



**Omar & another v Kulei & 4 others (Environment & Land Case E033 of 2023) [2024] KEELC 4537 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4537 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E033 OF 2023**

**A OMBWAYO, J**

**JUNE 5, 2024**

**BETWEEN**

**OMAR MOHAMED OMAR ..... 1<sup>ST</sup> PLAINTIFF**

**PATRICK MAINA WAKANDA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSHUA KULEI ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**THE HON. ATTONERY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**SIAN ENTERPRISES ..... 4<sup>TH</sup> DEFENDANT**

**AGRICULTURAL DEVELOPMENT CORPORATON ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

- The plaintiffs have filed an application dated 29<sup>th</sup> May 2024 seeking an order reviewing, setting aside and or varying the order issued by the Court on 28<sup>th</sup> May, 2024 that the Plaintiffs herein obtain certified copies of original letter dated 18<sup>th</sup> May, 1995 or that the same be produced by the maker and instead an order does issue allowing the production of the original letter dated 18<sup>th</sup> May, 1995 as Plaintiffs'-exhibit Number 5. That an order be and is hereby issued reviewing and or varying the order issued on 28<sup>th</sup> May, 2024 to the extent that where a party holds an original public document in these proceedings, the requirement for obtaining a certified copy from the makers who have been sued as Defendants herein under section sections 66, 80 and 81 of the *Evidence Act*, Cap 80 or calling the maker(s) who have been sued as Defendants herein is inapplicable. An order be and is hereby issued reviewing and or varying the order issued by the Court on 28<sup>th</sup> May, 2024 sustaining the objection against production of the letter dated 18<sup>th</sup> May, 1995 and marking it as "PMFI 2" to the extent that this letter be and is hereby produced as Plaintiff Exhibit Number 5.



2. The costs of the application abide the outcome of the suit herein.  
The application is made on grounds that there is pending in Court a land ownership dispute over Land Reference Number 13-287/99 between the Plaintiffs and the Defendants.
3. The Plaintiffs' case is that they purchased the suit property from the 5<sup>th</sup> Defendant pursuant to allocation for purposes of purchase and obtain a certificate of title on 14<sup>th</sup> February 1996, which position is disputed by the Defendants who have failed to admit the claim in this matter. On 28<sup>th</sup> May, 2024 the Court upheld an objection against production of the original allocation letter dated May, 1995 as Plaintiffs Exhibit Number 5 on the basis that no certified copy had been availed nor the maker called to produce it.
4. The maker of the document question has been sued as a Defendant in this suit where they have among others filed-a defence and witness statement, which renders it impossible and impractical for the Plaintiffs to call them as their witnesses to produce their documents so that they can prove their case against it. The custodian and maker of the public document which the Court vide the impugned ruling marked as PMFI 2 has been sued in this matter as a Defendant which position renders it impossible and impractical for them to obtain certified copies of the document from it so that they can prove their case against it.
5. The Plaintiffs have no power control or authority on the 2<sup>nd</sup> and 5<sup>th</sup> Defendants-to compel them to certify their documents or produce the said documents in evidence as a condition precedent to their production.
6. A sufficient cause exists to warrant an order allowing the production to the document that the Court marked as PMFI 2 in the impugned ruling and order of 28<sup>th</sup> May, 2024 premised on the original in the Plaintiffs' possession which is the primary document. There a sufficient cause for the Court to review its order of 28<sup>th</sup> May, 2024 as the Plaintiffs and not the 2<sup>nd</sup> and 5<sup>th</sup> Defendants bear the burden of proving their case.
7. There is an error apparent on the face of the record in the ruling of the Court as sections 67 of the Evidence Act, Cap. 80 which is the law on production of original documents does not envisage production of a certified copy when a party intends to produce an original document, which is primary evidence.
8. There is an error apparent on the face of the record in the ruling dated 28<sup>th</sup> May, 2024 as the requirement for certification of copies of public documents by authorities having their custody only applicable where a party has secondary evidence as set out in- sections 66, 80 and 81 of the Evidence Act, Cap 80 that is- not the case herein.
9. There is an error apparent on the face of the record as the ruling, sustaining the objection against production of the letter dated. 18<sup>th</sup> May 1995 renders secondary evidence superior to primary evidence contrary to section 67 of the Evidence Act, Cap 80.
10. The original documents that the Plaintiffs intend to produce including the letter dated 18<sup>th</sup> May, 1995. are. in possession or power of the 2<sup>nd</sup> and 5<sup>th</sup> Defendants who are principal parties herein and against whom the documents are sought: to be proved.
11. No prejudice shall be suffered by the Defendants as the Plaintiffs have not concluded their examination in chief and. the. parties herein shall have an opportunity to cross examine the Plaintiffs witnesses on the documents. It is fair, just and equitable that the Court grants the reliefs sought in the interest of fair



hearing. The supporting affidavit reiterates the grounds of the application. The application is opposed. Section 80 of the *Civil Procedure Act* provides as follows:-

- “ 80. Any person who considers himself aggrieved-
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act,
- May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

12 Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows:-

45 Rule 1 (1) Any person considering himself aggrieved-

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

13. This court finds that the order of the court can be reviewed for such sufficient reason: Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.

14. I have considered the application and find that in the interest of justice the same is allowed and the PMFI5 is allowed as PEX5. The defendants will be allowed to cross examine the plaintiff on the letter and that the maker is a party hence he will be cross- examined and therefore no prejudice will be suffered.

15. Likewise on 30<sup>th</sup> May 2024, defendants filed an application dated 29<sup>th</sup> May 2024 seeking orders that this Honorable Court be pleased to issue an order directing the Chief Lands Registrar to verify the Certificate of Title dated 14<sup>th</sup> February 1996, marked as PEXHB 2 for purposes of establishing its authenticity.

16. This Honorable Court be pleased to issue an order directing a document examiner to conduct forensic document examination of the Letter dated 18<sup>th</sup> May 1995 executed by Dr. W.K Kilele EBS, Certificate of Title dated 14<sup>th</sup> February 1996 for purposes of establishing the authenticity of the said Dr. K Kilele EBS's signature and that of the Registrar of Titles, respectively.

17. This Honorable Court be pleased to issue an order directing the Court Administrator to produce the Court File in Nakuru ELC No E15 of 2021, Omar Mohammed Omar v Thomas Kiprop Kirui and others and Nakuru ELC No E051 of 2021, Leah Jepchumba & 2 others v Richard Kipngeno Langat & 5 others before this Honorable Court.



18. Costs of this Application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
19. The applications is based on grounds that the Plaintiffs filed a claim against the 1<sup>st</sup> and 4<sup>th</sup> Defendants (Applicants) claiming ownership of all that property known as LR No 13287/99 on the basis of fraudulent and forged documents.
20. The Plaintiffs purport to rely on a Certificate of Title dated 14<sup>th</sup> February 1996, marked as PEXHB 2 and a Letter dated 18<sup>th</sup> May 1995 allegedly executed by one Dr. W.K Kilele EBS, which are clear forgeries that must be tested for validity
21. Particularly, the Certificate of Title dated 14<sup>th</sup> February 1996 and marked as PEXHB 2 contains glaring inconsistencies that if not verified, shall result in the admission of a forged document in this court and reliance on the same. The applicant states that The Inland Registry Number, that is, "IR 40236/85" is not properly aligned. Instead, the same is written over an erasure which is not countersigned.
22. The narration of the acreage of the land is not aligned and is characterized by several erasures. The signatures of the Registrar of titles on the Title and the registration stamp are fundamentally different. The Certificate of Title has an incomplete document identifier that is "GPK (L)"
23. Further, the signature of one Dr. W. K Kilele EBS as exhibited in the letter dated 15<sup>th</sup> May 1995, is fundamentally different from that which is exhibited on other letters and transfers. The same IS simply a superimposition and a forgery. More importantly, the Defendant has taken a position purporting to support the Plaintiffs, despite court records filed by it in Nakuru ELC No E15 of 2021, Omar Mohammed Omar v Thomas Kiprop Kirui and others and Nakuru ELC No E051 of 2021, Leah Jepchumba & 2 others v Richard Kipngeno Lang'at & 5 others showing that the suit property was transferred to the late Joseph Kasaine Nkaiserry , in clear violation of article 10 of the Constitution.
24. The Applicants are apprehensive that if the Certificate of Title and Letter dated 18<sup>th</sup> May 1995 are not scrutinized for authenticity and the records in Nakuru ELC No E.15 0 2021 Omar Mohammed v Thomas Kiprop and others and Nakuru ELC No E051 of 2021, Leah Jepchumba & 2 others v Richard Kipngeno Langat & 5 others not presented before this Honorable Court, the suit shall become convoluted and marred with material non-disclosure and misrepresentation of facts,
25. The Applicants pray that this Honorable Court order for the verification of the Certificate of Title dated 14<sup>th</sup> February 1996, the signature of one Dr. W.K Kilele EBS as exhibited in the letter dated 18<sup>th</sup> May 1995, and that the records in Nakuru ELC No E 1.5 of 2021, Omar Mohammed Omar v Thomas Kiprop Kirui and others and Nakuru ELC No E057 of 2021, Leah Jepchumba & 2 others v Richard Kipng'eno Langat & 5 others be presented before it, for the just determination of this suit. It is in the interest of fairness and justice that this application is allowed as prayed.
26. I have considered the application and the responses and do find that the suit was confirmed for hearing and therefore the prudent order to make, which I do make, is that the court administrator is compelled to produce the court files Nakuru ELC No E15 of 2021, Omar Mohammed v Thomas Kiprop Kirui and others and Nakuru ELC No E51 of 2021, Leah Jepchumba & 2 others v Richard Kipnge'no Langat & 5 others before this court on the hearing date. The other prayers are declined. Cost in the suit.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5<sup>TH</sup> DAY OF JUNE 2024.**

**A. O. OMBWAYO**

**JUDGE**

