



**Chavangi & another v National Assembly & 2 others; Swazuri
(Interested Party) (Petition E239 of 2022) [2023] KEHC 494 (KLR)
(Constitutional and Human Rights) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E239 OF 2022

M THANDE, J

JANUARY 26, 2023

BETWEEN

TOM AZIZ CHAVANGI 1ST PETITIONER

SALOME MUNUBI 2ND PETITIONER

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

KABALE TACHE ARERO 3RD RESPONDENT

AND

MOHAMMAD SWAZURI INTERESTED PARTY

RULING

1. The issue before me for determination is whether a replying affidavit said to be sworn by one Sarah Kioko on 12.10.22 on behalf of the 1st respondent should be admitted. The reason the issue came up is because counsel for the 1st respondent referred to the said replying affidavit in her submissions. Her counterparts however stated that they had never been served with the said replying affidavit and that the same was not in the court e-filing portal.
2. Counsel for the 1st respondent appealed to the court to have the said affidavit admitted in the interest of justice as the 1st respondent's case and submissions were anchored on the same. In opposition, the petitioner and interested party's counsel submitted that their clients would be prejudiced as



submissions have been filed and highlighted. The 2nd and 3rd respondent's counsel asked the court to consider admitting the said replying affidavit in the interest of justice.

3. I have considered the submissions of counsel and have agonized over the issue. I am guided by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules). Counsel for the 1st respondent checked her records and noted that an email had been sent to parties by her colleague stating that the replying affidavit was bulky and over 2,000 pages long and could not be uploaded and that hard copies would be filed and served. This I believe is where the problem arose. There appears to have been no follow up. The record shows that the 1st respondent sought and obtained leave to file a supplementary affidavit. the question this court would then ask is, supplementary to what? Clearly it must be to the substantive replying affidavit.
4. As I consider this matter, I am guided by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules). This is a court of justice which must do what is fair and just to all parties. The overriding objective of the *Mutunga Rules* as set out in Rule 3 thereof, is to facilitate access to justice for all persons as stipulated in article 48 of the *Constitution*.
5. I am keenly aware that allowing the replying affidavit to be filed and served at this stage, after submissions have been filed and highlighted will greatly prejudice the petitioners and the Interested Party. To decline to admit the said replying affidavit on the other hand, will result in greater prejudice and a miscarriage of justice. The court must therefore strike a balance between the rights of all the parties. In considering constitutional petitions, this court is constitutionally obligated and enjoined to adopt an approach that ensures determination of cases on merit as opposed to procedural technicalities. Each party ought to be heard and given an opportunity to participate in shaping decisions about their claim and defense.
6. In this regard, I associate with and adopt the sentiments expressed by Mativo, J. (as he then was) in the case of *Gitau v Kenya Methodist University (Kemu)* (Petition 5 of 2020) [2021] KEHC 322 (KLR) (8 December 2021) (Ruling) where the learned Judge stated:

Perhaps, I should clarify that a resolution “on the merits” occurs when a lawsuit is decided according to procedural rules that (1) are designed, interpreted, and implemented to give the parties a full opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case, and (2) do not systematically affect the outcomes of cases due to the intended operation of a principle other than the principle of allowing the parties a full opportunity to participate. A pertinent question as I see it raised in the instant application meriting determination by the Court of Appeal is whether the impugned order offends the “determination on merit principle” and the requirement to hear both parties. One thing is beyond argument, that is, the principle of resolving cases on their merits is now deeply ingrained in our Constitution. It's now constitutional canon. It's no longer a mere common law principle. Major aspects of the procedural laws both criminal and civil flow directly from the constitutional dogma that parties deserve a full opportunity to participate in shaping decisions about their claims and defenses. I am persuaded beyond peradventure that on this one ground alone, the Respondent's intended appeal is not only arguable but it presents pertinent constitutional questions meriting determination by the Court of Appeal.

7. In light of the foregoing, I am of the view the justice of the case requires that I give the 1st respondent's counsel the benefit of the doubt and allow the replying affidavit in question to be filed and served. The prejudice that will be occasioned to the petitioners and interested party, will be cured by allowing



them to file a further affidavit in response, which in any event is their right. Submissions will then be reopened in respect of the issues raised in the replying affidavit.

8. I view of the foregoing, I direct as follows:

1. The 1st respondent will file and serve the replying affidavit of Sarah Kioko sworn on 12.10.22 by close of business today 26.1.23.
2. Responses and submissions shall be filed and served by 2.2.23.
3. Highlighting on 16.2.23.
4. For the avoidance of doubt, responses and submissions will be limited to new issues raised in the replying affidavit.

DATED and DELIVERED in NAIROBI this 26th day of January 2023

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the 1st Respondent**

..... **for the 2nd and 3rd Respondents**

..... **for the Interested Party**

..... **Court Assistant**

