



**REPUBLIC OF KENYA**  
**SUPREME COURT OF KENYA AT NAIROBI**  
**ELLY OKONG'O INGAN'G'A & 6 OTHERS VERSUS JAMES FINLAY (KENYA) LIMITED**  
**CORAM: MWILU DCJ & VP, IBRAHIM, WANJALA, NJOKI & LENAOLA SCJJ**  
**S.C. PET. NO 7(E009) OF 2021**  
**DATE OF JUDGMENT: 31<sup>ST</sup> MARCH 2023**  
**MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.*

**Order:** Petition of Appeal dated 12<sup>th</sup> August, 2021 and lodged on 13<sup>th</sup> August 2021 is hereby dismissed with each party to bear their own costs of the Appeal. The Judgment be placed before the Speakers of the National Assembly and Senate, the Attorney General, the Kenya Law Reform Commission for necessary development of legislation on judicial assistance in obtaining evidence for civil proceedings in foreign courts and tribunals.

### **BACKGROUND**

The Appellants were former employees of the James Finlay (Kenya) Limited and instituted seven suits at the All-Scotland Sheriff Personal Injury Court at Edinburgh in Scotland claiming to have suffered work related injuries while at work in the Respondent's various tea estates and factories in Kericho, Kenya due to breach of duty to provide a safe working environment on account of negligence on the Respondent's part. Upon the Appellant's instigation, the Court in Scotland granted the locus inspection orders, in respect of the seven Appellants for the Respondent's various tea factories in Kericho County for a site visit for the purpose of observing the various activities such as tea pickers picking tea manually and with equipment, taking measurements of the tea plants and areas where workers were required to work, including distance workers are required to walk to weigh tea; photocopying and videoing work undertaken by the workers; considering Personal Protective Equipment (PPE) available to the workers; weighing the tea baskets when full of tea; observing and videoing picking, transporting and weighing of the tea; observing medical facilities available to the workers, and, weighing mechanical harvesting equipment for one, two and three users. It is the enforcement of these orders that the Respondent challenged before the Employment and Labour Relations Courts. Both the ELRC and Court of Appeal held that without intervention by Kenyan authorities it would not be possible to execute the locus inspection orders in Kenya.

The Court delineated the following issues for determination:

- i) Whether this Court is clothed with the requisite jurisdiction to determine this appeal?*
- ii) Whether the locus inspection orders issued by the Scottish Court could be executed in Kenya without intervention by Kenyan authorities*
- iii) Who should bear the costs of the appeal?*

**Issue 1:** The Court found that appeal fell squarely within the ambit of Article 163(4)(a) of the Constitution as it was the manner of enforcement, application or compliance of the orders from the Scottish Court and the construction and interpretation Articles 1, 50, 159 and 238 of the Constitution that has been in contention right from the trial Court and progressed by of appeal to ultimately reach the Court.

**Issue 2:** The Court agreed with the ELRC and the Court of Appeal that decisions by foreign courts and tribunals are not automatically recognized or enforceable in Kenya. They must be examined by the Courts in Kenya for them to gain recognition and to be enforced. Further, Kenya as a sovereign state cannot automatically allow citizens, individuals or officers of a foreign state to carry out upon its own territory the decisions of a foreign court, without authorization from the Kenyan Government upon recognition of the decision of the foreign court or tribunal. The Court concluded that for foreign courts

and tribunals to gain judicial assistance in Kenya during interlocutory proceedings, the foreign court or tribunal must channel a commission *rogatoire* or letter of request to the Registrar of the High Court in Kenya for assistance pursuant to the High Court (Practice and Procedure) Rules made pursuant to Section 10 of the Judicature Act, Cap 8 Laws of Kenya and Order 28 of the Civil Procedure Rules, 2010.

**Issue 3:** Each party to bear their own costs.

