



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NUMBER E263 OF 2020**

**RICHARD OWUOR (*Suing On Behalf of* Busia Sugarcane Importers Association).....PETITIONER**

**VERSUS**

**THE CABINET SECRETARY MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES AND**

**CO-OPERATIVES & OTHERS.....RESPONDENT**

**RULING No. 2**

1. On 6<sup>th</sup> October, 2020, this Court rendered Ruling No. 1. The Court issued directional orders on the hearing of the main Petition. The Court further set the timelines within which the directions were to be complied with. The matter was eventually stated for highlighting of submissions today.
2. Counsels for the parties appeared before Court this morning. Mr. Madowo, Counsel for the Petitioner, raised a red-flag in respect of a Replying Affidavit electronically served upon his firm of Advocates by Miss Omuom, Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents. He contends that service of the Replying Affidavit was made as Counsel for the Petitioner was virtually appearing in Court.
3. Mr. Madowo has raised three issues in respect of the Replying Affidavit. The *first issue* is that the affidavit be expunged from the record as it is filed in violation of the orders of the Court as contained in Ruling No. 1. Counsel further contends that the Respondents did not seek the leave of the Court to either extend time or to file and serve the affidavit out of time. It is argued that since the affidavit infringed express orders of the Court then such orders ought to have been, first, varied or set aside.
4. Counsel submitted that this Court should, instead, proceed and fix a judgment date in the matter rather than dealing with the Affidavit in any manner whatsoever.
5. The *second issue* is, as submitted, that in the event this Court exercises leniency upon and deems the Affidavit as properly on record, then the Petitioner ought to be granted leave to file and serve a Supplementary Affidavit thereto.
6. The *third issue* is dependent on the second one. Counsel submitted that in the event the Court deemed the Affidavit as properly on record as aforesaid, then the Court ought to issue some interim conservatory orders since the Petitioners case is by now rotting in light of the ongoing rains.
7. Miss Omuom apologized for the obtaining state of affairs. Counsel explained the delay in filing serving the Affidavit timeously. The delay, it was stated, was as a result of failure to receive a duly signed affidavit from the officers of the 2<sup>nd</sup> Respondent until very late last night. Counsel managed to file and serve the Affidavit this morning. To Counsel, the delay was unfortunate and the matter was beyond the Counsel's control.
8. Miss Omuom urged the Court not to expunge the Affidavit from the record, but to instead, deem it as properly filed with the leave of the Court pursuant to **Rule 30** of the **Mutunga Rules**. Counsel urged the Court to uphold the overriding objective of the **Mutunga Rules** as provided for in **Rule 3** thereof.
9. On the conservatory orders, Counsel submitted that the issue was clearly dealt with in Ruling No. 1 and that it is in the interest of the doctrine of separation of powers that the orders be declined.

10. Miss Sega, Counsel for the 4<sup>th</sup> Respondent, indicated that she was yet to be served with the Affidavit.

11. In a rejoinder, Mr. Madowo, submitted that given that Ruling No. 1 was not appealed against or varied then the extension of time sought under the **Mutunga Rules** do not apply. Counsel urged the Court to find that the Respondents do not have any right of audience before Court and to fix the matter for judgment.

12. I have, with patience, considered the submissions before me.

13. As said, in the main, Ruling No. 1 was directional. Through the ruling, this Court issued several directions on the manner in which Petition is to be heard and fixed timelines within which parties were to comply with filing of responses and submissions. What this Court, in essence, did was to issue the said directions as provided for under **Rule 20** of the **Mutunga Rules**.

14. That being the case, **Rule 30** of the **Mutunga Rules** donates powers to this Court to ‘*extend time limited by these rules, or by any decision of the court*’.

15. I, therefore, find that this Court is empowered by **Rules 3** and **30** of the **Mutunga Rules** as well as the inherent powers of the Court to extend time which the Rules or the Court fixed. (See the Court of Appeal decision in **Total Kenya Limited Vs Kenya Revenue Authority (2013) eKLR** for the proposition that existence of a specific relief under the Rules does not preclude the Court from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties and **Dickson Muricho Muriuki vs. Timothy Kagendo Muricho & 6 Others (2013) eKLR** on the nature of the inherent powers of the Court).

16. In view of the nature of this matter, I hereby *albeit* reluctantly, extend the time within which the Respondents were to file the Replying Affidavit and hereby deem the Affidavit as filed with the leave of the Court.

17. Having so found, I will still decline to grant any interim orders for the reasons clearly stated in Ruling No. 1.

18. The upshot of the foregoing are the following orders: -

**a. The highlighting of the submissions is hereby adjourned;**

**b. The Replying Affidavit is hereby deemed as filed with the leave of the Court;**

**c. The Respondents shall file and serve written submissions to the Petition within 5 days;**

**d. The Petitioner is hereby granted leave to file and serve a supplementary response, if need be, and rejoinder submissions within 5 days of service in (c) above.**

**e. Highlighting of submissions on 1<sup>st</sup> December, 2020.**

**f. The 4<sup>th</sup> Respondent shall be served with the Replying Affidavit within 3 days of this order.**

Orders accordingly.

**Dated, Signed and Delivered at Nairobi this 11<sup>th</sup> day of November, 2020.**

**A C MRIMA**

**JUDGE**

**Ruling No.2 virtually delivered in the presence of:**

Mr. Madowo, Counsel for the Petitioners

Miss Omuom, Counsel for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents

Miss Sega, Counsel for the 4<sup>th</sup> Respondent