



**Fanikiwa Limited v Sirikwa Squatters Group & 20 others (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 58 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KESC 58 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 32 (E036) & 35 (E038) OF 2022 (CONSOLIDATED)  
PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ  
JUNE 16, 2023**

**BETWEEN**

**FANKIWA LIMITED ..... PETITIONER**

**AND**

**SIRIKWA SQUATTERS GROUP ..... 1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF REGISTRAR OF TITLES ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 4<sup>TH</sup>  
RESPONDENT**

**DIRECTOR OF SURVEY ..... 5<sup>TH</sup> RESPONDENT**

**DISTRICT LANDS OFFICER, UASIN GISHU DISTRICT .... 6<sup>TH</sup> RESPONDENT**

**AGRI BUSINESS (EA) LTD ..... 7<sup>TH</sup> RESPONDENT**

**MARK KIPTARBEI TOO ..... 8<sup>TH</sup> RESPONDENT**

**DAVID K KORIR ..... 9<sup>TH</sup> RESPONDENT**

**HIGHLAND SURVEYORS ..... 10<sup>TH</sup> RESPONDENT**

**KENNEDY KUBASU ..... 11<sup>TH</sup> RESPONDENT**

**AHMED TEREJ & 60 OTHERS ..... 12<sup>TH</sup> RESPONDENT**

**RICHARD KIRUI & 15 OTHERS ..... 13<sup>TH</sup> RESPONDENT**

**STANBIC LIMITED ..... 14<sup>TH</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LTD ..... 15<sup>TH</sup> RESPONDENT**

**ECO BANK LIMITED ..... 16<sup>TH</sup> RESPONDENT**



MILLY CHEBET .....	17 <sup>TH</sup> RESPONDENT
NATIONAL BANK OF KENYA .....	18 <sup>TH</sup> RESPONDENT
KENYA WOMEN MICRO-FINANCE BANK .....	19 <sup>TH</sup> RESPONDENT
COMMERCIAL BANK OF AFRICA .....	20 <sup>TH</sup> RESPONDENT
CO-OPERATIVE BANK OF KENYA .....	21 <sup>ST</sup> RESPONDENT

*(Being an application for striking out in Petition No. 32 (E036) of 2022 consolidated with Petition No. 38 (E038) of 2022 pending the hearing and determination of an appeal from the judgment of the Court of Appeal at Eldoret in Civil Appeal 45 & 44 of 2017 (consolidated) P.O Kiage, K.M'noti & M.Ngugi JJ.A delivered on 18th November 2022.)*

**Supreme Court declines to strike out pleadings filed out of time on grounds that the delay was not inordinate.**

*In an appeal before the Supreme Court the 1st respondent filed an application to strike out three pleadings, one was a response to the petition of appeal on grounds that it was filed out of time, the second was an application to file additional evidence and the third was a joinder of parties' application. The Supreme Court held that whereas the response to the petition was filed late and whereas compliance with the court's timelines was importance, sufficient reasons had been adduced; the delay was held not to be inordinate. The Supreme Court held that the second and third application that the 1st respondent sought to be struck out had already been dismissed by the High Court. Ultimately the Supreme Court dismissed the instant application.*

Reported by John Ribia

**Civil Practice and Procedure** – pleadings – late filing of pleadings – application to strike out pleadings out of time at the Supreme Court – where cogent reasons for the delay had been proffered - whether the Supreme Court could dismiss a response to a petition of appeal that was filed out of time even where credible reasons for the delay had been raised -

section 14(5); 21(2)(3); rules 26, 31, 32, 36, and 38

**Brief facts**

The 1<sup>st</sup> respondent filed an application that sought for the Supreme Court to strike out the 8<sup>th</sup> respondent's affidavit for being filed out of time, to strike out the petitioner's applications; one that sought to adduce additional, and a joinder application that sought to introduce new parties to the proceedings before the Supreme Court.

**Issues**

Whether the Supreme Court could dismiss a response to a petition of appeal that was filed out of time even where credible reasons for the delay had been raised.

**Held**

1. Whereas strict compliance of the Supreme Court's rules and practice directions was important, the circumstances of the delay by the 8<sup>th</sup> respondent in filing its response to the petition of appeal was not inordinate. In the interest of justice, the Supreme Court declined to strike out the replying affidavit.
2. The notice of motion dated January 9, 2023 had been disallowed by the Supreme Court in its ruling dated June 16, 2023 in Petition no. 32 (E036) of 2022 consolidated with Petition no. 35 (E038) of 2022. The notice of motion application dated January 13, 2023 for joinder as interested parties had also been disallowed by the Supreme Court in a ruling dated June 16, 2023.

*Application dismissed.*



## **Orders**

*No order as to costs.*

## **Citations**

### **Cases**

1. Board of Governors, Moi High School, Kabarak & Daniel Toroitich Arap Moi v Malcolm Bell (Petition 6 & 7 of 2013; [2013] KESC 12 (KLR)) — Mentioned
2. Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited, Sammy Boit Arap Kogo, Antoinette Boit, Attorney General, Director of Public Prosecutions, Director of Criminal Investigations, Inspector General of Police, Chief Magistrates Court, Nairobi, Deposit Protection Fund (as Liquidator of Post Bank Credit Ltd) & ASL Limited (Petition 38 of 2019; [2020] KESC 38 (KLR)) — Mentioned
3. Kenya Section of the International Commission of Jurists vs Attorney General and 2 others (Criminal Appeal 1 of 2012) — Mentioned
4. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad, Ahmed Muhumed Abdi, Gichohi Gatuma Patrick & Independent Electoral and Boundaries Commission (Election Appeal 2 of 2018; [2018] KECA 677 (KLR)) — Mentioned
5. Muchanga Investments Limited vs Safari Unlimited (Africa) Ltd & 2 Others ([2009] KLR 229)
6. Nancy Musili v Joyce Mbete Katisi (Civil Appeal 189 of 2011; [2018] KEHC 1912 (KLR)) — Mentioned
7. Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission, Chairperson, Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta (Election Petition 1 of 2017; [2017] KESC 32 (KLR)) — Explained

### **Statutes**

1. Supreme Court Act (No. 7 of 2011) — section 14(5); 21(2)(3) — Interpreted
2. Supreme Court Rules, 2012 (No. 7 of 2011 Sub Leg) — rule 26, 31, 32, 36,38 — Interpreted

### **Advocates**

*Mr. Arusei, Ms. Kigen & Mr. Rapando* for Applicant/1st Respondent

*Mr. Ngatia S.C* for Petitioner/Respondent

## **RULING**

### Representation:

Mr. Arusei, Ms. Kigen & Mr. Rapando..... For the Applicant/1st Respondent

*(Arusei & Company Advocates)*

Mr. Ngatia S.C..... For the Petitioner/Respondent

*(Ngatia & Associates Advocates)*

1. Upon reading the notice of motion application dated January 30, 2023 filed by Sirikwa Squatters Group, the 1<sup>st</sup> respondent herein, which application is filed pursuant to sections 14(5), 21(2) and (3) of the *Supreme Court Act* and rules 26, 31, 32, 36 and 38 of the *Supreme Court Rules* and noting that the application prays for the court to strike out the following documents:
  - i. The 8<sup>th</sup> respondent's replying affidavit dated January 20, 2023 in response to the petition of appeal dated November 21, 2022 for being filed out of time;
  - ii. The affidavit of Jeremy Paul Henry Hulme sworn on January 9, 2023 and affidavit in rejoinder sworn on January 25, 2023;



- iii. The petitioner's application dated January 9, 2023 and supporting affidavit of Sophia Chemengen Too sworn on January 21, 2023 in answer to the 1<sup>st</sup> respondent's affidavit sworn on January 18, 2023;
  - iv. The submissions dated January 25, 2023 filed in response to the 1<sup>st</sup> respondent replying affidavit dated January 20, 2023 by John K Sitienei and 9 others being parties not yet joined to the proceedings.
2. Upon reading the supporting affidavit sworn on January 30, 2023 by Benjamin Chepng'otie Ronoh and the grounds in support of the application wherein the 1<sup>st</sup> respondent contends as follows: on the order seeking to strike out the 8<sup>th</sup> respondent's replying affidavit dated January 20, 2023, the applicant claims that the replying affidavit filed by the 8<sup>th</sup> respondent being Mark K Too should be struck out as it introduces new arguments and validates the appeal filed by Fanikiwa Limited. The applicant also avers that Fanikiwa Limited has sued Mary Jepkemboi Too and Sophie Jelimo Too (suing as joint administrators ad litem in the estate of Mark K Too) as the 8<sup>th</sup> respondent and that prior to the Supreme Court the same law firm represented the two parties;
3. Considering the applicant's contentions on the order seeking to strike out the petitioner's application dated January 9, 2023, and the affidavits both Jeremy Paul Henry Hulme sworn on January 9, 2023 and January 25, 2023 and the supporting affidavit of Sophia Chemengen Too sworn on January 21, 2023, and the applicant's contention that Mr Jeremy Hulme has been around since the inception of the case in the year 2012, that the surrender document dated November 1, 2000 which he seeks to adduce is not a new document and that the author of the document Sarah Mwendwa has not filed an affidavit producing it. Further Considering the applicant's averments that the two affidavits by Mr Hulme seek to advance a new case by a third party and not by his former employer Lonrho Agribusiness EA Limited, and the Noting the applicant's contention that the purported letter dated November 9, 2000 sought to be adduced did not give the land to Sirikwa Squatters Group but rather it was the surrender of the land to the Government;
4. Considering the applicant's contention that the additional evidence sought to be adduced seeks to give the appellant a fresh case in appeal and change the nature of the appeal and that that the appellant squandered the opportunity to place their full evidence before the superior courts and the contention that the evidence is not credible but seeks to create a new dispute at the Supreme Court;
5. Further interrogating the order seeking to strike out the submissions dated January 25, 2023 filed by John K Sitienei and 9 others, where the applicant claims that the submissions were filed by litigants who have not been admitted to the appeal and were filed without leave;
6. Upon considering the response by the appellant Fanikiwa Limited in its replying affidavit sworn on March 1, 2023 by Sophia Chemengen Too on behalf of the appellant and Jeremy Paul Henry Hulme that the application is an abuse of the court process with no grounds to justify the striking out of the notice of motion application dated January 9, 2023. Noting also that the 1<sup>st</sup> respondent had initially filed a notice of motion application dated January 26, 2023 seeking similar orders as the instant application and that the 1<sup>st</sup> respondent sought to withdraw the application dated January 26, 2023 and was directed by the court to procure the signatures of all parties which signatures are yet to be procured;
7. Further noting that in response to the prayer to strike out the application and affidavits on the issue of additional evidence, the appellant contends that the 1<sup>st</sup> respondent has already filed its responses to the issue of additional evidence which is before the court for determination;



8. Considering also that the appellant reiterated its grounds in support of the prayer before the court on admission of additional evidence urging the court not to strike out the application;
9. Noting the 1<sup>st</sup> respondent/applicant's submissions dated January 30, 2023 and supplementary submissions dated March 9, 2023 where it submits that the issues raised by the 8<sup>th</sup> respondent in its replying affidavit sworn on January 20, 2023 is guised as a petition of appeal and is filed out of the time contrary to rule 38 of the supreme court rules, 2020 and without leave. Also Noting the cases relied on for this assertion; *Board of Governors Moi High School Kabarak v Malcom Bell & another* Petition No 6 & 7 of 2013.
10. Interrogating whether the application seeking to adduce new evidence seeks to introduce a new cause of action and considering that the cases of *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others* [2020] eKLR and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR were relied on to buttress this assertion;
11. Further noting the submissions by the respondent/appellant where it contends that the instant application is an abuse of the court process on the grounds that the applicant is filing multiple documents seeking similar orders, and considering the decisions relied on by the respondent in *Kenya section of the International Commission of Jurists vs Attorney General & 2 others* [2012] eKLR, *Muchanga Investments Limited vs Safari Unlimited (Africa) Ltd & 2 others* [2009] KLR 229 and *Nancy Musili v Joyce Mbete Katisi* [2018] eKLR;
12. Noting that although the 1<sup>st</sup> respondent failed to procure the consent of all parties for the withdrawal of the notice of motion application dated January 26, 2023, it subsequently filed the instant application four (4) days later and the 1<sup>st</sup> respondent filed its respective response for our determination herewith;
13. Having considered the 1<sup>st</sup> respondent's application and submissions and the appellant's response and submissions, we hold as follows;

**On the order seeking to strike out the 8<sup>th</sup> respondent's replying affidavit dated January 20, 2023;**

14. This Court in the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Petition No 1 of 2017; [2017] eKLR invoked its inherent jurisdiction and exercised judicial restraint when it was called upon to expunge the petitioner's filed documents from the court record in the interest of justice to all parties in that petition.
15. While we emphasize the importance of strict compliance of this court's rules and practice directions, we find that in the circumstances the delay by the 8<sup>th</sup> respondent in filing its response to the petition of appeal dated November 21, 2022 is not inordinate and in the interest of justice we decline to strike out the replying affidavit.

**On the order seeking to strike out the application dated January 9, 2023 and the affidavits thereto;**

16. We have considered this prayer and note that the notice of motion dated January 9, 2023 has been disallowed by this court in its ruling dated June 16, 2023 in Petition No 32 (E036) of 2022 consolidated with Petition No 35 (E038) of 2022.

**On the order seeking to strike out the submissions by John K Sitienei & 9 others dated January 25, 2023;**

17. We have considered the grounds upon which this prayer is premised but taken note of the fact that John K Sitienei & 9 others, notice of motion application dated January 13, 2023 for joinder as interested



parties has been disallowed by this court in its ruling dated June 16, 2023 Petition No 32 (E036) of 2022 consolidated with Petition No 35 (E038) of 2022.

18. Consequently, we make the following orders:

- i. The notice of motion application dated January 30, 2023 is hereby dismissed.
- ii. There shall be no order as to costs.

19. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE, 2023.**

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**P.M MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

*I certify that this is a true copy of the original*

**REGISTRAR,**

**SUPREME COURT OF KENYA**

