



**Bamboo Twist Ltd v National Land Commission & 5 others; Embassy of Rwanda & another (Interested Parties) (Environment & Land Petition 3 of 2020) [2023] KEELC 18251 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18251 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND PETITION 3 OF 2020**

**SM KIBUNJA, J**

**JUNE 26, 2023**

**IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 27, 40, 47, 258, AND SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE REVOCATION OF TITLE/GRANT NO. L.R.MN/V/1128, 129, 1130, 1131, 1132, AND ENFORCEMENT OF KENYA GAZETTE NOTICE NO. 6862 VOL. CX1X-97 OF 17TH JULY 2017**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 21 & 22 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT**

**BETWEEN**

**BAMBOO TWIST LTD ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT .... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY LAND REGISTRAR, MOMBASA ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF MOMBASA ..... 6<sup>TH</sup> RESPONDENT**



**AND**

**EMBASSY OF RWANDA ..... INTERESTED PARTY**

**AWALE TRANSPORTERS ..... INTERESTED PARTY**

**RULING**

1. The petitioner moved the court through the notice of motion dated December 14, 2022 under Order 12 Rule 7 of the CPR, sections 1, 1A, 1B, 3A, 63E of CPA and Article 159(1) (d) of the Constitution, filed through Ms. Borona & Associates Advocates, seeking for among others the review of its orders of July 14, 2022 expunging the documents filed on July 13, 2022, reinstatement of the documents filed on the July 13, 2022 by the 6<sup>th</sup> respondent, costs of the application and “the plaintiff suit herein be heard and determined on its merits.” The application is based on the thirteen (13) ground on its face and supported by the affidavit sworn by Harji Govind Ruda, an advocate and one of the directors of the “plaintiff”. It is the petitioner’s case is that Eliud Njuki, an inspector of police in the office of the DCI, filed an affidavit through the Attorney General with a detailed investigation report on July 13, 2022 touching on the subject parcels of land in this petition. That on July 14, 2022 counsel for the AG applied to have the said affidavit expunged and removed from the record for reasons that it was not filed by the Office of the Attorney General. That the said report should be reinstated to shed light on the weighty issues of fraudulent attempts made to acquire parcels MN/V/1128 to 1132.
2. The application is opposed by the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup>, respondents through the eight (8) grounds of opposition dated January 31, 2023 filed through the Attorney General, *inter alia* that the petitioner cannot dictate or determine for them the nature of the reply to file; that the 6<sup>th</sup> respondent had informed the court that it did not draw, file or serve the subject affidavit; that the petitioner had failed to disclose to the court that he had initiated investigations on the subject matter before the court, and that the parliamentary report subject matter of the affidavit of Eliud Njuki was tabled in the house on June 14, 2017, but lapsed with all other pending business as it was not discussed by the time the National Assembly adjourned sine die on June 15, 2017.
3. The application is also opposed by the 2<sup>nd</sup> interested party through the nine (9) grounds of opposition filed through Ms. Garane & Somane Advocates, among others that the application has not met the threshold under Order 45 Rule 1 (b) of the CPR for review of orders; that the petitioner has not established the existence of a mistake or error apparent on the face of the record; there has been delay in filing the application; that the petitioner lacks capacity to seek for reinstatement of the document expunged on application of the Attorney General and that the application is incompetent, bad in law and an abuse of the process of the court.
4. The court issued directions on filing and exchanging submissions on February 1, 2023. The learned counsel for the petitioner and 2<sup>nd</sup> interested party filed their submissions dated March 13, 2023 and 1<sup>st</sup> February 2023 respectively, which the court has considered.
5. The following are the issues for the determinations by the court;
  - a. Whether the petitioner has made a reasonable case for review of the order of July 14, 2022 and reinstatement of the expunged document.
  - b. Who pays the costs of this application.



6. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions by the learned counsel, superior court decisions cited thereon, the record and come to the following determinations;

a. The proceedings of July 14, 2022 shows that Mr. Makuto for the 2<sup>nd</sup> to 5<sup>th</sup> respondents made an oral application that “There are documents filed on 13/7/2022. May it go on record that we did not file it. They can be expunged, and removed from the court.” The coram of that day indicates that Mr Borona and Mr Okubasu for the petitioners in Nos 3 of 2020 and 5 of 2019 respectively and Ms Abdi for 2<sup>nd</sup> interested party were also present but none appear to have responded to the oral application by Mr. Makuto. The court then proceeded to make the following order that is the subject of this ruling;

“I will expunge the documents, but on removal a formal application will have to be made.”

b. The record further shows that when the matter came up on February 1, 2023, the counsel for the Petitioner informed the court that he had served the application and no replies had been received. The counsel for the 2<sup>nd</sup> interested party disclosed that they had filed grounds of opposition that morning, and the court alerted the counsel of the Attorney General’s grounds of opposition dated January 31, 2023 that was on record. Mr. Mbuthia, learned council for the 1<sup>st</sup> respondent indicated their support for the application. The court then gave directions on filing and exchanging submissions.

c. The affidavit subject matter of the expunging order of July 14, 2022 that is annexed to the supporting affidavit of the Petitioner, indicates it was filed on July 13, 2022. It is indicated at the heading that it was to be filed in “Constitutional Petition No. 40 of 2017”. It is also headed “5<sup>th</sup> Respondent’s Replying Affidavit” and at the last page it is shown to have been drawn and filed by the Attorney General. The oral application and submissions by Mr. Makuto, learned counsel representing the Office of the Attorney General for the 2<sup>nd</sup> to the 5<sup>th</sup> respondents made on the July 14, 2022 is clear, that the affidavit filed on July 13, 2022 ostensibly by that office was not actually from that office. The counsel moved the court to have the document expunged and their request was allowed by the court. Needless to state, a party in a litigation cannot be dictated by the other party on what documents/statements/pleadings/affidavits to rely on in their claim or defence in the suit/application/petition, especially when such a party has denounced such documents and successfully moved the court to have them expunged. The application by the petitioner, if successful would force the 2<sup>nd</sup> to 5<sup>th</sup> respondents to take the deponent of the affidavit filed on July 13, 2022 as their witness against their will, which would be contrary to the principle of fairness in litigation. It is still open to the petitioner or any other party who believes the deponent of the expunged affidavit would help the court in determining the issues before it to consider getting him as their witness and moving the court for leave to file and serve the relevant documents.

d. That there is no grounds set out by the petitioner to suggest that there was an error or mistake apparent upon the record as a basis for the application for reviewing the order of July 13, 2022. There is also no new fact or evidence that has since been discovered that the petitioner could not have obtained and presented to the court when the oral application for review was heard and order of July 14, 2022 issued. The application has no merit and should be dismissed.

e. That the petitioner having failed in their application, they should pay the costs to the parties who opposed their notice of motion and participated in its hearing.



1. Flowing from the foregoing the petitioner's notice of motion dated December 14, 2022 is without merit and is accordingly dismissed with costs.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 26<sup>th</sup> DAY OF JUNE 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA**

IN THE PRESENCE OF;

PETITIONER: Absent

RESPONDENTS : Absent

INTERESTED PARTIES : Absent

COUNSEL : Mr. Borona for the Petitioner

Mr Makuto for the AG [3<sup>rd</sup> Respondent.

M/S Abdi for 2<sup>nd</sup> Interested Party.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

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