REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 166 OF 2013

HON. PATRICK SIMIYU KHAEMBA.....PLAINTIFF

VERSUS

KENYA ELECTRICITY TRANSMISSION.....1ST DEFENDANT

KENYA POWER & LIGHTING CO. LTD.....2ND DEFENDANT

RULING

(On whether or not to file other

Written Submissions)

1. This is a Ruling which this Court had to write after the delivery of another ruling on **16/11/2021** which had to be made before the writing and delivery of another one which will have a bearing on another ruling which is yet to be written and delivered in a related matter, namely, **Kitale ELC Misc. Civil Application No. 14 of 2021**. I have given that snippet view of the goings-on surrounding this Ruling so that it can form the basis of understanding why the delivery of this Ruling was extremely urgent. As things stand, this Court needs to go into the merits of what I would refer to as the "Applications proper" or "parent Applications" so as to determine the real issues in controversy between the parties. Thereafter, they can either move on with life or approach the higher Courts for other remedies. However, since justice ought to reside in the smallest of the steps taken in any matter, I will still do the best I can to give it herein swiftly and impartially.

2. After this Court delivered its ruling on **16/11/2021**, the Applicant herein who was the Respondent in the oral application that gave rise to the said ruling, moved this Court orally for two prayers. These were, that leave be granted for him to file an appeal against the ruling of **16/11/2021**, and that this Court gives him leave to file fresh submissions over what I understood him to mean were the issues raised by he and the Applicant in relation to the "parent Application." The first limb of the prayer was granted immediately. However, this court reserved the ruling on the second prayer to **18/11/2021** at **8.30 am**, virtually.

3. The second prayer in the instant Application is based on the grounds that the Applicant's Affidavit titled to as "Plaintiff/Respondent's Replying Affidavit" sworn on **5/11/2021** having been expunged from the record for reasons given in the Ruling of **16/11/2021**, it left his submissions that had been filed accompanying the said Affidavit hanging, so to say: that the submissions that were filed by the Applicant herein in respect of the parent Application were basically left without substance following that occurrence. Learned counsel submitted that he had made the said submissions, believing that the Affidavit which is now not part of the Court record was to be used to argue or in answer to the Application, and now that it was no longer part of it, it leaves his client in a precarious position without the submissions being changed. What counsel did not explain to the Court was how and why, if his arguments can be taken to be true, he chose not to make submissions touching also on the Affidavit sworn by the Applicant herein on **22/10/2021** in response to the parent Application. This to me seems awkward: that a party can file an Affidavit in response to a matter and decide not to submit on anything on it at all, and instead rely on another Affidavit for his submissions, and give no iota of explanation for that or even an indication as to whether he abandoned that non-referenced affidavit is puzzling. That notwithstanding the Court shall, in the interest of justice, consider the oral application before it now.

4. Learned counsel making the Application for leave to file other submissions urged the Court to consider the prayer on the basis that, as noted by the Court, the further Affidavit raised issues of law, and they should now be included in submissions. As will be stated below, submissions do not constitute a party's evidence, and in this instance, they do not constitute grounds of opposition. They can only be based on material that has been placed before the court. Otherwise, that will be a subtle way of cutting a jab under the other party's belly. When a party introduces matters in submissions, which matters he did not put across to the adverse party and thereby give him opportunity to respond thereto, how can that be reconciled with the adverse party's right to fair hearing? **Article 50 (1)** of the **2010 Constitution** guarantees every citizen's right to fair trial. That right includes but is not limited to the party to a matter giving the adverse party an opportunity to know the case he or she is "to meet" once the matter is subjected to hearing before an independent and impartial tribunal, in this case a judicial body. That is done by a party turning over the cards he has in evidence to the other side so that the adverse party prepares for his case.

5. That Application was opposed very strongly. Learned Counsel who represents his law firm which is the applicant in the parent Application and respondent in the instant oral application gave his whole mind in opposing the Application. He stated that the application is an abuse of the process of court, a delaying tactic by the Applicant now who is enjoying interim orders, that it is nothing but blackmail and is not anchored on any law. His submission was that for the reason that the Applicant herein had stated that his client wanted to appeal against the said ruling of **16/11/2021** and that he is willing to ventilate all avenues of justice however long the road may be, that this was nothing but blackmail aimed at making the court to give special treatment to the Applicant since he is a Governor. Lastly, he submitted that all parties are equal before the law and therefore being a Governor does not entitle the Applicant to preferential treatment.

6. I have considered the Application. I have also analyzed both the law and submissions made herein. The question for determination is *whether the Applicant should be given leave to file other submissions in light of the fact that he had, on **08/11/2021**, filed others* in support of his arguments in opposition to the parent Application.

7. First, I wish to point out that contrary to the submissions by counsel for the Respondent herein, this court is not being and shall not be blackmailed by a party to sway justice to his favour. The Court is alive to the independence it has and the impartiality that it should have at all times in all matters before it. Moreover, it is also alive to the doctrine of hierarchical determination of issues under the Common Law system wherein the legal system of Kenya operates. In that system, if a party is aggrieved by the decision of the Court he has a right to appeal against it unless the law does not permit it to be so. It does not matter how many decisions the party can resolve to appeal against in the same cause, as long as that does not amount to the abuse of the Court process. That is not counsel's submission herein.

8. At no time did Mr. Macharia, learned counsel for the Applicant raise the issue of his client being a Governor. Mr. Macharia did not present his client as a 'special litigant' in this matter. He only ventilated his client's case. On the contrary, it was Prof. Sifuna, learned counsel for the Respondent in the instant application, who raised the issue of the position of the Applicant in society. This Court does not know the said Applicant. It does not even know whether or not it is true that he is a Governor. At the same time, it will not bother to get into that issue or think it to be anything special. **Article 27(1)** of the **2010 Constitution** gives all citizens the right to equal treatment before the law. It provides, "*Every person is equal before the law and has the right to equal protection and equal benefit of the law*." It shall remain so forever in this Court. Both parties to this Application shall benefit equally from the law in place in Kenya in relation to the issues they have brought before this Court.

9. The Applicant had the right to seek leave to appeal against the ruling of this Court and also ask for any other prayers that he would deem fit. It would be upon the court to consider the prayers and grant appropriate orders within the law. Thus, in my view, the Applicant was not blackmailing the Court. And if he ever attempted to so do, the Court will not be moved by it.

10. Turning to the issue before the Court, the filing of submissions on any application before the Court is not a compulsory event. A party may or may choose not to do so but where one chooses to file them it is his or her right. It will not be fatal to any party's case if he does not file any submissions since the Court has at all times to decide on the issues that have been brought before it by way of Affidavit, grounds of opposition or preliminary objection or a combination of any of the three.

11. I think it is important to underscore the meaning of submissions and their import in a matter. In ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR***, the Court of Appeal stated:

> **"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."**

12. The Court of Appeal clearly pointed out in that authority that there is a difference between submissions and evidence. Evidence of parties comes into a matter in one of many ways, namely, by way of oral testimony, filed written witness statements that have been adopted as evidence of the parties in accordance with the rules of procedure and evidence, and affidavits of whatever nature as long as they have formed part of the Court record. Further, in relation to Applications or issues that come up before Courts for determination on such, submissions do not an cannot be equated to and be seen to be an Affidavit, Replying Affidavit, Supplementary Affidavit, Further Affidavit, Grounds of Opposition or Preliminary Objection. Moreover, submissions neither exist in nor are they made in a vacuum: they must be anchored on the filing of any or a combination of the above documents as relate to Applications in case they are filed. Where any such issues are raised orally, submissions must be based on the points or issues that are raised.

13. Short of the above, a party cannot be heard to submit on a hollow or non-existent point. As such, since submissions are "marketing tools" for parties, they must contain what is being marketed. Only persons with the disability of the mind which leads to total insanity are completely unable to discern what they are doing that may he heard in markets shouting that they are selling something when they actually are not. Perhaps drunkards and drug abusers who, in that state, have lost their senses due to the effect of the substances do likewise. But counsel, and learned for that matter, often market their clients' issues to judges and judicial officers generally through submissions. In regard to Applications, such issues obtain in the manner I have stated above, and not through submissions.

14. In **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** his Lordship stated as follows:

> **"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."**

15. I agree with the judge. Submissions, at best, are used by parties to single out points the judge should pay attention to as he/ she handles all the issues generally. The judge may or may not agree with counsel in their submissions since at times counsel may misinterpret or skew some ideas in a bid to sway the judge's mind to their client's case. Again, **Ngang'a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749**, the Court held that:

> **"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."**

16. I can only end it here by citing **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**, where he states that **"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided." In so coming to the closing point regarding the meaning and import of submissions in matters, I find that submissions are like decorations in a wedding fete where parties therein decorate the props and environment generally to direct the guests' attention to the fact that there is a wedding cake placed somewhere in readiness for enjoyment by way of eating. They are to attract guests to focus on the real issue partaking of the cake. Where there is no wedding cake, the decorations are meaningless for guests do not eat decorations. And, a wedding cake can be eaten without decorations necessarily being there. In like manner, courts will decide on issues before them even where submissions have not been made thereon.**

17. Having said so, I now move to the question whether there is a specific law on filing of submissions to any application. In regard to appeals to the High Court of Courts of Equal Status, **Order 42 Rule 16** of the **Civil Procedure Rules** envisages filing of written submissions where a party wishes not to appear in person or by an Advocate. But relevant to the instant issue is the provision in regard to Applications generally. The provisions on making or the filing submissions **is Order 51 Rule 16**. The Rule does not guide on how many sets of submissions parties may file. However, going by the practice of making submissions, this is done once by each party, unless exceptional circumstances make the Court to exercise its discretion to permit more than one set. The said **Rule** provides as follows: "*The court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written for submission submissions*." The **Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts**, (***Mutunga Rules***, 2013) provide the manner in which applications should be disposed of before the Environment and Land courts. **Rule 33** thereof gives a detailed procedure regarding the issue by providing as follows:

33. In order to expedite trial:

> **(a) The Judge shall encourage parties to proceed by way of written submissions in regard to all interlocutory applications. Oral submissions shall be permitted only in exceptional cases.**
>
> **(b) Parties shall submit written submissions that summarize their argument, and which do not exceed 10 pages (unless the Judge certifies the matter as complex and parties are granted leave to file lengthy submissions owing to the nature of the case). In all cases the submissions shall be paginated. Hard copies of all cited cases must accompany the submissions.**
>
> **(c) Where parties have filed written submissions and wish to highlight the same, the Judge shall be at liberty to allocate and cap the time for every party**.

18. In the instant case, learned counsel for the Applicant prays that this Court grants him an opportunity to file other submissions other than then ones he did on **08/11/2021**. I have agreed with both the Court of Appeal and my colleague judges whose authorities I have referred to above that submissions are neither a party's evidence nor pleadings. In my view, the filing of other submissions by the party who has made the oral application herein will not prejudice the Respondent herein (that is, the Applicant in the parent Application) in any way since that does not entail filing of another affidavit, a preliminary objection or grounds of opposition. These he ought to have filed and served the Respondent before he wrote his submissions. Since submissions are like a marketing tool for a party to a matter, this Court is of the view that the Applicant herein should not be hindered from carrying out his 'marketing'. However, he must do so within the rules.

19. I am therefore inclined him a to grant chance to file fresh submissions of a length not more than six (6) pages of New Times Roman Font 12, 1.5 Spacing. This is because the Respondent filed his which are five pages but of less spacing than 1.5. Also, in order for the Applicant not to have undue advantage over the Respondent, and bearing in mind that this Court has stated that submissions follow evidence or issues parties already have before a Court, the Submissions to be filed should address only issues raised by the applicant in the parent Application by way of the Supporting Affidavit, the Supplementary Affidavit and the Submissions he filed, and the instant Applicant's Replying Affidavit sworn on **22/10/2021** and filed on **26/10/2021**. They are to be filed in this Court not later than **22nd November, 2021** at noon and served not later than **23rd November 2021** at noon. There is no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MEDIA THIS 18TH DAY OF NOVEMBER, 2021.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.