



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 30 OF 2019

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 162(2) (a); 165(3) (d) (ii) AND 258 OF THE CONSTITUTION

IN THE MATTER OF ARTICLES 1(1); 1(3); 2(2); 94(5) AND 159(1) OF THE CONSTITUTION

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006

IN THE MATTER OF SECTION 87(1) OF THE EMPLOYMENT ACT NO. 11 OF 2007

IN THE MATTER OF THE JUDICATURE ACT CAP. 8 OF THE LAWS OF KENYA PART VII

IN THE MATTER OF PROVISIONS OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, CHAPTER 43 OF THE LAWS OF KENYA

IN THE MATTER OF THE KENYA CITIZENSHIP AND IMMIGRATION ACT NO. 12 OF 2011

IN THE MATTER OF ORDER 3 RULE 9 OF THE CIVIL PROCEDURE RULES – LEGAL NOTICE NO. 151 OF 2010

IN THE MATTER OF AN APPLICATION FOR DECLARATORY ORDERS

BETWEEN

JAMES FINLAY (KENYA) LIMITED.....PETITIONER

VERSUS

ELLY OKONGO INGANGA.....1st RESPONDENT

LUCAS ONDUSO OMOK.....2nd RESPONDENT

VITALIS OTIENO MUGA.....3rd RESPONDENT

REBECCA OKENYURI NYAKONDO.....4th RESPONDENT

JOICE MONGERE OCHOI.....5th RESPONDENT

CHRISTOPHER OMWAMBIA CHUMA.....6th RESPONDENT

GETUNGA MASELA INDINGA.....7th RESPONDENT

ORDER

1. On 25 January 2019, James Finlay (Kenya) Ltd (Petitioner) instituted legal proceedings (amended Originating Notice of Motion was filed on 31 January 2019) against the Respondents in this Court seeking declaratory orders

1. THAT the orders issued by the ALL SCOTLAND SHERIFF PERSONAL INJURY COURT (hereinafter referred to as the

Scottish Court''') dated 22nd November 2018 as amended on 18th December 2018 and more particularly listed below have to be adopted and recognised as orders of this Court before being executed as required by **Article 159(1)** of the Constitution:

(a) The **ORDER** for Inspection Reference No. PIC PG 10 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **ELLY OKONGO INGANGA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1055 – 17 dated NINTH day of May 2017.

(b) The **ORDER** for Inspection Reference No. PIC PG 16 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **LUCAS ONDUSO OMOKE** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1056 - 17 dated NINTH day of May 2017.

(c) The **ORDER** for Inspection Reference No. PIC PG 7 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **VITALIS MUGA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1057 - 17 dated NINTH day of May 2017.

(d) The **ORDER** for Inspection Reference No. PIC PG 8 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **REBECCA OKENYURI NYAKONDI** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1058 - 17 dated NINTH day of May 2017.

(e) The **ORDER** for Inspection Reference No. PIC PG 5 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **JOICE MONGARE OCHOI** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1052 - 17 dated NINTH day of May 2017.

(f) The **ORDER** for Inspection Reference No. PIC PG 11 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **CHRISTOPHER OMWAMBIA CHUMA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1053 - 17 dated NINTH day of May 2017.

(g) The **ORDER** for Inspection Reference No. PIC PG9 – 18 dated 22nd November 2018 as amended by a subsequent **ORDER** dated 18th December 2018 issued by the Scottish Court in the case of **GETUNA MASELA IDINGA** against **JAMES FINLAY (KENYA) LIMITED** filed at Edinburgh in the Scottish Court under Court Ref. No. PIC – PN 1051 - 17 dated NINTH day of May 2017.

1A. **THAT** the Respondents their agents and or servants must abide by and observe the provisions of the **High Court (Practice and Procedure) Rules PART VII** being part of the written laws of England applicable to Kenya by virtue of **Section 3(1)(b)** of the **Judicature Act Cap. 8** of the Laws of Kenya before conducting any locus inspection as ordered by the Scottish Court such *locus* inspection having the sole purpose of collecting evidence to be used in the Scottish Court.

1B. **THAT** failure by the Respondents, their agents and or servants to observe the provisions set out at **PART VII** of the **High Court (Practice and Procedure) Rules** will be in breach of the sovereignty of Kenya and an abuse of protocol as between the two sovereign states of United Kingdom and Kenya.

1C. **THAT** any execution of the Scottish Court orders before being adopted by this Honourable Court will be contrary to the legal spirit set out in the provisions of **Foreign Judgments (Reciprocal Enforcement) Act Chapter 43** of the Laws of Kenya.

2. **THAT** the Respondents have not sought judicial authority within Kenya for the inspection visit described in the Scottish Court orders dated 22nd November 2018 as amended on 18th December 2018 and more particularly listed at paragraphs No. 1(a),(b),(c), (d), (e), (f) and (g) herein above.

3. **THAT** judicial authority is required under Kenyan laws for the Respondents to be able to execute orders issued by the Scottish Court.

4. **THAT** the Applicant will be in breach of Kenyan Constitution and the country's legislative enactments were it to allow an inspection visit based on the Scottish Court orders to take place within its estates if such visits is not sanctioned by Kenyan judicial authority.

5. **THAT** in addition to the requirement of a Kenyan judicial authority to execute the Scottish Court orders dated 22nd November 2018 as amended on 18th December 2018 and more particularly listed at paragraphs No. 1(a),(b),(c),(d),(e), (g) and (f) herein any non-citizen visiting Kenya for the purposes of execution of the enlisted orders is required pursuant to **Section 40** of the **Kenya Citizenship Act of 2011** to be in possession of a valid work permit or be in possession of a special pass issued under the **Kenya Citizenship and Immigration Regulations 2012**.

6. **THAT** should the Applicant allow any non-citizen to visit its premises for the purposes of conducting inspections envisaged in the Scottish Court orders without such non citizen being in possession of a valid work permit or a valid special pass referred to under No. 5

above the Applicant would be committing an offence under section 45(4), (5) and (6) and Section 53(1) of the **Kenya Citizenship and Immigration Act** and could be liable to criminal prosecution.

7. **THAT** the costs of these proceedings be provided for.

2. The Respondents filed their response to the Originating Motion on 6 February 2019 and 8 February 2019.

3. On 15 February 2019, the Petitioner filed its written submissions and authorities (Supplementary List of Authorities was filed on 20 February 2019).

4. The Respondents filed their submissions and List of Authorities on 18 February 2019, Supplementary List of Authorities on 21 February 2019

5. The Motion was urged based on the record and oral submissions which the Court took on 21 February 2019 and because of the urgency which had been demonstrated, the Court has decided to issue an order ahead of delivery of judgment with reasons.

6. The Court allows the motion in terms of Orders 1(a)-(f), 1A, 1B and 1C.

7. The Court will address the question of costs in the judgment to be delivered on 28 May 2019.

Delivered, dated and signed in Nairobi on this 22nd day of February 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Obura instructed by Obura Mbeche & Co. Advocates

For Respondents Mr. Okero instructed by Behan & Okero Advocates

Court Assistant Lindsey