



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO. 1524 OF 2016**

**NAZMUDIN HABIB KASSAM KURJI.....PETITIONER**

**VERSUS**

**FRANK LOGISTICS LIMITED.....1<sup>ST</sup> RESPONDENT**

**FRANCIS NYAGA NJERU.....2<sup>ND</sup> RESPONDENT**

**JUDY MUTHONI NGUGI.....3<sup>RD</sup> RESPONDENT**

**SWAMI CONTRACTORS LIMITED.....4<sup>TH</sup> RESPONDENT**

**NAIROBI CITY COUNTY.....5<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS, HOUSING &**

**URBAN DEVELOPMENT.....6<sup>TH</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....7<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....8<sup>TH</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE....9<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....10<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling relates to two applications filed by the 2<sup>nd</sup> Respondent. In the first application dated 4/2/2021, the 2<sup>nd</sup> Respondent seeks review or setting aside of this court's ruling issued on 30/9/2020 vide which the court declined to recuse itself from hearing this suit. The 2<sup>nd</sup> Respondent also sought the setting aside and expunging from the record all the proceedings of 20/2/2020 and for him to be allowed an opportunity to present his evidence afresh.

2. The 2<sup>nd</sup> Respondent's application was made on the grounds that the ruling given by this court on 30/9/2020 contained observations and findings to the effect that there was no evidence to show that the 2<sup>nd</sup> Defendant's advocate got an emergency after she indicated to the court that he was ready to proceed with the hearing, that his conduct showed that he was keen to delay the conclusion of the hearing of the case and lastly, that there were no facts established to conclude that the court was biased.

3. The 2<sup>nd</sup> Respondent's application was made on the grounds that the ruling given by this court on 30/9/2020 contained observations and findings to the effect that there was no evidence to show that the 2<sup>nd</sup> Defendant's advocate got an emergency after she indicated to the court that he was ready to proceed with the hearing, that his conduct showed that he was keen to delay the conclusion of the hearing of the case and lastly, that there were no facts established to conclude that the court was biased.

4. The 2<sup>nd</sup> Respondent contended that there was an error and mistake apparent on the face of the court record. He contended that the court

failed to appreciate the fact that the advocates on record for the 2<sup>nd</sup> Respondent lodged an application dated 11/3/2020 to cease acting for him and attached evidence of an air ticket confirming that Ms. Celestine Apiyo Advocate had to travel to Mombasa to attend to her father who had suffered a stroke on 20/2/2020. The 2<sup>nd</sup> Respondent contended that the court failed to record that he did not have his original documents when the matter came up in court on 20/2/2020. He claimed that the court imposed copies of documents upon him and that the court denied him an opportunity to be represented by counsel. He maintained that there was an error on the face of the court's record in the ruling of 30/9/2020 as the court turned a blind eye to the documents and information which were properly before it.

5. The application was also grounded on the issue that the Judicial Service Commission (JSC) had had a chance to look into the matter and directed the 2<sup>nd</sup> Respondent to pursue a review since the issues at hand touched on the merits of the decisions of this court. Although he had filed a notice of appeal against the decision given by this court on 30/9/2020, the 2<sup>nd</sup> Respondent indicated that he did not file an appeal and did not intend to file one yet because he believed that if the court applied its fair and open mind to revisit the proceedings of the matter it would be able to regularise the court record and accord him a fair chance to properly participate in the case.

6. The application was supported by the 2<sup>nd</sup> Respondent's affidavit to which he annexed copies of the decision taken by JSC on 10/12/2020, his complaint against me to JSC dated 13/11/2020, the letter from JSC dated 3/11/2020 informing him that his complaint was being processed, the complaint dated 2/10/2020 and evidence of some payments made to the Commissioner of Lands in 2015. The 2<sup>nd</sup> Respondent also produced copies of his application for this court's recusal, the ruling delivered by this court, the application filed in court on 11/3/2020 by Omondi Odegi & Company Advocates to cease acting for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and as the typed proceedings.

7. The 2<sup>nd</sup> Respondent's second application dated 19/2/2021 seeks to set aside and expunge from the court record the proceedings taken on 9/2/2021 on the grounds that the court issued directions for the close of witnesses testifying and for the filing of submissions, which directions were prejudicial to the 2<sup>nd</sup> Respondent's defence after recording that the 2<sup>nd</sup> Respondent was not in court yet he was present through a next friend who actually addressed the court because he was unwell at the time.

8. Further, that the court had disregarded the application for review dated 4/2/2021 which was properly on record, within the court's knowledge and admitted by the advocates who were present in court on that day. He reiterated that he was keen to defend himself in this case and was committed to the expeditious disposal of these proceedings but at the same time he believed that it was important for everyone to be given a fair chance to be heard, to tender their own evidence and to have an advocate of their own choosing present to assist them.

9. The 2<sup>nd</sup> Respondent swore the affidavit in support of that application and reiterated the grounds set out on the face of the application. He deponed that had the court drawn its attention to his application for review dated 4/2/2021 and given an ear to his next friend who appeared on his behalf on 9/2/2021, the court would have done justice in the matter more so because he acts in person while the other parties have senior experienced advocates championing their interests. He contended that the application had been brought without delay and exhibited medical chits on his medical condition and challenges which he faced. He produced a copy of the letter dated 17/2/2021 from Dr. Pius A. Kigamwa, a consultant Psychiatrist together with the prescription of the same date.

10. The Petitioner swore one replying affidavit in opposition to the two applications brought by the 2<sup>nd</sup> Respondent. He averred that the 2<sup>nd</sup> Respondent had not sufficiently demonstrated that there were glaring errors in the ruling to warrant review under the Civil Procedure Rules. Further, that the issues raised by the 2<sup>nd</sup> Respondent in the application for review were substantive issues which could only be established through evidence and a long drawn process of reviewing the facts and circumstances at hand.

11. Further, that paragraphs 2 and 8 of the review application were similar to grounds of appeal where the 2<sup>nd</sup> Respondent highlighted his disagreement with this court's findings. The Petitioner averred that those paragraphs did not point to any obvious errors or mistakes in law reached by this court in its ruling and that the application did not meet the test established under case law. The Petitioner pointed out that the grounds set out in paragraphs 3(a) to (d) of the review application were raised in the 2<sup>nd</sup> Respondent's application dated 21/2/2020 and the supporting affidavit for the recusal of this court. The Petitioner relied on the Replying Affidavit he swore on 28/2/2020.

12. The Petitioner stated that the court gave the last adjournment of the hearing on 18/11/2019 as and that the Respondents were in court and were aware of that date. That the 2<sup>nd</sup> Respondent was also aware of the fact that counsel for the Attorney General (AG) appearing for the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents was bringing his witnesses to court for cross examination by the 2<sup>nd</sup> Respondent for the third time and that one of the witnesses was from Kisumu. He pointed out that it was in the interest of justice for the hearing to proceed on that day particularly since the hearing commenced in December 2017.

13. The Petitioner deponed to what transpired in court on 20/2/2020 and how the court guided Mr. Njeru on the process of adopting his witness statement and producing the documents filed with his statement. He pointed out that at the time when the matter was called out for hearing no explanation was provided as to Mr. Opiyo's whereabouts or the circumstances leading to the failure to attend court. He clarified that that information was only provided in the application for the recusal of this court and added that there was no explanation given of the whereabouts of Mr. Omondi and why he was not able to attend the hearing in Ms. Opiyo's absence since Ms. Opiyo was holding brief for Mr. Omondi.

14. Mr. Kurji averred that the 2<sup>nd</sup> Respondent was attempting to re-litigate the same issues which were canvassed in the application for recusal and determined by the court. He pointed out that the court was not biased and has always acted in an impartial manner. Further, that the 2<sup>nd</sup> Respondent ought to have appealed against the ruling of this court if he was dissatisfied with it or if he wished to challenge the merits of the ruling.

15. He averred that the 2<sup>nd</sup> Respondent was not denied the opportunity to produce critical evidence and that the 2<sup>nd</sup> Respondent produced all the documents which he had filed save for the photographs which were attached to his witness statement and whose production was objected to and the court directed that the 2<sup>nd</sup> Respondent was to avail the photographer for cross examination on 24/2/2020. On that day the 2<sup>nd</sup>

Respondent served parties the application for recusal but did not avail the photographer in court. The Petitioner was emphatic that the reasons mentioned by the 2<sup>nd</sup> Respondent were not sufficient to warrant a review of this court's ruling on the basis that there was a mistake or error apparent on the face of the record. The Petitioner contended that this application was filed more than four months since the ruling was given and that no explanation had been offered for the delay. The Petitioner contended that the 2<sup>nd</sup> Respondent was abusing the court process by filing the application for review after reserving his right to appeal against the court's ruling on the application for recusal.

16. On the application dated 19/2/2021, the Petitioner averred that the 2<sup>nd</sup> Respondent had failed to provide sufficient reasons for the court to set aside and expunge from its record the proceedings of 20/2/2020 and allow the 2<sup>nd</sup> Respondent to give its testimony afresh as this would delay the determination of this matter. Further, that expunging the 2<sup>nd</sup> Respondent's cross examination from the proceedings and taking his evidence again would prohibit the admission of critical evidence and give the 2<sup>nd</sup> Respondent an unfair opportunity to amend the answers he gave during cross examination. The Petitioner emphasised that the court should not give the 2<sup>nd</sup> Respondent a free ticket to better his case as that would be contrary to the Petitioner's right to a fair trial.

17. The Petitioner urged that it was appropriate for this court to issue directions on the filing of submissions on 9/2/2021 because during the virtual mention on 18/11/2020 parties including the 2<sup>nd</sup> Respondent agreed that the suit would be heard further in open court on 9/2/2021. That not only had it been agreed but that the 2<sup>nd</sup> Respondent was also aware that the Attorney General's witnesses were to attend court on that day for cross examination by the 2<sup>nd</sup> Respondent. He averred that the witnesses duly attended court for the fourth time including the witness who had travelled from Kisumu.

18. Thirdly, he averred that the 2<sup>nd</sup> Respondent was not present in court when the matter was called out and the Attorney General's Counsel and the Petitioner requested the court to give directions on the filing of submissions in light of the 2<sup>nd</sup> Respondent's failure to attend court to cross examine the Attorney General witness's despite being given several opportunities to cross examine those witnesses. The other grounds urged were the many requests for adjournment and the 2<sup>nd</sup> Respondent's obvious lack of respect for the court and the seriousness of these proceedings. Lastly, that the gentleman claiming to be the 2<sup>nd</sup> Respondent's employee made the submissions concerning the unavailability of the 2<sup>nd</sup> Respondent after the court had issued directions on the filing of submissions by parties.

19. The Petitioner pointed out that the documents relating to the 2<sup>nd</sup> Respondent's medical condition which he attached to his supporting affidavit do not indicate that the 2<sup>nd</sup> Respondent was unavailable or in hospital on the hearing date and that the documents are dated 17/2/2021. Further, that the 2<sup>nd</sup> Respondent did not make any effort to inform the other parties that he would not be attending court on that date.

20. The Petitioner contended that the 2<sup>nd</sup> Respondent was seeking to prolong the disposal of this suit and that any further delay of the suit would not only be prejudicial to his right to access justice but would also be an affront to his seniority of age and poor health due to the actions of the 2<sup>nd</sup> Respondent. He averred that he had faced financial hardship in seeking alternative accommodation and in the purchase of various household items and personal effects following the demolition of his home on the suit property. He attached a copy of his replying affidavit which was filed in court on 20/2/2020.

21. The Petitioner and the 2<sup>nd</sup> Respondent filed submissions in respect of the two applications. The 2<sup>nd</sup> Respondent relied on Section 80 of the Civil Procedure Act and the court's power to review its decision as well as Order 45 Rule 1 of the Civil Procedure Rules. He submitted that by denying him an opportunity to be represented by counsel of his choice during his examination in chief, cross examination and re-examination, the court acted unfairly and breached his right to a fair hearing and access to justice. He added that the court had acted in an openly biased and impartial manner in breach of the rules of natural justice which pointed to a mistake and error apparent on the face of the record.

22. The 2<sup>nd</sup> Respondent relied on several decisions including **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, **George Ochieng Olima v Republic [2019] eKLR**, **Musharaf Abdalla v Republic [2017] eKLR** and **Auto Selection (K) Limited & 2 others v John Namasaka Famba [2016] eKLR**. The 2<sup>nd</sup> Respondent submitted that the law allows review for any other sufficient reason and that by the court imposing documents from an adverse competing party on him, it acted in an openly biased and impartial manner which clearly fell under the ambit of sufficient cause because the 2<sup>nd</sup> Respondent was not allowed to adduce evidence in the presence of its counsel.

23. On the application to expunge the proceedings of 20/2/2020, the 2<sup>nd</sup> Respondent submitted that he gave his testimony under very unique and strained circumstances because he was not represented by an advocate of his choice and that he did so without his file because his original documents were with his advocate who had become indisposed.

24. The 2<sup>nd</sup> Respondent submitted that he sought to expunge the proceedings of 9/2/2021 because the court recorded that he was not present in court yet in fact he was present through a next friend who addressed the court because he was unwell. He contended that the court gave directions for the closing of the case and filing of submissions while disregarding his application for review dated 4/2/2021 which was on the court record. He urged that he should be afforded an opportunity to present his testimony afresh because he was not represented by a counsel of his choice and was not allowed to produce his documents. He faulted the court for proceeding with the matter on 20/2/2020 despite his giving an explanation for the absence of his advocate.

25. The Petitioner submitted that this court should not review and set aside its ruling of 30/9/2020 because the 2<sup>nd</sup> Respondent's application did not meet the circumstances under which the court may allow a review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The Petitioner submitted that the averments relied on by the 2<sup>nd</sup> Respondent do not point to any obvious error or mistake in law reached by this court in its ruling. Further, that although the 2<sup>nd</sup> Respondent stated that JSC directed him to pursue review, it was upon the court to exercise its discretion in accordance with Order 45 and established case law on whether or not to grant the review.

26. The Petitioner relied on the decision In **Re Estate of Simoto Omwenje Isaka (Deceased) [2020] eKLR** on when the court should order review based on error or mistake on the face of the record. The Petitioner submitted that the 2<sup>nd</sup> Respondent was essentially asking this court to reconsider the merits of the 2<sup>nd</sup> Respondent's application for recusal and essentially sit on appeal of its own decision.

27. The Petitioner further submitted that the 2<sup>nd</sup> Respondent's application for review was incompetent and relied on the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020]eKLR** in which the applicant seeking review had filed a notice of appeal. The Court of Appeal held that it was not permissible to pursue an appeal and an application for review concurrently and that if a party chose to appeal he automatically lost the right to ask for a review of the decision sought to be appealed against.

28. The Petitioner submitted that this court should not expunge from its records the proceedings of 20/2/2020 as that would be a drastic act that is not warranted by the circumstances of this case and would further delay the conclusion of this dispute. The Petitioner pointed out that on 20/2/2020, the 2<sup>nd</sup> Respondent gave his testimony on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and that he adopted his witness statement and produced the documents filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and was cross examined by the advocate for the Petitioner, the 5<sup>th</sup> Respondent and the Attorney General. The Petitioner conceded that the court had jurisdiction to expunge evidence from the record if justice so demanded but that in this case the 2<sup>nd</sup> Respondent's testimony was not obtained contrary to the applicable law or his constitutional rights so as to warrant the expulsion.

29. The Petitioner pointed out that this suit was first heard on 6/12/2017 and the hearing had not been concluded as yet owing to the 2<sup>nd</sup> Respondent's various tactics to delay this suit by filing interim applications and seeking adjournments. He added that by 20/2/2020 the other Respondents had already closed their cases on 28/3/2019 and that the court afforded the 2<sup>nd</sup> Respondent an opportunity to cross examine the Attorney General's witnesses and that the court scheduled the matter for further hearing on 20/2/2020 when the 2<sup>nd</sup> Respondent was given an opportunity to call the photographer to produce the photographs on 24/2/2020.

30. The Petitioner submitted that the 2<sup>nd</sup> Respondent was seeking to re-litigate issues which the court had already dealt with in the ruling by asking the court to expunge proceedings from the record. The Petitioner submitted that the reasons given for seeking expulsion of documents and the application for review were issues which had already been canvassed in the application for recusal and that the court was essentially being asked to reconsider its decision with respect to the ruling of 20/2/2020. The Petitioner submitted that this is a gross abuse of the court process by the 2<sup>nd</sup> Respondent who is estopped by the doctrines of issue estoppel and *res judicata* from re-litigating issues which have already been determined by the court between the same parties.

31. The Petitioner submitted that the 2<sup>nd</sup> Respondent had not provided any credible reasons why he should be given an opportunity to present his testimony afresh and that the request is further attempt to delay the conclusion of this suit. Additionally, that it would provide the 2<sup>nd</sup> Respondent an unfair opportunity to amend the answers he gave during cross examination particularly where those answers were detrimental to his case. The Petitioner pointed out that the 2<sup>nd</sup> Respondent was acting in person and had filed a notice to act in person. The Petitioner urged the court not to expunge the proceedings of 9/2/2021 from the record and pointed out that the documents relating to the 2<sup>nd</sup> Respondent's medical position do not show that he was unavailable or in hospital on the hearing date.

32. The issue for determination is whether the court should grant the orders sought by the 2<sup>nd</sup> Respondent in the two applications by reviewing the ruling vide which the court declined to recuse itself from hearing this case and whether the proceedings of 9/2/2021 should be expunged from the court record.

33. The grounds on which the court may review its orders are outlined in Order 45 of the Civil Procedure Rules. The 2<sup>nd</sup> Respondent failed to demonstrate that there was any error apparent on the face of the record or any other sufficient reason to warrant review of the orders that this court made on 30/9/2020 when it declined to recuse itself from hearing this suit. The grounds the 2<sup>nd</sup> Respondent relied on in support of that application show that the 2<sup>nd</sup> Respondent is asking this court to sit on appeal over its decision declining to recuse itself from hearing this case. That would be improper. The 2<sup>nd</sup> Respondent ought to have lodged an appeal against the decision this court made on 30/9/2020 if he was dissatisfied with that decision.

34. Regarding the application dated 19/2/2021, the court notes from the record that the 2<sup>nd</sup> Respondent attended the virtual proceedings of 10/11/2020 when the court directed that the suit would be heard on 9/2/2021. There was no appearance for the 1<sup>st</sup> to 5<sup>th</sup> and 8<sup>th</sup> Respondents on 9/2/2021 when the matter proceeded in open court. The Attorney General's Counsel informed the court that the 2<sup>nd</sup> Respondent had been granted many opportunities to cross examine the Attorney General's witnesses but he had failed to do so including failing to refund the witness expenses as ordered by the court on 18/11/2019. The court gave a ruling following the application made by the Attorney General's Counsel and the Petitioner's advocate for the court to give directions on the filing of submissions and the finalisation of the matter. The court directed parties to file and exchange written submissions and fixed the matter for highlighting of submissions on 11/3/2021. The Petitioner was directed to serve a notice on the 2<sup>nd</sup> Respondent notifying him to file and serve his submissions and to inform him of the date for highlighting the submissions.

35. After the court had dealt with the matter and given directions, a gentleman who identified himself as Ramadhan Juma stood up and informed the court that he was an employee of the 2<sup>nd</sup> Respondent. Mr. Juma informed the court that the 2<sup>nd</sup> Respondent fell ill on 8/2/2021 and that he called Mr. Juma that morning and asked him to attend court. Mr. Juma stated that he had challenges with the court. The court informed Mr. Juma that it had already dealt with the matter.

36. Order 9 Rule 2 of the Civil Procedure Rules gives the recognised agents by whom parties can appear or act through. The 2<sup>nd</sup> Respondent could not therefore have been represented by Ramadhan Juma when the matter came up for hearing on 9/2/2021 as Mr. Juma does not fall under the categories of recognised agents contemplated by the Civil Procedure Rules.

37. The 2<sup>nd</sup> Respondent contended that the court ignored the application which he had filed for review of the orders this court gave on 30/9/2020 vide which it declined to recuse itself from hearing this suit. He ostensibly filed that application following JSC's recommendation to pursue review. When a case is fixed for hearing parties are expected to attend court and conduct the hearing of the case unless the court adjourns the case for good reason. If a party files an application after the court has fixed a hearing date and the court does not give directions that that application will be heard first or that the hearing will not proceed as scheduled then the party must attend court ready to proceed with the hearing of the case. Filing an application does not necessarily mean the hearing will automatically be adjourned.

38. The doctor's note which the 2<sup>nd</sup> Respondent produced does not indicate that the 2<sup>nd</sup> Respondent was unwell on 9/2/2021 when this suit came up for further hearing. The documents from Dr. Pius A. Kigamwa are dated 17/2/2021 which was several days after the hearing date.

39. The 2<sup>nd</sup> Respondent has not provided sufficient reasons for the court to expunge the proceedings of 9/2/2021 from the record and give the 2<sup>nd</sup> Respondent an opportunity to present his testimony afresh. Doing so would undoubtedly delay the conclusion of this dispute. It is noteworthy that the hearing of this suit commenced in December 2017. The court record shows the many opportunities the 2<sup>nd</sup> Respondent was granted to present his case and to cross examine the Attorney General's witnesses but he failed to do so. The Attorney General's witnesses who were recalled for cross examination by the 2<sup>nd</sup> Respondent attended court more than three times but the 2<sup>nd</sup> Respondent was not keen to cross examine the witnesses. Even when the court directed that the 2<sup>nd</sup> Respondent was to refund the travel expenses of the witness recalled for cross examination by the 2<sup>nd</sup> Respondent he did not make the refund.

40. The 2<sup>nd</sup> Respondent's contention that he was denied an opportunity to present his evidence is not true because under the Civil Procedure Rules a party is required to serve copies of the documents he will rely on at the hearing on the other parties long before the hearing date. The 2<sup>nd</sup> Respondent produced the documents which his previous advocates filed in court on his behalf. When an objection was raised to the 2<sup>nd</sup> Respondent producing photographs the court gave the 2<sup>nd</sup> Respondent time to procure the attendance of the photographer to produce the photographs. However, on the day when the photographer was to give evidence the 2<sup>nd</sup> Respondent did not avail his witness but instead filed an application for my recusal from handling this case.

41. The application dated 4/2/2021 is dismissed with no orders as to costs.

42. The court declines to grant the orders sought in the application dated 19/2/2021. The Petitioner and the Attorney General are awarded the costs of that application which will be borne by the 2<sup>nd</sup> Respondent.

**DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF JUNE 2021**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Tabitha Raore for the Petitioner

Mr. Francis Nyaga Njeru- the 2<sup>nd</sup> Respondent

Ms. Fatma Ali holding brief for Mr. Allan Kamau for the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents

Mr. V. Owuor- Court Assistant

No appearance for the other Respondents