



Kasarani Mall Limited & another v Ministry of Defence & 4 others; National Land Commission & another (Interested Parties) (Environment & Land Case E010 of 2022) [2024] KEELC 6349 (KLR) (1 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E010 OF 2022
JO MBOYA, J
OCTOBER 1, 2024**

BETWEEN

KASARANI MALL LIMITED 1ST PLAINTIFF

UCHUMI SUPERMARKET PLC 2ND PLAINTIFF

AND

MINISTRY OF DEFENCE 1ST DEFENDANT

HON ATTORNEY GENERAL 2ND DEFENDANT

SOLIO CONSTRUCTION CO LIMITED 3RD DEFENDANT

REGISTRAR OF TITLES 4TH DEFENDANT

SIDHI INVESTMENTS LIMITED 5TH DEFENDANT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

KENYA COMMERCIAL BANK INTERESTED PARTY

RULING

1. The Plaintiffs/Applicants approached the court vide the Notice of Motion application dated the 14th of August 2024 brought pursuant to the provisions of Order 40 Rule 1 & 2; Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A 1B and 3A of the *civil Procedure Act*; and Article 159 of *the Constitution* 2010 and in respect of which same [Plaintiffs/Applicants] have sought for the following reliefs:-



- a. This application be and is hereby certified urgent, service of the same be dispensed with in the first instance, and the interim orders sought be granted ex-parte pending the inter-partes hearing of this application.
 - b. Pending the inter-partes hearing and determination of this application a temporary injunction do issue restraining the 1st Defendant either by himself, his office, his agents, servants, employees, and anybody/authority working under him from further construction, development and in any other way adversely dealing whatsoever with all that property known as LR No. 5875/2.
 - c. Pending the inter-partes hearing and determination of the main suit a temporary injunction do issue restraining the 1st Defendant either by himself, his office, his agents, servants, employees, and anybody/authority working under them from further construction, development and in any other way adversely dealing whatsoever with all that property known as LR No. 5875/2.
 - d. In lieu of 2 & 3 above, an order of status quo do issue on property LR No. 5875/2 pending the hearing and determination of this application and the main suit.
 - e. An order do issue compelling the 1st Defendant either by himself, his office, his agents, servants, employees, and anybody/authority working under him, to allow the Plaintiff's Directors and agents entry into the suit premises for purposes of conducting a valuation on property LR No. 5875/2.
2. The instant application is anchored on various grounds which have been highlighted at the foot of the application. Furthermore, the application is supported by the affidavit of Lawrence Ngao sworn on the 14th of August 2024 and in respect of which the deponent has annexed two [2] documents, including photographs of sic, ongoing construction, that is allegedly being undertaken on the suit property.
 3. Upon being served with the subject application, the 1st Defendant filed a replying affidavit sworn by one Major Josphat Muma and which is sworn on the 23rd of August 2024. For good measure, the deponent has contended that the suit property was compulsorily acquired for and on behalf of the department of Defence and thereafter the department of Defence have been in occupation thereof since June 1986.
 4. On the other hand, the 5th Defendant/ Respondent filed a replying affidavit sworn by Alex Trachtenberg on the 23rd of September 2024 and in respect of which the deponent has contended that the 5th Defendant herein entered into a lawful sale agreement with the Plaintiffs pertaining to and concerning the purchase of the suit property.
 5. Furthermore, the deponent of the replying affidavit has also averred that arising from the sale agreement, the 5th Defendant paid to and in favour of the Plaintiffs/Applicants the 10% stakeholders sum and in this regard, the deponent has contended that the 5th Defendant therefore has beneficial interest over the suit property.
 6. Other than the 1st and 5th Defendants, the rest of the Defendants neither filed grounds of opposition nor replying affidavit[s].
 7. The application beforehand came up for hearing on the 30th of September 2024, whereupon the advocates for the respective parties covenanted to dispose of the application by way of oral submissions. For good measure, the application thereafter proceeded for hearing.



Parties Submissions:

Plaintiffs'/applicants'Submissions:

8. The Plaintiffs/Applicants adopted the grounds enumerated at the foot of the application and thereafter reiterated the averments contained in the supporting affidavit sworn on the 14th of August 2024. Furthermore, the Applicant thereafter raised, canvassed and highlighted three (3) salient issues for consideration.
9. Firstly, learned counsel for the Plaintiffs/Applicants has submitted that the 2nd Plaintiff/Applicant herein is the lawful and registered proprietor of the suit property namely LR 5875/2, which is situated within the city of Nairobi.
10. By virtue of being the registered owner and proprietor of the suit property, learned counsel for the Plaintiffs has submitted that the 2nd Plaintiff/Applicant is therefore entitled to benefit from the ownership rights over the suit property. Nevertheless, it was contended that despite being the registered owner, the 1st Defendant has denied or deprived the 2nd Plaintiff of the right of entry upon and/or possession of the suit property.
11. Secondly, learned counsel for the Plaintiffs/Applicants has submitted that the 1st Defendant/Respondent has since commenced the construction of multi-storey building on the suit property, even though the subject suit is still pending before the honourable court.
12. Arising from the foregoing, learned counsel for the Plaintiffs/Applicants has therefore contended that the offensive constructions on the suit property are not only detrimental to the rights and interests of the Plaintiffs/Applicants, but also offends the doctrine of lis pendens. In this regard, it has been submitted that the court therefore ought to grant the orders of injunction to avert the alienation and wastage of the suit property.
13. Thirdly, learned counsel for the Plaintiffs/Applicants has submitted that same [counsel] has tendered and availed before the court pictorial exhibits to demonstrate the nature and kind of activities being undertaken on the suit property by the 1st Defendant. To this end, learned counsel cited and referenced exhibits LN-2, attached to the supporting affidavit.
14. Nevertheless, learned counsel for the Plaintiffs/Applicants conceded that same has neither availed nor exhibited an electronic certificate pertaining to and concerning the pictorial exhibits [photographs] which have been attached to the supporting affidavit.
15. Be that as it may, it was the submission by learned counsel for the Plaintiffs/Applicants that the absence of the electronic certificate does not vitiate and/or negate the probative value of the pictorial exhibits. In any event, learned counsel posited that the electronic certificate is a matter of procedure and not substance and hence same is curable vide the provision of Article 159 (2) (d) of *the Constitution*.
16. In view of the foregoing, learned counsel for the Plaintiffs/Applicants has therefore implored the court to find and hold that the application beforehand is meritorious and hence same ought to be allowed.

5th Respondent's Submissions:

17. The 5th Defendant/ Respondent filed a replying affidavit sworn by Alex Trachtenberg and in respect of which same articulated the nature of the 5th Respondent's interest over and in respect of the suit property. Furthermore, the 5th Respondent contended that same entered into a sale agreement with



the 2nd Plaintiff whereupon the 2nd Plaintiff sought to sell the suit property to and in favour of the 5th Respondent.

18. In addition, learned counsel for the 5th Respondent submitted that arising from the sale agreement, which was duly executed between the 2nd Plaintiff and the 5th Respondent, the 5th Respondent proceeded to and paid the 10% stakeholders sum in accordance with the contract.
19. Arising from the foregoing, learned counsel for the 5th Respondent has therefore contended that the 5th Respondent is the beneficial owner of the suit property and in this regard, the 1st Defendant/ Respondent should not be allowed to continue with the offensive construction on the suit property.
20. Secondly, the learned counsel for the 5th Respondent submitted that the 5th Respondent herein filed a suit against the Plaintiffs/Applicants herein namely ELC 1499 of 2013 and wherein the court proceeded to and granted orders of status quo. Furthermore, learned counsel highlighted that the import and tenor of the orders of status quo were to preserve the status of the suit property and in particular to avert the sale, alienation and disposal thereof by the Plaintiffs/Applicants herein.
21. Additionally, learned counsel has posited that the orders for maintenance of status quo over and in respect of the suit property, which were issued vide ELC 1499 of 2013, have neither been varied nor discharged. In this regard counsel posited that the said orders of status quo should apply to and as against the 1st Defendant herein.
22. Premised on the foregoing, Learned Counsel for the 5th Defendant/ Respondent has therefore submitted that the preservation of the suit property is essential and shall be in the interests of Justice. In any event, learned counsel posited that the actions complained of are bound to waste the suit property, during the pendency of the suit herein.
23. In a nutshell, the Counsel for the 5th Defendant/ Respondent invited the court to find and hold that the application beforehand is merited and hence same [application] ought to be allowed.

1st Defendant's/respondent's Submissions:

24. The 1st Defendant/Respondent adopted and relied on the contents of the replying affidavit sworn by Major Josphat Muma on the 23rd of August 2024 and thereafter proceeded to highlight four (4) salient issues for consideration by the court.
25. First and foremost, learned counsel for the 1st Defendant/Respondent submitted that the Plaintiffs/Applicants herein have neither established nor demonstrated the existence of a prima facie case, pertaining to and concerning the suit property. At any rate, learned counsel contended that the Plaintiffs/Applicants herein cannot rely on a fraudulent certificate of title to stake a claim to and in respect of the suit property.
26. In addition, learned counsel for the 1st Defendant/Respondent submitted that the concept of indefeasibility of title cannot be utilized by the Plaintiffs/Applicants herein to stake a claim to the suit property, even where the certificate of title is vitiated by illegalities and fraud. In this regard, counsel cited and referenced the holding in the case of Nguruman Limited Vs Jan Bonde Nielsen and others [2014] eKLR.
27. Secondly, the learned counsel for the 1st Defendant/Respondent has also submitted that the Plaintiffs/Applicants have neither established nor demonstrated the nature and kind of irreparable loss, that the Plaintiffs/Applicants shall be disposed to suffer, if the orders of temporary injunction are not granted.



28. On the other hand, it has been posited that the nature of loss, if any, that may arise is capable of being quantified and paid out in monetary terms. In this regard, it was contended that the loss, if any, is therefore not irreparable.
29. Thirdly, learned counsel for the 1st Defendant/Respondent has submitted that the Department of Defence has been in occupation and possession of the suit property from June 1986 and thus the orders of temporary injunction, if any, shall occasion great prejudice and injustice to the 1st Defendant/Respondent.
30. It was the further submission by learned counsel for the 1st Defendant/Respondent that the issuance of the orders of temporary injunction in the manner sought shall be tantamount to granting eviction against the 1st Defendant/Respondent, albeit at an interlocutory stage, which ought not to happen.
31. Notwithstanding the foregoing, learned counsel for the 1st Defendant/Respondent has submitted that the grant of the order sought shall occasion inconvenience and thus the balance of convenience tilts in favour of the not granting the order sought.
32. To buttress the submissions pertaining to the incidence of balance of convenience, learned counsel for the 1st Defendant/Respondent has cited and referenced the decision in Pius Kipchirchir Kogo Vs Frank Kimeli Tenai [2018] eKLR.
33. Premised on the foregoing, learned counsel for the 1st Defendant/Respondent has therefore submitted that the application by the Plaintiffs/Applicants does not meet the requisite threshold to warrant the grant of an orders of temporary injunction either as sought or at all.

2nd & 4th Defendants'/respondents' Submissions:

34. The learned chief litigation counsel intimated to the court that same had neither filed grounds of opposition nor replying affidavit. Nevertheless, same contended that the honourable Attorney General was still at liberty to raise and canvass issues of law, for purposes of ensuring justice is done.
35. It was the submission by learned chief litigation counsel that the pictorial exhibits [photographs] which have been annexed by the Plaintiffs/Applicants have no probative value in so far as same have neither been accompanied with nor verified by the requisite electronic certificate in terms of Section 106 (B) of the Evidence Act Chapter 80 Laws of Kenya.
36. Secondly, learned chief litigation counsel has submitted that the suit property was compulsorily acquired using public funds/resources for purposes of the department of defence. Furthermore, it was submitted that in so far as the suit property was compulsorily acquired for the Defence, same [suit property] was therefore not available for allocation to any third party.
37. Arising from the foregoing, learned chief litigation counsel has submitted that the 1st Defendant/Respondent therefore has the lawful rights to occupy, possess and utilize the suit property. In this regard, it was posited that the orders of injunction would therefore be contrary to public policy and thus ought not to be granted.
38. Thirdly, learned chief litigation counsel has submitted that the doctrine of lis pendens does not apply to the instant matter in so far as the suit property is not being alienated with a view to defeating the subject proceedings. On the contrary, it was contended that the suit property is being used by the 1st Defendant without any threat of alienation.



39. Finally, learned chief litigation counsel has submitted that the subject matter has substantially proceeded for hearing. In this regard, it was posited that the matter has reached defence hearing and hence all the parties should co-operate with the court to enable the hearing to be concluded.
40. Be that as it may, counsel posited that the filing of the instant application was calculated to delay, obstruct and/or prejudice the expeditious hearing and determination of the suit. In this regard, it has been contended that the application beforehand has not been made in good faith.
41. Based on the foregoing, learned chief litigation counsel has invited the court to find and hold that the application beforehand is not only premature and misconceived, but same is a calculated scheme/ device to delay the hearing and determination of the suit.

Issues For Determination:

42. Having reviewed the application, the record of the court; as well as the responses thereto and upon taking into consideration the oral submissions by the parties, the following issues crystallize and are thus worthy of determination:-
 - i. Whether the subject application filed by M/s Wambugu & Muriuki LLP Advocates is legally tenable or otherwise.
 - ii. Whether the pictorial exhibits/annexures attached to the supporting affidavit have complied with the provisions of Section 106 (B) of the Evidence Act and if not, whether same have any probative value.
 - iii. What orders ought to issue

Analysis And Determination

i. Whether the subject application filed by M/s Wambugu & Muriuki LLP Advocates is legally tenable or otherwise.

43. The instant suit was filed by and on behalf of the Plaintiffs/Applicants through the law firm of Kibet Rop & Co. Advocates. In this regard, there is no gainsaying that the said law firm was duly retained and thus constituted as the recognized agent for and on behalf of the Plaintiffs.
44. Having been duly constituted as the recognized agents for and on behalf of the Plaintiffs/Applicants, it is the said law firm that is mandated and authorized to take any legal steps toward protecting the rights and interests of the Plaintiffs/Applicants, as far as the instant matter is concerned.
45. To this end, it suffices to cite and reference the provisions of Order 9 Rule 1 of the Civil Procedure Rules 2010, which articulate the powers and authority of a recognized agent. Same stipulates as hereunder; -

Recognized Agents And Advocates

[Order 9, rule 1.]

Applications, appearances or acts in person, recognized agent or by advocate.

1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:



Provided that—

- a. any such appearance shall, if the court so directs, be made by the party in person; and
- b. where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.

[Order 9 rule 2.] Recognized agents

2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are -

- (a) subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
- (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

46. Taking into account the cited and referenced provisions [details in terms of the preceding paragraphs], there is no gainsaying that a party to a suit can either act by itself or through a duly authorized and recognized agent. In this respect, where the party acts through a recognized agent, that recognized agent must be duly authorized and the instrument of authorization must be filed with the court.
47. Suffice to underscore that the Plaintiffs/Applicants had retained and engaged the firm of M/s Kibet Rop & Co. Advocates to act for and on their behalf. In this regard, it is the said law firm that has the authority and mandate to file any civil process and documents on behalf of the Plaintiffs/Applicants.
48. Nevertheless, where the Plaintiffs/Applicants are desirous to change their recognized agent, it behooves the Plaintiffs/Applicants to issue appropriate instructions to the intended recognized agent, who shall thereafter be called upon to file and/or lodge the requisite instrument of authorization, in this case, a notice of change of advocate.
49. Be that as it may, in respect of the instant matter, the subject application dated the 14th of August 2024 has been filed through the law firm of M/s Wambugu and Muriuki LLP, but the said law firm has neither filed a notice of change of advocate or otherwise.
50. In the event that the firm of M/s Wambugu and Muriuki LLP was keen to come on record and/or take over the handling of the subject matter on behalf of the Plaintiffs/Applicants, it behooved the said law firm to comply with and/or adhere the provisions of Order 9, Rule 5 as read with Rule 6 of the Civil Procedure Rules, 2010. For good measure, it was imperative that the said law firm does file and serve the requisite notice of change of advocates.
51. On the other hand, if the law firm of M/s Wambugu and Muriuki LLP was retained to act alongside the firm of M/s Kibet Rop & Co. Advocates, which is also acceptable in law, then the civil processes



and documents could only be filed through and in the name of the said firm of M/s Kibet Rop & Co. Advocates and not otherwise.

52. However, in respect of the instant matter, the court is confronted with civil processes and documents which have been filed by the firm of M/s Wambugu and Muriuki LLP, albeit without the requisite mandate and/or authorization. Suffice to posit that the filing of the instrument of authorization is critical and integral, because same signifies the source of mandate and authority to act on behalf of a particular Party.
53. Arising from the foregoing, the documents filed by and on behalf of the firm of M/s Wambugu and Muriuki LLP, have certainly been filed by a law firm which is not lawfully on record and thus same was not authorized to file the impugned civil processes for and on behalf of the Plaintiffs/Applicants.
54. In my humble view, it was incumbent upon M/s Wambugu and Muriuki LLP to file the requisite instrument of authorization and the failure to do so, vitiates and invalidates the application dated the 14th of August 2024.

PARA 55.

At any rate, there is no gainsaying that the rules of procedure ought to be followed and complied with. Furthermore, where a party including a firm of advocate is not able to comply with and abide by the rules of procedure, the failure to do so must be explained to the satisfaction of the court

PARA 56.

In addition, I hold the view that a party cannot disregard and/or ignore the rules of procedure with licentious abandon and imagine that courts of law will treat such disregard of the rules of procedure with kid gloves. Certainly, the rules of procedure were meant to regulate court proceedings and to even the playing level with a view to foster the general administration of justice.

PARA 57.

The significance of the Rules of procedure was underscored in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, where the five Judge bench of the Court of Appeal stated thus;-

In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.

PARA 58.

Additionally the importance of complying with and adhering with the rules of procedure was also underscored by the Supreme Court in the case of Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR where the court stated as hereunder;-

SUBPARA (31)

Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others*, Petition No. 14 of 2013, that “Article 159(2)(d) of *the Constitution* is not a panacea for all procedural shortfalls.”



Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.

SUBPARA (32)

We take note that counsel for the appellant has invoked this Court's discretion under Rule 53, seeking extension of time to file a Notice of Appeal, or that we deem the Notice of Appeal dated 12th March, 2014 to be properly filed. The respondents contest such exercise of discretion, on ground that there is no formal application in that regard. It is true indeed, that there is no such application. It is requisite, in the circumstances, to apply a broad-based principle regarding electoral matters, which this Court has pronounced in other cases: on account of the large public interest in electoral matters, all petitions in that regards, ought to take into account the prescribed timelines.

PARA 59.

Premised on the foregoing, it is my finding and holding that the application dated the 14th of August 2024, which was filed by the firm of M/s Wambugu and Muriuki LLP, albeit before filing the requisite instruments of authorization, in accordance with the provisions of Order 9 of the civil Procedure Rules, is premature and legally untenable.

ii. Whether the pictorial exhibits/annexures attached to the supporting affidavit have complied with the provisions of Section 106 (B) of the Evidence Act and if not, whether same have any probative value.

60. Other than the fact that the subject application has been filed by a firm of advocates who are not lawfully on record, there is yet another issue that merits discussion and determination. In this respect, it suffices to highlight the fact that the Applicants herein have exhibited pictorial exhibits in an endeavor to demonstrate that the 1st Defendant/Respondent is undertaking constructions on the suit property.
61. Nevertheless, even though the Applicants have annexed the pictorial exhibits, there is no gainsaying that the Applicants herein have neither availed nor filed the requisite electronic certificate in accordance with the provisions of Section 106 (B) of the Evidence Act Chapter 80 Laws of Kenya.
62. Owing to the foregoing, the question that does arise is whether or not the pictorial exhibits[photographs] which were intended to persuade the court to believe that the 1st Defendant is undertaking construction, have any probative value.
63. To start with, it suffices to observe that the provisions of Section 106 (B) of the Evidence Act Chapter 80 Laws of Kenya, are coached in mandatory terms and hence it behooves all and sundry, the Applicants not exempted, to ensure that an electronic certificate accompanies any electronic evidence. In this regard, where an electronic evidence is not accompanied by the requisite certificate, such evidence is vitiated and becomes inadmissible.
64. To underscore the significance of the provisions of Section 106 (B) of the Evidence Act Chapter 80 Laws of Kenya and the legal effect thereof, it suffices to reiterate the holding of the Court of Appeal in the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR, where the court stated as hereunder;-

“ 65. Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original



document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106 B of the *Evidence Act* in its entirety:

“106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following -

- (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
- (b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
- (d) the information contained in the electronic record reproduces or is derived from such



information fed into the computer in the ordinary course of the said activities.

- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—
 - (a) by combination of computers operating in succession over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter



to be stated to be the best of the knowledge of the person stating it.

- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”
67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic devise and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.
68. The *Evidence Act* does not provide the format the certificate required under sub-section 106B (2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.
69. In this case as we have said the electronic record was made by one Denis Kongo, a freelance photojournalist. He, however, did not annex to his affidavit sworn on 11th December 2014 the required certificate. The averments in that affidavit themselves did not meet the above stated threshold of sub-section 106B(2) of the *Evidence Act*. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the electronic evidence of Denis Kongo was inadmissible and the learned Judge erred in relying upon it.[Emphasis supplied].
65. Duly guided by the ratio decidendi in the foregoing decision, there is no gainsaying that the pictorial exhibits, which were exhibited by the Plaintiffs/Applicants herein, are devoid of probative value. Furthermore, same [pictorial exhibits] are similarly inadmissible.
66. Arising from the foregoing, it is therefore my finding and holding that even if the application herein was to be looked at on the basis of merits, the Plaintiffs/Applicants would not have been able to establish and demonstrate that there are offensive constructions being undertaken on the suit property.
67. Additionally, it is appropriate to underscore that it is the obligation of every party who approaches the court with a view to procuring a positive order, to place before the court plausible and credible evidence. In the absence of such plausible evidence, one cannot expect a court of law to proceed and grant orders on the basis of sympathy or otherwise.
68. In a nutshell, it is my finding and holding that the pictorial exhibits that were annexed by the Plaintiff/Applicant to the supporting affidavit, albeit without the requisite electronic evidence are inadmissible. In any event, the pictorial exhibits merit being expunged from the record of the court.



iii. What orders ought to issue.

69. While discussing issue number one herein before, the court found and held that the subject application was filed by the firm of M/s Wambugu & Muriuki LLP Advocates, long before same had complied with the provisions of Order 9, Rules 5 & 6 of the Civil Procedure Rules.
70. To the extent that the application was filed without due regard to the provisions of the law, it suffices to underscore that same was filed by a stranger without the requisite locus standi [legal capacity] to file the impugned court process.
71. In so far the application was filed without the requisite locus standi, there is no gainsaying that the application beforehand is not only misconceived but same is legally untenable. It is worthy repeating, that parties and their advocates are under obligation to comply with the law, including the rules of procedure.
72. Other than the fact that the application was filed by a stranger, it is also not lost on the court that the pictorial exhibits, which were intended to demonstrate the offensive construction, were also not accompanied by the requisite electronic certificate. Consequently, the said pictorial exhibits are devoid of probative value
73. Simply put, the court has been confronted with an application that has been mounted by a stranger without the requisite locus standi. Consequently and in this regard, the court has no alternative but to strike out the impugned application.

Final Disposition:

74. Flowing from the discussions [details highlighted in the body of the Ruling], it must have become abundantly clear that the application before the court has been filed and mounted in contravention of the provisions of Order 9 Rule 1, 2, 5 & 6 of the civil Procedure Rules.
75. Arising from the foregoing, it suffices to posit that the application is legally untenable. In this regard, the application be and is hereby struck out.
76. As pertains to costs of the application, it is imperative to underscore that same ordinarily follow the event. However, the court is still bestowed with discretion on whether or not to award costs, taking into account the circumstance[s] of each case. [See the provisions of section 27 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya]. [See also the decision in the case of Jasbir Singh Rai and 3 Others versus Tarlochan Singh Rai and 4 Others [2013] eKLR]
77. In this regard, the order that commends itself to the court as pertains to costs is that same shall abide the cause.
78. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Kiprotich for the Plaintiffs/Applicants



Ms. Mung'ata for the 1st Defendant/Respondent

Mr Allan Kamau h/b for Mr. Oscar Eredi [chief litigation counsel] for the 2nd & 4th Defendants/Respondents

Ms. Wahinya holding brief for Mr. Kamau Karori (SC) for the 5th Defendant/Respondent

No appearance for the 3rd Defendant/Respondent

No appearance for the 1st and 2nd Interested Parties

15

