



**IN THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. APPLICATION 122 OF 2002**

**PHILIPS MEDICAL SYSTEM & ANOTHER.....APPLICANT**

**V E R S U S**

**MEDITEC SYSTEMS & OTHERS.....RESPONDENT**

**R U L I N G**

This is an application under Order 49 Rule 5 of Civil Procedure Rule seeking an order to extend the time imposed by this court requiring the interested party to file its affidavit in 7 days. It filed same 2 days out of the limited time and says the delay was occasioned by the inability of the Registry to supply the typed proceedings or avail the file for scrutiny. All the 3 respondents do not oppose the application but the applicant through Mr. Lubulela their learned counsel opposes the extension on grounds that it is caused by laxity on the interested party's part and that to allow it is to give retrospective effect to the order causing an irregular affidavit filed out of time by him to be regularised.

Two issues arise here. The admission of late affidavit under Order 49 Rule 5 of the Civil Procedure Rules and affidavit (generating) under Order 49 Rule 53 of Civil procedure Rule.

As for the latter issue I said earlier is a ruling in this case as follows:-

"We do not have procedural requirements like in England where any respondent to an application for Judicial Review who wished to rely on any evidence in opposition to the application must file affidavit evidence in reply. In our case it would appear that a respondent is not compelled that his evidence in opposition must be deponed to in an affidavit and this may be consistent with the opportunity allowed to whoever the court deems a proper person to be heard and who wants to be heard in opposition to the application to be given opportunity to be heard (and any person who wants to be heard in opposition to the application to be heard) notwithstanding that he has not been served with the notice or summons. It appears such a person would oppose the application either through counsel or be heard viva voce without affidavit.

The only requirement under our Order 53 Rule (4) (3) is that:-

"Every party to the proceedings shall supply to any other party, on demand, copies of affidavits which he proposes to use at the hearing".

"If he does not propose to use affidavits so be it. But I think it would still be expected practice that a respondent not merely answering but putting up factual defences must of necessity draft and use affidavit which would mean filing and serving on such affidavit on the parties in the case who ask for it."

It appears to me that the question of affidavits in Judicial Review application should not be rigidly applied because it would exclude otherwise relevant parties.

As for extension of time the Order 49 Rule 5 seems to me to be fairly liberal and in fact sanctions the idea of extension being made with retrospective effect. It all depends on discretion of the court but normally I think inordinate delay inadmissible evidence, or evidence irregularly obtained or irrelevant scandalous evidence in affidavit if be the one then would be the kind that would influence a court to fetter this otherwise wide jurisdiction, but not that the affidavit was filed before leave because then if that were

so it would be removed on order of the court. Here I am satisfied that the delay of 2 days was not inordinate and there is no grave prejudice occasioned by it to the parties although I agree with Mr. Lubulela that although not quantifiable there can also be perceived prejudice in any omission to comply with a court order even if only that it denies one to realize an expectation.

I think to bar this affidavit is to pave way for multifarious applications which may delay the conclusion of the case.

I allow the application and extend the time by admitting the already filed affidavit by ordering that it is filed in time. Costs be in the cause.

**Delivered to the parties in court this 12th day of June 2002**

**A. I. HAYANGA**

**J U D G E**