



Gatatha Farmers Company Limited v Chemtingei & 3 others; Kaitet Tea Estates (1977) Limited & another (Interested Parties) (Environment & Land Case 9 of 2023) [2024] KEELC 3910 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 9 OF 2023
FO NYAGAKA, J
APRIL 29, 2024**

BETWEEN

GATATHA FARMERS COMPANY LIMITED PLAINTIFF

AND

SIMATWA CHEMTINGEI 1ST DEFENDANT

ODUORI CHONGORE 2ND DEFENDANT

THE ESTATE OF OKIRO OKOYO 3RD DEFENDANT

OTIENO OKIRO 4TH DEFENDANT

AND

KAITET TEA ESTATES (1977) LIMITED INTERESTED PARTY

ENDEBESS ESTATE PRIMARY SCHOOL INTERESTED PARTY

(Formerly Eldoret High Court Civil Suit No. 113 of 1987 brought to Kitale High Court Registry by Order of Hon. Justice S. M. Muketi, Judge in Kitale High Court Civil Case No. 57 of 2011 issued on 20th December, 2011 at Kitale)

RULING

1. When the Application dated 18/10/2023 came up for hearing, the alleged Applicant moved this court orally to the effect that the same be withdrawn (This Court refers to him as the “alleged Applicant” because as it unfolds hereafter he did not author, sign or file the application). He relied on the grounds that he had sent to Court and filed two letters whose contents he wanted acted on. One was dated 17/10/2023 by which he wanted to represent himself in the matter. The other one was dated 18/10/2023 by which he wanted the application withdrawn since he neither drew nor filed drew the



application. Further, the person who filed the application forged his signature and filed the Application behind his back and without his knowledge. The said person was the one whom the court indicated earlier was not qualified to represent anyone and could not be given a power of attorney. He named the person as Mr. Wilfred Ogutu Makondiango. He asked the court to withdraw the application and let the suit be dealt with by this court.

2. In response, learned counsel for the plaintiff prayed that in view of the statement by the applicant the application be struck out. Further it was criminal for one to forge documents on behalf of a party and file them hence action be taken against the person who forged it.
3. Learned counsel for the 1st Interested Party submitted on his part that what unfolded before the court in the circumstances was evidence of why the Court had been, at all material times, insisted that a donee of a power of attorney receive it from a proper donor. He prayed for the application to be expunged from the record and prayed for criminal charges to be preferred against the person who allegedly forged the Applicant's signature, and further, that the person be apprehended and punished. Further, he submitted that indeed, the Application and Directions of the Court were sent to them through an e-mail address of one [particulars withheld]@gmail.com and it showed that it was from the person alleged to be criminally responsible. He urged the applicant to confirm whether he had given such instructions to the person who emailed the document.
4. On his part the applicant repeated that he never instructed that man. He urged that the Court does allow the application.
5. When the court considered the submissions by the applicant and both learned counsel, it was of the view that a party should not be condemned unheard. Therefore, it directed that the person alleged to have drawn and filed the application on behalf of somebody without instructions should be given a hearing to state his position. In relation to that, Mr. Okiro, the person alleged to have filed it prayed that if the maker of the document was to testify as to what he knew about its drawing and filing then he too should testify as to the truth about it. Thus, the Court issued summons against the said Alfred Ogutu to attend court.
6. On the material date, Mr. Okiro gave a sworn testimony, only limited to the issue of drawing and filing the application. He stated that he did not file the application. That he came to learn about it when one day Mr. Alfred Ogutu went to his home with a document he claimed was from Court, and that it was supposed to be heard. He found that it was the application Mr. Ogutu had filed. When Mr. Okiro inquired from him why he filed it without consulting him, Mr. Ogutu was annoyed.
7. Mr. Okiro protested Mr. Ogutu's act of forging his signature using a computer. He told him that he should have consulted first before making any application, but it was wrong. After that Mr. Okiro indicated to Mr. Ogutu that he would be refuting the application in court because those were not his instructions. He reminded Mr. Ogutu that during the ruling made earlier, the Judge only informed Mr. Ogutu that he did not have a certificate to represent him and that the power of attorney Mr. Okiro alleged to have given him should have first been filed at the Ardhi House as a proper power of attorney. After indicating the protest, Mr. Okiro wrote the two letters he referred to earlier.
8. He stated further that from then on Mr. Ogutu disappeared. When one day Mr. Okiro called him through the mobile of one Mr. Bruce that he used to use, the latter used abusive words against Mr. Okiro and informed him that Mr. Ogutu could not go to his home. After that Mr. Ogutu and his friends became enemies with Mr. Okiro to the extent that on the material date of testimony Mr. Bruce met him at the Environment and Land Court registry in Kitale and tried to chase him away from Court but Mr. Okiro stood his ground and attended the court to testify.



9. About the application he submitted that earlier on Mr. Ogutu had given him a piece of paper to sign on and after that he (Mr. Ogutu) handed it over to the Cyber person. That it was from that piece of paper that Mr. Ogutu got all his signatures on the application. He denounced the application, indicating that all the words in it were of Mr. Ogutu. He added that they said Mr. Ogutu had not forged his signature in the instant suit only but in regard also to the succession course in the Eldoret High Court regarding the Confirmation of Grant given for the family of the late mzee Otieno in Succession Cause No. 48 of 1989. It was about a change in the acreage due to him of 9 acres from the Estate. Mr. Okiro never signed the document to authorize the filing of the application.
10. Both learned counsel for the parties and one, Mr. Peter Simatwa, did not have questions in cross-examination.
11. Mr. Ogutu attended Court pursuant to the summons and testified on oath as follows. He was a Director of an NGO whose name was Center for Social Welfare Justice and Governance with headquarters in Ugunja. The Kitale office was a branch. He filed the instant application with the consent of Mr. Okiro but he (the applicant) did not sign the document in person. He instructed the person who usually prepared the documents for Mr. Okiro in the computer (*sic*). When the person (whom he only named as “the cyber lady”) prepared the instant application, Mr. Okiro sent to Mr. Ogutu Kenya Shillings, 2250 /= of which Kshs. 400/= was filing fee. He did not have any evidence that Mr. Okiro sent him the money.
12. He stated that things took a downturn on 23/10/2023 when the issue of a Power of Attorney came up and the Court made comments adverse to him. They were in both Kiswahili and English; the Power of Attorney was in his name; in the Ruling the Court ordered that he be not given the power of attorney by Mr. Okiro; the Court referred to him as a quack and alleged he was about to take Mr. Okiro’s land.
13. His further testimony was that the instant application was not the only one he had made before for Mr. Okiro, using the same means. He insisted that the instant one was made by Mr. Okiro himself save that he only prepared it for him. Further, he only gave directions to Mr. Okiro on what to say; the person who prepared the document was the one who usually prepared documents for Mr. Okiro.
14. He testified that the previous day before the oral testimony in open court he discussed the matter with the applicant who said he was not willing to attend court over it. Instead, he would make a further application because he had since been evicted. He was willing to support the matter of Mr. Peter Simatwa, but the Court should allow his prayer for withdrawal of the instant application. He insisted he had forgiven Mr. Okiro save that he attended court to clarify the position. He relied on Section 85 of the [Registration of Titles Act](#) regarding any act that may affect any person. He repeated that the signatures on their documents before the court were the ones the Applicant usually used. On his part he had no intention of committing forgery or fraud, and the allegations in the Application were correct.
15. One cross examination Mr. Ogutu stated that he fell out with Mr. Okiro on 11/10/2023. Further, he did not have any power of attorney from Mr. Okiro when he made the instant application on behalf of Mr. Okiro. He only communicated with him on the phone hence Mr. Okiro was aware he was preparing the document. When he went to Mr. Okiro’s home he was accompanied by two people who were Mr. Bruce and one Matembe.
16. He stated further that he drew the documents in his capacity as a social worker, under the [NGO Act](#) of 1990. When he served the documents to learned counsel, he used his e-mail which was [particulars withheld]@gmail.com. He admitted that at no point in time did he disclose that Mr. Okiro had instructed him to e-mail the documents or that acting for anybody. On being pressed further, he did not disclose the Cyber Place owner or whereabouts where the documents were prepared. He refused to



answer the question whether he knew it was a crime for one to act as a lawyer when he was not qualified. He admitted he offered himself to give legal aid and services through the NGO but understood that he did so without a professional certificate. He insisted that his act of representing people was mandated by the [NGO Act](#) 1990.

17. I have considered the Application, the law and both the evidence and submissions of the parties summoned to give more information regarding the application sought to be withdrawn. The issues before me for determination are whether the application was a proper before the Court, whether the Application could be withdrawn and who to bear the costs of the same.
18. Regarding the first issue on whether the application was properly before the Court, the argument by the Applicant was that he was not the one who drew the Application. He stated that it was drawn by Mr. Ogutu. He stated further that he protested at the filing of the same, his signature was forged, he did not want the Court to recuse itself and he wanted to proceed with his matter before this Court.
19. On his part, Mr. Alfred Ogutu, the person who allegedly drew the application admitted that indeed it was he who drew the application. He stated that he used a cyber to do the document, and that it was done under his direction after he contacted Mr. Ogutu and gave instructions to a certain undisclosed lady (woman) at an undisclosed cyber to do it. To be clear, he could not disclose the name of the person who drafted the document and affixed the signature of the alleged applicant. He admitted further that he used a signature which Mr. Okiro had earlier signed on a piece of paper and it was put in the computer for use. That it was not the first document that was done like that.
20. Clearly, this was nothing but pure computer forgery and its related offences under the [Computer Misuse and Cybercrimes Act](#), Act No. 5 of 2018, The [Oaths and Statutory Declarations Act](#), Chapter 15 of the Laws of Kenya and the Penal Code, Chapter 63 of the Laws of Kenya. The said Mr. Ogutu cannot pretend that he was not the one who authored the illegal document and presented it before the Court, through his email as a genuine and proper document. He bears full criminal and other responsibility over the same. The alleged woman at a cyber could either be a witness or accomplice to the crimes committed herein. The Directorate of Criminal Investigation (DCI), Kitale and Headquarters (Nairobi) ought to be served with this Ruling by the Deputy Registrar of this Court for further action.
21. In the case of [Presidential Election Petition Nos. E001, E002, E003, E004, and E007 & E008 of 2022](#) the Supreme Court had the following to saying in drafting affidavits:
 - “(136) This Court cannot countenance this type of conduct on the part of counsel who are officers of the Court. Though it is elementary learning, it bears repeating that affidavits filed in Court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to”.
22. Specifically, the signature of the person ought to be appended by the person himself and where it is a digital on then it should be by him as a person inserting it on a document. Section 29 of the [Computer Misuse and Cybercrimes Act](#) provides:
 - “A person who fraudulently or dishonestly makes use of the electronic signature, password or any other unique identification feature of any other person commits an offence and is liable,



on conviction, to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding three years or both”.

23. In the instant case the alleged applicant neither signed the application nor gave authority for to be drawn. Further, he did not swear the Affidavit in support of the application before a Commissioner for Oaths as required under Section [Oaths and Statutory Declarations Act](#) and Order 19 of the [Civil Procedure Rules](#), 2010 this, the entire deposition was not a deposition properly so called. The entire Affidavit is therefore struck out.
24. Section 349 of [Penal Code](#) where the punishment for offence of forgery is given thus:

“Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years”.
25. Forgery being a criminal offence, this court is not clothed with jurisdiction to entertain it.
26. In [Josephine Mwikali Kikenye v Omar Abdalla Kombo & another](#) [2018] eKLR, the court of Appeal cited the decision in [Gallie v Lee and Another](#) [1969] 1 ALL ER 1062, where Lord Denning (MR) stated:

“If the deed was not his deed at all, (non est factum) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document. (Emphasis mine)”.
27. Mr. Ogutu having admitted that he forged the Applicant’s electronic signature, the Application therefore is defective. The Supporting Affidavit does not conform to [Oaths and Statutory Declarations Act](#) and Order 19 of the [Civil Procedure Rules](#), 2010. In short it was not made by the deponent neither was it signed in the presence of the Commissioner for oaths.
28. For these reasons, the order that commends itself to me is to strike out the Application. I order that it be and is hereby struck out. The applicant is at liberty to continue representing himself.
29. This Court gave Mr. Ogutu an opportunity to be heard, though he was not a party. Since costs follow the event, the Application is lost and they can only be borne by the individual, Mr. Ogutu, who moved the Court illegally.
30. The DCI to be served with this Ruling for action as directed at paragraph 20 above.
31. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 29TH DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE.

