REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 52 OF 2020

IN THE MATTER OF SECTIONS 26, 27, 28(1) AND (2) OF THE MENTAL HEALTH ACT, CAP 248 LAWS OF KENYA

AND

IN THE MATTER OF SMG (A PERSON SUFFERING FROM DEMENTIA)

JGM.....1ST PETITIONER

LWG.....2ND PETITIONER

SNM.....3RD PETITIONER

RWG.....4TH PETITIONER

VERSUS

LJNG.....1ST RESPONDENT

CNGM.....2ND RESPONDENT

RULING

1. This ruling addresses the issue of the Replying Affidavit dated 6th December, 2021. The affidavit, which was sworn by the 1st Petitioner, seeks to respond to the affidavit sworn by FWG, who is a son to the Subject and a brother to the Petitioner. F had sworn his affidavit on 5th October, 2021.

2. At the hearing date of 8th December, 2021, Mr. Nyamodi learned Counsel for FG stated that his Client's replying affidavit had been served upon the Petitioners electronically through their Counsels on record in early November. He however noted that he had on 7th December, 2021 received a letter from Mr. Gatheru learned Counsel for the Petitioners which indicated that the affidavit which had been served electronically via email had gone to SPAM mail folder and had only been discovered a week before the letter dated 7th December, 2021 was written. The letter had been served upon him together with the 1st Petitioner's Replying Affidavit.

3. Mr. Nyamodi further submitted that he had gone through the Replying Affidavit and noted that it goes way beyond responding to his Client Fs' affidavit. Counsel contended that the Replying Affidavit was irregular and highly prejudicial since the 1st Petitioner had concluded his *viva voce* evidence and the Respondents had commenced their case. Additionally, that the Replying Affidavit had been filed without leave of Court and the explanation given was not plausible.

4. Counsel further urged that throughout these proceedings, he has always stated that his Client's Case was predicated on the Affidavit he had filed and at no time had Counsel Mr. Gatheru stated that he had not been served with the said Affidavit. Based on the foregoing, he prayed that the Replying Affidavit dated 6th December, 2021 be expunged from the record to enable the hearing of this matter proceed in a lawful manner.

5. Mr. Nyamodi's submissions were echoed by Mr. Nyaburi, learned Counsel for the Respondents, who stated that he was similarly served with the subject Replying Affidavit on 7th December, 2021 at precisely 10.32 a.m. Counsel contended that the Affidavit, which is 7 pages long and contains 54 paragraphs, casts very serious aspersions on the character of his Clients and touches on some of the evidence already given. He urged that the Affidavit was highly irregular since it was coming in at the close of the 1st Petitioner's Examination in Chief, and there was no application to reopen the Examination in Chief. Further that this would only scuttle the proceedings and deny their Clients a fair hearing. Therefore, that the Affidavit ought to be expunged from the record, and in the event that the Court is inclined to allow the Affidavit,

he prayed for thirty (30) days to allow him to consult his Clients and file responses.

6. In response, Mr. Gatheru for the Petitioners contended that although the pleadings in this matter were served electronically, they had also been served physically. However, in the instant case, Mr. Nyamodi had not served them with the physical copy and that he only came upon FG's Affidavit when his computer was undergoing maintenance.

7. Counsel submitted that he shall seek leave to have the Replying Affidavit admitted as the 1st Petitioner's evidence since his testimony had not closed and urged that the letter to Mr. Nyamodi was merely out of courtesy. Further that the 1st Petitioner could therefore be recalled just to adopt the Replying Affidavit as his evidence before his cross-examination commenced. He further urged that since this is an inquiry, it would be draconian to expunge the Affidavit from the record when it sought to answer the issues raised in the affidavit of F.

8. His sentiments were echoed by learned Counsel Mr. Kanjama who stated that the Court ought to retain rather than strike out the Replying Affidavit, and in so doing weigh its probative value against all the other evidence.

9. In his rebuttal, Mr. Nyamodi contended, firstly, that the Constitution does not enjoin this court to be informal, and the formal rules of procedure ought to apply to all proceedings. That since the 1st Petitioner had already been Examined in Chief and had adopted his affidavit as evidence, there was no room for him to adopt new evidence. Secondly, that electronic service is proper service, and there was, in any case, no proof that the email went to Mr. G's SPAM folder. To his mind, that averment was untrue.

10. It was Mr. Nyamodi's further statement that at the beginning of the trial, parties identified the documents they had filed and he too identified the Affidavits he had filed on behalf of his Client FG. That since Mr. G did not, at the time, state that he had not received that Affidavit, he lost the opportunity to state that he did not receive it. Counsel termed the Replying Affidavit an afterthought geared towards producing more evidence when the right thing to do would have been to make a formal application.

11. Upon carefully analyzing the oral submissions made by the respective Counsel's on record, two issues emerge for determination:

a. Whether electronic service alone is deemed as proper and adequate service.

b. Whether the Replying Affidavit dated 6th December, 2021 ought to be expunged from the record.

12. In view of the **Electronic Case Management Practice Directions, 2020** (*hereinafter "the Directions"*) electronic service by email is now deemed to be proper service. **Paragraph 6(2)** of the **Directions** provides that in every judicial proceeding, the court and the parties to the case shall employ the use of technology to expedite the proceedings and make them more efficient. **Paragraph 6(3)** goes on to state that the technology referred to in subparagraph (2) shall include *inter alia* e-service of documents.

13. The guidelines on Electronic Service are provided under **Paragraph 13** of the **Directions**. Subparagraph (1) provides that where under any law a document is required to be served on a person, service may be effected by electronic means in accordance with the Practice Directions. It is however the responsibility of the person effecting service electronically to ensure that the parties served have indeed received service. In the instant proceedings, it appears that in addition to serving pleadings electronically, the Counsels on record also shared hard copies, or informed the other Counsels about the documents which had been served electronically. Good practice I must say. This was however not observed in respect of the subject Replying Affidavit.

14. While Mr. Nyamodi states that at the onset of the hearing he had indicated that his Client had sworn an affidavit on which his case would be centered, the record reveals otherwise. On the mention date of 21st October, 2021 when the matter came up for directions, Mr. Nyamodi prayed for seven (7) days to file and serve his Client's Affidavit stating that he had come on board after the Petitions had been consolidated. The Court granted Mr. Nyamodi leave to file the Affidavit within seven (7) days of that date. The next time the matter came before court was for a hearing. There is nothing on record to indicate that Mr. Nyamodi did in fact file the Affidavit as prayed.

15. Needless to say, a party ought not to be prejudiced owing to the acts or omissions of their Counsel on record. I bear in mind that this Court serves to administer justice and ought therefore not to be strictly bound by procedural technicalities especially in cases such as this where justice will be better served by admitting the Replying Affidavit on record. This to my mind is what **Article 159(2)(d)** of the **Constitution** sought to address when it impressed the court to administer justice without undue regard to procedural technicalities. This is not to state that parties ought to disregard laid down rules of procedure, but to acknowledge that the parties herein embarked on a quest for justice and it is my duty to ensure, not only that justice is done, but that it is seen to be done. (See – **Johanna Kipkemei Too vs. Hellen Tum [2014] eKLR**).

16. In any event, to allow the Replying Affidavit will not alter the character of these proceedings, but will only serve to avail the Petitioners a chance to respond to the averments raised in the Affidavit of Francis Githunguri. To expunge the Replying Affidavit which sought to respond to Francis' averments would not guarantee justice and fairness to the parties on an equal footing, on what can be termed their quest for administration of justice.

17. Notably, Mr. Nyamodi was of the view that they ought to have instead filed a separate application. However, in view of the outcry by the Counsels on record that this matter has been crippled with delays, not to mention the numerous interim applications that have been continuously filed, in order to ensure the expeditious conclusion of this Cause, it would be best to address all the issues at hand once and for all, so that when the Court finally has a chance to render a decision, it has all the relevant facts from all parties to ensure that the decision is sound in law.

18. Since the 1st Petitioner did not mention or allude to the Affidavit of Francis during his testimony, it is right to assume that he knew not of its existence until 2nd December, 2021 when it was brought to his attention by his Advocate on record. Should he then suffer prejudice for

this reason? I think not. I find the reason given for having not filed a Replying Affidavit earlier to be a plausible one. In any event, I see not why the Petitioner and his Advocates on record would, if they had prior knowledge of the Affidavit of Francis, elect not to respond to it when they thought it raised matters which were prejudicial to their case. While this court does not condone the delayed filing of the Replying Affidavit, it is cognizant of the fact that it must do whatever is necessary to ensure that the interest of justice is met.

19. I seek refuge in the Court of Appeal majority decision in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** where the court observed thus:

> **"It is globally established that where procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness…**
>
> **In modern times, the courts do not apply or enforce the words of statute or rules, but their objects, purposes and spirit or core values…reiterate what the court said in Githere V. Kimungu [1976 - 1985] E.A. 101, that:**
>
> > ***"….the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case.***
>
> **…A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice."**

20. Upon weighing the circumstances of this case, I consider it prudent to allow the Replying Affidavit in the interest of justice and further to avert piecemeal litigation. I deem it imperative to state that the Court must allow all information that would be relevant to ensure the ends of justice are met, especially where it appears that the Petitioners and their Advocates on record did not have prior knowledge of the Affidavit which the subject Replying Affidavit seeks to respond to. In any case, there is nothing to suggest that Mr. Nyamodi's Client will suffer prejudice since he is yet to present his case. Whereas the 1st Petitioner had completed his Examination-in-Chief, his Cross-examination is currently underway and his case has not closed. It is therefore quite in order to recall the 1st Petitioner for Examination-in-Chief, to produce the Replying Affidavit in evidence before he can continue in Cross-Examination.

21. In the end, I direct as follows:

a. The 1st Petitioner is hereby granted leave to admit the Replying Affidavit dated 6th December, 2021 into evidence.

b. Should the Petitioner's Advocates wish to have the 1st Petitioner produce the Replying Affidavit, he may be recalled in Examination-in-Chief solely to produce the Affidavit without any further testimony in Examination-in-Chief.

c. FG is at liberty to file a further affidavit and is hereby granted leave to so do within seven (7) days of this date if he so wishes, after which the hearing of the matter shall proceed with Cross-examination of the 1st Petitioner.

d. The parties shall strictly adhere to the set timelines to avert any further delays in the conclusion of this matter.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 15TH DAY OF FEBRUARY, 2022.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of …….....Advocate for the Petitioners.

In the presence of…….....Advocate for the Respondents.

In the presence of…….....Advocate for Francis Githunguri.