



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**HIGH COURT CIVIL CASE NO. 108 OF 2004**

**JOSHUA KYALO NYUMU & 3 OTHERS ::::::::::::::::::::::::::::::::::: PLAINTIFFS**

**VERSUS**

**MERCY MUEMA & 21 OTHERS ::::::::::::::::::::::::::::::::::: DEFENDANTS**

**R U L I N G**

Mrs Nzei counsel for the applicants objected to the filing of three further affidavits by Mr Mutinda counsel for the Respondents on grounds that leave was never given by the court to file the three affidavits and secondly, that the three affidavits are filed out of time. It is Mrs Nzei's contention that the court ordered that the applicants file their further affidavit within seven days of 28/10/04. That time began to run on 29/10/04 and that they filed their affidavit on 4/11/04 which was the 7th day and was served on Respondents on 5/11/04. That the Respondents were supposed to file their affidavit within 7 days of being served. The defendants filed their three affidavits on 18/11/04 which counsel contents is outside the time allowed by the court and had no leave of the court to file the same and they should be struck off the record. It was the prayer of Mrs Nzei that if the court finds that the affidavits are filed in time, she seeks leave to file a reply to Kimanthi Muswii's affidavit.

Mr Mutinda's argument is that they were granted leave to file a further affidavit once they were served and that the other affidavits are necessary to help the court reach a fair determination in the matter.

Mr Kavila on his part said that if the affidavits filed by the Respondents are to be expunged the plaintiffs' supplementary affidavit should in turn be expunged especially the part touching on his replying affidavit filed on 5/10/04. He urged that counsel had been given leave to file supplementary affidavit before hearing date which was 28/10/04 but filed it on 4/11/04.

Problem started with the interpretation of this court's order of 28/10/04. This court ordered that Mrs Nzei do file a further affidavit within seven days and Mr Nzomo to file his affidavit seven days thereafter if necessary. It meant that once served by Mrs Nzei which was supposed to be within seven days from 28/10/04, the Respondents were supposed to file their affidavit within the next seven days. Service by Mrs Nzei was on 5/11/04. Mr Nzomo was to file his affidavit by 15/11/04. Filing of the affidavit on 18/11/04 was irregular as it was outside the time allowed by court. It is without the court's leave and the affidavits by the Respondents were, therefore, irregularly on record as they were filed without leave of the court and should be expunged from the record. Time was of essence and should be computed in terms of order 49 of the Civil Procedure Rules.

As regards the two other affidavits by Leonard Zambia and Nathan Mutua they were irregularly on record in that these people had not sworn any affidavits before. What they filed on 18/11/04 is not a further or supplementary affidavit. Even if they are meant to assist the court in fair determination of this matter, they should have been properly introduced on record with the leave of the court. They are irregularly on record and they are, therefore, struck off record.

Mr Kavila, though he was not directly affected seemed to sympathize with the other Respondents though it should not have been his concern but restrict himself to representing his clients. He asked the court to expunge from the applicants' supplementary affidavit the part relating to his affidavit of 5/10/04. However, that cannot be so because on 28/10/04 Mrs Nzei sought leave of the court to respond to issues in the affidavits filed by both counsels. The said application is on record and it was granted.

Mrs Nzei raised issues touching on Mr Nyandieka who was counsel for the 4th plaintiff. When the suit

was first filed Mr Nyandieka appeared for the defendants to which the plaintiff's counsel objected. The said Mr Nyandieka gave up the representation to Mr Mutinda. Though Mr Nyandieka's conduct was irregular and unethical having represented the 4th plaintiff before, the court cannot go on to make orders against him because he is not party to this suit. What is alleged may be true especially considering the said counsels earlier conduct but that is it. Mrs Nzei should raise her complaints elsewhere - may be with Law Society of Kenya to investigate misconduct of the said counsel and failure to release files and documents belonging to the 4th plaintiff. That is as far as this court can go.

In sum, I do agree with Mrs Nzei's objection to the affidavits filed on 18/11/04 by Leonard Zambia Mwangi, Nathan Mutua and Kimanthi Muswii and they are hereby struck off the record for being irregularly on record without leave of this court.

Dated at Machakos this 9th day of December 2004

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**