



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.656 OF 2009**

**BETWEEN**

**NAZLIN UMAR FAZALDIN RAJPUT..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1ST RESPONDENT**

**THE COMMISSIONER OF POLICE.....2ND RESPONDENT**

**THE COMMISSIONER GENERAL OF THE**

**KENYA REVENUE AUTHORITY.....3RD RESPONDENT**

**AND**

**TARIQ MAHAMOOD HUSSAIN.....INTERESTED PARTY**

**RULING**

1. Although the Petition herein was filed in 2009, for various reasons it is yet to be concluded and the Application dated 25th April 2014 is another setback to the finalisation of the said Petition. In any event, the Application aforesaid seeks the following substantive orders under **Article 159** of the **Constitution** and certain misplaced provisions of the **Civil Procedure Rules**;

***“(1) That the Court be pleased to admit and hear the instant Application during the current vacation.***

***(2) That the Court be pleased to hear the matter ex-parte and then to fix it inter-partes after service upon all the parties.***

***(3) That the Court be pleased to review, vary or otherwise set aside its order and/or directions made on the 4th day of March, 2014.***

***(4) That the Court be pleased to re-open the matter and/or allow the Interested Parties to cross-examine the Petitioner and also to prosecute the due interests in the matters.***

***(5) That the delivery of judgment be stayed and or otherwise be arrested pending the full hearing and determination of this Application.***

**(6) That the costs be in the cause.”**

2. I have read the Supporting Affidavit sworn on 25th April 2014 by Mr. Wandugi, Advocate for the 1st, 2nd and 5th Interested Parties and also perused his Submissions as recorded by this Court. It is his deposition and submission that when the Petition came for hearing on 4th March 2014, he decided to first go to Hon. Lady Justice Mumbi Ngugi's Court for hearing of Petition No.127 of 2011. He also instructed his Court Assistant to get an advocate to hold him brief in this Court and indicate that he would be coming later. According to him, the Assistant failed to get a lawyer to do so and the matter was concluded in his absence and a date reserved for judgment without his clients being heard.

Although the Application however refers to the 1st, 2nd and 5th Interested Party, sadly, my perusal of the record only established the identity of the 1st Interested Party.

3. In any event, his further submission is that by the mistake and inadvertence detailed above, his clients were denied a chance to cross-examine the Petitioner and also a chance to present their respective cases. Further, that the 1st and 2nd Interested Parties claim ownership of certain motor-vehicles forming part of the subject of the Petition and to deny them a hearing may mean loss of the motor-vehicles whose value is estimated at Kshs.45Million. That therefore it would be in the interests of justice to re-open the hearing and grant the orders sought.
4. The Petitioner filed a lengthy Replying Affidavit sworn on 29th April 2014 and also tendered oral submissions. Of relevance to the Application before me is her submission that firstly, Mr. Wandugi filed the said Application quite late and near the date of delivery of Judgment and has shown no reasonable cause for the said delay. Secondly, that the Application was part of an orchestrated malicious campaign by the 1st and 2nd Respondents to frustrate the hearing of the Petition and her quest for justice. Thirdly, that Mr. Wandugi as an advocate, should not have entered into the dispute between the parties and to depone to issues which are contested between them. Fourthly, that the Application is devoid of merit and should be dismissed with costs.
5. Many other issues were deponed to by the Petitioner which she may consider important but for the sake of a focused determination of the Application before me, I see no reason to delve into those issues.
6. Mr. Moimbo, learned Litigation Counsel appearing for the Attorney General and the Commissioner of Police is not opposed to the Application neither is Mr. Matwere, Advocate for the Kenya Revenue Authority. These Parties are the 1st, 2nd and 3rd Respondents to the Petition, respectively.
7. In disposing of this Application, I will begin by stating that the Petition herein was filed based on allegations of certain violations of the Petitioner's fundamental rights and freedoms under the provisions of *inter-alia* **Sections 71-86 of the Repealed Constitution**. Reference has also been made to provisions of the **Police Act, Cap.84 Laws of Kenya**, the **Penal Code, Cap 63 Laws of Kenya**, the **Kenya Revenue Act, Cap.496, Laws of Kenya** and the **Repealed Legal Notice No.6 of 2006 the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules**.
8. In that context therefore, it is obvious why the **Civil Procedure Rules** as invoked by the Applicant, are inapplicable. Presently, it is Legal Notice No.117 of 2013, the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** that is applicable to an application such as the one before me. But those Rules have no specific provision for grant of setting aside orders save that **Rules 3, 4, 5, 6, 7 and 8** provide as follows;

**“(3)(1) These Rules shall apply to all proceedings made under Article 22 of the Constitution.**

**(2) The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.**

**(3) These rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realising the-**

**(a) rights and fundamental freedoms enshrined in the Bill of Rights; and**

**(b) values and principles in the Constitution.**

**(4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.**

**(5) For the purpose of furthering the overriding objective, the Court shall handle all matters presented before it to achieve the-**

**(a) just determination of the proceedings;**

**(b) efficient use of the available administrative resources;**

**(c) timely disposal of proceedings at a cost affordable by the respective parties; and**

**(d) use of appropriate technology**

**(6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to-**

**(a) participate in the processes of the Court; and**

**(b) comply with the directions and orders of the Court.**

**(7) The Court shall pursue access to justice for all persons including the-**

**(a) poor;**

**(b) illiterate;**

**(c) uninformed;**

**(d) unrepresented; and**

**(e) persons with disabilities**

**(8) Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”**

9. The import of the above Rules as read together is that access to justice is an overriding objective in a matter such as the one before me. Similarly, the Court must ensure just, expeditious and proportionate disposal of all cases. Looking at the Application before me and noting the reasons given by Mr. Wandugi, why did it take him a month and three weeks to file his Motion for setting aside? The excuse that there was a Court Vacation in the intervening period is escapist because the Court Registry is open at all times including during the Vacation. Even if therefore I were to accept that he was attending a different matter in a neighbouring Court on 4th March 2014, where

is the diligence in acting to preserve his clients' interests soon thereafter?

10. But having said so, the issues raised in the Petition are heavily contested and I have seen the high emotions exhibited by some parties in correspondences exchanged between them and even in Court. Further, access to justice and a just and proportionate disposal of this Petition cannot be achieved if only some parties are availed the opportunity to present their side of the story to the Court. The mistake and inadvertence that led to the orders of 4th March 2014 being issued cannot in any event be squarely attributed to the 1st and 2nd Interested Parties but to their advocate who has explained his actions and accepted his mistake. Why should they be punished for the mistake of their lawyer?

11. I also note that **Article 159(b) and (d)** obligate this Court to do justice without delay and without undue regard to procedural technicalities. In doing so, like a double-edged sword, justice must not unduly favour one party as against another.

12. I further note that other Parties to the Petition, save the Petitioner, are not opposed to the orders sought in the Application and as for the Petitioner, costs will assuage the inconvenience caused to her by granting the orders sought. The overriding objective is in any event the need to give each side a chance present its case and thereafter the Court can make a fair and just determination of the issues in contest.

13. In conclusion, although the Petitioner is vehemently opposed to the Application, the wider interests of justice would necessitate that I grant the following orders;

***“(1) That the orders made on 4th March 2014 are hereby recalled, reviewed and set aside.***

***(2) That the matter is hereby ordered to be re-opened and the Interested Parties granted leave to cross-examine the Petitioner and also to prosecute their due interests in the matters.***

***(3) That judgment shall be delivered in the usual manner after all the Parties have presented their respective cases.***

***(4) Costs of this Application to be assessed by this Court shall be paid to the Petitioner by the 1st, 2nd and 5th Interested Parties before the next hearing date failure to which all the orders above shall stand vacated and a judgment delivered based on the evidence on record.”***

14. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Irene – Court clerk

Petition present in Person

Mr. Wandugi for 1st, 2nd and 5th Interested Parties

Mr. Moimbo for 1st Respondent

Mr. Matuku for 3rd Respondent

Mr. Mule for 2nd Respondent

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

Costs of Kshs.10,000/- to be paid to the Petitioner before the next hearing.

**ISAAC LENAOLA**

**JUDGE**

**By Consent**

Application dated 15/6/2010 is stood over for hearing on 14/10/2014

Leave to file a Supplementary Affidavit is granted to the Petitioner.

**ISAAC LENAOLA**

**JUDGE**