



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**LAND AND ENVIRONMENTAL DIVISION**  
**ELC CIVIL SUIT NO. 1209 OF 2013**

**BATIAN LOGISTIC SOLUTIONS LIMITED ..... PLAINTIFF**

**VERSUS**

**ABDUL WAHEED SHEIKH .....1<sup>ST</sup> DEFENDANT**

**ABDUL HAMEED SHEIKH .....2<sup>ND</sup> DEFENDANT**

**RULING**

The Defendants by a Notice of Motion dated 10<sup>th</sup> April 2014 brought under Article 159 of the Constitution 2010, sections 1A, 1B and 3A and Order 2 Rule 15 (1)(b) and (d), Order 51 Rules 1 and 3 of the Civil Procedure Act Cap 21 of the Laws of Kenya seeks orders:-

1. That the suit and entire proceedings taken out against the Defendants herein be struck out as it is an abuse of the process of court.
2. That in the alternative and without prejudice to the foregoing this Honourable Court be pleased to strike off the entire suit and proceedings against the Defendants as it is scandalous, frivolous and/or vexatious.
3. That the plaintiff be condemned to pay the costs of this application.

The application is based on the grounds set out on the body of the application and on the affidavit sworn on 10<sup>th</sup> April 2014 by one **Abdul Waheed Sheikhj** the 1<sup>st</sup> named Defendant herein. Inter alia the Defendants have set out the following grounds in support of the application:-

1. The property **L.R. NO. 209/74/3** Nairobi was acquired by the Defendants late brother sheikh Abdul Rashid as Trustees of Sheikh **Fazal Ilahi Noordin Charitable Trust** (The Trust) by the indenture dated 4<sup>th</sup> July, 1946 for the then unexpired residue of a term unexpired residue of a term of 99 years lease from 16<sup>th</sup> day of July 1903 expiring on 15<sup>th</sup> day of July 2001.
2. The Defendant do not hold the subject title as individuals but as trustees of the **Sheikh Fazal Ilahi Noordin Charitable Trust**,
3. The plaintiff's suit is frivolous, misconceived, un-meritorious and a gross abuse of the due

process as the plaintiff is purporting to make a claim by way of ownership and possession against the lawfully registered owners in succession and in continuous and un interrupted possession of the subject property since July 1946 upto today.

4. The plaintiff has not made a full, frank and candid disclosure to the court of all material facts and have contrived to conceal material facts in not disclosing to the court that there have been previous proceedings in this court relating to the same subject matter and between the same parties namely **HC ELC Civil suit NO. 559 of 2013**.

5. The suit herein is a gross abuse of process of the court as it is wholly and solely relying on the exact (verbatim) grounds previously in High Court **ELC NO. 559 of 2013**.

The Applicant has in the supporting affidavit annexed a copy of the pleadings in **HC ELC 559 of 2013** marked as “**AWS2**” which shows the present parties were the same parties in that suit but the copy of the record of the proceedings attached shows that the plaintiff withdrew the suit and **Lady Justice Nyamweya** on 7<sup>th</sup> October 2013 ordered the plaintiff in the earlier suit to pay the costs of the withdrawn suit to the Defendants. The Defendants depone that the suit property is owned by **Sheikh Fazal Ilahi Noordin Charitable Trust** and that the Defendants are merely registered as the Trustees of the Trust. The Defendants depone that they applied for the renewal of the lease before it expired and the Commissioner of Lands approved the lease extension for further term of 99 years with effect from 1<sup>st</sup> November 1998 vide the letter dated 19<sup>th</sup> October 1998 annexed and marked “**AWS4**”. The Defendants were issued with a new Grant NO. **IR 103381 of L.R.NO.209/74/3** dated 24<sup>th</sup> November 2005 which was duly registered as IR 103381/1 on 5<sup>th</sup> June 2006. The Grant is annexed and marked “**AWS5**”.

The Defendants depone that the certificate of lease allegedly issued to the plaintiff under the Registered Land Act, Cap 300 Laws of Kenya now repealed in respect of the same property was fraudulently procured. The Defendants state that the Lands Office wrote to the plaintiff informing them the certificate of lease they held being lease title **Nairobi Block 34/464** was fraudulently processed and requested for its surrender. Letter by Land Registrar dated 24<sup>th</sup> December 2013 addressed to the plaintiff is annexed and marked “**AWS-9**”. By a letter dated 17<sup>th</sup> February 2014 by the Land Registrar addressed to the Defendants the Land Registrar confirmed the plaintiff surrendered the certificate of lease.

The plaintiff was served with the Defendants Notice of Motion application dated 11<sup>th</sup> April 2014 as per the affidavit of Service sworn by one **John Mwatu** on 18<sup>th</sup> September 2014 and filed on the same date. The plaintiff did not file any response to this application and neither did the plaintiff appear for the hearing of the Defendants application on 18<sup>th</sup> September 2014 when it was scheduled to be heard. The court directed the Defendants to file written submissions and effect service on the plaintiff. The plaintiff was duly served with the submissions as per the affidavit of service filed on 16<sup>th</sup> October 2014 but the plaintiff neither filed a response and/or any submissions and consequently the Defendants application is unopposed.

I have perused the Defendants Notice of Motion and reviewed the supporting affidavit and the annexures together with the Defendants submissions and I am satisfied that indeed the Defendants are the registered Trustees of **Sheikh Fazal Ilahi Nordin Charitable Trust** in respect of **L.R. NO.209/74/3** as per annexure “**AWS5**” and even if the plaintiff had a cause of action against the Trust the Defendants could only be sued as Trustees and not in their individual capacities. From the material presented by the Defendants in support of their application it is quite evident that the certificate of lease that the plaintiff held in respect of the suit property was fraudulently procured and it is not surprising that the Land Registrar called for its surrender which the plaintiff as per the available evidence obliged to do. Following the surrender by the plaintiff of the certificate of lease the plaintiff ceased to have any interest in the suit property and it is no wonder that the plaintiff could not respond to the Defendants application. No doubt the plaintiff must have come to the realization that their fraudulent scheme had been blown open and there was no possibility that they could see it through in the face of the information that the Defendants had unearthed.

In the premises having considered the pleadings and the material placed before the court by the Defendants I am satisfied that the suit by the plaintiff is scandalous, frivolous and vexatious and indeed amounts to abuse of the process of the court and consequently I order the suit by the plaintiff struck out and I award the costs of the struck out suit and the instant application to the Defendants.

Orders accordingly.

Ruling dated, signed and delivered this **6<sup>th</sup>** day of **February** 2015.

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A.....for the plaintiff

Mr. Gatheru Gathemia.....for the Defendants