



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ANTI-CORRUPTION & ECONOMICS CRIMES DIVISION
MISC. APPLICATION NO 78 OF 2017

THE ASSETS RECOVERY AGENCY.....APPLICANT

VS

CHARITY WANGUI GETHI.....1ST RESPONDENT

SAMUEL MDANYI WACHENJE alias SAM MWADIME.....2ND RESPONDENT

RULING

1. On 16th September 2020, the court issued directions to the parties with respect to the filing of submissions in this matter. It did so after noting that the 1st respondent had filed her affidavit in reply to the application. The replying affidavit is dated 11th August 2020.
2. The matter was then fixed for mention today, 28th October, 2020, to confirm compliance with filing of submissions. It transpired at the mention of the matter this morning that aside from filing her submissions out of time, the 1st respondent had also filed a further replying affidavit sworn on 22nd October 2020. The affidavit was ostensibly sworn in reply to the supplementary affidavit sworn by Sautet Jeremiah Matipei on behalf of the applicant.
3. Ms Muchiri for the applicant asked the court to expunge the affidavit from the record as it was filed without the leave of the court and it raised new matters after the court had given directions on submissions, the applicant had filed submissions, and all that remained was for it to file supplementary submission. She relied on the decision of the Supreme Court in **Nicholas Kiptoo Salat vs IEBC** with respect to the expunging of pleadings filed without leave.
4. Mr. Muriungi argued in reply that the court had, on 24th June 2020, granted the 1st respondent leave to file a further affidavit. He argued, secondly, that the applicant had raised new issues in the supplementary affidavit. It is his argument, thirdly, that the further replying affidavit was intended to cure certain inadvertent omissions in the 1st respondent's affidavit. Finally, he argued that the applicant will not suffer any prejudice; that the court should seek to render substantive justice and not be bound by procedural technicalities as provided under Article 159; and that the applicant can address any issues of law or fact that arise in its supplementary submissions.
5. Ms Muchiri's response was that there are new issues raised in the further replying affidavit while the applicant had not raised any new issues. The applicant would also be prejudiced as it had already filed submissions, and had had no opportunity to review the affidavit before filing submissions.
6. I have considered the submissions of the parties regarding the 1st respondent's further replying affidavit. The record of proceedings on 24th June 2020 indicates that the 1st respondent was granted time to file her replying affidavit in respect of the application. There was therefore no leave sought or granted with respect to the filing of a further affidavit. Mr Muriungi is therefore in error when he submits that such leave was granted.
7. Secondly, the 1st respondent's further replying affidavit is stated expressly to be in response to the averments by Sautet Jeremiah Matipei in his affidavit of 15th September 2020. It could therefore not be pursuant to leave granted on 24th June, 2020 as Mr. Muriungi submitted.
8. The 1st respondent was represented in court by Mr. Muriungi on 16th September 2020 but no leave was sought to respond to any new issues raised in the supplementary affidavit of Mr. Matipei. The 1st respondent's further affidavit was thus filed without the leave of the court. The question is whether it should be expunged from the record as prayed by the applicant, or admitted to the record.

9. I have considered the authorities relied on by the applicant, in particular **Nicholas Kiptoo arap Korir Salat v IEBC and 7 Others (2014) eKLR**. The matter related to an appeal being filed in the Supreme Court without time being extended and the court being asked to deem it as properly filed and to extend time for its filing.

10. While there are similarities with respect to the absence of leave between the Salat appeal and the present matter, I am inclined to exercise discretion and admit the further replying affidavit, for three reasons. First, the 1st respondent was initially acting in person. Secondly, the nature of the present proceedings differs from the election petition in which there are strict timelines with respect to the time for filing of appeals. Finally, given that the application before this court is an application for forfeiture, justice will be best served, in my view, by allowing the 1st respondent to place her entire case before the court.

11. Accordingly, I will allow the 1st respondent's further replying affidavit into the record. However, I will grant the applicant leave to address any new issues that the 1st respondent has raised in the said affidavit.

12. The applicant shall file and serve its further affidavit together with supplementary submissions within 28 days of today. Judgment on the basis of the affidavits and submissions on 27th January, 2021.

Dated Delivered and Signed at Nairobi this 28th day of October 2020

MUMBI NGUGI

JUDGE