



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu; (DCJ & VP), Ibrahim, Njoki, Lenaola & Ouko SCJJ)*

**PETITION NO. 32 (E036) OF 2022 consolidated with PETITION  
NO. 35 (E038) of 2022**

FANKIWA LIMITED.....PETITIONER

**-VERSUS-**

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

LONRHO 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

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*(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 JJA delivered on 18<sup>th</sup> November 2022)*

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Representation:

Mr. Arusei, Ms. Kigen & Mr. Rapando.....For the Applicant/1<sup>st</sup> Respondent  
(*Arusei & Company Advocates*)

Mr. Ngatia S.C.....For the Petitioner/Respondent  
(*Ngatia & Associates Advocates*)

**RULING OF THE COURT**

**[1] UPON** reading the Notice of Motion application dated 30<sup>th</sup> January 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 20<sup>th</sup> January 2023 in response to the Petition of Appeal dated 21<sup>st</sup> November 2022 for being filed out of time;
- ii) The affidavit of Jeremy Paul Henry Hulme sworn on 9<sup>th</sup> January 2023 and affidavit in rejoinder sworn on 25<sup>th</sup> January 2023;
- iii) The petitioner's application dated 9<sup>th</sup> January 2023 and supporting affidavit of Sophia Chemengen Too sworn on 21<sup>st</sup> January 2023 in answer to the 1<sup>st</sup> respondent's affidavit sworn on 18<sup>th</sup> January 2023;

iv) The submissions dated 25<sup>th</sup> January 2023 filed in response to the 1<sup>st</sup> respondent replying affidavit dated 20<sup>th</sup> January 2023 by John K. Sitienei and 9 others being parties not yet joined to the proceedings.

**[2] UPON** reading the supporting affidavit sworn on 30<sup>th</sup> January 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 20<sup>th</sup> January 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 9<sup>th</sup> January 2023, and the affidavits both Jeremy Paul Henry Hulme sworn on 9<sup>th</sup> January 2023 and 25<sup>th</sup> January 2023 and the supporting affidavit of Sophia Chemengen Too sworn on 21<sup>st</sup> January 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 1<sup>st</sup> November 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 9<sup>th</sup> November 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 25<sup>th</sup> January 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 1<sup>st</sup> March 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 9<sup>th</sup> January 2023. Noting also that the 1<sup>st</sup> respondent had initially filed a notice of motion application dated 26<sup>th</sup> January 2023 seeking similar orders as the instant application and that the 1<sup>st</sup> respondent sought to withdraw the application dated 26<sup>th</sup> January 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 30<sup>th</sup> January 2023 and supplementary submissions dated 9<sup>th</sup> March 2023 where it submits that the issues raised by the 8<sup>th</sup> respondent in its replying affidavit sworn on 20<sup>th</sup> January 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 vs 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 Shakhalaga Khwa Jirongo vs Soy Developers Limited & 9 Others* [2020] eKLR and *Mohamed Abdi Mahamud vs 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 and 2 others* [2012] eKLR, *Muchanga Investments Limited vs Safari Unlimited (Africa) Ltd & 2 Others* [2009] KLR 229 and *Nancy Musili vs 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 26<sup>th</sup> January 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;

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

[14] This Court in the case of *Raila Amolo Odinga & another vs 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 21<sup>st</sup>

November 2022 is not inordinate and in the interest of justice we decline to strike out the replying affidavit.

***b) On the order seeking to strike out the application dated 9<sup>th</sup> January 2023 and the affidavits thereto;***

[16] We have considered this prayer and note that the notice of motion dated 9<sup>th</sup> January 2023 has been disallowed by this Court in its ruling dated 16<sup>th</sup> June 2023 in Petition no. 32 (E036) of 2022 consolidated with Petition no. 35 (E038) of 2022.

***c) On the order seeking to strike out the submissions by John K. Sitienei & 9 Others dated 25<sup>th</sup> January 2023;***

[17] We have considered the grounds upon which this prayer is premised but taken note of the fact that John K. Sitienei and 9 others, notice of motion application dated 13<sup>th</sup> January 2023 for joinder as interested parties has been disallowed by this Court in its ruling dated 16<sup>th</sup> June 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 30<sup>th</sup> January 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**

.....  
**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**

