



Muturi & 2 others v Thiongo & 2 others (All being Administrators of the Estate of Dedan Thiongo Kingangi - Deceased) (Environment and Land Case Civil Suit 180 of 2014) [2024] KEELC 1349 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 180 OF 2014
LN MBUGUA, J
MARCH 12, 2024**

BETWEEN

**YVONNE NJERI MUTURI 1ST PLAINTIFF
STEVE WAROBI GITAO (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF LAWRENCE KINYANJUI GITAO-DECEASED) 2ND PLAINTIFF
JANE WANJIKO GITAO 3RD PLAINTIFF**

AND

**JOAN W. THIONGO 1ST DEFENDANT
JANE W THIONGO 2ND DEFENDANT
JOHN K. NJUGUNA THIONGO 3RD DEFENDANT
ALL BEING ADMINISTRATORS OF THE ESTATE OF DEDAN THIONGO
KINGANGI - DECEASED**

RULING

1. The Defendants' Notice of Motion application dated 23.1.2023 is for determination. They seek orders directing the National Registration Bureau to forward a copy of the identity card of Dedan Thiongo (deceased) to a forensic document examiner and orders directing the plaintiffs to submit original documents of the Photocopies of their documents filed herein for authentication by a forensic examiner for purposes of confirming if the thumb print and signature appearing thereon is similar to that of Dedan Thiongo's (deceased) thumb print and signature as appears on his national identity card and that they do submit a confidential report confirming findings in relation to the said documents which are;
 - i. Original copy of the sale agreement dated 18.11.1986.



- ii. Original copy of the transfer of undivided share dated 8.10.1986.
 - iii. Original application for land Control Board consent (the application whose letter of consent is dated 29.10.1986).
 - iv. Original indenture of conveyance dated 16.6.1988.
 - v. Original copy of the sale agreement dated 14.10.1988.
 - vi. Original copy of the sale agreement dated 4.6.1991.
 - vii. Original copy of special power of Attorney dated 18.11.1986.
2. The application is based on grounds on its face and on the 2nd Defendant's supporting affidavit sworn on 23.1.2023. She avers that despite being an administrator of the Estate of Dedan Thiong'o (deceased), she has never come across any of the documents filed by the Plaintiff and listed at paragraph 1 herein.
 3. She contends that she has engaged a private forensic document examiner who has examined the aforementioned photocopies at paragraph 1 and made a finding that the signatures on the photocopies do not tally with the signature of the deceased in the photocopy of his ID card, thus the Defendants have good reasons to believe that the documents are a work of forgery and as such, the Plaintiffs should produce them for assessment of authenticity.
 4. The application is opposed by the Plaintiffs vide grounds of opposition dated 15.1.2024. They contend that the application has been overtaken by events as the Defendants have already allegedly forensically examined the documents and produced a report in court.
 5. They also aver that the Defendants did not raise the issue of production of documents before hearing at the pre-trial stage and that the said documents are in a fragile state thus they may be exposed to damage if released and in any case, they will be produced at the hearing of this case.
 6. The application was canvassed by way of written submissions. The Defendants filed submissions dated 24.1.2024 averring that considering that the purported seller and purchaser of the contested property herein are deceased and cannot give their testimony or be cross-examined, it is important that the court be furnished with all the necessary documents of proof including an expert opinion on whether any of the documents are forged. To that end, the case of *Iskorostinskaya Svetlana & another v Gladys Naserian Kaiyoni* [2019] eKLR is relied upon.
 7. It is argued that the application has been brought in time since hearing of the suit is yet to take off. It is also submitted that the Plaintiffs are in actual custody of the original documents which are primary evidence contemplated under Section 65 (1) of the *Evidence Act* and as such, they should produce them. The case of *Re-Estate of Charles Ndegwa Kiragu aias Ndegwa Kiragu-Deceased* [2016] eKLR is cited.
 8. The Plaintiff's submissions are dated 29.1.2024. They rely on the case of *Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba & another* [2013] eKLR to submit that the application has been filed late in the day as the pre-trial phase has already ended.
 9. It is also argued that there is no need to subject fragile documents to forensic examination as the author of the annexed forensic report does not express difficulties with using the photocopies filed herein. To this end, the case of *Re Estate of Daulatkhanu Mansurali Hassanali Dhrani (Deceased)* [2018] eKLR is cited.



10. It is also argued that the application is not merited as it is the duty of the court to examine documents and satisfy itself as to the genuine nature of the documents produced. The case of *Asira v Republic* [1986] KLR 227 as well as the case of *Rose Kaiza v Angelo Mpanju Kaiza* [2009] eKLR are relied upon.
11. I have considered the rival arguments and submissions. I have also taken into consideration the practice directions on proceedings in this court which came into effect vide Gazette Notice No 5178. Under direction 28 (h), this court has discretion to give any further orders and/or directions as the ends of justice may require before hearing commences. The main hearing is yet to take off, hence the court can give appropriate directions relating to the documents.
12. The court is cognizant of the fact that the primary witnesses whose signatures appear on the documents in question are all deceased. But again, Kenya is a common law jurisdiction operating in an adversarial system of justice. See - *Progress Welfare Association of Malindi Kenya National Chamber of Commerce and Industry & another v County Government of Kilifi, County Executive Committee, Member, Lands, Housing, Physical Planning & Urban Development & 4 others* [2021] eKLR.
13. In the Court of Appeal case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, it was stated that;

“In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to”.
14. The applicants desire that this court gives directions for some entities including the National Registration Bureau to conduct forensic examination of original documents which are in custody of the plaintiff.
15. The defendants claim that they have already engaged a private forensic document examiner who has examined the photocopies of the documents in question and has made a finding thereof. If that forensic examiner was able to make a finding from the photocopies, what would prevent other investigatory bodies from conducting a similar exercise using the photocopies?.
16. I find that the applicants have not demonstrated that they tried in vain to get services of the National Registration bureau or other entities to carry out the exercise which they want the court to spearhead.
17. Further, it is noted that the defence of the applicants is that “the plaintiffs did not honor their part as set out in the various agreements for sale.” The case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (supra) is again applicable on the point that parties are bound by their pleadings.
18. One more issue; it is pertinent to note that this court would not be able to ascertain the sanctity of the chain of custody of the original documents once they are released by the plaintiff.
19. All in all, I find that the application amounts to an invitation for the court to descend into the investigation arena, that in essence would give rise to a court enabled evidence. I therefore find that the application is not merited and the same is hereby dismissed with costs to the plaintiffs. The plaintiffs are however directed to avail the original documents during the trial.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE



In the presence of:-
Ndirangu for Plaintiff
Maina for Defendant
Court assistant: Judith

