



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 15 OF 2019

IN THE MATTER OF NYERI CRIMINAL CASE NO. 1833 OF 2019

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 10,

40. 46 & 75 OF THE CONSTITUTION OF KENYA 2020

AND

IN THE MATTER OF EASTERN AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT

AND

BETWEEN-

GITUMA KAUMBI KIOGA.....PETITIONER

-VERSUS-

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....2ND RESPONDENT

RULING

1. The 1st respondent wrote a letter dated 30/7/2020 to the court indicating that they had come across critical documents in the Criminal case but which were not annexed in their replying affidavit that was sworn by Morris Mbaabu on 14/11/2019. It was therefore their request for an urgent mention date for directions on the matter.

2. The matter came up for mention on 17/9/2020 where Ms Kithinji counsel for the 1st respondent made an oral application requesting for leave to validate their further affidavit which annexed the said documents. She was also of the view that, to prevent prejudice, the other parties should be given an opportunity to reply to the further affidavit. She based her application on Article 159 (2) (d) of the constitution which emphasizes substantive justice.

3. The application was opposed by Mr Kimata counsel for the petitioner who argued that the 1st respondent were aware of the criminal case and had also filed their submissions. Their claims cannot therefore stand for they go against the Mutunga Rules. In support of their position he filed a list of the following authorities:

(a) Johanna Kipkemoi Too Vs Hellen Tum (2014)eKLR.

(b) Ace Engineering & Building Co. Ltd V National Bank of Kenya (2019 eKLR.

(c) Emily Cherono Kiombe V Joacob Kaari (2018 eKLR.

(d) Kirui Tea Factory Company Ltd Vs Stephen Maina Githiga & 13 others 2019 eKLR.

(e) Raila Odinga & 5 others Vs IEBC & 3 others (2013) eKLR .

(f) MNM VS NWK (2019) eKLR.

(g) Republic Vs Kenya Ports Authority & 3 others (2014)eKLR.

(h) Floris Pierro & another Vs GianCarlo Falasconi (2014 eKLR.

(i) Telkom Kenya Ltd Vs John Ochando (2014 eKLR.

4. He significantly quoted **Raila Odinga & 5 Others v. IEBC & 3 Others [2013] eKLR** whereby, the Supreme Court declined to bend the rules to accommodate a party who had failed to comply with the rules of procedure.

ANALYSIS AND DETERMINATION

5. I have considered the application by the 1st respondent and the rival arguments thereto. Arising therefrom are two inextricable issues which relate to;

a. Competence; and

b. Merit of the application.

Competence of Application

6. Mr. Kimaita argued that the applicant should have filed a formal application for extension of time to file a further affidavit in accordance with the Mutunga Rules. *The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013* are what advocates commonly refers to as Mutunga Rules.

7. The applicant took the view that, they approached the court through their letter above-mentioned for a mention date so that they may seek for appropriate directions on their request. They also founded their application on article 159(2) (d) of the Constitution which decrees that justice shall be administered without undue regard to technicalities. They stated that as long as the other parties are given an opportunity to reply to the further affidavit, there will be no prejudice on the petitioner. But, according to Mr. Kimaita the petitioner will suffer prejudice as the case was scheduled for judgment on 21st September 2020- and this date may be affected by this request.

8. Under the Mutunga Rules, parties may approach the court through oral application or informal documentation as the case may be. The said rules were made pursuant to article 22 of the Constitution. Article 22(b) is particularly relevant on the constitutional command that rules of procedure should keep formalities in commencement of proceedings in court to the minimum. The rule provides:

The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a)

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation

(c)

9. Accordingly, I find that the letter herein as well as the oral application suffice to competently place the request herein before the court. The elephant in the room, however, is whether the request for leave has merit.

Is leave merited?

10. The applicant requests the court to admit the further affidavit as part of record. Rule 21 of the Mutunga Rules provides as follows;

Evaluating petition for directions and allocating hearing dates

(1) In giving directions on the hearing of the case, a Judge may require that parties file and serve written submissions within fourteen days of such directions or such other time as the Judge may direct.

(2) A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court.
[Underlining mine]

(3) The Court may frame the issues for determination at the hearing and give such directions as are necessary for the

expeditious hearing of the case.

11. This is a request by the 1st respondent for leave to file additional documents which they find to be crucial in this case. I am aware that I gave directions on the filing of submissions which parties complied with. I am also acutely aware these proceedings are in the nature of public litigation for they seek enforcement of Bill of Rights. I am too alive to the fact that the rules allow such requests to be made at any stage of proceedings. See rule 21 above. Therefore, the request is not out of order or preposterous. But, what considerations are necessary in determining the request?

12. Rule 3 of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules) incorporates and emphasizes on the overriding objective of the court in adjudication of cases under the rules. In particular rule 3(4) and (5) thereof provides as follows:

4) The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.

5) For the purpose of furthering the overriding objective, the court shall handle all matters before it to achieve the:-

a. just determination of the proceedings,

b. efficient use of the available and administrative resources;

c. timely disposal of proceedings at a cost affordable by the respective parties; and

d. use of appropriate technology.

13. I also do note that the applicants have based their request on article 159(2) (d) of the Constitution. I will cast Article 159 (2) of the Constitution which provides that;

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities[Underlining mine]

14. Doubtless, the people of Kenya gave ourselves these elegant provisions after they suffered greatly at the altar of technicalities. This provision was enacted to ameliorate a mischief in adjudication of cases. They may, nonetheless, be abused, and have been abused by indolent and belligerent suitors. This warning and caution was sounded by the Supreme Court of Kenya- but which also provided the scope of application of this principle- in the case of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR thus;

“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] eKLR).” (Emphasis Mine)

15. Accordingly, Article 159(2) (d) of the Constitutional is to be applied on a case to case basis. Here, tune to reality; litigants with varied claims and expectations will be aboard this vessel of justice. Some will attempt to invoke the principle to advance personal desires to obtain all manner of reliefs mainly to delay the case or to prejudice the other party. Here, it bears repeating that the law sub-serves legitimate interests of a litigant as opposed to individual desires, and its greater concern is to serve justice. Others, however, will invoke it for legitimate reasons in pursuit of justice. Yet, the court which is at the helm is expected to steer the vessel through these stormy waves of varied facts and circumstances of each case towards the ultimate destination prescribed by the Constitution; to serve substantive justice to the parties. This philosophy remains the significant navigational tool in the voyage of adjudication of cases. I will be so guided.

16. It should be noted that the decision of the Supreme Court in *Raila Odinga & 5 Others v. IEBC & 3 Others* (*supra*) should be understood within the strict and severely restricted timelines of determining a presidential election petition. Those peculiar circumstances dictated the rejection of the voluminous affidavit presented in court outside time. It is thus distinguishable from the circumstances of the present case.

17. Be that as it may, I do note and appreciate the arguments by Kimaita to be reasonable and fair assessment of duty of legal counsels, especially that the previous counsel on record is taken to have full instructions when she filed the replying affidavit and that they were aware of these documents at the time of filing the replying affidavit. The previous counsel for the 1st respondent should have been more diligent to understand that these proceedings relate to the criminal case and therefore annex relevant documents thereto. Such professional diligence would avert interventions of this type. Nonetheless, given the nature of these proceedings, this is not an apt case to visit the omission of

counsel upon the 1st respondent. From the explanations provided by the applicant, failure to annex the documents in question earlier was not deliberate. But, things will be clearer after what I say next.

18. Of great significance is that this petition relates to NYERI CMCRC NO. 1833 OF 2019 against the petitioner. The documents annexed to the further affidavit relate to and are obtainable from the said criminal case. Therefore, it will be unfair to infer indolence or mala fides on the part of the 1st respondent in the request to file the documents in these proceedings. The documents in issue are customs documents and of history of the vehicle in question. The judicial nexus between these two judicial proceedings makes it absolutely necessary for the court to be properly grounded on the subject matter. The documents will however be utilized within the limited scope of adjudication of constitutional petition. Needless to state that evaluation of evidence or evidentiary value of any document for purposes of a criminal case is essentially the work of the trial court. This type of safeguard is necessary to ensure fair trial. Accordingly, the filing of these documents in this petition does not prejudice the petitioner. Further, to ensure no prejudice is suffered by the petitioner, he 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.

19. Before I close, I should not fail to appreciate Mr. Kimaita's argument that this kind of interventions is likely to occasion delay in the case. Therefore, to avert any such delay, I must give very clear directions and orders especially because submissions had already been filed.

Orders

20. Accordingly, I make the following specific orders.

- 1. I re-open the proceedings for limited purposes stated below. Meanwhile, I hereby arrest the judgment herein.**
- 2. The further affidavit and annexures thereto filed herein by the 1st respondent is deemed to be duly filed and is part of record.**
- 3. Since the further affidavit has already been served, I direct the petitioner to file and serve within 7 days of today, affidavit and submissions limited to and only in reply to the further affidavit filed by the 1st Respondent. These submissions are in addition to the earlier submissions filed herein.**
- 4. Upon service in (3), the respondents shall, within 7 days thereof, file and serve submissions in reply to the submissions filed by the petitioner pursuant to (3) above.**
- 5. Time is of the essence.**
- 6. Judgment shall be delivered on 22nd October 2020.**

Dated, signed and delivered at Meru this 21st day of September, 2020

.....

F. GIKONYO

JUDGE

Representation

Kimaita for petitioner

m/s Onyango for 1st respondent

No appearance for 2nd respondent

No appearance for 3rd respondent