



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kwale International Sugar Company Limited v Kenya Bureau of Standards & 4 others  
(Constitutional Petition 226 of 2018) [2024] KEHC 6673 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6673 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 226 OF 2018**

**OA SEWE, J**

**MAY 23, 2024**

**IN THE MATTER: ARTICLES 2(1) & (2), 3(1), 10, 19, 20, 22,  
23(1) & (3), 27(1), 35, 40, 46, 47(1) &  
(2), 48, 50(1), 159 AND 258(1) OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER: THE STANDARDS ACT 496 OF THE LAWS  
OF KENYA**

**AND**

**IN THE MATTER: THE KENYA REVENUE AUTHORITY ACT  
NO. 2 OF 1995 LAWS OF KENYA**

**AND**

**IN THE MATTER: SECTIONS 3, 4(1) (2), (3) (A) (B) (D) &  
(G), (4), 6, 7(1) (A) & (2) OF THE FAIR  
ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER: ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 2, 3(1), 10, 19, 20, 21,  
22, 23(1) & (3), 27(1), 35, 40, 46, 47, 48  
AND 50(1) OF THE CONSTITUTION OF  
KENYA, 2010**



**BETWEEN**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED ..... PETITIONER**

**AND**

**KENYA BUREAU OF STANDARDS ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF TRADE ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 4<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

- (1) The Notice of Motion dated 9<sup>th</sup> February 2024 was filed herein by the 1<sup>st</sup> respondent, Kenya Bureau of Standards, under Sections 3 and 3A of the *Civil Procedure Act*, Rules 3(6)(b), (8), 18 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (otherwise known as “the Mutunga Rules”) for orders that:
  - (a) The Court be pleased to strike out the petitioner’s Amended Petition dated 24<sup>th</sup> January 2024 for having been filed without leave of the Court.
  - (b) The costs of the application be borne by the petitioner.
- (2) The application was premised on the grounds that, at the instance of the petitioner, the Court delivered a ruling on 22<sup>nd</sup> August 2023 in which it allowed the petitioner’s application on clear terms, in that the leave was limited to 14 days from 22<sup>nd</sup> August 2023. The 14 days lapsed on 7<sup>th</sup> September 2023. The 1<sup>st</sup> respondent therefore took issue with the fact that the petitioner thereafter purported to file an Amended Petition on 24<sup>th</sup> January without leave of the Court and after directions had been given for the matter to proceed on the basis of the original Petition.
- (3) The 1<sup>st</sup> respondent further pointed out that, in the intervening period, the Court had given directions, on the 26<sup>th</sup> October 2023, that hearing would proceed on 14<sup>th</sup> and 15<sup>th</sup> February 2024 on the basis of the original pleadings filed by the parties. Thus, the 1<sup>st</sup> respondent averred that the leave granted on 22<sup>nd</sup> August 2023 was not an open cheque for the petitioner to act on at will and at any time. It posited that the only way of according the parties a level playing ground is by striking out the purported Amended Petition.
- (4) The petitioner opposed the application vide the Replying Affidavit sworn by its Head of Legal & Board Affairs, Mr. Benson Nzuka Musili. It explained that it was unable to comply with the timelines imposed by the Court in its ruling of 22<sup>nd</sup> August 2023 because:
  - (a) The petitioner instructed the firm of Muriu Mungai & Company Advocates LLP to assist in the matter; and that it took some time for the new firm to fully acquaint itself with the matter.
  - (b) Upon their familiarization with the matter, it took more time to obtain documentary and affidavit evidence to support the proposed amendments.



- (c) The advocate handling the matter had several assignments which also required his attention and was therefore unable to get to this matter in time.
- (5) It was further the contention of the petitioner that the delay is not unreasonable given the circumstances; and that it would be contrary to the overriding objective to deny it an opportunity to present its entire case.
- (6) The application was urged on 12<sup>th</sup> March 2024 by Mr. Masafu, counsel for the applicant. He reiterated the grounds set out on the face of the application and underscored the fact that the petitioner not only failed to comply with the directions of the Court, but also failed to attend Court on 26<sup>th</sup> October 2023 when the Court directed that the matter be proceeded with to hearing on the basis of the original Petition. He therefore submitted that, in those circumstances, it was incumbent on the petitioner to seek the leave of the Court and the setting aside of the order of 26<sup>th</sup> October 2023 before purporting to file its Amended Petition belatedly. The 1<sup>st</sup> respondent relied on *Nairobi Bottlers Limited v Mark Ndumia Ndung'u & another* for the proposition that pleadings filed out of time are a nullity.
- (7) It is indeed the case that, at the instance of the petitioner, leave to amend the Petition was granted herein on 22<sup>nd</sup> August 2023 pursuant to Rule 18 of the *Mutunga Rules*, which states:
- “A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.”
- (8) Leave was accordingly tethered to the following terms:
- (a) That leave be and is hereby granted to the petitioner to amend its Petition in terms of the draft Amended Petition annexed to the Supporting Affidavit herein.
- (b) That the Amended Petition be filed and served within 14 days from the date hereof; with corresponding leave to the respondents to amend their responses, if need be.
- (9) There is no dispute that the petitioner did not comply and that reasons have been given for non-compliance which reasons have not been refuted by the respondents. Notwithstanding the justification for non-compliance, what stands out from the record is that, by 26<sup>th</sup> October 2023 when the matter came up for directions the petitioner had not complied, directions were then given that the matter proceeds to hearing on 14<sup>th</sup> and 15<sup>th</sup> February 2024 on the basis of the pleadings as they were. Granted those directions, it was presumptuous for the petitioner to proceed and purport to file an Amended Petition without first seeking extension of time; granted the directions of 26<sup>th</sup> October 2024. The Supreme Court made the point in *Nairobi Bottlers Limited v Mark Ndumia Ndung'u & another* [2023] KESC 96 (KLR) (10 November 2023) Ruling thus:
- “28 ...even assuming that the applicant had offered satisfactory explanation for the entire period of delay, which it hasn't, its motion for extension of time would still be subject to the same fate. This is because, the applicant has urged this court that upon extending time to deem the appeal as being properly filed. Time and again, we have reiterated that filing an appeal out of time without



leave and then seeking this court’s discretion to extend time is presumptive and inappropriate. As we stated in *Nicholas Salat-*

“No appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.”

We therefore decline to accede to the request to deem the appeal, which was filed out of time, as properly before us. To do so would be tantamount to sanctioning an illegality.”

10 I note that Mr. Kongere made reference to *Charles Karanja Kiiru v Charles Gitbinji Muigwa* [2017] eKLR to support his argument that in the above case the Supreme Court applied its mind to Rule 53 of the *Supreme Court Rules*, a rule specific to applications made to the Supreme Court. Indeed, in *Charles Karanja Kiiru* (*supra*) what was before the Court of Appeal was the question whether the High Court had power to extend time for filing an appeal to the Court of Appeal and to deem an appeal filed out of time duly filed. The Court of Appeal observed that Section 79G specifically provides that an appeal “may be admitted out of time” and approved the position taken by Hon. Emukule, J. in *Gerald M’limbine v Joseph Kangangi* [2009] eKLR that:

“...an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of the court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B.”

(11) It is manifest therefore that the circumstances herein are markedly distinguishable from the ones at play in *Charles Karanja Kiiru* (*supra*). In this matter, the petitioner was granted time to file an Amended Petition but failed to comply within the period stipulated. The order was then superseded by directions of the Court for the matter to proceed as is. Under those circumstances, the petitioner could not purport to unilaterally comply 5 months down the line without any recourse to the Court, because the respondents had already acquired the legitimate expectation that hearing would proceed on the basis of the original petition and had prepared accordingly.

(12) Accordingly, I endorse the remarks of Hon. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR thus:

“I am not in the least persuaded that Article 159 of the *Constitution* and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”

(13) In the result, I find merit in the Notice of Motion dated 9<sup>th</sup> February 2024. The same is hereby allowed and orders granted as hereunder:

- (a) That the petitioner’s Amended Petition dated 24<sup>th</sup> January 2024 be and is hereby struck out for having been filed out of time and without the Court’s sanction.
- (b) The costs of the application be borne by the petitioner.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23<sup>RD</sup> DAY OF MAY,  
2024

OLGA SEWE

\*\*JUDGE\*

