



**Roy Transmotors Limited & another v County Government of Mombasa;
Energy & Petroleum Regulatory Authority & 3 others (Interested Parties)
(Petition E059 of 2022) [2024] KEHC 2976 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION E059 OF 2022**

OA SEWE, J

MARCH 14, 2024

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010
AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20,
21, 22, 23(1) AND (3), 40, 47, 50 AND 258 OF THE CONSTITUTION**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE ENERGY ACT NO. 1 OF 2019

AND

IN THE MATTER OF THE INTERGOVERNMENTAL RELATIONS ACT NO. 2 OF 2012

BETWEEN

ROY TRANSMOTORS LIMITED 1ST PETITIONER

**EAST AFRICAN PETROLEUM TRANSPORTERS ASSOCIATION 2ND
PETITIONER**

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

ENERGY & PETROLEUM REGULATORY AUTHORITY INTERESTED PARTY

COUNCIL OF GOVERNORS INTERESTED PARTY

MINISTRY OF ENERGY & PETROLEUM INTERESTED PARTY



RULING

1. The Notice of Motion dated 10th May 2023 was filed by the respondent, the County Government of Mombasa under Articles 48 and 50 of the Constitution as well as Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. The respondent also cited Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law as the basis for its prayers that:
 - (a) Spent
 - (b) The Court be pleased to review its orders issues on 28th March 2023 and extend time for the respondent to file its response and submissions in this matter;
 - (c) The Court be pleased to arrest and/or stay the Judgment on the Petition scheduled for delivery on 11th May 2023 (spent)
 - (d) The Court be pleased to issue further or better orders as shall meet the ends of justice;
 - (e) The costs of the application be provided for.
2. The application is based on the affidavit of Jimmy Waliaula sworn on 10th May 2023 in which it was averred that, due to oversight on the part of the advocate handling this matter, there was no appearance on behalf of the respondent on 28th March 2023. In particular, Mr. Waliaula explained that the confusion arose because counsel was then handling two similar matters involving the same parties and therefore that this matter was mis-diarized as a result. A copy of the Cause List for 3rd May 2023 was annexed to the Supporting Affidavit in proof of the Mr. Waliaula's averments. He further averred that the respondent is desirous of defendant the Petition and that no prejudice will be occasioned to the petitioners or the interested parties if the orders sought are granted.
3. The application was conceded to by counsel for the 1st, 3rd and 4th Interested parties, Ms. Kiti. It was however opposed by the petitioners; on whose behalf a Replying Affidavit was filed herein sworn by Nairuti Fridah Makena. According to the petitioners, counsel for the respondent was present when the judgment date of 11th May 2023 was taken and therefore cannot feign oversight. He added that it is dishonest for the County Attorney to claim confusion with Petition No. E008 of 2023 granted that the judgment date was taken way back on 14th March 2023. Ms. Makena added that the 1st petitioner continues to suffer prejudice at the hands of the respondent who has chosen to disregard the orders of the Court for extraneous reasons.
4. The application was canvassed orally on the 17th May 2023. Learned counsel for the respondent, Mr. Tajbhai submitted relied on Articles 48 and 50 of the Constitution as well as Rule 16(2) of the Mutunga Rules and reiterated the respondent's stance that this Petition affects the public interest in so far as it relates to revenue collections; and therefore that the respondent ought to be heard before judgment can be delivered. He relied on the averments set out in the Supporting Affidavit to explain his non-attendance on 28th March 2023 and insisted that were it not for the confusion involving the two petitions he would have been in attendance to defend the interests of the respondent.
5. On his part, Mr. Otieno took the posturing that no good reason has been given for setting aside the ex parte proceedings of 28th March 2023. He submitted that court orders must be obeyed and that Mr. Tajbhai has no excuse for non-attendance given that he has handled this matter from inception. He



added that the Court has the obligation of upholding the overriding objective and therefore that the application ought to be dismissed with costs and judgment delivered as originally intended.

6. I have given careful consideration to the application and the averments set out in the parties' respective affidavits. Although the application is expressed to have been filed under the provisions of the [Civil Procedure Rules](#), the applicable procedural rules to constitutional petitions and the applications made thereunder are the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 (otherwise known as the Mutunga Rules). In this regard, I entirely endorse the position taken by Hon. Musyoka, J. in [Francis Angueyah Ominde & Another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others \(Interested Parties\)](#) [2021] eKLR that:

“..... it should be pointed out that the constitutional petitions are governed and regulated by the [Constitution of Kenya \(Protection of Rights and Freedoms\) Practice and Procedure Rules](#), 2013, so far as procedures and processes are concerned. They are not subject to the [Civil Procedure Rules](#), which governs processes that are brought under the [Civil Procedure Act](#), Cap 21, Laws of Kenya. So far as procedure is concerned, the [Constitution of Kenya \(Protection of Rights and Freedoms\) Practice and Procedure Rules](#), 2013 captures the spirit of Article 159(2)(d) of the [Constitution](#), which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of the [Constitution](#). The focus is trained on substance rather than process. The [Constitution of Kenya \(Protection of Rights and Freedoms\) Practice and Procedure Rules](#), 2013 are more flexible compared with the provisions of the [Civil Procedure Rules](#), with respect to who may bring proceedings and the manner of initiating the proceedings.”

7. Indeed, Rule 16 of the [Mutunga Rules](#) provides for the instant situation, in that it provides that:

- “(1) If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent's absence.
- (2) The Court may set aside an order made under subrule (1) on its own motion or upon the application of the respondent or a party affected by the order.”

8. In the same vein, Rule 19 provides that:

“A formal application under these rules shall be by Notice of Motion set out in Form D in the Schedule and may be supported by an affidavit.”

9. In the premises, the only issue for consideration is the question whether the respondent has made out a good case for the setting aside of the ex parte proceedings held on 28th March 2023 with a view of reopening the proceedings. Although counsel for the petitioners submitted that perusal of the proceedings shows that Mr. Tajbhai was in attendance on 28th March 2023 when the judgment date was taken, the record shows otherwise. It shows that there was no appearance for or by the respondent.
10. Needless to say that the Court has unfettered discretion to set aside the ex parte proceedings held on 28th March 2023 so long as sufficient cause has been shown to warrant such action. In [Shah v Mbogo](#) [1967] EA 116, it was held that the discretion is intended to be exercised

“.... to avoid injustice or hardship resulting from inadvertence or excusable mistake or error,” but is not designed to assist a person who has deliberately sought, whether by evasion or



otherwise, to obstruct or delay the course of justice, Similarly, in *Patel v. East Africa Cargo Services Ltd* (1974) EA 75, this principle was expressed thus:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

11. While it is true that Mr. Tajbhai was present when the date of 28th March 2023 was taken, he explained that due to the fact that the matter was mis-diarized, he was unable to attend court on 28th March 2023. That may reflect tardiness, but it is nevertheless a plausible explanation in my view. Indeed, in *Philip Keipto Chemwolo and Mumias Sugar Co. Ltd v. Augustine Kubende* [1986] eKLR the Court of Appeal acknowledged that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits ... Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

12. In the result, the Notice of Motion dated 10th May 2023 is hereby allowed and orders granted as hereunder:

- (a) That the proceedings and order given on 28th March 2023 be and is hereby set aside and time given to the respondent to file its response and submissions in this matter. The same be done within 14 days from the date hereof.
- (b) Corresponding leave be and is hereby given to the petitioner to file a Supplementary Affidavit together with Supplementary Submissions if need be. The same be filed within 14 days of service by the respondent.
- (c) The costs of the application be borne by the respondent in any event.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF MARCH 2024

OLGA SEWE

JUDGE

