



REPUBLIC OF KENYA



KENYA LAW
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**Mohammed (Suing as the Executrix of the Estate of the Late HE Daniel
Toroitich Arap Moi) v Rai Plywood (K) Limited & 5 others (Petition
17 (E021) of 2022) [2023] KESC 34 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KESC 34 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 17 (E021) OF 2022
MK IBRAHIM, JA
MAY 26, 2023**

BETWEEN

**ZEHRABANU JAN MOHAMMED (SC) (SUING AS THE EXECUTRIX OF THE
ESTATE OF THE LATE HE DANIEL TOROITICH ARAP MOI) APPELLANT**

AND

**RAI PLYWOOD (K) LIMITED 1ST RESPONDENT
NATHANIEL. K LAGAT 2ND RESPONDENT
SUSAN CHERUBET & DAVID K CHELUGUI (SUING AS THE
ADMINISTRATORS OF THE ESTATE OF THE LATE NOAH KIPNGENY
CHELUGUI) 3RD RESPONDENT
DISTRICT LAND REGISTRAR UASIN GISHU 4TH RESPONDENT
THE REGISTRAR OF TITLES 5TH RESPONDENT
THE NATIONAL LAND COMMISSION 6TH RESPONDENT**

*(Being an application for the review and discharge of the decision
of the Honorable Deputy Registrar issued on 13th January 2023)*

Scope of the powers of the Supreme Court's Registrar to impose sanctions/costs on a party that is not compliant with the Registrar's directions.

The instant case was an application by a party in a Supreme Court appeal challenging the decision of the Deputy Registrar to bar them from filing submissions. The registrar barred them on grounds that they were contemptuous, the party having failed to file submissions when directed on grounds that they had a pending application for leave to file additional evidence; evidence which would be critical in their submissions. The Supreme Court held that in making decisions Registrars should distinguish a decision on the merits of the pleadings as opposed to mere



administrative action. The court reviewed and discharged the decision of the Deputy Registrar and allowed the party to file the submissions upon the conclusion of its application for leave to file additional evidence.

Reported by John Ribia

Civil Practice and Procedure – directions – registrar’s directions – directions to file submissions issued by the registrar where a party had a pending application to adduce more evidence - what considerations should a court’s registrar make in imposing sanctions against a party who failed to comply with the registrar’s directions - whether the actions of the 3rd respondent to not file submissions in compliance with the registrar’s directions on grounds that they had sought leave to file an application to adduce more evidence that would be relevant in the submissions was contemptuous - , 2020, rules 6 (2), (3), 31 and 32; , 2020, sections 31, 32, 33

Brief facts

The instant matter emanated from two interrelated appeals in which the Deputy Registrar of the Supreme Court had directed the parties to file submissions. The 3rd respondent contended that they were unable to comply with the directions of the Deputy Registrar for filing of submissions as they considered it imperative in the determination of the two interrelated appeals to first file an application to adduce more evidence. Subsequently the Deputy Registrar barred the 3rd respondent from filing submissions. Aggrieved the 3rd respondent filed the instant application to review and discharge the decision of the Supreme Court Registrar requiring the filing of submissions.

Issues

- i. What considerations should a court’s registrar make in imposing sanctions against a party who failed to comply with the registrar’s directions?
- ii. Whether the actions of the 3rd respondent to not file submissions in compliance with the registrar’s directions on grounds that they had sought leave to file an application to adduce more evidence that would be relevant in the submissions was contemptuous.

Held

1. The role of a registrar to impose sanctions or orders costs against a party who failed to comply with the directions of the court pursuant to section 10 of the Supreme Court Act and rule 6(1)(c) of the Supreme Court Rules, 2020 and the Supreme Court’s authority to review the decision of the registrar under section 11 of the Supreme Court Act as read with rule 6(2) of the Supreme Court Rules 2020.
2. Prudence and precaution must be observed to ensure that the reasons proffered by the Deputy Registrar would clearly and specifically distinguish a decision on the merits of the pleadings as opposed to mere administrative action. A decision in which the law and rules were merely restated without justification may result in injustice.
3. The 3rd respondent’s actions were not in any way contemptuous. The reasons afforded by the 3rd respondent were cogent and valid. It was fair and reasonable for the application to adduce further evidence to be heard and determined first before the 3rd respondent filed its submissions in the two interrelated appeals both emanating from the impugned judgement of the Court of Appeal.

Application allowed.

Orders

- i. *The Supreme Court reviewed and discharged the decision of the Honorable Deputy Registrar issued on January 13, 2023 barring the 3rd respondent/applicant from filing submissions in the two interrelated appeals both emanating from the impugned judgment of the Court of Appeal.*
- ii. *The 3rd respondent/applicant was allowed to file submissions in the two interrelated appeal both emanating from the impugned judgment of the Court of Appeal upon determination of the application dated January 13, 2023 seeking to adduce further evidence.*
- iii. *Costs to be in the appeal.*



Citations

Cases

1. Judicial Service Commission v Gladys Boss Shollei & another (Civil Appeal 50 of 2014; [2014] KECA 334 (KLR)) — Mentioned
2. Justice Amraphael Mboghali Msagha v Chief Justice of the Republic of Kenya & 7 Others (Misc Appli 1062 of 2004; [2006] eKLR) — Mentioned
3. Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 1 (KLR); [2013] 1 KLR 63) — Explained
4. Okiya Omtatah Okoiti & Nyakina Wycliffe Gisebe v Attorney General & Parliament of Kenya (Civil Application 1 of 2019; [2019] KESC 5 (KLR)) — Explained
5. Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014; [2014] KESC 12 (KLR)) — Mentioned
6. TN Godavarman Thirumulpad via the Amicus Curiae v Ashok Khot & Ane (AIR2006 SC 2007) — Mentioned
7. Wildlife Lodges Ltd v County Council of Narok & Anor ([2005] 2 EA 344 (HCK)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 (Const2010) — Article 21, 27, 48, 50(1) — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — Section 10, 11 — Interpreted
3. Supreme Court (General) Practice Directions, 2020 (Act No 7 of 2011 Sub Leg) — Section 31, 32, 33 — Interpreted
4. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 6(1)(c), 6 (2), (3), 31, 32 — Interpreted

Advocates

Mr. Julius Kemboy for Petitioner/Respondent

Mr. Kibe Muigai & Ms. Wairimu for 1st Respondent

Mr. Ahmednasir S.C. & Ms. Khadija for 3rd Respondent/Applicant

RULING

Representation

Mr. Julius Kemboy for the petitioner/respondent

(Kemboy Law Advocates)

Mr Kibe Muigai & Ms Wairimu for the 1st respondent

(Kinoti Kibe & Company Advocates)

Mr Ahmednasir SC & Ms Khadija for the 3rd respondent/applicant

(Ahmednasir Abdullahi Advocates LLP)

1. Upon perusing the notice of motion by the 3rd respondent dated January 27, 2023 and filed on February 3, 2023, anchored on section 31, 32, 33 of the *Supreme Court (General) Practice Directions, 2020* as read together with rules 6 (2), (3), 31 & 32 of the *Supreme Court Rules, 2020* seeking the following orders:
 - a. The court be pleased to review and discharge the decision of the Honorable Registrar issued on January 13, 2023 barring the 3rd respondent/ applicant from filing submissions in the two interrelated appeals both emanating from the impugned judgement of the Court of Appeal.



- b. The 3rd respondent/applicant be allowed to file submissions in the two interrelated appeal both emanating from the impugned judgement of the Court of Appeal upon determination of the application dated January 13, 2023 seeking to adduce further evidence.
 - c. The costs of the application be in the cause.
2. Upon considering the grounds on the face of the application and the supporting affidavit sworn on January 24, 2023 by David K Chelugui, the legal representative of the estate of the 3rd respondent, contending that they were unable to comply with the directions of the Deputy Registrar for filing of submissions as they considered it imperative in the determination of the two interrelated appeals to first file an application dated January 13, 2023 seeking to adduce further evidence before filing submissions, which needed to be determined first. Further, that despite that clarification, the Hon Deputy Registrar barred them from filing their submission in the two interrelated appeals; that this was despite the Hon Deputy Registrar giving directions for the disposal of their application dated January 13, 2023 seeking to adduce additional evidence, which outcome would affect their submissions; that the Hon. Deputy Registrar's decision subverts the 3rd respondents' right to fair hearing enshrined in article 50(1) of the *Constitution*, their equality before the law under article 27 of the *Constitution* and breaches the court's duty to among other things protect and promote the rights of every party before it pursuant to article 21 of the *Constitution*. Additionally, that the 3rd respondent is a key party to the proceedings, defending its right to property with about one billion Kenya Shillings at stake, thus barring them from filing submissions would result in an unfair and unjust determination of the appeals; and
3. Upon perusing the 3rd respondent's written submissions dated January 27, 2023 and filed on February 3, 2023 wherein in addition to the grounds in the application, it is contended that the decision of the Hon Deputy Registrar barring the 3rd respondent from filing submissions would be to give all of its opponents a platform while denying them a chance to present their side of the story; that the non-compliance was not out of negligence, ignorance or disobedience, rather abundant caution to adduce additional evidence that would fortify the 3rd respondent's position that the decisions of the lower courts were correct. They rely on the decisions in *Judicial Service Commission v Gladys Boss Shollei & Another* Civil Appeal No 50 of 2014; [2014] eKLR, *Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others* Nairobi HCMCA No 1062 of 2004; [2006] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2015] eKLR, to urge that the decision by the Deputy Registrar goes against the principles of natural justice, violate the 3rd respondent's right to fair hearing as enshrined under article 50 (1), as well as violate their right to access justice pursuant to article 48 and the right to equal benefit of the law as espoused under article 27 (1). They cite *Okiya Omtatah Okoiti v Attorney General & Another*, SC Application No 1 of 2019; [2019] eKLR to urge the need for judicial officers to ensure due process of the law is followed while having due regard for the affected parties' interests and consequences of their decisions.
4. Upon considering the petitioner's replying affidavit dated February 10, 2023 sworn by the petitioner averring that from the chronology of the events, the same demonstrated that the 3rd respondent not only chose to disrespect this court but also willfully disobeyed the orders and directions of the court; that the filing of the application to adduce additional evidence did not vary or defeat the mandatory orders of this court concerning the filing of written submissions; that the 3rd respondent invokes the constitutional safeguards on fair trial but he conveniently ignores the fundamental obligation of every party to aid in the dispensation of justice by complying with the orders and directions issued by the court in furtherance of an expeditious disposal of matters; and that the use of coarse language and choice epithets hurled at the Deputy Registrar for performing the judicial duties not only threatened



the integrity and judicial authority of this apex court but also engenders the malaise of anarchy and brazen impunity in the administration of justice.

5. Upon perusing the petitioner's written submissions dated February 10, 2023 and filed on February 15, 2023 wherein relying on the Supreme Court of India in *TN Godavarman Thirumulpad via the Amicus Curiae v Ashok Khot & Ane* AIR 2006 SC 2007 and *Wildlife Lodges Ltd v County Council of Narok & Anor* [2005] 2 EA 344 (HCK) it is urged that compliance with court orders is not a discretionary matter, neither is it a favour to be doled out to the Judiciary; rather, it is a crucial matter of constitutional and civic obligation. Further, that this court's discretion should be exercised judiciously and cannot avail when a party is contumeliously acting in defiance and that the circumstances of the *Okiya Omtatab Okoiti* case (*supra*) are entirely different from those of the present case submitting that the Deputy Registrar's decision in this instant case cannot be said to be unreasonable and arbitrary.
6. The 1st respondent resolved to resonate with the reply and submissions made by the petitioner. the 4th to 6th respondents never made any response to the application.

I now pronounce as follows, bearing in mind all these submissions:

7. Appreciating the role of a Registrar to impose sanctions or orders costs against a party who fails to comply with the directions of the court pursuant to section 10 of the *Supreme Court Act* and rule 6(1) (c) of the *Supreme Court Rules, 2020* and this court's authority to review the decision of the Registrar under section 11 of the *Supreme Court Act* as read with rule 6(2) of the *Supreme Court Rules 2020*.
8. Restating the principles in *Okiya Omtatab Okoiti* (*supra*) where this court expressed itself that prudence and precaution must be observed to ensure that the reasons proffered by the Deputy Registrar would clearly and specifically distinguish a decision on the merits of the pleadings as opposed to mere administrative action. A decision in which the law and rules are merely restated without justification may result in injustice.
9. Similarly, restating this court's decision in *Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 1 (KLR) while addressing itself on discretion to extend timelines stated:

“It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the *Constitution*, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.” (Emphasis provided).

10. Noting from the record that directions to filing of submissions to the petition were first issued on August 1, 2022. The petitioner filed its submissions to the petition on October 27, 2022. On October 28, 2022, the respondents were directed to file their Submissions. As at December 2, 2022 only the 4th and 5th respondents had filed their submissions. On December 2, 2022 the 3rd respondent sought leave to finalize its submissions and prayed for leave to file an application to adduce more evidence. On January 13, 2023 the 3rd respondent had only filed the application seeking to adduce further evidence, noting that they would first await the determination of the application prior to filing its submissions.
11. Accordingly, this court finds that the 3rd respondents actions were not in any way contemptuous. It is my considered view that the reasons afforded by the 3rd respondent are cogent and valid. It is fair and



reasonable for the application to adduce further evidence be heard and determined first before the 3rd respondent files its submissions in the two interrelated appeals both emanating from the impugned judgement of the Court of Appeal.

12. For the aforesaid reasons I come to the conclusion that the 3rd respondent's application dated January 27, 2023 has merit.
13. Consequently, I make the following orders:
 - a. The court hereby reviews and discharges the decision of the Honorable Deputy Registrar issued on January 13, 2023 barring the 3rd respondent/ applicant from filing submissions in the two interrelated appeals both emanating from the impugned judgement of the Court of Appeal.
 - b. The 3rd respondent/applicant be and is hereby allowed to file submissions in the two interrelated appeal both emanating from the impugned judgement of the Court of Appeal upon determination of the application dated January 13, 2023 seeking to adduce further evidence.
 - c. Costs to be in the appeal herein.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2023.

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

