



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CONSTITUTION AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 4 OF 2019

IN THE MATTER OF ARTICLES 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOM UNDER ARTICLES 1 (1) (B), 1 (4)(B), 2(1), 3(1), 10, 19, 20, 21 (1), 22, 23, 27, 28, 40, 47, 232(1) (D) (E) AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF BREACH OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF NATIONAL GOVERNMENT CO-ORDINATION ACT, 2013,

AND

IN THE MATTER OF COUNTY GOVERNMENTS0 ACT, 2012

BETWEEN

- ISAAC MUGO.....1ST PETITIONER
- BERNARD NYAGA.....2ND PETITIONER
- EUSTACE MUTURI.....3RD PETITIONER
- GEOFFREY K. WAMUGWETWA.....4TH PETITIONER
- JAPHET MICHENI NJERU.....5TH PETITIONER
- JASPER M. NJERU.....6TH PETITIONER
- SILAS MUTEGLI.....7TH PETITIONER
- SABASTIAN N. NJOKA.....8TH PETITIONER
- JOSEPH MBUBA MIRIBA.....9TH PETITIONER
- JUSTUS N. M'NGITUNG'A.....10TH PETITIONER
- NATHAN KEA IBURIA.....11TH PETITIONER

ERASTUS K. NKUNE.....12TH PETITIONER
SAMUEL MUTEKI KIUNGO.....13TH PETITIONER
JOSEPH MBUBA.....14TH PETITIONER

VERSUS

**DR. FRED OKENGO MATIANG'I, THE CABINET SECRETARY, MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT**

AND

**INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION OF KENYA.....1ST INTERESTED PARTY
LUANO MUGAMBI KIANIA.....2ND INTERESTED PARTY
PATRICK NYAGA.....3RD INTERESTED PARTY
LEXIOUS NJAGI MUNENE.....4TH INTERESTED PARTY
KAMWARA KIJU.....5TH INTERESTED PARTY
MWIKAMBA KARANJA.....6TH INTERESTED PARTY
ANDREW NYAGA.....7TH INTERESTED PARTY
GILBERT MAINGI.....8TH INTERESTED PARTY
EVERINO K. NGUMOKO.....9TH INTERESTED PARTY
CHARLES KIRIMO.....10TH INTERESTED PARTY
MICHENI KATHENYA.....11TH INTERESTED PARTY
MUGO M'ITHARA.....12TH INTERESTED PARTY
NJUKI KAMUMO.....13TH INTERESTED PARTY
GILBERT KAMWARA.....14TH INTERESTED PARTY
BASILINA CIANTHWA.....15TH INTERESTED PARTY
EUSTUS MUNENE.....16TH INTERESTED PARTY
EDIEL MWITI MICHAEL.....17TH INTERESTED PARTY
AUSTIN M NGAINE.....18TH INTERESTED PARTY
MARK NJUE.....19TH INTERESTED PARTY**

RULING

1. Before this court is a Notice of Motion dated 3rd October 2019 brought by the 1st Interested Party (Independent Electoral and Boundaries Commission – IEBC) the applicant herein who has invoked Rule 25 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules 2013, Sections 1, 1A, 3A and 95 of Civil Procedure Act and Order 50 Rules 5&6 Civil Procedure Rules, in seeking the following reliefs/orders.

a. Spent

b. That this honourable court be pleased to set aside and/or vary its orders issued on 25th July 2019 and re-admit into the court's record the 1st Interested Party's Replying Affidavit filed on 24th July 2019.

c. That upon grant of prayer (b) above, the 1st Interested Party's Replying Affidavit herein marked as annexure 'A' to the Supporting Affidavit be deemed to be part of the official record duly and regularly filed and served upon the parties herein.

d. Costs be in cause.

2. The applicant has listed the following grounds for the above prayers sought namely:-

i. That the petitioners instituted a suit against the Respondent and the 1st Interested Party vide petition dated 5th March 2019 together with a Notice of Motion application dated 4th March 2019 claiming inter-alia that the people of Chuka Sub-tribe were never engaged in public participation by the Respondent in respect of creations of new administrative units being Igambang'ombe Sub-County

ii. That the Interested Party/Applicant subsequently filed its grounds of opposition dated 6th May 2019 against the petition.

iii. That the 24th July 2019 this court ordered that the applicant's Replying Affidavit sworn by Christine Otieno Owiye on 23rd July 2019 and filed on 24th July 2019 be expunged from the record on account of being filed out of stipulated time as directed by this court.

iv. That the applicant wishes to rely on that Replying Affidavit

v. That the omission by the applicant's counsel to seek leave to file and serve the Replying Affidavit out of time was an inadvertent mistake which ought not to be visited upon an innocent party

vi. That it would be prejudicial if the application is allowed as all parties have had an opportunity to peruse the Replying Affidavit.

vii. That the Replying Affidavit raises important legal and constitutional questions that would help this court in determination of this petition.

viii. That it is imperative that this application is heard immediately.

3. This application is further supported by the affidavit of Kelvin Mbogo sworn on 3rd October 2019 where he has mainly reiterated the above grounds. He avers that the delay in filing the Replying Affidavit on time was occasioned by circumstances beyond his control. He has however not stated what those circumstances were.

4. The applicant submits that that its advocate inadvertently forgot to seek leave on 24th July 2019 when the matter came up in court. It contends that it stands to suffer loss noting that serious issues have been raised in both the substantive application and the main petition.

5. The applicant further contends that **Article 159 (2) (d)** promotes administration of justice without undue regard to technicalities. According to the applicant, failure to seek leave is a technicality that can be cured.

6. The applicant has relied on the case of Joshua Mutie and Another –vs- County Government of Machakos and Another [2018] eKLR where the court stated that it considered an explanation delay in filing due to the bureaucracy of the defendant's office and due to lack of prejudice to be suffered by defendant in granting the applicant leave to file defence out of time. The applicant has further cited the decision in the case of Chairman, Secretary and Treasurer School Management Committee of Sirin Salim School –vs- Francis Bahati Dwari & 2 other [2014] eKLR to support its contention. In that case, the court stated that since the Rules allow for extension of time, striking out a pleading should be an extreme measure in the clearest of cases. The Applicant contends that is in the interest of justice to admit the Replying Affidavit.

7. It further submits that the parties are interested in speedy hearing and determination of this petition and contends that admitting the Replying Affidavit out of time will aid that goal as it will not prejudice any party.

8. The petitioner/Respondents have opposed this application vide a lengthy affidavit sworn by Isaac Mugo on 11th November 2019, They have given a summary of the proceeding and the order/directions given at various times and in particular the orders/directions given by this court on 4th June 2019 giving the Interested party 21 days to file response to the application dated 4th March 2019. They fault the applicant for failing to comply despite strict timelines given by this court.

9. The Respondents further terms this application as vexatious, frivolous and an abuse of court because the Replying Affidavit in issue was filed out of time without reasons for the delay given. They have faulted the applicant for laxity contending that non-compliance of court orders is not a mere technicality. They rely on the decision of Nicholas Kiptoo Arap Korir Salat –vs- IEBC where they aver the supreme established principles of extension of time. In their view the applicant has not met the threshold for the court to exercise discretion in its

favour. They contend that rules of procedure ought to apply strictly.

10. The Respondents further submit that **Section 95** of the **Civil Procedure Act** and **Order 50 Rule 6** do not apply here as timelines for compliance were fixed as per the request of the applicant itself and by consent. They contend that no reasons have been advanced for extension of time and that such extension would delay this matter.

11. The Respondent further aver that the application is incompetent and *res judicata* as this court has already made a determination on whether or not to admit the affidavit and having rejected the affidavit, the applicant sought leave to appeal but has not pursued that course. They have insisted that the interests of the parties must be balanced for the interest of justice.

12. This court has considered this application and the response made by the Petitioners/Respondents. The other parties in this petition for the record did not oppose this application. That notwithstanding this court will determine this application on its merit.

13. The crux of matter in this application is an application dated 4th March 2019 which were seeking for interim orders. The said application came up for inter partes on 7th May 2019 where the Interested Party/Applicant sought for time to file a response. This court fixed the matter for inter partes hearing on 4th June 2019 and the Interested Parties/Applicant was given 14 days to file its Replying Affidavit as requested. On 4th June 2019, the Interested Party/Applicant counsel sought for more time (21days) to file a response to the said application as they had not complied with this court's order to file response in 14 days from 7th May 2019. This court indulged the applicant (Interested Party) and gave it 21 days more further to respond. The application was then fixed for hearing on 2nd July 2019 when the 2nd to nineteenth Interested Parties bought an application dated 29th June 2019 for joinder. This court then entertained that application and delivered its ruling on 9th July 2019. On 9th July 2019 this court delivered its ruling and allowed the 19 parties to be enjoined as 2nd to 19th Interested Parties. The 1st Interested Parties /Applicant then told this court that it had filed grounds of opposition and only sought 7 days to file authorities they would be relying on. This court expressly put all the parties on notice because of the previous unnecessary delays that had been caused by the 1st and 2nd Respondents and 1st Interested Party. This court then gave them 7 days strictly to file their responses and whatever authorities they wished to rely and fixed the matter for mention on 24th July 2019 for further directions. On 24th July 2019 some other parties applied to be enjoined vide Notice of Motion dated 23rd July 2019 and this court directed that the same application be canvassed vide written submissions. This court was also alerted that the 1st Interested Party/applicant herein had filed its response late and had failed to seek leave of this court. This court upon hearing representation from both parties found that the Replying Affidavit filed on 24th July 2019 had been irregularly filed out of time without leave and expunged the same from the record. The applicant then sought leave to appeal which was granted by this court.

14. The Applicant is now seeking to have the same orders set aside or varied but it has not stated whether it pursued its appeal and if so the status of the same. The applicant has also failed to give reasons for the delay in filing its Replying Affidavit despite being given adequate time to file response. When it asked this court orally to extend time on 24th July 2019 it also did not give reasons to explain the delay so that this court could decide whether or not to exercise its discretion and grant extension. The Applicant has also made a fundamental error by failing to seek leave to be allowed to file its Replying Affidavit out of time under **Order 50(6)** of the **Civil Procedure Rules**, the applicant has therefore failed to properly invoke the discretion of this court. In the cited Supreme Court's decision in *Nicholas Kiptoo Arap Korir Salat –vs- IEBC [20014] eKLR* the court expunged an appeal that was irregularly filed and made the following observations;

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court.”

In this instance the application is being presumptive that with the setting aside of the order made by this court on 24th July 2019 this court would grant leave automatically which is a misconception. An extension of time is not automatic or a matter of right. It is an equitable remedy and a party seeking for such a relief must lay sufficient basis for the same. In this application the applicant has neither sought leave nor lay any basis. He has just stated that **“circumstances were beyond his control”** which I find to be a lame excuse. This court cannot be persuaded by such lame excuses by parties who fail to adhere to time lines set to facilitate speedy trial and determination of matters bought before court particularly when these circumstances are not disclosed. The applicant has not raised anything new from what it raised on 24th July 2019. This court rendered itself on the issue of late filing of the Replying Affidavit without leave.

In the end this court finds no merit in the application dated 3rd October 2019. The same is dismissed with costs.

Dated, signed and delivered at Chuka this 27th day of May 2020.

R.K. LIMO

JUDGE

27/5/2020

Ruling signed dated and delivered via zoom in presence of Mbogo for Applicant, Kariuki for 2nd to 19th Interested Parties and Otieno for Petitioner.

R.K. LIMO

JUDGE

27/5/2020