



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 285 OF 2012

**JULIA WANJIJU GABURIA (Suing as the legal administrator of
the estate of the late JOSEPH GABURIA MITARU.....PLAINTIFF**

VERSUS

SAMMY NDUNGU MUNGAI.....1ST DEFENDANT

DISTRICT LAND REGISTRAR NAKURU.....2ND DEFENDANT

RULING

(An application for an order that order the government document examiner to examine signatures in a sale agreement and to file a written report; application said to be part of discovery process; government document examiner not a party to the proceedings; held that the order can't issue without hearing the government document examiner; application dismissed)

1. This ruling is in respect of plaintiff's notice of motion dated 26th October 2016 and filed in court on 27th October 2016. The application is brought under Order 51 rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. It seeks the following orders:

a) Spent

b) THAT this court be pleased to order the Government document examiner to examine the signatures in the sale agreement dated 24th October 1989 compared with the agreements signed in 1992 or any other original document that may have his signature and do a written report within 45 days after service of this order.

c) THAT if prayer (b) above is allowed the 2nd defendant should be ordered to hand over the original sale agreement dated 24th October 1989 to the government document examiner.

d) THAT the costs of this application to abide the outcome of the suit.

2. The application is supported by the affidavit of the plaintiff sworn on 26th October 2016 and filed in court on 27th October 2016. She deposes that upon receiving the list of documents filed herein by the 1st defendant she noted that one of the documents the 1st defendant intends to rely on is a sale agreement dated 24th October 1989 allegedly signed by her late husband. Since her husband is now deceased, she wishes to have the signature on the sale agreement authenticated in comparison with other documents in her possession which were signed by her late husband. Since the matter is still at the pre-trial and

discoveries stage, she prays for the orders sought in the application.

3. In her submissions in support of the application, counsel for the applicant submitted that no prejudice will be occasioned to the 1st defendant if the order sought are granted and that a party is free to seek the court's assistance to avoid possible prejudice. She also submitted that the applicant cannot commence a criminal process on the matter of the said signature.

4. The application is opposed by the 1st defendant through grounds of objection dated 8th February 2017 and filed in court on 9th February 2017. The issues raised in the grounds of objection are that the application lacks merit and is abuse of court process; that the prayers sought are not backed by any provision of law; that the agreement in question was signed in the presence of an advocate over 28 years ago thus making it now too late to seek the prayers being sought; that the court has no way of knowing whether or not the agreements being compared with the plaintiff's were actually signed by the deceased and lastly that the suit is already statutorily time barred and this cannot be cured by the application.

5. In his submissions, counsel for the 1st defendant cautioned that there is a risk of the court making orders in vain and that the resulting report from the document examiner will not help the court in the absence of clear evidence that the signature that will be submitted to the examiner for comparison with the one on the sale agreement is really the deceased's. Further that the orders sought cannot be made in a civil matter. Whereas there exists a clear procedure in criminal law for obtaining a report from a document examiner, no procedure exists in civil law. In conclusion, counsel asked the court to dismiss the application.

6. Counsel for the 2nd defendant indicated to the court that the 2nd defendant does not oppose the application.

7. I have considered the application, the supporting affidavit, grounds of objection and submissions by all counsels. I note that the government document examiner is not a party to these proceedings. We will later revisit the question as to whether an order should issue against the document examiner without affording him an opportunity to be heard.

8. Can the orders sought be issued in civil proceedings such as those presently before the court? There is no doubt that it is normal to obtain a report from a government document examiner in criminal proceedings. Such an order is very rare in civil proceedings more so in the context in which the present application is made, where one party in civil proceedings wishes to compel another party to submit a document in his possession to a government document examiner. No enabling law has been cited to support the application.

9. The plaintiff submits that the application is part of the discovery process. If that be the case, there are ample provisions in law for production and inspection of documents. The court has not been told whether that option has been explored.

10. It is important to note that the application seeks to order the government document examiner to examine the documents and to file a written report within 45 days after service of the order. The government document examiner is not a party to this suit. It is a cardinal requirement of justice that a person is given a hearing before orders are issued against him. In The case of **Joseph Mbalu Mutava v Attorney General & another [2014] eKLR** the court observed thus:

*It is now settled that it is a fundamental principle of justice and procedural fairness that no person is to be condemned unless the person has been given prior notice of the allegations made against him or her, and a fair opportunity to be heard. In **Halsbury Laws of England, 5th Edition 2010 Vol. 61** at para. 639, it is stated as follows with regard to the right to be heard:*

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a

fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

In the above case the court also cited **Central Organisation Of Trade Unions Vs. Benjamin K Nzioka & Others Civil Appeal No. 166 of 1993** where the Court of Appeal stated as follows:

*“This principle of law is well settled and was recently reaffirmed in the ruling of this court in **Central Organisation of Trade Unions (Kenya) and Benjamin K. Nzioka and Others Civil Application No. NAI 249 of 1993 (108/93) (UR)** in the following words:*

“As a concept, it is derived from the Latin maxim ‘audi alteram partem’ which in English means ‘hear the other party’. This rule obliges a judge or an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides. He should not base his decision only on hearing one side. In the case of a judge he should give equal opportunity to both parties to present their cases or divergent view points. And in doing so, should hold the scales fairly and evenly between them”.

11. The requirement of hearing the other party before making orders is founded on sound logic. In the context of the orders sought herein, it is important to note that forensic examination of documents is a specialty that has its own procedures. It may very well be that the orders sought will, if issued, be impossible to enforce. It may also turn out that for whatever reason the document examiner is not in a position to examine and furnish a report in respect of the particular documents herein. Either way, the court would benefit from the input of the document examiner prior to issuing the orders sought.

12. I have said enough to show that I am not persuaded that the orders sought should issue in the circumstances. The application is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 20th day of April 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiffs

Mr. Maina holding brief for Mr. Ikua for the 1st defendant

No appearance for the 2nd defendant

Court Assistant: Gichaba