

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARU

ELCLC NO 108 OF 2023

(Formerly Nyahururu E024 OF 2022)

SOUTHSHORE LOGISTICS LTD.....PLAINTIFF

VERSUS

MARY WANJIKU KANYOTU.....1ST

DEFENDANT

MARGARET NYAKINYUA MURIGU.....2ND

DEFENDANT

JANE GATHONI MURAYA.....3RD

DEFENDANT

LAND REGISTRAR NYANDARUA.....4TH

DEFENDANT

RULING:

Before me is an Application under a Certificate of Urgency dated 6/5/2025 asking that the Proceedings of 8/4/2025 be set aside and that this matter starts afresh. Secondly, that I recuse myself from hearing of the matter forthwith. I am also being asked to refer the matter to the Presiding Judge of the Environment and Land Court for allocation of the case to another Judge. The same is brought under Articles 50(1) and 25 (e) of the Constitution of Kenya, 2010

Rule 5 of the Judicial Code of Conduct and Ethics, Sections IA&B and 3A of the Civil Procedure Act.

The Application is premised on grounds on the face of the Application and the Affidavit of one Daniel Macua Ndonga of P.O Box 52030, Nairobi, the Director of the Plaintiff. The reasons the Application is preferred are that:-

When the matter came up for hearing on 11/3/2025 at Ol-kalou, the Plaintiff/Applicant was ready to have the matter heard and the same was to be mentioned on 13/3/2025 when the Judge asked the 1st Defendant questions online and asked both Counsel to do likewise. The matter was then fixed for Hearing on 8th and 10th April, 2025 at Ol-kalou. Then the Court called the Applicant's Counsel through the 1st Defendant's Counsel on 7/4/2025 and informed him that the Judge was in Limuru Law Courts and that he was going to proceed with the Hearing from there, "out of the Court's jurisdiction" which is irregular and inappropriate. No party had made such an Application. It was the Court on its own volition which decided to sit in Limuru. Counsel for the Plaintiff logged in and told the Court he was not ready to have the case heard in Limuru and had he been aware he would have been ready to have the case heard in Limuru.

The matter was adjourned to the following day when the Plaintiff's Director together with his other witness fell ill on the evening of 7/4/2025. the Court would not hear of that. He said Mr. Ndonga said that the Judge said that he had personally spoken to the 1st

Defendant and persuaded her to come to Court personally. The Court refused to grant the Plaintiff an adjournment but instead said it was going to take the 1st and 2nd Defendants' case de bene esse against the Plaintiff's wish and with the latter's objection.

The Applicant's Advocate declined to cross-examine the said 1st and 2nd Defendants which made the proceedings of 8/4/2025 illegal, inappropriate and a clear case of misconduct and bias with the Court taking submissions from the members of the public who were not parties to the suit and even calling them by name. The Judge also forced Counsel for the 4th Defendant, the A.G to participate in the proceedings when she was not ready and against protest from the A.G. He also said he is reasonably and reliably informed that a Mr. Andrew Peter Ngirichi who is a stranger in the suit has bribed the Judge "in millions" so that he can determine this matter in the Defendants' favour. This makes the Judge partial and he finally said,

".....please note due to the irregular and illegal change of the hearing date and venue of the hearing, the 4th Defendant's Counsel was unable to participate in the proceedings on the 8th April, 2025....."

The 2nd Defendant vide a Replying Affidavit sworn on 21/10/2025 deponed that the proceedings of 8/4/2025 were lawfully conducted in the presence of the Court and parties who were duly notified. The record shall show that all parties present were accorded opportunity to participate and no prejudice was occasioned to the

Plaintiff. She said that she is advanced in age and Counsel for the Plaintiff admitted that he had failed to call the other witness to testify in Court and that starting the case de novo would occasion great prejudice and strains to the said Defendant due to her old age.

She exhibited a copy of the proceedings which show that the case was to be heard on 7th, 8th and 10th April, 2025 at pp 17 of the proceedings.

The 3rd Defendant in an Affidavit in Reply sworn on 21/5/2025 which she swore on her own behalf and on behalf of and with authority from the 1st Defendant deponed that on 13/3/2025 the Judge indicated his intention to seek the Chief Justice's approval to have the matter heard at the Limuru Law Courts in order to accommodate the 1st Defendant and that if granted, the decision would be communicated to the Advocates on record.

And on 7/4/2025 the Advocates received a phone call from a Court Assistant at the Nyandarua Law Courts notifying them that the matter had been listed for hearing before the Judge. The Court further requested my Advocates to inform all other Counsel involved, as he did not have their contacts. The Defendants and all Counsel appeared in Court virtually on 7/4/2025 all of who said they were not ready to proceed since the Notice was too short.

The matter was then rescheduled to the following day when all parties confirmed their intention to proceed with the Hearing. When on 8/4/2025 Counsel for the Plaintiff applied for an

adjournment, all other Counsel objected and opposed the Application for adjournment since Counsel for the Plaintiff had not communicated this intention beforehand.

The Court declined to grant the Application and on its own motion, directed the evidence of the 1st and 2nd Defendants be taken *de bone esse* due to the first 2 Defendants' advanced age. And the Plaintiff's Counsel consented to this and also consented for another date for the Hearing of the Plaintiff's case.

In a further Affidavit sworn on 8/7/2025, the Director of the Plaintiff repeated that the Judge did not at any time ever suggest that the Hearing venue was going to be at Limuru.

After the exchange of the Pleadings I asked the parties to put in written Submissions which I have gone through before writing this Ruling.

To begin with it is indeed true that this case came up for mention on 13/3/2025 when I directed that the same be heard on 7th, 8th and 10th April, 2025. And after the 1st Defendant indicated that she is on artificial oxygen I told the parties that I would seek the Chief Justice's approval to hold the sitting at Limuru Law Courts near the 1st Defendant's home for her own convenience since she is advanced in age - 83 years and on artificial oxygen. I told my Assistant to inform the parties to be ready and the request to the Chief Justice was allowed on the morning of 7/4/2025 when the Court was already in Limuru. All Counsel logged in and none ever travelled to Ol-kalou where the Court normally sits, meaning that

the parties and their Counsel had already received the information of the case being heard in Limuru. I do not understand whether the Plaintiff was disadvantaged and failed to turn up in Court because he was sick as he claims or it is because the hearing took place at Limuru. It is noteworthy that apart from the Judge and his staff, the Court sitting at Limuru meant it was now closer to all the other parties and their Counsel, including the Plaintiff whose address is P.O Box 52030, Nairobi. When Counsel for the Plaintiff appeared in Court on 7/4/2025 virtually, he did not protest that the hearing was to take place in Limuru. This Court can sit anywhere in the country including one's home and even bedroom if that is the only way to take one's evidence.

The 1st Defendant came to Court early so that the oxygen she had could not expire. The Court could not start early since it was waiting for the Plaintiff and his Counsel and when Counsel for the Plaintiff came to Court, this is how he started addressing Court:-

“.....I have bad news for the Court. My client is not able to come to Court because he is sick.....”

It is therefore not that the Plaintiff was not prepared to have the case heard at Limuru. In any case did he turn up in Ol-kalou where the case as they claim was to be conducted. The Court declined to grant the adjournment. At this juncture the Court could have as well dismissed the Plaintiff's claim but in order to do justice to all the parties I decided I was going to take evidence from the 83 year old and 81 year old, 1st and 2nd Defendants respectively *de bene*

esse. The Plaintiff's Counsel said that was acceptable but after examination in chief he said he did not have instructions to cross-examine the witnesses.

And although there was still time, the Court did not take evidence from the 3rd Defendant who is relatively younger. Is it that the Plaintiff did not want the same to be heard until such a time as the 1st and 2nd Defendants would either lose memory or became too old to testify. The third thing that would happen to them is anyone's guess. Any of these scenarios would complicate the case. Failure by the Plaintiff's Counsel to cross-examine the witnesses was deliberate in order to make up a case that the Plaintiff was not given a fair Hearing.

As to the allegation of bribery, these are very wild allegations and it is curious to note that in the letter to the Judicial Service Commission dated 15/4/2025, these allegations are not mentioned.

The Defendant has also not reported the matter to the Ethics and Anti-Corruption Commission so that I can record a Statement. Particulars of the same are also not given.

It is interesting to hear that a Judge received millions from the Defendants but still went ahead and failed to dismiss the Plaintiff's case after the said Plaintiff failed to turn up and where the Advocate for the said Plaintiff said that he did not tell the other witness to attend Court. How would such a Judge justify to his bribers the monies he received.

Finally and of utmost importance, all that the Director of the Plaintiff has stated in his Affidavit is not admissible in evidence under order 19 Rule 3 (1) of the Civil Procedure Rule. What does the law say on who should swear an Affidavit? Order 19 Rule 3 (1) of the Civil Procedure Rules provides that: -

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an Affidavit may contain statements of information and belief showing sources and grounds thereof.”

The proviso to Rule 3 (1) above is not applicable to the Applicant. Secondly the deponent of the Affidavit does not disclose the sources of his information. The Affidavit of the Applicant is 100% hearsay and also fails the test of admissibility of Evidence.

The Plaintiff concluded his depositions by swearing that: -

“...what is deponed to herein is true to the best of my knowledge, information and belief.....”

The said Mr. Ndonga was not in Court either physically or virtually. In his letter to the J.S.C. and even in his 2 Affidavits he says that: -

“.....on the same 7th April, 2025 in the evening, the underwriter herein, Director of the Plaintiff and its main witness fell ill and he was advised to take a bed rest for a week due to diabetes and high blood pressure

complications. Therefore , we would not be able to proceed on 8th April, 2015.....”

In the case **Raila Odinga & Others -vrs- William Ruto & Others presidential Election Petition Nos. E001, E002, E003, E004, E005, E007 & E008 of 2022** (consolidated) at paragraphs 135 to 137 Supreme Court of Kenya held that: -

“The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective Affidavits was not only inadmissible, but was also unacceptable. It has been established that none of the agents on whose behalf the Forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two had gone ahead to depone on matters that were not within their knowledge.Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge.....Besides that, the counsel’s affidavit is defective for the reason that it offends the proviso (to) order XVIII Rule 3 (1) (now order 19 rule 3) of the Civil

Procedure Rules for failing to disclose who the sources of his information are and the grounds of his belief.”

On the 7/4/2025 the Defendant was on sick bed and not in Court. His Affidavits are in first person singular. He depones as though he saw and heard all he has said without indicating the source of the information. In short, this is hearsay and, on this account, only, the Application is fatal.

As to the Judge calling a person by his name, the children of the 1st and 2nd Defendants were in Court on 11/3/2025 when the said Defendants, online, identified them. They all said their names. The reason was because some strangers had filed a statement of Admission in Court rather than a Defence denying the Plaintiff's claim thereby compromising the suit by claiming to be the Defendants' children and personal assistant respectively. The Court noted down their names. It is not true that I called one Ngirichi by his 3 names. I gave him audience when he raised up his hand to address the Court and said that he had seen the Director of the Plaintiff in a traffic jam in Nairobi that morning and that the latter could not have been on bed rest. This information was given after I

had already made my Ruling to proceed with the case and therefore the same could not have influenced the Ruling of the Court. In fact, it was said after the 1st and 2nd Defendants had already testified. Anybody has a right to address the Court. It is for the Court to know what to do with the information he gives to the Court.

Secondly, on 7/4/2025 the 1st and 2nd Defendants logged in when the matter was called out and it is true the Court told them to come to Court the following day so that their matter could be heard. There is nothing irregular about asking a party and particularly one who is so advanced in age to turn up in Court.

It is quite clear that the intention of whoever brought the Application for recusal was that of ridiculing the Trial Court in the eyes of the other parties before the Court.

A letter written to the Judicial Service Commission dated 15/4/2025 was attached to the Application. The same is a complaint against me in the conduct of this matter. And as soon as the complaint was filed, the file was called for from this Court as a matter of urgency by the JSC and only came back after the scheduled date for

Hearing. I believe the purpose was to ensure the case does not proceed for Hearing as scheduled.

For this kind of behaviour of complaint and attaching a copy of the complaint to the Application asking a Judge to recuse himself which seems to be used when litigants don't want a matter to proceed, I wish to respond as follows: -

"I took the oath of office to impartially do justice without any fear, favour, bias, affection, ill-will or prejudice"

As for fear, the oath was general. The prescribed oath does not specify where the fear will come from. I therefore refuse to be intimidated and to fall prey of fear of death, fear of parties before me, intimidation from litigants and even fear of Judicial Service Commission. Although this does not give a Judge or a Judicial Officer a license to misbehave, the Judicial Service Commission is meant to facilitate my judicial duties but not to be invoked in order to intimidate me. As long as I do my work to dispense justice fairly and impartially, my conscious is clean. I will not have sleepless nights because someone has maliciously accused me of having been compromised. The work of dispensing justice requires a thick

skin. I urge all Advocates and Officers of the Court not to be moved by the emotions of their clients but know that they are employed and instructed by their clients to prosecute the latter's cases with their intellect and with decorum.

Finally, there was another (second) witness whose name was not disclosed but the Plaintiff's Advocate, Mr Tumu said he had not told him to come. Reason? Unknown. Is this also due to the "Judge's bias, illegality, inappropriate, irregular conduct and impropriety?"

The upshot of the above is that the Plaintiff's Application dated 6/5/2025 is dismissed with costs.

Ruling dated, signed and delivered at Nyandarua this 11th day of December 2025.

**MUGO KAMAU
JUDGE**

In the presence of: -

Court AssistantSamson.

Plaintiff's Advocate.....Mr. Tumu.

1st & 3rd Defendant's Advocate..... Ms. Abdulrashid

2nd Defendant's Advocate Ms. Bande

Intended Interested parties.....Ms. Muturi