



REPUBLIC OF KENYA



AVGM v JMK (Matrimonial Cause 17 of 2021) [2022] KEHC 9914 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KEHC 9914 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE 17 OF 2021
TM MATHEKA, J
JULY 8, 2022
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL
PROPERTY ACT (NO.49 OF 2013)

BETWEEN

AVGM PLAINTIFF

AND

JMK DEFENDANT

RULING

1. The Plaintiff/Applicant through an application dated 4th of March 2022 brought under Order 16 Rule 6 and 14, Order 18 Rule 11 and Order 28 Rule 7 of the [Civil Procedure Rules](#) seeks for orders that: -
 1. Spent;
 2. This Honourable Court be pleased to issue an order compelling the Defendant to produce the original format of the documents annexed as a bundle as “JMK 3,” JK4” and “JMK 5” in her replying affidavit sworn on 13th January, 2022 for purposes of investigation.
 3. This Honourable court be pleased to issue an order directing the Director of Criminal Investigations to investigate the authenticity of all the documents annexed as a bundle as “JKM3,” JMK 4” and “JMK 5” in the Defendant’s Replying Affidavit sworn on 13th January,2022 and file a report in court within thirty days from the date of said order.
 4. The costs of this application be provided for.



2. The Application is predicated on the grounds on its face and supported by an affidavit of AVGM. He deponed that on the 9th October, 2018 he solely entered into a sale agreement for the purchase of all that parcel of land known as Miti/Mingi Mbaruk Block X/XXX(Kianjoya) for a purchase price of Kenya Shillings Two Million Five Hundred Thousand from JNK and after taking possession of the land he started developing the same by building a house thereon for his family, and as the head of the family he solely developed the property with funds obtained from selling of all that parcel of land known as LR XXXX/XX and charging the property to Kenya Bankers Savings and Credit Co-operative Society Limited to secure a loan facility.
3. He deposed that on 26th November, 2021 he instructed his advocates to file this suit against the Defendant and to serve the defendant with the pleadings and on 31st January, 2022, his advocate was served with a notice of preliminary objection, memorandum of appearance and a replying affidavit all dated 13th January, 2022 from the firm of Njeri Njagua & Co Advocates.
4. He contended that upon receiving and perusing the said documents, it came to his attention that some of the documents annexed in Respondent's Replying Affidavit were forgeries regarding the developments made to the property.
5. He stated that defendant further gave misleading information with the intention of misleading this Honourable court in that she produced a forged receipt of serial No.XXX purportedly issued by Sideways Welding & Fabricators for the supply of steel doors and repair yet the steel doors were purchased from Jam City Metal Works.
6. He further stated that Defendant in her Replying Affidavit attached a receipt of serial No. XXX from sideways welding and fabricators for the supply of steel gate which is believed to be a manipulated receipts as the alleged steel gate was supplied by Kiti Kaine Welding.
7. He deponed that the respondent further annexed an RTGS receipt indicating the payment made to Mabati Rolling Mills which was made under his name as he paid personally for the supply from his bank account.
8. He stated that it was within his knowledge that all the steel windows, doors and grills that were used in the construction of his house were supplied by Jam City Metal Works in Pipeline and not sideways welding and fabricators as alleged by the defendant hence the receipt of serial No.XXX produced by the defendant was a forgery.
9. He averred that the receipts of the said transactions are forgeries which have been made with the intention of misleading this honorable court of her alleged contribution to the building and developing of their matrimonial house.
10. It was his deposition that the defendant filed her Replying Affidavit outside the stipulated time, a period that is longer than the statutory time of filing responses as she was forging or fraudulently obtaining the documents produced.
11. He stated that it is therefore in the interest of justice that this honorable court makes an order directing the Director of Criminal Investigation to investigate the authenticity of all the documents produced by the defendant pending the hearing of the matrimonial suit and that if the orders sought are granted, it will help in expeditious disposal of the matter.
12. He deposed that no prejudice will be suffered by the defendant if the orders sought are granted.



13. The Application is opposed. The defendant/respondent filed grounds of opposition dated 28th March 2022 stating that the application is an abuse of the court process, has no merit and its incompetent as it has not met the threshold laid down by the law.
14. The Application was canvassed by way of Written Submissions.

Applicant's Submissions

15. The Applicant filed two sets of submissions. One is dated 13th April, 2022 while the other one is dated 5th May, 2022.
16. He submitted on the following issues;
 1. Whether the applicant has made out a case for the grant of the orders sought on the application &
 2. Who should bear the costs of the application?
17. The applicant first dealt with the effect of absence of a Replying Affidavit by the respondent to controvert his sworn averments. He cited the provisions of Order 51 Rule 14 of the *Civil Procedure Rules* and submitted that any factual deposition made by a party ought to be rebutted by way of a replying affidavit. That in the case of *Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR the court held that a Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and or list of authorities that may be subsequently filed and that in the absence of this foundational pleadings, the Replying Affidavit, it follows that even the Written Submissions filed afterwards are of no effect.
18. The Applicant in further support of the above position relied on the case of *Car Importers Association Of Kenya vs County Government Of Mombasa* [2021] eKLR where the court held that in the absence of Replying Affidavit by the respondent to controvert sworn averments by the petitioner, the grounds of opposition could not amount to a proper or valid denial of allegation made on oath.
19. The Applicant submitted that the defendant having failed to file the Replying Affidavit to controvert his factual averments those averments are deemed to have been admitted and he urged this court to so hold.
20. On the first issue for determination, the applicant cited the provisions of Order 28 rule 7 of the *Civil Procedure Act* and submitted that the documents relied on by the respondent are believed to be forgeries made purposely to deceive this court on her alleged contribution towards the building of the matrimonial property and that it is just and fair that such documents be investigated to establish their veracity as this will not only help in maintaining the integrity of this court but it will also enable this court to make a fair, equitable and expeditious determination of the division of the matrimonial property regarding each party's contribution.
21. He submitted he is seeking to have the defendant produce the original receipts in question so that they can be subjected to a forensic examination as no forensic examination can be done using copies when the originals are readily available. He argued that this court has power donated by Section 22 of the *Civil Procedure Act* and Order 11 of the *Civil Procedure Rules* 2010 to grant the orders sought.
22. He contended that matters of forgery are complex, critical and require investigations to establish the genuineness of the documents produced and that the investigations are necessary as the purported documents goes to the root cause of the suit herein.



23. It was the Applicant's submissions that his constitutional right to a fair trial will be contravened if the court relies on the documents produced by the defendant as a response to the matter herein and if the orders sought are not granted.
24. With regard to the issue on costs, the Applicant submitted that costs follow the event and are discretionary. He prayed to be awarded costs of this Application.

The Defendant's/Respondent's Written Submissions

25. The submissions on behalf of the Defendant/respondent were filed on 27th April, 2022 on two issues for determination;
 - i. Whether the applicant has made out a case to warrant the alleged disputed documents be referred for forensic.
 - ii. If the answer to the above is in the affirmative, whether the court has powers to issue the orders sought.
26. On the first issue, it was submitted that had the applicant noted the alleged forgery of the documents attached in the afore stated Replying Affidavit he would have lodged a complaint with the criminal investigations wherein active investigations would have commenced and that this being a civil claim this court lacks jurisdiction to hear the claim and as such it must down its tools.
27. The respondent's counsel further submitted that it is trite law that he who alleges must prove and that in the present case the plaintiff is trying to evade the rules of procedure by placing the burden of proving fraud on the court.
28. That the documents attached to her Replying Affidavit are not forgeries and to invite the court to assist Applicant in proving the same is unjust and prejudicial to the defendant/respondent. To buttress this position the Respondent relied on the case of *Abmed Abdullabi Abdille vs Abdille Nur Abdi & 3 Others* [2019] eKLR where the court held that the court is an impartial umpire and cannot exercise its discretion to assist a party to procure evidence to the disadvantage of the opposing party.
29. It was the Respondent's submissions that the Applicant/plaintiff should share the aforesaid documents with the investigative agency and should not turn this court into an investigative agency. She urged this court to dismiss the application noting that no formal report has been lodged with any investigative agency.
30. The Respondent relied on the *Francis Kirimi Nkarichia V David Nkanata Magiri & 7 Others* [2022] eKLR where the court while dealing with similar issue raised herein held as follows: -
 - “ 33. Section 35 (G) of the *National Police Service Act* No. 11A of 2011 allows the Director of Criminal Investigation to undertake forensic analysis while undertaking investigations where a complaint has been lodged as provided by law.
 34. Article 245 9 (a) of *the Constitution* states no person may give a direction to the Inspector General of Police with respect to investigations of any offence or offences. The Inspector General of Police has constitutionally guaranteed independence to ensure investigations are undertaken independently.
 35. Even though the applicant states he made an OB report at Kiirua police station, there is nothing to show he has made a follow-up and or specifically lodged



a complaint with the DCI Land Fraud Unit. As stated above, the D.C.I 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 of the *National Police Service Act*; one of its jurisdictions is to investigate crimes...”

31. The Respondent thus submitted that the fraud allegations are baseless and subjecting her annexed documents to forensic examination is ludicrous and a clear indication that the applicant is on a fishing expedition hoping to find information that will be beneficial to his case.
32. The respondent argued that the application is unmerited and prayed that it be dismissed with costs to her.

Issues for Determination

33. The issues that crystallize for determination are: -
 - i. Whether this court should compel the defendant/respondent to produce the original format of documents annexed as JMK 3, JMK4 & JMK 5.
 - ii. Whether this court should compel the Director of Criminal Investigation to investigate the authenticity of documents annexed as JMK3, JMK4 AND JMK5.
 - iii. Who should bear the costs of this Application?
34. Order 51 rule 14 of the *Civil Procedure Code* provides for the procedure for opposing applications in High Court;
 - (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
 - (a) a notice preliminary objection: and/or;
 - (b) replying affidavit; and/or
 - (c) a statement of grounds of opposition;
 - (2) the said documents in sub rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.
 - (3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub rule (1) may, with the leave of the court, file a supplementary affidavit.
 - (4) If a respondent fails to file to comply with sub rule (1) and (2), the application may be heard ex parte
35. It is noted that the defendant/ respondent filed only Grounds of Opposition.
36. It’s imperative to note that the Grounds of Opposition raise only issues of law and therefore a party wishing to controvert factual averments raised by a party in his or her Supporting Affidavit should do so via a Replying Affidavit.
37. The court is however required to determine the application on its merits.



Issue No.1- Whether this court should compel the defendant/respondent to produce the original format of documents annexed as JMK 3, JMK4 & JMK 5.

38. The Applicant contends that the receipts attached and annexed as JMK, JMK4 and JMK5 by the respondent in her affidavit of 13th January 2022 were procured fraudulently and are intended to deceive and mislead this court on the respondent's alleged contribution towards building of their matrimonial property.
39. The Applicant believes that the said documents are forgeries because he is the one who solely made all the payments related to the building and construction of their matrimonial home.
40. The Respondent did not controvert this position as she did not file any replying affidavit in response thereto.
41. The application herein is brought under Order 16 rule 6 and 14 and Order 18 rule 11. It is my view order 16 Rule 6 and 14 are inapplicable as the Applicant is not seeking any person to be summoned to appear before court either to produce document or to testify and produce document.
42. The above section 16 rule 6 and 14 provides as follows
- “Order 16 rule 6 of the Civil Procedure Rules provides thus; “Any person may be summoned to produce a document without being summoned to give evidence and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.”
- Order 16 rule 14 provides that;
- “whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it or cause it to be produced at such time and place.”
43. Order 18 rule 11 is similarly inapplicable. It is on Power of court to inspect. Precisely, it provides that the court may at any stage of a suit inspect any property or thing concerning which any question may arise.
44. Order 28 rule 7 provides for Commissions to make investigations;
- “On the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose of ascertaining—
- (a) any matter in dispute in the suit, whether or not the matter is substantially the whole matter in dispute between the parties; or
- (b) the value of any property or the extent of any damage thereto, or the amount of returns, profits, damages or mesne profits.”
45. What the applicant is asking for is not akin to the investigation foreseen by this provision which speaks about a matter in dispute between the parties. In this case the applicant wants more than just that: he wants an order to produce and an order to investigate by Directorate of Criminal Investigations.



46. Paragraph 1 of the Volume 13 of the *Halsbury Laws of England* states that-

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

47. In the words of Kimondo J. in *Oracle Productions Limited vs Decapture Limited & 3 others* [2014] eKLR;

“Pre-trial discovery is so central to litigation that the entire Order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. ... The true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial.”

48. Nothing would stop the applicant to ask for pretrial discovery so as to peruse the said documents. There are ways of ensuring that a party gets a document in its near original form, e.g. in the form of a scan, or photograph. If it is for the perusal of the applicant that would not be too much to ask for. Hence even as I find that the prayer for an order to produce for the purpose of investigation for forgery is not tenable, the respondent is obligated to provide the applicant with documents that are legible and reveal all the necessary information intended to be used at the trial.

Issue No.2 - Whether this court should compel the director of criminal investigation to investigate the authenticity of documents annexed as JMK3, JMK4 and JMK5.

49. Section 24 of the *National Police Service Act* No 11 A of 2011 sets out functions of the Kenya Police Service as being the—

- (a) Provision of assistance to the public when in need;
- (b) Maintenance of law and order;
- (c) Preservation of peace;
- (d) Protection of life and property;
- (e) Investigation of crimes
- (f) Collection of criminal intelligence;
- (g) Prevention and detection of crime;
- (h) Apprehension of offenders;
- (i) Enforcement of all laws and regulations with which it is charged; and
- (j) Performance of any other duties that may be prescribed by the Inspector-General under this Act or any other written law from time to time.

50. The word “investigate” is defined in the Black’s Law Dictionary 9th Edition as: “To inquire into a matter systematically; to make an official inquiry.”



51. Section 35 (G) of the *National Police Service Act* No. 11A of 2011 allows the Director of Criminal Investigation to undertake forensic analysis while undertaking investigations where a complaint has been lodged as provided by law.
52. In the case of *Bernard Mwangi Nderitu & 5 Others v Ndiara Enterprises Limited* [2012] eKLR, the Court while dealing with an application under Order 28 Rule 7 stated as follows: -

“I have considered the application, and affidavits filed in Court. I have also considered the oral submissions made by both counsels. The issue for determination is the procedure for determining the authenticity of a Title document, and whether this Court should issue a commission to the Director Criminal Investigation Department, and Commissioner of Lands to investigate and establish the authenticity of the Title referred herein. Counsel for the Applicants brought this application under Order 28 Rule 7(a) which empowers the Court upon an application, or on its own motion to issue a commission to any person to make an investigation and report to the Court, for purposes of ascertaining any matter in dispute in the suit. It is apparent that that applicant has not detailed the fraud alleged. I do agree with the respondent’s submission that the applicant should move to the lands registry and do an official search on the title as the same is conclusive. Granting prayer no. 2 would setting a dangerous precedent for parties in land matters wherein a procedure has been laid down on how a document can be authenticated. I therefore find no merit in the application and dismiss it with cost to the respondent.’ (emphasis added)
53. The applicant depones in his Affidavit that the documents are forgeries. He wants this court to direct the Director of Criminal Investigations to carry out investigations to confirm whether or not they are forgeries. He has not made any complaint to the police or the DCI of his suspicions or recorded any statement with the respective investigative agencies regarding the alleged forgery or fraud. Needless to say these agencies do not require the direction of the court to do their work. See *Francis Kirimi Nkarichia vs David Nkanata Magiri & 7 Others* where the court stated as well that The Inspector General of Police does not require a court order to undertake its mandate since under Section 24 of the *National Police Service Act* one of its jurisdictions is to investigate crimes.
54. Should these agencies refuse/neglect / fail to carry out their duties there are procedures to be followed to do so; this, in my considered view is not the procedure or the circumstances. To allow the application as sought would create a bad precedent where a party refuses to follow the right process and choses to come to court to seek untenable orders. Nothing bars the applicant from submitting the said copies of the alleged forged documents to the Director of Criminal Investigation for authentication purposes if he so wishes.
55. As indicated herein above the applicant can obtain better copies from the respondent through the usual civil procedure processes if he thinks they are fraudulent he can without the orders of this court have them verified by DCI.
56. As far as the just outcome of this matter before me is concerned, each party will have the opportunity to present his or her evidence before court at the hearing. Each piece of evidence will be subjected to the scrutiny expected by the *Evidence Act*, and that is the role of this court. To hear each party and for each to produce its evidence. The gathering and extra judicial scrutiny of any documents or evidence in the manner contemplated by the applicant is not part of it.
57. It is my view then that the application is not merited. The same is dismissed.
58. Taking into consideration the nature of the matter before me there is no order as to costs.



59. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 8TH DAY OF JULY, 2022.

MUMBUA T MATHEKA

JUDGE

CA Edna

Ms Mwaniki for Njeri Njagua for Defendant Respondent

Njeri Njagua & Co. Advocates

N/A for Konosi & Co

Konosi & Company Advocates

