



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ikere & another (Suing as administrators of the Estate of Miriam Edwin Mbugua) v Mbugua (Environmental and Land Originating Summons 24 of 2021) [2024] KEELC 1352 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1352 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 24 OF 2021**

**JG KEMEI, J  
MARCH 13, 2024**

**BETWEEN**

**EUNICE WANJIKU IKERE ..... 1<sup>ST</sup> APPLICANT**

**ROBERT MUNGA MBUGUA ..... 2<sup>ND</sup> APPLICANT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF MIRIAM EDWIN  
MBUGUA**

**AND**

**PETER GACHERU MBUGUA ..... RESPONDENT**

**RULING**

1. This Ruling relates to the Notice of Motion dated 10/4/2023 filed by the Applicants under Section 22, 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules](#) seeking the following orders:-
  - a. That the Directorate of Criminal Investigations (DCI) – Kiambu Head Office be directed to conduct a forensic handwriting examination of the hand written letter dated 5<sup>th</sup> January 1989 towards establishing whether the handwriting belongs to the Respondent and present a report to the Honourable Court and the parties.
  - b. The Respondent be directed to provide any support including availing documents with his known handwriting to the Directorate of Criminal Investigations – Kiambu Head Office for the purposes of the forensic handwriting examination.
  - c. That cost of this Application be provided for.
2. The Application is premised on the grounds annexed thereto and the Supporting Affidavit of Eunice Wanjiku Ikere sworn on 10/4/2023. The Applicant avers that the dispute relates to parcel No LR



- Kiambaa/Kihara/T.394 where the Plaintiffs claim is premised on trust for themselves and other family members who live on the suit land. She averred that Respondent who is their brother took a loan with the Bank of Baroda and on default, their mother stepped in to pay the loan hence their claim of customary trust over the suit land. That the act of redeeming the land by their mother created a customary trust in their favour, a fact vehemently denied by the Respondent.
3. To prove the payment of the said loan, the Applicants have relied heavily on a handwritten letter dated 5/1/1989 annexed to the Replying Affidavit filed on 21/6/2022 and marked EW1-1. She alleges that the said letter was written by the Respondent in his own handwriting and was typed and forwarded to the bank. The typed version is marked EW1 2 dated 10/1/1989. Further that the Respondent has denied ever allowing his mother to pay the loan. The import of EW1 1 is therefore to support their proposition that the Respondent approved the redemption of the property by their mother and the evidence comprised in the said letter is therefore key in proving their claim of trust in the property. Inter alia that the confirmation of whether the handwriting belongs to the Respondent and secondly whether the Respondent consented to the mother settling the loan is key in resolving the dispute herein.
  4. Opposing the Application the Respondent filed a Replying Affidavit dated 10/5/2023. He admitted that the Plaintiffs are his siblings. That the involvement of the Director of Directorate of Criminal Investigations (DCI) as prayed by the Plaintiffs is in bad faith and is intended to intimidate and harass him for no justiciable reason. He denied authoring the handwritten letter dated 5/1/1989 nor the typed one of the 10/1/89. He maintained that the Applicants are guilty of forgery of the Bank pay in slips which slips have been annexed to the Affidavit in support of the Originating Summons.
  5. Further the Respondent denied any trust interest in the suit land for anyone least of all the Applicants and averred that he purchased the property on 6/2/1986 and got title on 14/2/1986. In addition that the Applicants vacated the land in 1998 on his instructions and therefore do not currently reside on the suit land. Further he denied that his mother, Miriam Edwin Mbugua repaid the loan and contended that the annexed pay in slips are forgeries and do not originate from Bank of Baroda. In addition, he denied that Account No 8124286 stated in the pay in slips belong to him. That his account at the bank was Account No 8124206, different from what the Applicants have stated.
  6. Finally, the Respondent contended that the confirmation of handwriting by DCI is irrelevant as the bank confirmed that he paid the loan in full and issued him with a discharge of charge on 22/11/2000. He relied on PGM4 and PGM5 - the receipts issued to him by the bank. He urged the Court to dismiss the Application.
  7. The Applicant submitted that to prove their case they rely on a handwritten letter dated 5/1/1989 a letter written by the Respondent typed and forwarded to the bank. It was submitted that the Applicants seek to prove that the Respondent authored the handwritten letter.
  8. Both parties filed written submissions which I have read and considered.
  9. The key issue for determination is whether the Applicants are entitled to orders directing the DCI to conduct forensic handwriting examination of the hand written letter dated the 5/1/89 and if yes whether the Respondent should be ordered to avail the documents with his known handwriting to the DCI – Kiambu offices for the purposes of forensic examination.
  10. This Application has been brought under Section 22 of the [Civil Procedure Act](#) which states as follows:-

“Subject to such conditions and limitations as may be prescribed, the Court may-



- a. Make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material object producible as evidence.
  - b. Issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;
  - c. Order any fact to be proved by Affidavit.”
11. The Applicant urged the Court to allow discovery of documents before the trial so as to assist them in appraising the strength and weaknesses of their relevant case and to aid fair disposal of the suit in the trial. It was their submission that an examination on whether the hand written letter dated 5/1/1989 bears the handwriting of the Respondent. That no prejudice shall be occasioned to the Respondent since the trial is yet to commence.
  12. Relying on Article 35 of *Constitution* of Kenya, the Applicant submitted that every person has a right to access information and in this case the Applicants require information on whether the letter dated 5/1/1989 bears the Respondent’s signature for purposes of proving their case and to finally access justice. As to why they propose that the examination by DCI is paramount, the Applicants stated that the institution is independent with expertise on document examination and further that the Applicant is indigent and the DCI should offer the service free of charge.
  13. The Respondents submitted and denied that he authored the letters dated 5/1/1989 and 10/1/1989 respectively. Further he submitted that the documents in the possession of the Applicants are suspect on grounds that the bank account number disclosed is erroneous, the letters are not signed, no evidence that the bank was served with the letters has been placed before the Court and that the original pay in slips have not been produced. For the above reasons the Respondent urged that the Application is unmeritorious.
  14. Before I embark on analyzing the Application I find it apt to revert to the pleadings of the parties. The cause of action of the Applicants as disclosed in the Originating Summons is based on trust. They aver that though the Respondent is the registered proprietor of the suit land, there exists customary trust interest in their favour. That the Respondent borrowed a loan from the bank and on default requested their mother to pay the loan and redeem the land. That it is the very act of redeeming the land by their mother that created a customary trust in their favour.
  15. The Respondent on the other hand has denied authoring the letter nor that the land was redeemed by their mother. He asserts that he was an employee of Bank of Baroda and upon leaving employment of the bank, he duly settled the outstanding loan upon which he was given a discharge of charge and the title released to him.
  16. The *National Police Service Act* (NPSA) establishes the DCI pursuant to Article 247 *Constitution* of Kenya and the *National Police Service Act* (NPSA) No 11A of 2011. Article 247 Constitution of Kenya provides;

“247. Other police services

Parliament may enact legislation establishing other police services under the supervision of the National Police Service and the command of the Inspector-General of the service.”



17. Part V of the [NPSA](#) and in particular Section 28 establishes the DCI as follows;
- “28. Establishment of the Directorate of Criminal Investigations Department. There is established the Directorate of Criminal Investigations which shall be under the direction, command and control of the Inspector-General.”
18. Some of the functions of the DCI are enumerated under Section 35 (g) of the NPSA allows the DCI to undertake forensic analysis while undertaking investigations where a complaint has been lodged as provided by law. Article 245 (4) (e) of the [Constitution](#) creates the office of the Inspector General with constitutionally guaranteed independence to ensure investigations are undertaken independently. The question therefore is whether this Court has power to order the DCI to carry out its duties set out in law. To my mind the answer is in the negative. The DCI falls under the Inspector General of Police as an independent institution. The Inspector General of Police does not require a Court order to undertake its mandate since under Section 24 (e) of the [NPSA](#), one of its functions is to investigate crimes and examine documents.
19. This Court has not been given evidence that the DCI has failed to act on a complaint or request to carry out forensic investigation or examination of the impugned documents. To the extent that the Applicants have not complied with the law allowing the Application at this stage will be to usurp the powers of a constitutionally body whose mandates have been set out by Kenyans in the [Constitution](#) of Kenya and in the Statute.
20. The Court of Appeal in the case of [Speaker of the National Assembly v Karume](#) [1992] KECA 42 (KLR) underscored the relevance of exhausting alternative dispute resolution mechanism created in law by stating;
- “15. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”
21. Later on, the same court in the case of [Joseph Njuguna Mwaura & 2 others v Republic](#) [2013] eKLR held as follows on the issue of a Court’s jurisdiction;
- “It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision-making function.
- In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act....”
22. Had the Applicants presented their complaint or request and the DCI failed to act on it the Applicant would have had recourse to Article 47 of the [Constitution](#) of Kenya and the [Fair Administrative Actions Act](#) (FAAA) for orders of mandamus and certiorari to compel the DCI to undertake its constitutional and statutory mandate. I find the circumstances of this Application is such that it has been placed before the Court prematurely and therefore unsustainable.



23. In an adversarial legal system like the one in Kenya, the adage is that he who asserts must prove. Each party in a suit is expected to put its best evidence forward which he wishes to rely on to persuade the Court to grant the reliefs sought. Section 107 of the Evidence Act states as follows;

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. I find that the Applicants are inviting the Court to enter the arena of conflict and assist a party to gather evidence for use against another, an invitation that this Court must discourage as an impartial umpire.

25. For the above reasons I find that the jurisdiction of the Court has been improperly invoked and for that reason the Application has no merit.

26. It is dismissed with costs in favour of the Respondent.

27. Orders accordingly

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 13<sup>TH</sup> DAY OF MARCH , 2024.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

1<sup>st</sup> and 2<sup>nd</sup> Applicants – Absent but served

Mrs. Njiru for Respondent

Court Assistants – Phyllis/Oliver

