REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 86 OF 2019

(Formerly Machakos ELC Case No. 4 of 2016)

STAVROULA GEORGOPOULOU (FORMERLY

STAVROULA ROUSALIS).....PLAINTIFF/RESPONDENT

VERSUS

DENANCY INVESTMENTS LTD.....1ST DEFENDANT/ APPLICANT

DAVID RONALD NGALA ADHOCH.....2ND DEFENDANT/ APPLICANT

LABH SINGH HARMAN SINGH LTD.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

SILVER BRIDGE INVESTMENTS LTD.....6TH DEFENDANT

REAL ENERGY LTD.....7TH DEFENDANT

HOKING (KENYA) REAL ESTATE CO. LTD.....8TH DEFENDANT

THE NATIONAL LAND COMMISSION.....9TH DEFENDANT

RULING

1. This ruling is with respect to the application dated 26th November, 2019 and the preliminary objection (P.O) dated 31st January, 2020.

The Application

2. The application was filed under certificate of urgency and is brought under Order 51 Rule 1, Order 45 and Order 2 Rule 15 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act and all other enabling powers and provisions of the Law.

It seeks the following orders: -

a) Spent.

b) The Plaintiff be ordered to furnish security for costs in respect of the 1st and 2nd defendants in the amount of kshs 17, 817,600.00 only or such sum as the Court may order within 30 days thereof.

c) The security be deposited in an interest earning account in the joint names of the Plaintiff's and the 1st and 2nd defendant's Advocates.

d) In default of security being provided, an order be issued that the Plaintiff's suit against the 1st and 2nd defendants be struck out

with costs to the 1st and 2nd defendants.

e) An order be issued summoning the Plaintiff to be cross examined on the circumstance surrounding his change of name from Stavroula Rousalis to Stavroula Georgopoulou.

f) An order striking out the affidavit attached to the application and the one contained in the plaint both dated 25th November 2015 for being fatally defective and inadmissible.

g) The costs of the application be provided for.

3. The application is supported by the grounds on its face and the affidavit of Sharifow Abdi Rashid sworn on the same day.

He has deposed *inter alia* that the matter is *sub judice Machakos* ELC 60 of 2015, that the Respondent has no capacity as she is not the registered proprietor of the suit properties, that the Respondent has not adduced any evidence of her change of name and that being a foreigner, the Respondent has no known bank account, operational office or business in Kenya. He has also deposed that there is evidence to show that the Respondent is a man and not a woman as claimed. Further, he deposed that the Respondent does not exist at all and that all the documents presented to Court, concerning her existence, are forgeries.

4. He has deposed that the details of the person who notarized the Respondent's documents and a translation certificate of the notary public stamp have not been produced to this Court. The notarized documents have been exhibited as **SAR-1** & **2.** He has deposed that the Respondent's signatures in her affidavits are different hence the need to cross examine her. The signatures are exhibited as **SAR-3, 4** & **5**. Further, he has deposed that the Department of Immigration at the Ministry of Interior and Coordination of National Government has no records of the Respondent's passport and that there is a letter showing that the Respondent has never been in the Country. Copies of correspondence between the Interpol, the said Ministry and the Directorate of Criminal Investigations (DCI) have been exhibited as **SAR-6.**

5. It is also his deposition that the Daily Nation of 20th April 1993 bears a photo of the real Stavroula Rousalis which is clear that he is a man and not a woman as stated by the Respondent.

The newspaper cut out has been exhibited as **SAR-7**.

6. The application is opposed through the replying affidavit sworn by the Respondent's Counsel, Kishore Nanji, on 31st January, 2020, the grounds of opposition dated 13th February, 2020 and the Preliminary Objection (P.O) dated 31st January, 2020. The Counsel has also relied on the proceedings on record so far to oppose the application. The gist of the opposition is that the applicants' previous motions, seeking similar orders as the present application, have been dealt with. The Counsel deposed that two of the applications were abandoned by the applicants to facilitate the substantive hearing of this case while the one dated 21st September, 2018 was dismissed with costs *(the dismissed application)*. He deposed that a subsequent application *(dated 07th February, 2019)*, to reinstate the dismissed application, has never been prosecuted.

7. He has specifically relied on the Respondent's replying affidavit sworn on 07th December, 2018 which was filed in opposition of the application dated 21st September, 2018. The affidavit is exhibited as **KN-1**.

8. The Respondent's grounds of opposition are basically an elaboration of the replying affidavit and the P.O. It is stated that the present application is an attempt to frustrate the Respondent from pursuing her legitimate claim to the suit properties and is not a bona fide application to serve the ends of justice.

9. In rejoinder, the applicants filed grounds of opposition dated 10th February, 2020 which I have summarized as follows;

a) That the replying affidavits dated 31st January, 2020,19th February, 2019 and supporting affidavit dated 11th September, 2018 having been sworn by Mr. Kishore Nanji, offend rule 9 the Advocates (practice) Rules which provides that Advocates are not required to swear affidavits in contentious matters.

b) That the Advocate on record makes himself a viable witness for cross examination on the case at hand which he is merely handling for his client as an agent which practice is irregular.

c) That the Advocate Mr. Kishore Nanji has sworn an affidavit on contentious matters. In fact, he has sworn an affidavit based on information he obtained from other persons. As a deponent, he cannot give first hand answers as to the marriage certificates produced, divorce certificates, certificate of translation, all of which have been contested and whose authenticity is in question.

d) That the replying affidavit dated 7th December, 2018, supporting affidavit dated 25th November, 2015 and verifying affidavit dated 25th November, 2015 all purportedly sworn by Mrs. Stavroula Georgopoulou (formerly Stavroula Rousalis) are all defective and not admissible since they offend section 88 of the Evidence Act, Cap 80 Laws of Kenya.

e) That the affidavits by the Respondent have all been sworn in Athens Greece which is not a common law country and as such, the said affidavits that are commissioned in Greek language are not admissible in Kenyan Courts and should automatically suffer the fate of being struck off the record.

The Preliminary Objection (P.O)

10. The P.O is grounded as follows;

a) That the Notice of Motion is an abuse of this honourable Court's process by reason of the following facts;

i. The 1st and 2nd defendant's Notice of Motion dated 14th May, 2017 and the 2nd defendant's Notice of Motion dated 4th May, 2017 and the 1st and 2nd defendants' Notice of Motion filed on 13th November, 2017, all of which sought same/similar orders as the present application, were abandoned by the 1st and 2nd defendants on 22nd May, 2017 to facilitate the substantive hearing of this case on 24th and 25th September 2018 and yet the 1st and 2nd defendants filed their notice of motion dated 21st September, 2018 and their present application seeking the same/similar orders as their said abandoned applications.

ii. The 1st and 2nd defendants' Notice of Motion dated 21st September, 2018, which sought the same orders as the present application, was dismissed with costs when it came up for inter -partes hearing on 30th January, 2019.

iii. The 1st and 2nd defendants' notice of motion dated 7th February, 2019 which seeks an order that the 1st and 2nd defendants' said notice of Motion dated 21st September, 2018 be reinstated is yet to be prosecuted.

11. Directions were given that the application and P.O be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

The Applicants' Submissions

12. The applicants have identified the following as the issues for determination;

a) Whether the Plaintiff/Respondent should be ordered to furnish security for costs?

b) Whether all the affidavits sworn by both the Advocate Mr. Kishore Nanji and the Plaintiff/Respondent are defective?

c) Whether the Plaintiff/Respondent has sufficiently proved her change of names from Stavroula Rousalis to Stavroula Georgopoulou?

d) Who bears the costs?

13. On the **first issue**, they have submitted that the Respondent has multiple identities and her entry records to the country are unverifiable. That nobody knows her place of residence and in the absence of proper legal status, the only remedy from the Court is to grant an order for security of costs in order to sustain this litigation. They contend that the expense with shadowy litigants is prejudicial not only to them but also to the Court.

14. They submitted that the Court should take judicial notice of the belief that the Respondent is behind the filing of Machakos ELC Case No. 60 of 2015 which she abandoned after discovering that she could not succeed. They have also submitted that two suits, *to wit* Makueni ELC Cases No.s 83 & 84 of 2019, have been filed over the subject matter herein.

15. They contend that the defendants are unknown and even though they are Kenyan citizens, they have not proved ownership of their pleadings. Accordingly, they have submitted that there is a deliberate scheme by the Respondent to ensure that they do not enjoy quiet possession of the suit property. They contend that the Court is being misused and abused by the Respondent to achieve the same. They rely *inter alia* on **Nairobi ELC Case No. 633 of 2014: Bhanumati Ishwarlal Ghadialy -Vs- Thomas Maseki Maera & Another [2016] eKLR** where the Court stated that;

"In this particular case, having regard even to my finding relating to the Plaintiff's Application, the court gets the general sense that the Plaintiff has little or no interests in Kenya. It is not even clear whether or not she was ever resident in Kenya and if so, she must have left the country many years ago. This can be gleaned from the fact of her expired lease over 12 years ago which she does not appear to have applied for its extension. With this impression, I consider that the 1st Defendant's concern for the non-payment of his costs in the likely event of his success in this suit are well founded. As I have earlier found, the 1st Defendant has a strong defence in this suit while the Plaintiff does not have a prima facie case with high chances of success at the main trial. That being the case, I find no difficulty in finding that the 1st Defendant's Application is merited. To that extent, I do allow it save that I direct that the Plaintiff do deposit in court the sum of Kshs. 1 million being the security of the 1st Defendant's costs. This should be done within 60 days from the date of delivery of this Ruling."

16. They have submitted that the letter from the Department of Immigration (SAR-6) clearly indicates that there are no records captured on the Respondent's passport number K25418 hence all the documents adduced by her are forgeries. They contend that it is immoral to allow such an individual to entertain a suit at their expense and detriment. They have also cited the case of **Keary Development -Vs- Tarmac Construction (1995) 3ALL ER 534** where the Court stated that;

"The Court has a complete discretion whether to order security and accordingly, it will act in the light of all the relevant circumstances.

The probability that the Plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.

The Court must carry out a balancing exercise. On one hand, it must weigh the injustice to the Plaintiff if prevented from pursing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial, the Plaintiff's claim fails and the defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim.

In considering all the circumstances, the Court will have regard to the Plaintiff's company prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high probability of success or failure.

The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simple normal amount, in all the circumstances, it is probable that the claim would be stifled."

17. They have submitted that the Respondent has not filed anything to show whether she has attachable property in Kenya that can be used as security for costs if the suit fails. They also submitted that no affidavit of means has been filed either.

18. Further, it is their submission that the property was valued at Kshs 360,000,000/= on 5th April 2016 hence the amount of Kshs 17,817,600/= was deduced to be sufficient security for cost.

19. On the **second issue**, they have submitted that the affidavits sworn by the Respondent on 7th December, 2018 & 25th November, 2015 are defective and inadmissible for offending section 88 of the Evidence Act, Cap 80 Laws of Kenya. They submitted that the affidavits do not contain the particulars of the drawer and were not witnessed by a person authorized to do so under section 88 of the Civil Procedure Act. They rely on **Nairobi HCCC 192 of 2015; Peeraj General Trading & Contracting Company Limited Kenya & another –Vs- Mumias Sugar Company Limited [2016] eKLR** where the Court held that;

"11. I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public."

20. It was also their submission that Section 76 of the Evidence Act allows the Court to summon a person to be cross examined on the account that his/her signatures do not match on the documents. They urge the Court to summon the Plaintiff in order to ascertain the authenticity of the signatures.

21. They submitted that Rule 9 of the Advocates Practice Rules prohibits Advocates from swearing affidavits in contentious matters and contend that by doing so, the Respondent's Advocate has made himself a viable witness for cross examination in a matter which he is merely handling for his client as an agent. They rely on **Nairobi HCCA 327 of 2012: Regina Waithira Mwangi Gitau –Vs- Boniface Nthenge [2015] eKLR** where the Court stated that;

"On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd 1998 e KLR and Kisya Investments Ltd & Others Vs Kenya Finance Corporation Ltd, it was held that.

"……it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit."

22. On the **third issue**, they submitted that changing a name is not a casual process as there is a legal process which has to be followed before such change is effected. They contend that the process worldwide involves preparation of a deed poll which culminates in gazzetment of such change. They rely *inter alia* on **Kitale HC Election Petition No. 9 of 2013: Jonas Misto Vincent Kuko -Vs- David Wafula Wekesa & Anor [2013] eKLR** where the Court held that;

"94. This Court finds no evidence on record and it was the testimony of both the Petitioner 7 and the 2nd Respondent that no Deed Poll was submitted to the 2nd or the 3rd Respondent to support the inclusion of this preferred name "Mutacho".

99.The Petitioner registered as a voter using his National Identification Card which this court reiterates bore only the names "Omari Wafula Asman" and in the absence of a Deed Poll as proof of change of name could only be registered as a candidate by the 3rd Respondent by the same names hereinabove mentioned."

23. The applicants submitted that proof of dissolution of marriage is not enough and does not serve any legal purpose in proving change of name.

24. On the **fourth issue,** they submitted that being the bonafide owners of the suit property, they have been condemned with frivolous suits and have spent a fortune defending them since 2015. Accordingly, it is their submission that they are entitled to costs.

Submissions by the Respondent

25. The Respondent submitted that upon dismissal of the similar application dated 21st September, 2018, the applicants should have prosecuted the application for reinstatement instead of filing another application of a similar nature. She relies on **Nairobi HCCC No. 482 of 20014: Stephen Okero Oyugi -Vs- Law Society of Kenya & Anor** where the Court stated as follows;

> ***"21. The second issue relates to whether the present application is properly before me. As earlier noted, a similar application previously lodged by the applicant suffered a dismissal and the applicant's attempts at seeking a reinstatement of the dismissed application fell through as its application for reinstatement was equally dismissed.***
>
> ***22. It therefore follows that the proper procedure would have been for the applicant to either seek to have the dismissal orders reviewed and set aside or to appeal against the dismissal orders.***
>
> ***23. From the foregoing, I am of the view that the applicant's attempts at now bringing a fresh application seeking orders related to those earlier sought constitutes an abuse of the court process within the following definition set out by the Court of Appeal in the case of Muchanga Investments Ltd –Vs- Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR:***
>
> > ***"In the Nigerian Case of KARIBU-WHYTIE J SC in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-***
> >
> > ***"The concept of abuse of judicial process is imprecise; it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"***
> >
> > ***The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-***
> >
> > ***(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action…" "***

26. She submitted that where an earlier application is dismissed for want of prosecution, it is not open for an applicant to file the same application again and doing so amounts to abuse of Court process.

27. The Respondent submitted that she is neither aware of a contest regarding the withdrawn applications nor the pendency of related adjudication. She contends that the current application is not properly before Court and should be dismissed.

28. With regard to the affidavits sworn by her Counsel, she submitted that the replying affidavit dated 7th December, 2018 was sworn by herself at Athens Greece and filed on 16th January, 2019. With regard to the one sworn on 31st January, 2020, she submitted that the applicants have not pointed out which of the 12 paragraphs offends the law or rules of procedure.

She contends that there is no law that bars an advocate from swearing an affidavit in a client's matter as long as such advocate has personal knowledge of the contents. Further, she submitted that the applicants have not demonstrated the specific deposition that would require cross examination of the advocate.

29. With regard to the current application, she submitted that the contents are matters of law which are within the advocate's competence and personal knowledge as he has been in conduct of the case since inception. She relies on **Civil Appeal No. 354 of 2004: Kamlesh MA Pattni -Vs- Nassir Ibrahim Ali & 2 Others** where the Court of Appeal held that;

> ***"…there is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing this information."***

30. With regard to the supporting affidavit filed on 11th September, 2018, she agrees that it was sworn by her advocate but submitted that it is of no relevance to the current application as it was supporting an application for joinder of parties and amendment of plaint. Similarly, she submitted that the replying affidavit dated 19th February, 2019 is irrelevant as it was opposing the reinstatement of the dismissed application, recusal of the Judge and transfer of the matter.

She contends that these are issues of law which were within the advocate's knowledge.

31. With regard to admissibility of documents made outside the commonwealth, she relied on rule 32.17 and 32.20 of the 1998 England Civil Procedure Rules to submit that affidavits taken outside the jurisdiction of England are admissible in evidence without proof of the notarial stamp, seal or official position of the person taking the affidavit. She contends that the same position obtains in Kenya. She submitted that in the **Peeraj case (Supra),** the Courts relied on rules of the Supreme Court of England which had been replaced by the said Civil Procedure

Rules. She submitted that the current position is that a presumption exists in favour of notarial documents made outside the jurisdiction of England.

32. On the flipside, she submitted that even if the law is as submitted by the applicants, there is proof that the affidavit, which she swore in Athens-Greece, was taken by a notary public and that the signature and seal affixed thereto were of such notary.

33. She submitted that the applicants' quest, to have the affidavit in support of her injunction application struck out, is wholly misconceived as the said application was heard on merit hence *res judicata*. Accordingly, she contends that this Court has no jurisdiction to allow the applicants to reopen the injunction application.

34. As for the affidavit verifying the correctness of the averments in the plaint, she reiterated the presumption in favour of notarial documents made outside the jurisdiction of England. Further, she reiterated that the affidavit was proved to have been taken by a notary public in Greece and that the signature and seal affixed thereto belonged to the notary public.

35. With regard to the prayer of security for costs, she submitted that granting of such an order is purely within the discretion of the Court and relies on **Shah -Vs- Shah** where the Court of Appeal held that;

> ***"The general rule is that security is normally required from Plaintiffs resident outside the jurisdiction but as was agreed in the Court below, a Court has a discretion to be exercised reasonably and judicially to refuse that security to be given."***

36. She submitted that the onus is on the applicants to prove her inability to pay costs and relies on **Mombasa HCCC No. 326 of 1999: Abbeybarn Ltd -Vs- Infinity Gemstones Ltd** where the Court observed that;

> ***"On the merits, it is common ground that the grant of an order for security lies in the discretion of the Court. It matters not whether the Plaintiff is a limited liability company or an individual. The onus is on the applicant to place credible evidence of their inability to pay costs for the Court to exercise its discretion judicially."***

37. She has also relied on **Nairobi Civil Appeal (Appln) No. 188 of 2012: Moses Wachira –Vs- Neils Bruel & 2 Others (2015) eKLR** where the Court of Appeal observed that;

> ***"22. The applicant's case for making this application is that the 1st Respondent is a foreign national who is not resident in Kenya. The question to be answered is whether the fact that the 1st Respondent is not resident in Kenya, or within the jurisdiction of this Court, is sufficient to warrant the grant of the orders sought to furnish security for costs.***
>
> ***23. The fact that the 1st Respondent resides out of jurisdiction of this Court is a factor to consider but not the only one that is considered by the Court…."***

38. Further, she has cited the principles set out by Lord Denning M.R in **Sir Lindsay Parkinson and Company Ltd –Vs- Triplan Ltd.** *to wit;*

> ***a) Whether the claimant's claim was bonafide and not a sham,***
>
> ***b) Whether the claimant had a reasonably good prospect of success,***
>
> ***c) Whether there was admission by the defendant on the pleadings or elsewhere that money was due,***
>
> ***d) Whether there was a substantial payment into Court or an 'open offer' of a substantial amount,***
>
> ***e) Whether the application for security was being used oppressively, for example so as to stifle a genuine claim.***
>
> ***f) Whether the claimant's want of means had been brought about by the conduct of the defendant's such as delay in payment or in doing their part of the work.***
>
> ***g) Whether the application for security was made at a late stage in the proceedings."***

39. Referring to the reasoning in the case of **Bhanumati Ishwarlal Ghadialy *(Supra)*** relied on by the applicants, she submitted that the position obtaining in this case is that the Court has already found that she has a *prima facie* case with chances of success. Further, she submitted that to date, the applicants have never filed their list of documents to show that they have a defence.

40. She submitted that the fact of being a foreigner, on its own, is not a good ground for seeking and granting security otherwise no foreigner will invest in this Country. She contends that the questions of unknown assets, bank account, office or business in Kenya are mere allegations.

41. With regard to her gender, she submitted that the photo appearing in the newspaper extract is that of her step-son, Stavro Rousalis, who will be happy to attend Court at the substantive hearing and prove that he has never met the 2nd applicant or donated power of attorney to him. She submitted that according to the defence, the power of attorney was donated to the 2nd applicant by a Stavroula Rousalis, the holder

of a Swedish passport. She wondered why the said donor has not sworn any affidavit in support of the current application if indeed he exists.

42. With regard to the correspondence between the DCI-Mlolongo and the Director of Immigration services, she submitted that it does not show that the DCI ever referred to her passport, for verification, to the Director of Immigration Services. She contends that her passport has two stamps of immigration control at Mombasa Airport *to wit*, the one dated 14th October, 1994 for single entry to Kenya and the other dated 10th December, 1994 for exit out of Kenya.

43. With regard to the different signatures in her affidavits and passport, she submitted that the ones in her passport and statutory declaration were done in 1994 and 1995 respectively while she was still married to Spiro Rousalis. She submitted that after her divorce, she changed her signature to the one she is currently using. It is also her submission that she will be happy to attend Court at the substantive hearing and be cross examined on the same.

44. With regard to the change of name from Rousalis to Georgopolou, the Respondent submitted that from the onset *(paragraph 1 of the plaint)* she pleaded that her name is Stavroula Georgopolou *(formerly Stavroula Rousalis)*. She submitted that according to the defence, the applicants aver that they are strangers to the contents of paragraph 1 of the plaint and will seek to put the Plaintiff to strict proof as to the gender of the real Stavroula Rousalis. Accordingly, she submitted that the issue of her name is to be tried and determined at the substantive hearing and not at this interlocutory stage.

45. She submitted that in the case of **Jonas Misto (Supra),** relied on by the applicants, there was a specific regulation requiring uniformity of the candidate's name in the register of voters and nomination paper to IEBC. She contrasted this position with her case by submitting that that there are no requirements in the Civil Procedure Act and Rules, 2010 as to the name in which a litigant must sue as long as the litigant proves his/her true identity.

46. On the issue of this matter being *sub-judice*, she submitted that in Machakos ELC No. 60 of 2015 *(now Makueni ELC No. 85 of 2019)*, the 5th defendant, Stavroula Rousalis, is described as a male adult of sound mind, a national of Switzerland and holder of Swiss passport No. F2107803 based and doing business in Nairobi whereas in the current case, the Plaintiff is described as a female adult and a resident of Athens, Greece. Further, she submitted that the subject matter in the former case is LR. No. 12715/595 whereas the latter case relates to both LR. No.s 12715/595 and 12715/632. It was also her submission that she does not understand the relevance of Makueni ELC No.s 83 & 84 of 2019.

Analysis and Determination

47. With regard to the P.O, I have looked at the applicants' application dated 13th November, 2017 and indeed, its prayers include security for costs and cross examination of the Plaintiff. I have not traced the applications filed on 14th April, 2016 and 10th May, 2017 but the record of 22nd May, 2018 clearly shows that Mr. Agina Advocate withdrew the three applications. At the time of the withdrawal, the record shows that Mr. Agina was duly on record for the applicants and as such, their submission that the withdrawal is contested and under adjudication elsewhere, cannot be taken seriously. In any case, the alleged adjudication must be in a place which has a name but the applicants did not deem it fit to substantiate.

48. I have also looked at the application dated 21st September, 2018 and indeed, the prayers therein are similar to the prayers in the current application. The record shows that it was dismissed on 31st January, 2019 for non attendance of the applicants' Advocate. The applicants proceeded to file another application dated 7th February, 2019 which *inter alia* sought reinstatement of the dismissed application. When it came up for hearing on 8th November, 2019, Angote J recused himself and there is nothing on record to show that it was ever prosecuted. Accordingly, I am in agreement with the Respondent that the proper course of action would have been to prosecute the application dated 7th February, 2019 instead of filing the current one. The applicants have clearly abused the process of this Court and I find that the P.O is merited.

49. Be that as it may, the just thing to do in the circumstances is to deal with the merits of the application once and for all since the parties have already submitted on it extensively. This will also advance the overriding objective of the Civil Procedure Act which mandates the Court to facilitate the just, expeditious and proportionate resolution of disputes.

50. Having looked at the application, response and annextures, it is my considered view that the following issues arise for determination;

a) Whether the affidavits sworn by the Respondent are defective?

b) Whether the affidavits sworn by the Respondent's Counsel are defective?

c) Whether the Respondent has sufficiently proved her change of name.

d) Whether this case is sub judice?

e) Whether an order should be issued for the Respondent's cross examination?

f) Whether the Respondent should be ordered to furnish security for costs.

Whether the affidavits sworn by the Respondent are defective?

51. The bone of contention here is that the Respondent swore her affidavits in Athens-Greece, which is not a commonwealth country, and that they bear a notary public stamp which is in Greek hence contravening **Section 88** of the Evidence Act which provides as follows;

> ***"When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the Judicial or official character claimed by the person by whom it purports to be signed;***
>
> > ***a) the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the Judicial or official character which he claims in such document and***
> >
> > ***b) the document shall be admissible for the same purpose for which it would be admissible in England.***

52. The import of this section is that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal, stamp or signature authenticating it or of the Judicial or official character indicated in the document.

53. It is true that the Respondent's affidavits were sworn in Athens, Greece which is not a commonwealth country. However, and as correctly submitted by the Respondent, the law which precluded admissibility of documents from non-commonwealth countries was amended by the **England Civil Procedure Rules of 1998**. The relevant rules provide as follows;

> ***"32.17. A person may make an affidavit outside the jurisdiction in accordance with;***
>
> > ***a) this part, or***
> >
> > ***b) the law of the place where he makes the affidavit***
>
> ***32.20. A notarial act or instrument may be received in evidence without further proof as duly authenticated in accordance with the requirements of law unless the contrary is proved."***

54. Accordingly, documents from non-commonwealth countries are admissible in the English Courts of Justice with the effect that they are also admissible in Kenyan Courts. Further, I have looked at the said affidavits and I do agree with the Respondent that they contain a translation of the seal and of the Notary Public before whom they were sworn. Clearly, this amounts to proof of the Seal and Notary Public which is actually a bonus.

55. It is also noteworthy that nothing has been placed before this Court to show that the affidavits were not made in accordance with the law of Greece.

Accordingly, I find that the Respondent's affidavits are admissible. This position applies to all the affidavits sworn by the Respondent including the one in support of her application for injunction. In any case, that application has already been heard and determined by the Court.

Whether the affidavits sworn by the Respondent's Counsel are defective?

56. The affidavit dated 11th September, 2018 was sworn in support of an application for joinder of parties and amendment of plaint. Having been in conduct of this case since inception, these are prayers within the professional competence of the Respondent's Advocate. He was the person best placed to know why it was necessary to add other defendants and amend the plaint. The affidavit is in line with Order 19 Rule 3 of the Civil Procedure Rules which provides that;

> ***"3(1) Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove."***

57. I agree with the Respondent that the said affidavit is irrelevant to the present application and in any case, it has already been heard and determined.

58. Contrary to the applicants' submission, the replying affidavit dated 7th December, 2018 was sworn by the Respondent and not her Advocate.

59. The affidavit dated 19th February, 2019 was sworn in opposition to the applicants' motion which sought orders of the Judge's recusal, reinstatement of the dismissed application and transfer of the case to another ELC Court. Again, these are issues of law which an advocate can competently depose on. I have read the entire affidavit and I am convinced about the advocate's competence to make the depositions therein.

60. The affidavit dated 31st January, 2020 is the one in opposition to the present application. I have looked at it keenly and contrary to the applicants' averments in their grounds of opposition, the Advocate has not made depositions on contentious matters. What he has done is to make reference to the Respondent's affidavit sworn on 7th December, 2018 which in turn was sworn in opposition to the dismissed application.

61. The dismissed application was a replica of the current application and as such, it is logical for the response to be the same. Furthermore, I

have already made a finding that the Respondent's affidavits are admissible. Apart from the referenced affidavit, the rest of the depositions relate to the proceedings in this matter which are within the knowledge and competence of the Advocate. The upshot is that the affidavits sworn by the Respondent's Advocate are not defective.

Whether the Respondent has sufficiently proved her change of name.

62. The Respondent has exhibited documents showing that she got married to one Spiro Rousalis in 1979 and divorced him in 2001. The divorce decree shows that she is the daughter of Antonios and Eleni Georgopoulos. In my view, this is a logical explanation of why she was formerly Stavroula Rousalis and currently Stavroula Georgopoulou.

63. The applicants have also raised the issue of her gender and insist that the real Starvroula Rousalis is a man. It is also their case that the real Starvroula Rousalis donated the power of attorney to the 2nd applicant. In paragraph 3 of the 2nd applicant's supporting affidavit dated 13th November, 2017, he deposed as follows;

> ***"That I personally know Stavroula Rousalis having dealt with him and do state that he is a man as is evident from a Daily Nation report of April 20th 1993 hereto annexed and marked DRNO 1 and 2."***

64. The Respondent has explained that the man in the newspaper report is her step-son whom she is ready and willing to avail in Court as her witness. This deposition is given credence by the record of 30th January, 2019 where the Respondent's Counsel submitted as follows;

> ***"My client is actually in Court. She is a woman and she is the Plaintiff in this case. The Plaintiff is right here in Court. My client's son whose photo appeared is also in Court.."***

65. Now, if the man in the newspaper extract is the real Starvroula Rousalis who is known by the 2nd applicant and who donated a power of attorney to him, why did he cross over to be the Respondent's witness? I join the Respondents in wondering why he has never sworn a single affidavit in support of the applicants' case. I am aware that this issue will be canvassed in detail at the main trial but from the evidence on record so far, I do not see any issue with the way the Respondent has pleaded her name.

66. As for the correspondence between the DCI and Director of Immigration Services, I agree with the Respondent that nothing therein shows that her passport was ever submitted to the Director of Immigration Services for verification. The exhibited passport shows that she was actually in the Country on a 3 month visitor's visa in 1994.

67. I have looked at the authorities relied on by the Applicants *vis-a- vis* the relevant law and indeed, there is no requirement in the Civil Procedure Act and Rules regarding the name in which a litigant must sue. Accordingly, I find that the Respondent has sufficiently explained her change of name.

Whether this case is sub judice?

68. The *res sub judice* rule is provided for in **Section 6** of the Civil Procedure Act as follows:

> ***"6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."***

69. The Plaintiff in Machakos ELC No. 60 of 2015 *(now Makueni ELC No. 85 of 2019)* is Labh Singh Harman Singh Ltd whereas the Respondent is the Plaintiff in the current case. As correctly submitted by the Respondent, the 5th defendant- Stavroula Rousalis- in Machakos ELC No. 60 of 2015 is described as a male adult of sound mind, a national of Switzerland and holder of Swiss passport No. F2107803 based and doing business in Nairobi whereas in the current case, the Plaintiff is described as a female adult and a resident of Athens, Greece.

70. Further, the subject matter in Machakos ELC No. 60 of 2015 is LR. No. 12715/595 whereas the current case relates to both LR. No.s 12715/595 and 12715/632. It is therefore quite obvious that the two suits are substantially different hence the *sub judice* rule is inapplicable.

Whether an order should be issued for the Respondent's cross examination?

71. It The basis of this prayer is **Section 76** of the Evidence Act, Cap 80 Laws of Kenya which provides as follows;

> ***1. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared by a witness or by the Court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.***
>
> ***2. The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.***
>
> ***3. This section applies with necessary modifications to finger impressions.***

72. This issue is intertwined with the issue of her change of name as her deposition is that after the divorce, she changed her signature to the one she is currently using. In my view, the purpose that cross examination will serve at this interlocutory stage is the same one that it will serve at the substantive hearing. Accordingly, and in the interest of saving precious judicial time, it is unnecessary to make the order at this stage.

Whether the Respondent should be ordered to furnish security for costs.

73. This Court has already made a finding that the Respondent has a *prima facie* case with probability of success. The applicants have not discharged their burden of proving the Respondent's inability to pay costs and I am not convinced that the Respondent is a shadowy litigant.

74. Further, I agree with the Respondent that the fact of being a foreigner, on its own, is not sufficient to grant the order. Having considered the totality of the foregoing, this Court declines to order the Respondent to furnish security for costs.

75. The upshot is that the application lacks merit and is hereby dismissed with costs.

Signed and delivered at Makueni via email this 9th day of February, 2021.

……..

HON. C. G. MBOGO

JUDGE

Court assistant: Mr. Kwemboi