



**Kwale International Sugar Company Limited v Chief Justice of Kenya (Petition E415 of 2023)
[2024] KEHC 12080 (KLR) (Constitutional and Human Rights) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E415 OF 2023
EC MWITA, J
OCTOBER 4, 2024**

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LIMITED PETITIONER

AND

THE CHIEF JUSTICE OF KENYA RESPONDENT

RULING

1. This is a notice of motion application filed by the respondent seeking postponement of delivery of judgment in this matter and leave to file a replying affidavit to the petition out of time. The respondent also prays that the affidavit annexed to the application be admitted.
2. The respondent states that when the petition came up for highlighting of submissions on 12th March 2024, it was adjourned because a response and submissions had not been filed. The respondent was granted 14 days to file a response and written submissions. Highlighting of submissions was rescheduled for 20th May 2024.
3. The respondent stated again that counsel handling the matter had wrongly diarized the date and for that reason, counsel was unable to file the response on time. On 17th May 2024, counsel realized the mistake, prepared a replying affidavit and shared it with the respondent and the petitioner's counsel before the date for highlighting of submissions.
4. The respondent further asserts that on the date for highlighting of submissions, counsel confirmed having filed submissions and sought leave to file a sworn and commissioned affidavit within 1 day. The request was, however, turned down by the court. Highlighting of submissions proceeded without the response on record.



5. The respondent argues that it is in the interests of justice that the hearing of the petition be reopened and the replying affidavit and written submission be considered so that the petition is determined on merit.
6. It is the respondent's position that counsel's mistake was inadvertent and the delay to respond was not deliberate. The respondent maintains that the application is not an afterthought or an abuse of the court process. The respondent relies on the decision in *Okiya Omtatah Okoiti v Director of Public Prosecutions; Inspector General of national Police Service & another (interested Parties); International Commission of Jurists (Kenya section) (Amicus Curiae) [2021] eKLR*.
7. The respondent again relies on rules 3(2), (4), (5), (8), 16(2) and 30 of the Mutunga Rules, that the court has discretion to set aside its orders of 20th May 2024 and allow the replying affidavit to be deemed to have been filed.
8. The respondent puts further reliance on the decisions in *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR* and *Okiya Omtatah Okoiti v Director of Public Prosecutions; Inspector General of National Police Service & another (Interested Parties); International Commission of Jurists (Kenya Section) (Amicus Curiae) (supra)*, for the position that the failure to file a replying affidavit was occasioned by mistake and error on the part of counsel.
9. The respondent urges the court to allow the application, admit the documents and reopen the matter for fresh hearing.

Response

10. The petitioner has opposed this application through a replying affidavit. The petitioner states that the petition was filed on 21st October 2023 together with an application seeking conservatory orders staying implementation of the impugned Practice Directions. On 23rd October 2023, the court directed that pleadings be served and set the matter for directions on 22nd November 2023. The respondent was duly served with the pleadings together with directions of the court.
11. On 22nd November 2023, the respondent did not attend court and had not filed a response. The court directed that the petition be expedited for hearing instead of dealing with the application. The court further directed that the petition be served again; that the respondent file a response within 14 days and that parties file and exchange written submissions. Highlighting of submissions was set for 12th March 2024.
12. Following the second service, counsel for the respondent filed a Notice of Appointment on 18th December 2023 but no response was filed. The petitioner was thus, unable to file written submissions within the timelines directed by the court, to indulge the respondent file a response.
13. The petitioner asserts that by 6th March 2024, the respondent's counsel had not filed a response or written submission. The petitioner's advocate filed written submissions on 6th March 2024. On 12th March 2024 when the matter came up for highlighting of submissions, the petitioner's counsel was ready to proceed but the respondent's counsel sought an adjournment to file written submissions. Though opposed, the adjournment was granted. The matter was set for highlighting of submissions on 20th May 2024.
14. The petitioner states that on 20th May 2024 when the matter was called out, the respondent's counsel informed the court of they were ready to proceed with the highlighting of submissions. Counsel informed the court that they had filed written submissions and were filing a replying affidavit. The



court directed parties to ensure all documents they intended to rely on were in the court file and allocated time for highlighting of submissions.

15. At the time allocated for highlighting of submissions, the respondent's counsel was ready to proceed but requested to be allowed to rely on unsworn, unsigned replying affidavit. The request was declined since the petition had already been argued.
16. The petitioner contends that the application suffers from lack of transparency and material non-disclosure. It is mischievous, made in bad faith and an abuse of the court process. The petitioner argues that the request having been made on 20th May 2024 and declined, the court is functus officio and the issues raised are res judicata.
17. The petitioner takes the view, that respondent has no satisfactory explanation for the delay in filing a response to the petition by 30th October 2023; 11th December 2023 and 12th March 2024. The court should not exercise its discretion in the respondent's favour. The petitioner relies on the decisions in *Chandaria Industries Limited v Sonal Holdings (K) Limited & another* [2014] eKLR; *Charles Karathe Kiarie & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 2 others* [2020] eKLR; *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR; *Nicholus Kiptoo Korir v IEBC* [2013] eKLR and *Mae Properties Limited v Joseph Kibe & another* [2017] eKLR.
18. The petitioner argues that it will be prejudiced by any further delay in concluding this petition because of the numerous cases pending in various courts against it.

Determination

19. The issue before court is whether it should reopen the petition, allow the respondent's replying affidavit to be deemed filed and served and set the petition for highlighting of submissions a fresh.
20. This petition was filed under certificate of urgency together with an application seeking conservatory orders. The court considered the matter on 23rd October 2023 and directed that it be served and set the matter for directions on 22nd November 2023. The court did not issue conservatory orders at the ex parte stage as sought.
21. On the date for directions, the respondent was not represented. The court issued further directions on service and set the matter for highlighting of submissions on 12th March 2024 for the petition, noting that it would be proper to fast track and hear the petition instead of the application. When the matter came up again, counsel for the respondent had filed a notice of appointment but no response or written submissions had been filed. They were indulged to comply and the court set the matter for highlighting of submissions on 20th May 2024.
22. When the matter came up on that day, counsel for the respondent was in court and was ready to proceed. They had, however, not filed a replying affidavit. The court set the time for highlighting of submissions. Indeed, the petitioner's counsel highlighted their submissions. When it was the respondent's turn to submit, counsel asked the court to allow them rely on an affidavit that had not been signed or sworn. The court declined because counsel had not sought an adjournment and the petitioner's counsel had completed submitting. The court reserved its judgment.
23. Subsequently, the respondent's counsel filed this application seeking the orders already alluded to above. It is argued that they misdiarised the matter and that was why a replying affidavit was not filed.
24. I have considered the arguments by counsel for the respondent and the reason advanced for not filing a response to the petition. The record is clear that the respondent's counsel was granted time to file a



response to the petition between October 2023 when the matter was first in court and 20th May 2024 when the petition was heard.

25. The respondent's counsel has not demonstrated that they were diligent in handling this matter. On 20th May 2024 when the matter came up for highlighting of submissions counsel informed the court that they were ready for hearing, only to turn and seek to rely on unsworn and unsigned affidavit after the petitioner's counsel had rested the petitioner's case.
26. Directions issued by court must mean what they are to parties. Where the court fast tracked the hearing of the petition and as a result, the petitioner abandoned its application for conservatory orders, that sacrifice must not be in vain unless there are compelling reasons, which I do not find in the present situation.
27. Although the court has discretion to vary its directions, that discretion should be exercised judiciously. However, in the circumstances of this case, I am not satisfied that I should exercise the discretion in favour of the respondent. The petitioner has waited for its case to be heard and done everything, including abandoning its application to give priority to the petition. The respondent will suffer prejudice since it has waited for a year to have its case heard. Having been heard and the respondent squandered the opportunity to file a response, the respondent does not deserve the court's discretion.
28. In other words, to allow the application and reopen the matter for taking submissions afresh, would be prejudicial to the respondent. However, since the response and submissions are on record, the court will look at them in coming up with its decision.
29. Consequently, and for the above reasons, the application is declined and dismissed. I make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER 2024

E C MWITA

JUDGE

