



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC PETITION NO. 1524 OF 2016**

**IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF: ARTICLES 10, 19, 20, 21, 22, 23, 24 AND 25 OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF: THE LAND ACT, 2012, THE LAND REGISTRATION ACT 2012, THE NATIONAL LAND COMMISSION ACT, 2012; THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES 28, 40 (2) (A), 40(3), 43(B), 47 AND 57 (C) OF THE CONSTITUTION OF KENYA, 2010.**

**BETWEEN**

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

**AND**

**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 COUNCIL.....5<sup>TH</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS**

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

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

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

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

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

**RULING**

Through the application dated 12/4/2019, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents seek to set aside and expunge from the court records the evidentiary proceedings taken in court on 28/3/2019. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents also seek to have the witness statements, list of witnesses and replying affidavit filed on 21/3/2019 without leave of the court expunged from the record. The application is made on the grounds that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' advocate, Mr. Michael Osundwa Sakwa, was indisposed on 28/3/2019 when the matter came up for hearing and he had instructed an advocate to hold his brief and seek an adjournment. And that despite presenting evidence of Mr. Osundwa's infirmity, the court declined to accept the evidence and directed that the matter would proceed for hearing on that day. The 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents gave their full testimony and closed their respective cases on 28/3/2019. The Applicants urge that the continuance of the proceedings without affording the 1<sup>st</sup> to 3<sup>rd</sup> Respondents an opportunity to test the veracity of the testimony of the witnesses who testified on behalf of the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents infringed on their right to be heard under Article 50 of the Constitution and also denied them access to justice which is guaranteed under Article 48 of the Constitution. The Applicants argue that it is imperative for them to be allowed to pose questions to those witnesses who testified in their absence and that the proceedings of 28/3/2019 should be set aside in their entirety and expunged from the record.

The 1<sup>st</sup> to 3<sup>rd</sup> Respondents further argued that the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents filed their witness statements, list of witnesses and replying affidavit out of time on 21/3/2019, without leave of court and that they have not given any reason for doing so. The Applicants maintained that the request for the setting aside and expunging of the proceedings and recalling of witnesses which they seek is to afford the other Respondents in the suit an opportunity to participate so that the court can determine the real questions in controversy between the parties.

The application was supported by the affidavit of Michael Osundwa Sakwa, in which he explains that his absence from court on 28/3/2019 was inadvertent and occasioned by health reasons beyond his control. He deponed in his affidavit that the colleague who held his brief on that day applied to be discharged from the proceedings when the court declined to grant an adjournment. He averred that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have been keen to defend their interest over the suit land and are committed to the expeditious disposal of this suit.

The Petitioner filed a replying affidavit in opposition to the application seeking to set aside the proceedings of 28/3/2019. She deponed that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents have sought to delay the hearing of this suit on previous occasions and made reference to the letter dated 14/5/2008 which was sent to the Petitioner's advocate indicating that the Honourable Dr. Otiende Amollo Advocate, had been instructed to lead the advocates for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents in the conduct of these proceedings and that they would be seeking an adjournment when this matter came up on 15<sup>th</sup> and 23<sup>rd</sup> May 2018 based on the fact that Mr. Amollo had been taken ill and was admitted in hospital. The hearing dates for 15<sup>th</sup> and 23<sup>rd</sup> May 2018 were fixed on 6/12/2017. Mr. Amollo Advocate never appeared in this matter. The Petitioner averred that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents also sought an adjournment on 22/10/2018 citing the reason that they were unable to call their witnesses to testify on that day and that the court indulged the 1<sup>st</sup> to 3<sup>rd</sup> Respondents and put off the hearing to 28/3/2019.

The Petitioner stated that the court had issued summons at the instance of the Attorney General's counsel for three witnesses to attend court on behalf of the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents on 28/3/2019 and give evidence. As a result of this, Mr. Gilbert Okello, Mr. Charles Ng'etich and Mr. Onyino Mukobe travelled overnight from Kisumu to Nairobi to attend court on 28/3/2019. She further deponed that counsel holding brief for Mr. Osundwa should have been fully and properly instructed to proceed with the hearing of the matter in furtherance of the overriding objective under Section 1A of the Civil Procedure Act. The Petitioner averred that the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents' witnesses gave evidence and closed their cases on 28/3/2019 following which the court directed that the 5<sup>th</sup> Respondent's case would be heard on 9/4/2019 while that of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents would be heard on 11/7/2019. She deponed that Mr. Richard Mumo testified on behalf of the 5<sup>th</sup> Respondent on 9/4/2019 when Mr. Osundwa Advocate was present in court. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents are yet to give their evidence.

The Petitioners averred that it is apparent that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have treated this suit in a casual manner and intentionally delayed its progress while pointing out that despite the sick note being issued on 26/3/2019, Mr. Osundwa advocate did not inform the other advocates in the matter that he was unwell and that he would be seeking an adjournment when this matter came up for hearing on 28/3/2019. The Petitioner contended that the interest of all parties must be recognised by the court and not just the 1<sup>st</sup> to 3<sup>rd</sup> Respondents' right to a fair trial. She contended that it would not be in the interest of justice to expunge the proceedings of 28/3/2019, or to strike out the documents filed on 21/3/2019. The Petitioner urged that the court has the discretion to enlarge time for doing something under the rules upon such terms as the justice of the case may require. She pointed out that none of the other parties objected to the filing of the documents by the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents and that the advocate who held brief for Mr. Osundwa did not take any issue with those documents but that he abruptly left court when the hearing commenced.

Counsel made oral submissions. Ms. Mulomi urged that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents did not get an opportunity to cross examine the witnesses of the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents. Mr. Wahome submitted on behalf of the 8<sup>th</sup> Respondent that expunging the documents and the proceedings from the record would be draconian and would affect all the other parties yet it is expected that justice should be done to all parties. He submitted that the three witnesses could be recalled for purposes of cross examination by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.

Ms. Ndundu who appeared for the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents stated that their witnesses who testified on 28/3/2019 could be recalled for cross examination by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent pursuant to Order 8 Rule 10 of the Civil Procedure Rules. She further submitted that expunging the proceedings of 28/3/2019 would not only delay the determination of this suit, but that it would not serve justice for the other parties. She contended that had Mr. Osundwa who was in hospital and got the sick sheet on 26/3/2019 communicated his predicament to the other advocates, Ms. Ndundu would have informed her three witnesses not to travel from Kisumu to attend court on 28/3/2019. She submitted that the advocate instructed to hold brief ought to have been given full instructions and further that Mr. Osundwa's firm has other advocates who could have cross-examined the witnesses on the date of the hearing. She added that the act of walking out during the hearing by the advocate who held brief for Mr. Osundwa was disrespectful and contemptuous of the court. On the documents filed on 21/3/2019, she submitted that they were not received under protest by any of the parties and that the documents formed part of what was filed on 31/12/2018 and were already on the court record. She stated that the evidence of the three witnesses was vital for the just determination of the dispute.

Both Mr. Wahome and Ms. Ndundu submitted that the instant application was an abuse of court process since Mr. Osundwa had not elected to recall the three witnesses for cross examination.

Mr. Situma submitted on behalf of the Petitioner that Mr. Osundwa lacked courtesy when he failed to notify the other advocates of his illness in good time which would not have made it necessary for the witnesses to travel from Kisumu, especially taking into consideration the difficulty in getting government officers to attend court to give evidence. He urged that the seeking of an adjournment on the date of the hearing was calculated to inconvenience the court and the parties and to delay the determination of the case yet cases should be expeditiously disposed of. He added that granting an adjournment was discretionary and that an advocate holding brief is deemed to have instructions and should be prepared to conduct the trial if the application for adjournment is disallowed by the court.

The court has considered the application, the supporting affidavit, replying affidavit as well as the submissions urged by counsel. The issue for determination is whether the court should grant the orders sought in the application. The court notes that the sick sheet presented on behalf of Mr. Osundwa was issued on 26/3/2019. It would have been courteous and proper if Mr. Osundwa or his firm had communicated his infirmity to all the advocates in the suit as well as the court on 26/3/2019. If this had been done, the witnesses for the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents would not have travelled from Kisumu to attend court on 28/3/2019.

The court has discretion under Order 18 Rule 10 of the Civil Procedure Rules to have witnesses who have already testified recalled for further questioning. The court agrees with the counsel for the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents that it would be prudent to have the three witnesses who testified on 28/3/2019 recalled for cross examination by the advocate for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents. The only reason given by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents for seeking to have the proceedings of 28/3/2019 expunged is that they were not given an opportunity to cross examine the witnesses who testified on that day. No useful purpose will be served by expunging the proceedings altogether if the 1<sup>st</sup> to 3<sup>rd</sup> Respondents can be afforded an opportunity to cross examine the witnesses and the typed proceedings for that day furnished to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.

The hearing of this suit commenced on 6/12/2017. On that morning at 9.00 a.m., an advocate held Mr. Osundwa's brief and informed the court that Mr. Osundwa was not ready to proceed since he was retrieving documents from the lands office. Mr. Osundwa later came to court at 11.45 a.m. and the hearing proceeded. The case was further heard on 23/5/2018 and 22/10/2018. The Petitioner closed her case on 22/10/2018 and the 1<sup>st</sup> Respondent started giving evidence but the case had to be adjourned at Mr. Osundwa's instance when he sought time to comply with Section 77 of the Evidence Act on the production of documents by his witness. The hearing was adjourned to 28/3/2019.

Section 1A of the Civil Procedure Act gives the overriding objective of the Civil Procedure Act and the Rules as being intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. To further the overriding objective, the court is enjoined to handle matters presented before it with the aim of attaining the just determination of proceedings; efficient use of the available judicial resources; and the timely disposal of proceedings at a cost affordable by the parties.

The court is of the view that the interest of justice will not be met if the documents filed by the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents on 21/3/2019 and the proceedings of 28/3/2019 are expunged from the court record as not only will this delay the expeditious determination of this dispute, but it will also occasion an injustice to all the other parties in this suit. Expunging the documents filed by the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents will occasion an injustice to these parties and will not assist the court arrive at a fair determination of this dispute.

The 1<sup>st</sup> to 3<sup>rd</sup> Respondents will be afforded an opportunity to cross-examine the witnesses who testified on behalf of the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents on 28/3/2019 on a date to be fixed by the court on a priority basis. The 1<sup>st</sup> to 3<sup>rd</sup> Respondents will meet the travel costs of the three witnesses when they travel to attend court for cross examination by these parties. The court declines to expunge the documents filed by the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondents on 21/3/2019. Each party will bear its costs of the application dated 12/4/2019.

Dated and delivered at Nairobi this 27<sup>th</sup> day of September 2019

**K.BOR**

**JUDGE**

**In the presence of: -**

Mr. B. Situma holding brief for Ms. Raore for the Petitioner

Mr. Osundwa Sakwa for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents

Ms. Fatma for the 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> & 10<sup>th</sup> Respondents

Mr. A.M. Wahome for the 8<sup>th</sup> Respondent &

Mr. A.M. Wahome holding brief for Mr. L. Wahome for the 5<sup>th</sup> Respondent

Mr. V. Owuor- Court Assistant