

THE REPUBLIC OF KENYA
ENVIROMENT AND LAND COURT AT BUNGOMA
ELC CASE NO: 12 OF 2020

JUDITH NEKOYE.....PLAINTIFF/APPLICANT

VERSUS

ETHICS AND ANTI CORRUPTION
COMMISSION...DEFENDANT/RESPONDENT

RULING.

1. Before this court for determination is an oral application by Counsel for the Plaintiff/Applicant to have the undated replying affidavit sworn by one Eric Mabeta and filed on 03/11/2025 in opposition to an application dated 15/10/2025 expunged from the court record for having been filed out of time and without leave of the court.

2. The background of this case is that a judgment was delivered by this Court on 09/10/2025 and being dissatisfied with the said Judgment, the Plaintiff/Applicant on 10/10/2025 filed a Notice of Appeal and an application for stay of execution under certificate of urgency dated 15/10/2025. When the said application was placed before sitting as the duty Judge, I gave directions that the Defendant/Respondent to file their response within 14 days and the application was fixed for mention to confirm compliance and further directions on 06/11/2025.

3. Counsel for the Plaintiff/Applicant argued that one of the orders given by this court in its directions was for the Defendant/Respondents to file and serve their response within

14 days upon service of the application in question but instead, the Defendant/Respondent filed and served their response on 03/11/2025 outside the timelines given without leave of the court. They therefore argued that there was no proper opposition to their application and urged the court to treat their application as unopposed and have it allowed as presented.

4. The Defendant/Respondent explained that the delay in filing the replying affidavit was inadvertent, noting that the deponent was unavailable to sign it within the expected time. They submitted that the affidavit was filed and served immediately upon the deponent becoming available. They further contend that no prejudice would be suffered by the Applicant and urged the Court to deem the replying affidavit as properly on record.

Analysis and determination.

5. It is trite that court orders are never made in vain and/or futility. To the contrary, Court orders are made to be obeyed, adhered to and/or complied with. In the case of **Teachers Service Commission v Kenya National Union of Teachers & 2 Others (2013) eKLR**, the Court held as hereunder; ***“A court order is not a mere suggestion or an opinion or a point of view It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will***

not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

6. In respect of the subject matter, the obvious consequence of such failure would be to strike out and/ or expunge the impugned documents/pleadings, which are filed contrary to and in contravention of the court order for being a nullity. See the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR**

7. In determining whether the replying affidavit filed out of time and without prior leave of the Court should be struck out or not, this Court must balance procedural requirements with the overarching constitutional obligations that guide the administration of justice. While timelines serve an important purpose in ensuring orderly proceedings, Article 159(2)(d) of the Constitution commands courts to administer justice without undue regard to procedural technicalities and Article 50 guarantees every party the right to be heard and to have their case fairly adjudicated. In my view, the Respondent has provided sufficient and reasonable explanation for the delay, attributing it to the unavailability of the deponent to sign the affidavit within the stipulated period and it is evident that the Respondent acted promptly once the deponent became available.

8. Further, it is important to note that this court has not been informed by oral submissions or otherwise through an affidavit of service when the application in question was served upon the Respondent. This leaves the court without concrete evidence upon which to determine whether the delay was inordinate or not. In the absence of such material, this court cannot engage in speculation. However, taking into account the circumstances of the matter and the interval between the filing of the application and the Respondent's replying affidavit, this court is of the view that the delay is excusable.

9. Further, the Applicant has not demonstrated any prejudice she is likely to suffer as a result of the late filing nor has the delay been shown to be deliberate, inordinate, or calculated to obstruct justice. In the interest of justice and ensuring that all relevant material is placed before the Court and adopting a holistic approach that enables the just, expeditious, and proportionate resolution of disputes, this Court finds that striking out the replying affidavit would elevate form over substance.

10. It is equally imperative to note that the facts surrounding this case bear a critical issue for determination and which issue bears public interest connotation. Given the likely implication of the decision herein, it is not lost to this court that this is one dispute that ought to be heard and determined on merits, so as to enable the court to pronounce itself with finality. Having said

so, it would then mean that latitude must be extended to the Defendant/Respondents to place before this court their set of facts for this court to reach a reasonable and just decision. It is my considered view that such a lapse, failure and/or omission should not dis-entitle the Defendant/Applicant from presenting their case before the court and being heard on merits. It is trite that an inadvertent error such as the one explained by the Defendant/Respondent should not ipso facto, drive a party away from the Seat of Justice. Accordingly, the procedural lapse does not, in the circumstances, warrant the drastic remedy of striking out the replying affidavit.

11. In the end, this Court finds in favour of the Defendant/Respondent and exercises a measure of judicial clemency to avert the hardship or injustice that would inevitably arise were the Court not to extend latitude for admitting the replying affidavit out of time for its consideration.

12. The replying affidavit filed on 03/11/2025 is hereby admitted as part of the court record. The Applicant is granted fourteen (14) days' leave to file and serve a further/supplementary affidavit, if necessary, together with her submissions.

13. Orders accordingly.

DATED, SIGNED and DELIVERED at **BUNGOMA** this 27th day of November, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Makokha appearing alongside M/S Rauto for the Applicant.
2. Mr. Kibet for the Respondent.
3. Bett C/A.