



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. E023 OF 2021

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

KENYA INSTITUTE OF SUPPLIES MANAGEMENT.....1ST RESPONDENT

THE COUNCIL, KENYA INSTITUTE OF SUPPLIES MANAGEMENT..... 2ND RESPONDENT

MR. JAMES KALOKI..... 3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. Before court is an application by the Petitioner dated 9th December 2021 brought pursuant to Articles 20, 22, 50 (1), 23(3), 159 (2) (d), 162(2), 165 (3), and 258 of the Constitution of Kenya 2010 and Rules 18, 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Petitioner is seeking for orders that this court be pleased to issue an order admitting into these proceedings his supplementary affidavit dated 18th day of November 2021 and the annexure thereto plus costs.

2. The Application is premised on the grounds on its face and on the Petitioner's supporting affidavit sworn on even date. The grounds are, that; the petitioner has come across new evidence which is contained in the supplementary affidavit dated 18th November 2021 and the annexure thereto; they are material to these proceedings and are necessary for determining all questions in controversy; the supplementary affidavit does not introduce a new cause of action; the respondents will not be prejudiced as they will be given a chance to respond to the same so that the case can be heard on its merits; being that he will be bound by his pleadings and the admission will ensure the right to fair trial is accorded him; and the granting of the orders sought will not determine the petition.

3. In his supporting affidavit, he reiterated the facts and the grounds on the face of the application.

The respondents' response

4. The 4th respondent did not respond to the application.

5. The 1st – 3rd Respondents filed grounds of opposition dated 25th January 2022 in opposition to the application, urging for its dismissal with costs and for striking out the supplementary affidavit. The summarized grounds are that;

i. The supplementary affidavit dated 18th November 2021 is of no evidential and probative value in this case.

ii. The members of the said WANUNUZI-KE WhatsApp group did not discuss the merits and demerits of the Petition.

iii. Gachuba Advocate who is a member of both the 1st Respondent and WANUNUZI-KE WhatsApp Group informed members that the petition was about the provision of continuous professional development in supplies practice (profession). The said advocate

further differentiated capacity building in public procurement law in Kenya from continuous professional development in supplies practice (profession) in Kenya. Basically the advocate only enlightened the members on the legal position on the two issues.

iv. That the petitioner's supplementary affidavit erroneously juxtaposes capacity building in public procurement law in Kenya with continuous professional development in supplies practice (profession) in Kenya.

v. The admission of the petitioner's supplementary affidavit will convolute the issue in the petition which is the provision of continuous professional development services.

The petitioner's response to the 1st to 3rd respondents' grounds of opposition

6. The Petitioner filed a response dated 9th February 2021, in which he outlined the mandate of the 1st Respondent and the Cabinet Secretary under the Supplies Practitioners Management Act. He also explained what the continuing professional development policy is all about.

He mentions the policy guidelines which the 1st respondent has made and which he is not in agreement with especially the 2021 CPD policy guidelines as is outside the KISM Act and violates Article 46 of the Constitution.

7. According to him, there is no justification for engaging in training and development in competition with its licensed members and professional firms. The guidelines are *ultra vires* as they deal with matters beyond the scope of Section 5 of the SPMA Act 2007 by accrediting professional training firms or accrediting programs mounted by professional training firms. These are just guidelines bereft of legal force as they do not constitute regulations gazetted by the Cabinet Secretary of National Treasury. There is a competing and conflicting interest and consideration in the training and development of professional that could reasonably affect its ability to make a decision based on the public interest mandate of the institute as a regulator.

8. In conclusion, he argues that CPD policy guidelines 2021 do not meet the proportionality test, are unconstitutional and contrary to the competition and consumer laws of the Country.

Petitioner's submissions

9. The petitioner filed submissions dated 15th February 2022. He more or less reiterates the contents of the application and maintains that no prejudice will be occasioned on the respondents. Further, the supplementary affidavit shades more light on the issues for determination in the Petition. He relied on **Gituma Kaumbi Kioga v Kenya Revenue Authority & another [2020] eKLR** for that argument and urged the court to allow the Supplementary Affidavit.

10. The **1st to the 3rd Respondents** chose to rely on their grounds of opposition.

Analysis and determination

11. Having carefully considered the parties pleadings and submissions I find only one issue falling for determination: -

i. Whether the petitioner/applicant has made out a case for leave to be granted to adduce additional evidence.

12. The petitioner argued that he had come across new information after filing the petition. That the information is contained in the supplementary affidavit which does not determine the petition but is necessary for determination of the petition. Lastly, that the respondents have not endeavoured to demonstrate how they will be prejudiced, and in any event, they will be granted a chance to respond to the same.

13. The 1st to the 3rd respondents in their grounds of opposition submitted that there is no evidential and probative value in the application and that the members of the said WhatsApp group did not address the merits and demerits of the petition. They argued that the petitioner's supplementary affidavit is erroneous as it juxtaposes capacity building in public procurement law in Kenya with continuous professional development in supplies practice (profession) in Kenya. Its admission will convolute the issue in question in the petition, which is the provision of continuous professional development services.

14. Rule 21 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (**Mutunga Rules**) provides that:

“A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court”.

15. In **Gituma Kaumbi Kioga v Kenya Revenue Authority & another [2020] eKLR**, the court while allowing the applicant's application to adduce additional evidence stated as follows:

“[18]... Accordingly, the filing of these documents in this petition does not prejudice the petitioner. Further, to ensure no prejudice is suffered by the petitioner, it must be given an opportunity to reply to the documents. All this will help proper evaluation of all the circumstances of the case and thus yield a just determination.”

16. In the case of **Johana Kipkemei Too v Hellen Tum [2014] eKLR**, Munyao Sila J. although dismissing the Application to adduce more evidence, observed that;

“This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.”

17. In **Raila Odinga and 5 Others Versus I.E.B.C. and 3 Others [2013] eKLR**, the Supreme Court added its voice on reception of additional evidence in the context of the Presidential election and Stated:

“The other issue the Court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other Party is able to respond to it, than the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the other Party to respond effectively the Court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of addition evidence....”

18. Based on the above cited authorities and the provisions of the law, in my view the Supplementary Affidavit ought to be allowed for the reasons that: the 1st to the 3rd Respondents have not demonstrated how they will be prejudiced; the Supplementary Affidavit is not so complex as to render it difficult for them to respond; this information has been acquired by the Petitioner after the filing of his pleadings as evidenced by the WhatsApp messages; the authenticity of the WhatsApp messages sought to be adduced is not questioned; and in any event , they will have the chance to respond to it. This will also enable the court determine the case on merits and to ensure that all parties are granted a chance to fully present their respective cases.

19. I have considered the application, the supporting affidavit, the grounds of opposition, the submissions, the law and guided by the above cited authorities I make the following findings:

- i. The 1st – 3rd respondents have not demonstrated how they will be prejudiced by the new evidence.
- ii. The supplementary affidavit is not so complex as to render it difficult for them to respond.
- iii. The new information was acquired by the petitioner after the filing of his pleadings as evidenced by the WhatsApp messages.
- iv. The authenticity of the WhatsApp messages sought to be adduced is not an issue and in any event the respondents will have an opportunity to respond to it.
- v. The new evidence will enable the court determine the case on merit and to ensure that all parties are granted a chance to fully present their case to the court.
- vi. From the above findings it is my considered view that the application dated 9th December, 2021 has merit. The petitioner/applicant is granted leave to file the additional evidence by the admission of his supplementary affidavit sworn on 18th November, 2021.
- vii. The respondents are granted leave to file and serve their response to the supplementary affidavit within 14 days from the date of this Ruling.
- viii. Mention on 28.4.2022 for directions on the hearing.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MARCH, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT