard of proof in criminal cases.

14. It is pretty clear that the Constitutional body mandated to deal with the allegations raised against DW3 is the Director of Public Prosecutions. I absolutely endorse the position taken by N. Olao J in **Alice Mweru Ngai –v- Kenya Power and Lighting Company Ltd (2015) e KLR** that;

“Where the law has granted jurisdiction to other organs of Government to handle specific grievances, the courts must respect and uphold the law.”

15. As this court must respect and uphold the law, the plaintiff’s counsel is at liberty to file a complaint with the office of the Director of Public Prosecutions for appropriate action.

16. Having considered the application in it’s entirety and the law, I am persuaded that the orders sought in the application are not for grant.

17. Consequently and for the above reasons, I dismiss the application with no orders as to costs.

DELIVERED, SIGNED and DATED in open court at MIGORI this 14th day of November 2018.

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. Oguttu Mboya learned counsel for the defendant

Gidion Nyambati learned counsel for the defendant

Tom Maurice Court Assistant