REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. E.131 OF 2022

REPUBLIC……..……..... APPLICANT

VERSUS

NAIROBI METROPOLITAN SERVICES (NMS)..…….... 1ST RESPONDENT

THE DIRECTOR ROADS, PUBLIC WORKS & TRANSPORT, NMS……..2ND RESPONDENT

THE DIRECTOR OF ENFORCEMENT, NMS…….3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE……..4TH RESPONDENT

THE DTO CENTRAL POLICE STATION…….... 5TH RESPONDENT

THE HON. ATTORNEY GENERAL……..6TH RESPONDENT

AND

METRO TRANS E. A LTD……INTERESTED PARTY

AND

KAKA TRAVELLERS CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTD……..……EX-PARTE APPLICANT

AND

ROSANA OSCAR OMURWA…….CONTEMNOR/APPLICANT

RULING ON ADMISSIBILITY OF AFFIDAVIT FILED LATE

Introduction

1. This matter has a chequered history. It was filed in 2022 and to date, the substantive notice of motion has never been heard. I first encountered the file on 3/3/2025 when the matter came up for mention and Mr. James Tugee Advocate representing the contemnor informed the Court that the matter had an application dated 11/3/2024, which the Judge had heard but recused

himself and did not render the Ruling. Counsel for the contemnor asked the Court to give a date for oral highlighting of the application.

2. This Court then gave the date of 2/4/2025 for highlighting of the aforesaid application, which was seeking for review and setting aside of the orders of contempt of court and the orders extracted and served upon the contemnor which, according to the applicant contemnor, were not the orders which the Judge had given.
3. The aforesaid application was not heard on 2/4/2025 owing to delay by the exparte applicant in filing its response and it was not until 29/9/2025, with back-and-forth directions being given by the Court that the application was heard and a ruling set for 3/11/2025. The Ruling was delivered as scheduled, dismissing the application.
4. It is important to note that all along, it was the contemnor who had sought to set aside the orders which he is alleged to have disobeyed and the contempt proceedings, claiming that he was no longer the managing director of the interested party.
5. Another oral application by the contemnor for leave to appeal and an interim stay of the ruling dismissing the application for setting aside orders on contempt of court was dismissed in a ruling rendered the same day upon which the interested party's counsel, Mr. Rapando got aggrieved by the dismissal of the oral application for stay and leave to appeal made by the

contemnor and he asked me to recuse myself from this case. He later filed a formal application for recusal.

6. This Court on its part, as the application for recusal had not been filed, set the matter to be mentioned on 12/11/2025 when the contemnor was expected to attend court for mitigation. This opportunity for mitigation was accorded to the contemnor, despite Mr. Kinyanjui's submission that the contemnor should come for sentencing and not mitigation since the order of sentencing stands and that he had challenged the earlier orders dismissing his application for setting aside contempt orders issued against him, to the Court of Appeal hence the contemnor had not been deprived of the right of appeal by this Court dismissing the oral application for leave to appeal and stay.
7. It should be noted that this court had not encountered the contemnor at all and that therefore I found it necessary to accord him a further opportunity to mitigate further, which mitigation would, in any event, indicate whether he had now purged the contempt, since contempt of court is a continuing act and would or may have been purged along the way in this long-standing matter.
8. Mr. Ndegwa counsel for the interested party on the other hand also informed this Court that there is a pending preliminary objection dated 27/2/2024 and the court had on 25/2/2024 given directions on the same.
9. When the matter came up for mitigation on 12/11/2025, Mr. Rapando for the interested party informed the court that he had since filed the application for

my recusal from handling this matter. The Court therefore gave directions on the hearing of the application for recusal as filed on 8/11/2025.

10. Mr. Kinyanjui counsel for the exparte applicant had upon being served with the said application for recusal, filed grounds of opposition and he sought leave of court and three days to enable him file a replying affidavit. The Court granted timelines for filing of the response as sought, further affidavit and supplementary affidavit by the respective parties as well as written submissions and set the matter for mention to confirm compliance and to fix a ruling date on the application for my recusal on 2/12/2025.

11. On the later date, Mr. Ndegwa, the interested party's counsel raised an objection to the replying affidavit filed by Mr. Kinyanjui counsel for the exparte applicant, submitting that the same was filed out of time without leave of court and that therefore the same should be struck out and expunged from the record. He also submitted that the grounds of opposition on their own could not be treated to be adequate in opposing the application for recusal and therefore the court should treat the application for recusal as being unopposed.

Submissions on objection raised by the interested party on the late filing of the replying affidavit

12. I now highlight the submissions by the interested party's counsel and the exparte applicant on whether the replying affidavit filed by Mr. Kinyanjui, outside the three days sought and granted should be struck out and expunged

from the record as prayed by the interested party's counsel and whether grounds of opposition cannot be treated as a response to the application for response.

13. On behalf of the interested party, Mr. Rapando, acting alongside his colleague Mr. Ndegwa Advocate submitted that they had filed their submissions dated 26/11/2025. However, they raised issue with the Replying affidavit which had been was filed on 19/11/2025 and served on them the same day. He urged this court to strike out the replying affidavit because it was filed out of time.

14. Mr. Rapando submitted that the period for filing of the replying affidavit lapsed on 15/11/2025. He prayed that the same be expunged from the record and their application for recusal of the judge be delivered as unopposed. He relied on the case of **Mativo vs KCB Bank Cause No. E001/2021** where Justice Agnes Kitiku Nzei is said to have stated that court orders are not suggestions and any thing filed out of time is an illegality, the learned Judge relying on the supreme Court decision in the **Nicholas Arap Salat case.**

15. In response and opposing the challenge to the replying affidavit, Mr. Kinyanjui submitted that people in glass houses do not throw stones. He raised several issues. On the allegation that the interested party's application is unopposed, Mr. Kinyanjui submitted that he had earlier on 12/11/2025 when he sought leave of 3 days to file a replying affidavit informed the court that he had already filed grounds of objection dated 11/11/2025. On the

delay in filing the replying affidavit outside the 3 days sought and granted by this court, Mr. Kinyanjui submitted that the 3 days lapsed on a Saturday and that his staff were away; not working until Monday when he prepared the affidavit. He submitted that he could only work on the Monday which was on 17/11/2025 when he filed the Replying affidavit, which, according to him, was not out of time as per the law.

16. Mr. Kinyanjui submitted that it was not until he served the written submissions dated 24/11/2025 upon the interested party's counsel that the interested party's counsel wrote him an email threatening to do what he has done quite belligerently, without giving the exparte applicant the opportunity to explain to the court that time of 3 days lapsed on a Saturday and that he also wrote back an email explaining that he would apply to strike out the written submissions filed out of time without leave of the court.

17. On the decision cited by Mr. Rapando, Mr. Kinyanjui submitted that the decisions by **Agnes Kitiku Nzei J** are persuasive. He submitted that **Article 159(2)(d) of the Constitution** calls on this court to exercise judicial discretion and that in the absence of any prejudice being occasioned to any party, this court cannot condemn any party unheard, as that would be contrary to Article 50(1) of the Constitution and against the Rule that fair trial is unlimited **Article 25 of the Constitution.**

18. The other point submitted on by Mr. Kinyanjui was that the law governing rules on filing of affidavits is **Order 19 Rule 5 of the Civil Procedure**

Rules giving the court discretion to admit affidavit evidence. He submitted that in this case, there was no allegation of breach of the said Rules. He submitted that the only lamentation by Mr. Rapando was the filing out of the 3 days granted by the court yet the interested party had used the same affidavit to file his written submissions.

19. Counsel for the exparte applicant maintained that there is no law cited, by which this court to strike out the replying affidavit. He submitted that the interested party applicant wants to jump the gun and seek striking out of the replying affidavit yet they themselves had not filed their submissions within the time granted by the court and that they did so without leave of court, which, in his view, was not a balancing act to justice.

20. Counsel also submitted that the submission to strike out the affidavit was premature as the interested party rushed to raise the objection before Mr, Kinyanjui could seek for enlargement of time and he sought the court's discretion to enlarge time because if the affidavit is struck out, there would be no basis for the interested party's submissions.

21. In a very terse rejoinder by Mr. Ndegwa appearing together with Mr. Rapando for the interested party, submitted that to the extent that the affidavit was filed out of time, then the application for recusal of the Judge was unopposed.

22. On the persuasiveness of the cases that he had cited, Mr. Ndegwa submitted that the Judges quoted the Supreme Court decision in the ***Nicholas Salat v***

IEBC case. He also relied on the decision in the ***Konchellah case*** which refers to the question of whether grounds of opposition are sufficient response to an application. He submitted that Paragraph 9 of the **Gideon Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** decision is explicit that a replying affidavit is the principal document where a respondents' reply is set.

23. On reliance on **Article 159(2)(d)** of the Constitution by Mr. Kinyanjui, he submitted that court orders/directions are not mere suggestions and should be strictly complied with. He relied on the cases of **Mativo vs KCB and the Nick Salaat vs IEBC** where the court is said to have been clear that documents filed out of time will not be accepted and that **Article 159** is not an excuse or a basis. He maintained that leave must first be obtained before filing the replying affidavit out of time.

24. On interpretation of when time runs, he submitted that, under **Section 57 of the Interpretation and General Provisions Act,** the only day which is excluded is a Sunday. That in this case, the replying affidavit was filed on Wednesday at night and conveniently claimed to have been filed within 3 days, yet it was filed on 19th November, 2025 instead of 17th November, 2025 which was a Monday.

25. On allegation that they had filed their submissions late, Mr. Ndegwa submitted that they were given 7 days upon Mr. Kinyanjui filing a proper and competent affidavit. That in the absence of a competent affidavit, the

days were not triggered for them to file their submissions but that they nonetheless filed their submissions within 7 days of being served with an incompetent affidavit hence their submissions are properly on record.

26. On allegation of being condemned unheard, Mr. Ndegwa wondered whether Mr. Kinyanjui and his client were acting for the Judge whom the interested party has sought to recuse from handling this matter, since the exparte applicant is not the one on trial. He submitted that if the Replying affidavit was admitted on record on that day, then they had a right to file a reply to it.

27. On the question of prejudice, Mr. Rapando submitted that there was no competent affidavit before court hence, their client will not have responded to it and that the submissions which they had filed did not respond to the issues raised by Mr. Kinyanjui in the replying affidavit as the said affidavit was not properly on record hence it should be expunged from the record.

28. In his further submission with leave of Court in view of the fresh decision referred to by the interested party's counsel, Mr. Kinyanjui first sought to correct his earlier submission where he had cited the incorrect Rule under Order 19 of the Civil procedure Rules and stated that he meant Order 19 Rule 7 of the Civil Procedure Rules, not Order 19 Rule 5.

29. On the **Konchellah** decision that grounds of objection cannot be sufficient response, Mr. Kinyanjui submitted that in the Supreme Court and the Court of Appeal, there is no room for filing of grounds of opposition, only the Replying affidavit; unlike in the High Court where Order 51 Rule 14(1) (c)

of the Civil Procedure Rules is a Plant, Springboard upon the party may file Grounds of Opposition (read out the provision), maintaining that the Supreme Court Rules do not apply to these proceedings.

30. Mr. Ndegwa then rejoined with leave of court, clarifying that in the context of the Supreme Court decision of the ***Konchellah*** Case, it was made in the context that an application is supported by an affidavit so, one can only contradict an affidavit with another affidavit otherwise the contents of the affidavit remain uncontroverted.

Analysis and determination

31. I have considered all the arguments for and against the replying affidavit filed by the exparte applicant's counsel on 19th November 2025 and the, main issue for determination is whether that affidavit is competently on record and if not, what orders should the court make.

32. On 12/11/2025, this court gave directions, granting the exparte applicant, represented by Mr. Kinyanjui, three days within which to file his replying affidavit in addition to the grounds of objection to the interested party's application dated 8/11/2025 for my recusal from handling this matter. The interested party was then given seven days, from the date of service by the exparte applicant's counsel, within which to file and serve a further affidavit, if need be, together with written submissions. Additionally, the exparte applicant was granted seven days of the date of service by the interested party, within which to file and serve a supplementary affidavit if need arises,

together with written submissions. With those clear directions in mind, the court then set a mention date for 2/12/2025 to fix a ruling date on the application for recusal dated 8/11/2025.

33. On 2/12/2025 is when the interested party's counsel Mr. Ndegwa and Mr. Rapando quickly raised the issue of the exparte applicant having filed the replying affidavit on 19/11/2025 out of the three days given by the court and also submitted that on their part, they had complied with the court's directions and filed their submissions dated 26/11/2025.

34. Mr. Kinyanjui's defence was that the application to strike out his client's replying affidavit was premature and that the interested party's counsel did not even give him a chance to address the court on why he had filed the replying affidavit on the 19/11/2025, which he believes was in time as the last day fell on a Saturday and that his staff were away hence the late filing. He also submitted that this court has discretion to enlarge time for filing of the said affidavit, noting that there is no prejudice. The interested party's counsel maintained that the court cannot admit an affidavit filed out of time under whatever circumstances, citing the Supreme Court decision in the **Nicholas Arap Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)** (***Nicholas Arap Salat case***.)

35. From the onset, and this court agrees with the interested party's counsel's submissions that Directions of the Court, including those requiring the filing

of a replying affidavit within a specified timeframe, are not mere suggestions but binding orders. They must be complied with strictly and timeously. Article 159 (2) (b) of the Constitution enjoins this Court to facilitate the expeditious delivery of justice and therefore, disregard of prescribed timelines not only impedes that constitutional imperative but also undermines the authority of the Court.

36. In this case, it is not in dispute that the exparte applicant filed the replying affidavit on 19th November, 2025 followed later by written submissions on 24th November, 2025.

37. On whether the replying affidavit sworn on 17th November, 2025 by Duncan Murunga Mwaura and filed in court on 19th November, 2025 was filed out of time, the court must compute the time as provided for in law.

38. The law on computation of time is the **Interpretation and General provisions Act** at section 57 which provides that:

> ***57. Computation of time***
>
> ***In computing time for the purposes of a written law, unless the contrary intention appears—***
>
> ***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
>
> ***(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as***

excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

39. On the other hand, the procedural rules under Order 50 Rule 8 of the Civil Procedure Rules provides that:

50(8) Computation of days [Order 50, rule 8]

In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.

40. Thus, in this case, where the order for filing of a replying affidavit was made on 12/11/2025 which was a Wednesday, the 12th November, 2025 is an *excluded day* and we start counting 13th, 14th and 15th, with the latter day being the last day for filing of the replying affidavit and which was a Saturday.

41. However, since Saturday is not a working day, it is an ***excluded da***y according to section 57 of the Interpretation and General Provisions Act. It was therefore expected that the exparte applicant files the replying affidavit on Monday the 17th November, 2025 which was the next working day. This is in line with the provisions of Order **50 Rule 3 of the Civil Procedure Rules** which provides that:

> ***50(3) Time expiring on Sunday or day offices closed [Order 50, rule 3]***
>
> ***Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open. [emphasis added]***

42. Saturday is one of those days when the Courts are closed and although filing of documents into court is no longer physical, a person filing may still require services of the court staff for intervention for example, a request for mapping or where the system may be down. As such, Saturday not being a working day, the day on which the court was next open was a Monday which was on 17th November, 2025.

43. From the court record, the exparte applicant did not file the replying affidavit on 17th November, 2025. He instead filed it on 19th November, 2025 and although he initially maintained that he filed within time, he conceded that

this was filed out of time, the reason being that his staff were away and further submitted that there is no prejudice occasioned on the interested party. He submitted that this Court cannot deny the exparte applicant a right to be heard or condemn them unheard as that would be in violation of Article 50(1) of the Constitution. He therefore urged this Court not to strike out or expunge the affidavit from the record as that would undermine the administration of justice.

44. That said, it is not in doubt that this Court retains inherent discretionary power to enlarge prescribed timelines where sufficient cause is shown, taking into account unforeseen or excusable circumstances. Such discretion will, however, only be exercised where the delay is neither inordinate nor unreasonable, where the delay is explained to the satisfaction of the Court and where no prejudice is occasioned to the other party or to the expeditious administration of justice. It is for that reason that the law provides for extension of time under **Order 50 Rule 6 of the Civil Procedure Rules** which provides:

(6). Power to enlarge time [Order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement

<u>may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:</u>

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

45. The interested party tersely submits that such time cannot be enlarged post the filing of the replying affidavit because the Supreme Court has spoken, as cited by Agnes Kitiku Nzei J in **Mativo vs KCB Bank Cause No. E001/2021.**

46. I shall now proceed to consider the cited decision by Nzei J, citing the Supreme Court case of **Nicholas Arap Salat**, together with other authorities relied upon.

47. I must, however, state by way of caution that while this Court is bound by the decisions of courts superior to it, namely the Court of Appeal and the Supreme Court, it is neither obliged nor prepared to adopt, without critical scrutiny, decisions of courts of coordinate or concurrent jurisdiction. Such decisions are merely persuasive and do not bind this Court, notwithstanding that they may have relied upon or cited decisions of the Supreme Court or the Court of Appeal, in circumstances which may be different from the case at hand.

48. In the aforesaid ***Mativo v KCB*** case, on May 9, 2022, the learned judge made the following orders*:* **-**

"(1) the application for adjournment is allowed; and is marked as the last adjournment on the part of the respondent.

(2) the respondent is granted leave to file and serve a further list of documents placing on record certified copies of its documents nos. 4,5,6 and 8 within 14 days of today.

(3)defence hearing on September 26, 2022."

49. However, the respondent did not file a further list of documents within the 14 days ordered and did not seek extension of time and/or leave to file the documents outside the time limit set by the court if, for whatever reason, it was unable to file the documents within the time ordered. On September 16, 2022, the respondent filed a further list and bundle of documents dated September 15, 2022 without first seeking the court's leave to file the documents out of time.

50. Subsequently, the claimant filed an application seeking orders: -

a. that the court be pleased to strike out and/or expunge from the court's record the respondent's further list and bundle of documents dated September 15, 2022.

b. that costs of the application be provided for.

51. The learned Judge considered the said application, which the respondent had opposed and delivered a ruling February 9, 2023, rendering itself as follows:

"12. The respondent's list and bundle of documents dated September 15, 2022 and filed in court on September 16, 2022, out of time and without leave, is not legally on record. It is invalid and an illegality.

13. Consequently, the claimant's notice of motion dated September 20, 2022 is merited and is allowed. The respondent's further list and bundle of documents dated September 15, 2022 is hereby struck out, and is expunged from the court's record."

52. The Supreme Court in the ***Nicholas Arap salat*** case indeed set out principles to be considered in exercise of discretion to extend time for filing appeals. The Court considered the following issues which related to the timelines set by the Elections Act in filing of Appeals:

Issues

i. Whether the intended appeal raised any constitutional matters to warrant it being an appeal filed as of right without certification.

ii. Whether the Supreme Court had jurisdiction to extend time to file an election petition appeal out of time.

iii. Whether the applicant had laid satisfactory basis to warrant the court to extent time to file the appeal.

iv. Whether a letter addressed to the Registrar was a sufficient way of withdrawing an application before the Court of Appeal.

53. In its holding, the Supreme Court found that:

i. *Pursuant to rule 33(1) of the Supreme Court Rules, 2012, it was mandatory that an appeal be filed within 30 days of filing the notice of appeal. Under rule 53 of the same Rules, the Supreme Court could indeed extend time. However, it could not to be gainsaid that where the law provided for the time within which something ought to be done, if that time lapsed, one needed to first seek extension of that time before he could proceed to do that which the law required.*

ii. *The applicant, by filing an appeal out of time before seeking extension of time, and subsequently asking the court to extend time and recognize such 'an appeal', was tantamount to moving the court to remedy an illegality which the court could not do and such a document was unknown in law.*

iii. *Where one intended to file an appeal out of time and sought an extension of time, the much he could do was to annex the draft intended petition of appeal for the court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it.*

iv. *Under the Supreme Court Rules, 2012, one did not need to seek and get certification before filing a notice of appeal. A notice of appeal was a primary document which could be filed whether or not the subject matter under appeal was that which required leave or not.*

v. *From the notice of appeal, it was clear that the applicant expressed a general intention to appeal the Court of Appeal's decision. He did not state that he intended to appeal as of right or on the basis that the matter involved matters of general public importance. Further, the same was to be filed pursuant to article 163(4) (a) of the Constitution.*

vi. *The applicant intended to move the court as of right where no leave was required. Whether, the intended appeal properly fell under the realm of the court's jurisdiction was a substantive matter to be decided in the main appeal, if and when filed. Thus, where a party moved the court as of right, a respondent could not move to strike out such an appeal during the hearing of an application for extension of time. Such a respondent ought to wait until the intended appeal was properly filed.*

vii. *The notice of appeal having been filed within the 14 days of the decision of the Court of Appeal that was intended to be appealed against, and given that the applicant sought to come to the court as of right, there was no legal mandatory requirement for certification first and the same was proper.*

viii. *Whether or not the constitutional questions framed by the applicant were indeed canvassed and determined by the Court of Appeal was a substantive question that rightly fell for determination during the hearing of the appeal if and when filed.*

ix. The application for determination was for extension of time to file an appeal. Determining that the appeal did not involve constitutional issues would amount to a court deciding on a matter that was not before it. All that the court needed to determine was whether the applicant had a prima facie case that raised issues of constitutional interpretation and/or application.

x. The intended appeal revolved around the application and interpretation of articles 81 and 86 of the Constitution of Kenya, 2010 on general principles for the electoral system and voting. The applicant had also expressed an intention to invoke the court's jurisdiction under article 163(4) (a) of the Constitution of Kenya, 2010. Hence, the applicant had established a prima facie case to approach the court as of right.

xi. Time was of the essence in election matters where the people's sovereign power to elect their legal representatives was involved. It was with that recognition that the Constitution provided for the time frame within which election matters had to heard and determined.

xii. A party could however, encounter some delay and the time within which he/she was to perform an act lapsed. At common law, equity developed in the courts of Chancery Division to check the excess of common law. If one showed that he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time that

cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if established that he was not at fault.

xiii. *It was on that equitable underpinning that courts in common law jurisdictions in exercise of their discretion granted orders extending time. Extension of time had been given statutory backing with various pieces of legislation providing courts with the power to extend time.*

xiv. *Extension of time being a creature of equity, one could only enjoy it if he acted equitably: he who seeks equity must do equity. Hence, one had to lay a basis that he was not at fault so as to let time to lapse. Extension of time was not a right of a litigant against a court, but a discretionary power of the courts for which litigants had to lay a basis where they sought to invoke the courts' discretion to grant it.*

xv. *The Supreme Court by virtue of rule 53 of the Supreme Court Rules, 2012 had discretionary powers to extend time within which certain acts could be undertaken. That could be perceived by the use of the word "may" in crafting of the rule. The discretion was a very powerful tool which ought to be exercised with abundant caution, care and fairness; it ought to be used judiciously and not whimsically to ensure that the principles enshrined in the Constitution were realized.*

xvi. *Discretion to extend time was indeed unfettered. It was incumbent upon the applicant to explain the reasons for delay in making the*

application for extension and whether there were any extenuating circumstances that could enable the court to exercise its discretion in favour of the applicant.

xvii. The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:

a. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;

b. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;

c. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;

d. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;

e. Whether there would be any prejudice suffered by the respondents if the extension was granted;

f. Whether the application had been brought without undue delay; and;

g. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.[emphasis added]

54. In the aforesaid case, the Supreme Court struck out and expunged from the Court's record the appeal which had been filed out of the stipulated period

but ordered that the time limited for filing of a Petition of Appeal by the applicant was extended; the applicant was granted leave to file an appeal within 14 days from the date of the ruling; and the applicant was to bear the respondents' costs of the application.

55. From the above decision, which was an election petition, unlike this case, the Court was relying on specific provisions of the law that provided for specific timelines within which an appeal to the Supreme Court from the Court of Appeal was to be lodged, which timeline the applicant had not met. That notwithstanding, the Supreme Court laid down principles to be considered in applications for enlargement of time and further stated that the discretion of the Court in extension of time was unfettered. The Supreme Court did not in the circumstances of the case, have any option but to strike out the appeal which was filed out of time but allowed the applicant leave to file an appeal within 14 days of the date of the ruling.

56. From submissions by counsel for the interested party, it appeared that the ***Nicholas Arap Salat*** decision fettered discretion of the Court in all cases where, as is in this case, a party was granted 3 days to file a replying affidavit and instead of filing it by 17th November, 2025, he filed it on 19th November, 2025. Therefore, the question is, should this court go by the interested party's submission in its strict application of the decision in the ***Nicholas Arap Salat*** Case and strike out and expunge the exparte applicant's replying affidavit from the court record? Are there any other cases where the

Supreme Court has pronounced itself differently, even when faced with the same circumstances as was in the ***Nicholas Arap Salat*** **case** and this instant case? Let us see, in the succeeding paragraphs.

57. The **Nicholas Arap Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)** case was a ruling rendered on 4th July, 2014.

58. Subsequently, in **SC Petition No. 13 (E019 of 2020) as Consolidated with Petition No. 8 of 2020 between Kenya Railways Corporation, Attorney General, The Public Procurement Oversight Authority and Okiya Omtatah Okoiti, Wycliffe Gisebe Nyakinya, Law Society of Kenya and China Road and Bridge Corporation*((Being an application filed by the 1st Petitioner on 23rd June 2022 seeking to strike out the 1st & 2nd Respondents Cross-Appeal dated 10th August 2020, 1st Respondent's Replying Affidavit sworn on 20th May 2022 and the 1st Respondent's submissions dated 18th May 2022 & 26th May 2022 and being a Notice of Motion application filed by the 1st Respondent on 12th July 2022 seeking to strike out the 1st Petitioner's Petition dated 21st July 2020 and submissions dated 15th March 2021)*,;

59. At paragraph 1 of this the above decision, the Supreme Court upon reading the notice of motion application filed by the 1st petitioner dated 6th June 2022 and filed on 23rd June 2022 pursuant to Article 159 (2) of the Constitution, Rule 3(5) and Rule 13 (1) of the Supreme Court Rules, 2020

and Rule 12 & 17 (b) of the Supreme Court (General) Practice Directions, *2020 seeking the Court to strike out and expunge from the record the 1st respondent's replying affidavit sworn on 17th May 2022, submissions dated 18th May 2022 and 26th May 2022 and the 1st and 2nd respondents' cross-appeal dated 10th August 2020;and at paragraph 3, upon* considering the 1st petitioner's grounds in support of the application and written submissions filed on 23rd June 2022 *wherein it contends that; the replying affidavit sworn on 17th May 2022 by the 1st respondent was filed without leave of the court and introduced new facts that were not subject to the Court of Appeal's decision. And that the replying affidavit was filed after the Court had directed parties to file their respective submissions thereby denying the 1st Petitioner the opportunity to respond and causing prejudice. And that the cross petition was never served upon it;*

60. The Supreme Court held as follows, relying on its earlier decisions:

> ***[10] Having considered the two notice of motion applications filed by the 1st Petitioner and the 1st Respondent on 23rd June 2022 and 5th July 2022 respectively, WE HOLD as follows:***
>
> ***i. This Court in Raila Amolo Odinga & another -v- Independent Electoral and Boundaries Commission & 2 others Presidential Petition No. 1 of 2017 [2017] eKLR invoked its inherent jurisdiction and exercised judicial restraint when it was called upon to expunge the***

Petitioner's filed documents from the court record in the interest of justice to all parties in that Petition.

ii. We are further guided by this Court's reasoning in Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 others [2018] eKLR where we emphasized the importance of complying with court orders, rules and practice directions, we observed as follows:

"[24] We however acknowledge that the petitioner's submissions were filed out of time. Whereas this would have given Mr. Ndettoh a basis, if at all, for objecting, it is not upon Mr. Ndettoh to decide on the punitive measure to befall upon a party who fails to comply with the directions 5 of the Court, as every other party has a respective individual obligation to honour Court's directions. We underscore the importance of complying with Court Orders and directions given especially with regard to filing and service of documents within the requisite time. <u>That notwithstanding, we take cognizance of Rule 53 of the Supreme Court Rules, 2012 which gives us power to extend the time limited by the Rules, or by any decision of the Court. To this extent, therefore, the late filing of submissions is not patently incurable</u>…..Suffice to add, Mr. Ndettoh's objection is at the very least an <u>epitome of infringement of Article 159 of the Constitution which not only dissuades us from being tied to the ropes of procedural technicalities but also reminds us that justice delayed is justice denied." (Emphasis added</u>)

iii. Turning to the instant case, we note that the 1st respondent filed its replying affidavit dated 17th May 2022 on 20th May 2022 without leave of the Court and in response to a petition filed on 22nd July 2020, almost two (2) years after the petition was filed. It is our considered opinion that this is inordinate delay and no plausible justification was advanced by the 1st respondent for such delay. Consequently, we expunge the said affidavit from the court record. We however find that the 1st respondent's written submissions dated 18th May 2022 and 26th May 2022 were filed only a few days past the Court's direction and the 1st petitioner did not suffer any prejudice therefore, the prayer to expunge the said documents is dismissed.

61. In expunging from the record, the replying affidavit, the Supreme Court noted that the 1st respondent filed its replying affidavit dated 17th May 2022 on 20th May 2022 without leave of the Court and in response to a petition filed on 22nd July 2020, almost two (2) years after the petition was filed, which, in its opinion, was inordinate delay and no plausible justification was advanced by the 1st respondent for such delay. The Supreme Court however, allowed the written submissions which were filed only a few days past the Court's direction and observed that the 1st petitioner did not suffer any prejudice. The above decision was rendered on the **4th Day of November 2022.**

62. In **Dari Limited & 5 others v East African Development Bank (Petition (Application) E012 of 2023) ruling delivered on 7th November, 2023, *(Being applications for leave to adduce additional evidence and to strike out the Respondent's Replying Affidavit sworn by Carol Luwaga on 31st January 2024***), the Supreme Court held that ***it was not appropriate to strike out the respondent's response for being filed 4 hours and 40 minutes after the Court's stipulated time of 9.00am. The respondent used best efforts under the circumstances with part of the delay being attributable to the Judiciary e -filing system, a fact which was uncontroverted.***

63. At paragraph 20 of the ruling, the apex Court stated as follows:

> ***"20. Considering the foregoing, we hold the considered view that it is apposite to deal with the striking out of the respondent's response to the petitioners' application to adduce additional evidence first, for its seminal connection with the latter application. Having considered the applications and responses before us, We now opine as follows:***
>
> ***i. Whereas rule 31(4) of the Supreme Court Rules stipulates that a response to the interlocutory application together with written submissions shall be filed and served within seven days, rule 3(5) affirms the unlimited inherent power of the court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

64. In yet another ruling by the same Court in the same matter delivered on 7th November, 2023 and unrelated to election petitions, in **Dari Limited & 5 others v East African Development Bank (Petition (Application) E012 of 2023) [2024] KESC 18 (KLR) (Civ) (26 April 2024) (Ruling) Neutral citation: [2024] KESC 18 (KLR) (*Being an application to strike out the respondent's replying affidavit and leave to adduce additional evidence and opportunity to file rejoinder to the respondent's response),** the Supreme Court was faced with issues, among them, was the issue of whether the replying affidavit by Justa Kiragu should be struck out as there was no leave sought to extend the time for filing of the said affidavit as prescribed in Rules 42(2) and (3) of the Supreme Court Rules, which time had lapsed by the time the replying affidavit was filed, the Supreme Court reproduced Rule 42 (1) of its Rules made under the Supreme Court Act. The apex Court declined to strike out the replying affidavit.

65. The Supreme Court in the above case simultaneously dealt with the question of whether grounds of objection are sufficient response to an application, the Supreme Court in the above Dari Limited case in a ruling rendered on 7th November, 2023 stated as follows:

> ***iii. Rule 42 of the Supreme Court Rules provides for response to petition of appeal in the following manner:***

"42. (1) Unless otherwise directed by the Court, a respondent shall file grounds of objection, an affidavit, or both, within fourteen days of service of the petition."

The tenor of the above provision is that the respondent was at liberty to choose whether to file grounds of objection and/or affidavit. In this instance, the respondent opted to file the affidavit sworn by Justina Kiragu. This rule does not specify the form or content of the said response to petition. The petitioners having filed their petition and record of appeal, it is not upon the them to dictate the manner in which a respondent should file its response. The petitioners are at liberty to attack the contents of the response during the hearing of the petition, within the petition itself and not through an application such as the one before us. As such we find the prayer to strike out the replying affidavit to be premature and unmerited."

66. The above decision overrides the holding by the same Supreme Court in the **Gideon Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** case where it had earlier held that:

"[9] A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written

Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect…

[10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter."

67. The same Supreme Court in **Petition (Application) No. E011 of 2023 Kenya Airports Authority versus Otieno, Ragot & Company Advocates (being an application to strike out submissions, list of authorities and digest of authorities filed by the petitioner),** in a ruling rendered on 8th **December, 2023,** the Supreme Court stated as follows, quite elaborately and I shall quote the apex Court in extenso, with emphasis added:

"[2] UPON examining the grounds on the face of the application, the supporting affidavit and further affidavit sworn on 29th September, 2023 and 19th October, 2023 respectively, by Otieno David, a Partner in the respondent's law firm in which he contends that: <u>on 7th August, 2023 the Court's Deputy Registrar directed the appellant to file and</u>

serve submissions within 21 days; the appellant breached the timelines and filed the submissions 25 days out of time without the leave of the Court and without reference to the respondent; no explanation for the delay was given by the appellant when the matter came up before the Hon. Deputy Registrar on 25th September, 2023; and the appellant's subsequent reasons for delay as stated in its replying affidavit are unsupported by any evidence and are false;

[3] NOTING the respondent's further arguments that: the rules of procedure, case management and the court's directions serve a vital role in attainment of justice; the sequence of filing or making submissions is well established in the practice of law with an appellant first filing its submissions, the respondent filing its response and thereafter an appellant has an opportunity to file a rejoinder restricted to matters arising in the response; it is prejudicial to the respondent who had to file submissions without the benefit of addressing the appellant's submissions; the appellant's actions were discourteous and disrespectful to the Court, to the respondent, and was deliberately intended to cause a delay in the finalization of the petition;

[4] CONSIDERING the respondent's submissions dated 29th September, 2023 and its supplementary submissions dated 19th October, 2023 where it contends that: Article 159 of the Constitution provides for the principles that guide all courts in Kenya in their

exercise of judicial authority to include that justice shall not be delayed; the appellant's submissions and authorities remain unchallenged having been filed after the respondent had filed its submissions, thus prejudicial to the respondent's fair trial right under Article 50(1) of the Constitution; the appellant having obtained a stay of proceedings and execution from this Court, the respondent continues to be exposed to suffering due to the devaluation of the Kenya shilling while the appellant continues to benefit from the delay in conclusion of the matter; and that it is highly irregular and presumptive to file documents out of time without Petition leave and thereafter seek the Court's stamp of approval to deem them to be regularly on record. The respondent cites this Court's decisions in Okiya Omtata Okoiti & 3 others vs The Cabinet Secretary National Treasury & Planning and 10 others SC Application No. E029 of 2023, Senate & 3 others v Speaker of the National Assembly & 10 others; Fund Board (Interested Party) (Petition 19(E027) of 2021) [2022] KESC 20 (KLR) Nicholas Kiptoo Arap Salat v IEBC & 7 others and Edwin Harold Dayan Dande & 3 Others v Director of Public Prosecutions & 2 others SC Petition No4(E005) of 2022 to buttress its arguments; and

[5] CONSIDERING the appellant's replying affidavit sworn on 11th October, 2023 by Martin Munyi and submissions dated 11th October, 2023 in which the appellant opposes the application by stating that: the

application is vexatious and misconceived, intended to impede the expeditious determination of the petition of appeal; the delay in filing the submissions was not inordinate; the delay was caused by exigencies of work and was not intended to circumvent the interests of justice; the appellant had not had sight of the respondent's submissions by the time it filed its submissions; the respondent has not demonstrated the prejudice it stands to suffer if the submissions remain on record as it can be afforded the opportunity to file submissions in rejoinder; Counsel for the appellant expressed remorse for the belated filing of the submissions; and this Court should decline the invitation to sway into a trajectory that defeats the fair, just and expedient determination of the dispute;

[6] FURTHER considering the appellant's contention that the Okiya Omtata case (supra) is distinguishable from the instant case as it arose from an interlocutory application under Rule 31 of the Supreme Court Rules which requires the application to be filed alongside the submissions; the application aims to elevate procedural issues over substantive questions of law which should not be countenanced; striking out of pleadings is draconian and doing so will have an effect to the larger public; the doctrine of proportionality calls for the prayer to strike out the impugned documents to be disallowed, citing the Court of Appeal decisions in Cooperative Merchant Bank Limited v George

Fredrick Wekesa CA No. 54 of 1999, Petition No. E011 of 2023 Page 4 of 7 Attorney General v Torino Enterprises Limited [2020]eKLR, John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018]eKLR and this Court's decision in Raila Amolo Odinga & Another v Independent Electoral & Boundaries Commission & 2 others [2017]eKLR; and

[7] TAKING INTO ACCOUNT the mention before the Hon. Deputy Registrar of the Court on 7 th August, 2023 when directions were issued for the appellant to file its submissions within 21 days with the respondent having corresponding period to file submissions thereafter, and the mention before the Hon. Deputy Registrar of 25th September, 2023 where it was noted that the appellant had failed to comply with the timelines set for filing submissions;

[8] COGNISANT of the provisions of Section 21 of the Supreme Court Act which grants this Court general powers to make any ancillary or interlocutory orders, and Rule 65 of the Supreme Court Rules 2020 which empowers this Court to issue such directions as may be appropriate where a provision of the Rules or practice directions is not complied with, having regard to the gravity of the non-compliance and the general circumstances of the case;

[9] FURTHER NOTING the provisions of Article 159 of the Constitution which set out the guiding principles of the exercise of judicial authority which include that justice shall not be delayed and shall be administered without undue regard to procedural technicalities;

[10] WE HAVE CONSIDERED the application, responses and submissions filed by the parties and NOW OPINE as follows:

i. This Court has in several of its decisions reiterated that compliance with its orders and directions on filing and service of documents is imperative. As we stated in the Okiya Omtatah case (supra) compliance with court orders goes to the root of the rule of law as well as the dignity of the court.

ii. We note that from the directions issued by the Hon. Deputy Registrar on 7 th August, 2023 the appellant ought to have filed and served its submissions on or before 28th August, 2023. It was not until 22nd September, 2023 that the appellant filed its submissions online, and filed its hardcopies on 25th September, 2023 thus delaying to comply with the Court's directions by over 25 days. As noted in Rule 12(1) of the Court's Rules, filing is deemed complete when the document is submitted both electronically and physically.

iii. The appellant having failed to comply with the Court's direction, the respondent proceeded to file its submissions online on 22nd September,

2023 aware of the impending mention to confirm compliance on 25th September, 2023. The delay in compliance by the appellant was therefore prejudicial to the respondent who was deprived the opportunity to respond to the appellant's submissions. Upon exhaustion of the timelines, the Hon. Deputy Registrar proceeded to certify the matter as ready for hearing.

iv.Guided by this Court's decision in Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 others SC Petition No.5 of 2016 [2018] eKLR where we underscored the importance of complying with Court orders and given directions, every party has an obligation to honour the Court's directions. Whereas late filing of submissions is not incurable, and this Court has discretion to allow such late filing, the appellant has not moved the Court appropriately by way of an application for extension of time to file the said documents, however, is that fatal?

v. This Court is granted general powers to make any ancillary or interlocutory orders by the provisions of section 21 of its Act. Similarly Rule 65 of the Court's Rules empowers the Court to issue such directions as may be appropriate. The bottom line in all cases is for parties to litigation to reasonably access justice.

vi. The consideration to bear in mind here is what prejudice has been suffered by the respondent due to the applicant's failure to timeously

file its submissions and whether the respondent can be facilitated to mitigate such prejudice as may have been suffered. Conversely, would the applicant be able to still argue their appeal without the submissions? ***The answer to both enquiries, we find, are in the affirmative. At the hearing, the applicant Petition No. E011 of 2023 Page 6 of 7 can well argue their appeal orally. The respondent can always be granted leave to file supplementary submissions in reply to the submissions by the appellant which were filed out of time all in the interest of justice and to an expeditious disposal of this litigation.***

vii. Consequently, and under powers granted by section 21 of the Supreme Court Act and Rule 65 of the Court's Rules, we order that the late filed submissions be admitted and deemed to have been filed within time. The respondent is hereby granted 14 days therefrom to draw, file and serve supplementary submissions." [emphasis added]

68. The above latter decision is on all fours with the instant case where the applicant filed the replying affidavit only two days late unlike the applicant in the above case who filed after 25 days without leave of court but the apex Court still found that not to be fatal and proceeded to exercise discretion to extend the period for filing and deemed the late filed affidavit and authorities as duly filed. The Court also allowed the respondent to file supplementary affidavit, noting that no prejudice had been shown to be occasioned to the respondent.

69. It is trite, from the above Supreme Court decisions that striking out a pleading or an affidavit should be the last resort. In **Wilfred Rotich Lesan, Robert Siolei, Returning Officer Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo (2013) KECA 113 (KLR),** it was held that:

> ***"The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and***
>
> ***even then only in the clearest of cases."***

70. Accordingly, and applying the above principles espoused in Supreme Court decisions to this case, I find and hold that all the arguments by the interested party must fail.

71. The interested party did not stop at challenging the exparte applicant's replying affidavit for being filed out of the time granted by the Court, counsel for the interested party even questioned why the exparte applicant was pleading prejudice and being condemned unheard if the replying affidavit was struck out and expunged from the record, yet it was not the exparte applicant on trial unless Mr. Kinyanjui counsel for the exparte applicant was acting for the Judge, meaning that where the Court is being asked to recuse itself, the adverse party should not file an opposing affidavit

because to do so is tantamount to representing the Judge who in the circumstances is on trial.

72. It is true that the pending proceedings giving rise to this ruling concern an application for the recusal of the presiding Judge in this matter. It follows therefore, that it is this Judge writing this ruling who is the subject of scrutiny, and not the exparte applicant.

73. Indeed, and as stated by Mr. Ndegwa and Mr. Rapando and properly put, and whether it was said with the intention of vexing the Court or otherwise, the exparte applicant is not on trial, nor is any substantive relief sought against the exparte applicant at this stage. Accordingly, the principle of *audi alteram partem* cannot be invoked in the context of a recusal application.

74. The right to be heard in such circumstances is exercised by the Applicant in the application for recusal, placing before the Court the factual and legal basis giving rise to a reasonable apprehension of bias. It cannot therefore be said that the exparte applicant is condemned unheard, as no adverse determination is sought or capable of being made against it in the recusal proceedings.

75. However, the statement by the interested party's counsel that unless Mr. Kinyanjui was acting for the Judge is, to say the least, insolent to the Court. The record shows that the interested party's counsel refused to apologize to court over that kind of remark after Mr. Kinyanjui protested saying that it was unfortunate that such a statement could find its way on record against

this Court and Mr. Ndegwa was ably supported by Mr. Rapando his co-counsel on behalf of the interested party, trying to give the statement by Mr. Ndegwa, a different meaning all together.

76. Be as it may, in every adversarial discourse, as the parties fight it out, the Judge remains the grass that suffers in silence because the Judge must at all times make a decision either way unless parties agree to a negotiated settlement of the dispute. And as a referee in may disputes now spanning over 11 years serving as a Judge of this Court, I have had to hear all sorts of mud poured on me by parties who feel aggrieved by the decisions that I have rendered over time. I remain resolute, acting in good faith and I am conscious at all times of what to expect after a decision is made especially in highly contested matters.

77. Having said that, the present proceedings relate to an application for my recusal and therefore the exparte applicant, though not on trial, and neither am I on trial, is entitled to place a response on record. The allegations giving rise to the apprehension of bias by the presiding Judge arose in virtual court proceedings in the presence of the exparte applicant's counsel Mr. Harrison Kinyanjui, and it is therefore both proper and necessary that the exparte applicant's counsel be afforded an opportunity to address those allegations and if in his view they are baseless, counter them.

78. A Judge cannot descend into the arena of the same dispute between parties to defend or explain conduct complained of, by way of an affidavit and in those

circumstances, the adverse party bears a duty to state its position on record so as to assist the Court in the proper determination of the application.

79. In that regard, the filing of an affidavit in reply by the exparte applicant or its counsel cannot, in and of itself, be impugned as impermissible, nor can its consideration be said to be in defence of the Judge. The Court will consider all the allegations made in these very heated proceedings that come after I had dismissed an application for setting aside contempt orders against the interested party's alleged Chief Executive Officer and make its independent decision on the matter without fear or favour.

80. The exparte applicant had also sought to have the submissions filed by the interested party, allegedly out of time to be struck out. I hesitate to do that, noting that the interested party was waiting for the exparte applicant to first comply with the directions of the court on filing of a replying affidavit which was filed two days late and, in any event, the interested party was entitled to, according to the said directions, file a further affidavit.

81. In the end, and in view of all the above analysis, i find the objection raised by the interested party to have the replying affidavit filed on 19th November, 2025 out of time instead of 17th November 2025 to be devoid of merit.

82. This Court is bound to agree with the Supreme Court's holding in the latest decisions that it is in the unfettered discretion of the Court to permit a replying affidavit filed out of time without leave of court to be admitted as duly filed. This is in view of the legal principle that in determining whether

the replying affidavit filed out of time and without prior leave of the Court should be struck out or not, the Court must balance procedural requirements with the overarching constitutional obligations that guide the administration of justice.

83. 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 while Article 50 (1) guarantees every party the right to be heard and to have their case fairly adjudicated.

84. In my view, the exparte applicant's counsel has provided sufficient and reasonable explanation for the delay, attributing it to the unavailability of his staff with the deadline for filing ending over the weekend to draft the replying affidavit and the fact that the delay of two days is neither inordinate nor prejudicial to the interested party's interest in the application for recusal of the Judge. Above all, no prejudice has been demonstrated to occur to the interested party if the exparte applicant 's affidavit is sustained on record.

85. I therefore dismiss the objection raised by the interested party and grant the exparte applicant leave to file the replying affidavit out of time. As the replying affidavit is on record and already served, I order that the same is hereby deemed to be duly filed and served. I further grant the interested party seven days of today to file and serve a further affidavit.

86. The exparte applicant still retains the initial leave of seven days to file and serve a supplementary affidavit if need arises together with brief supplementary submissions since he had already filed the written submissions which are hereby admitted on record as properly filed and served.

87. I order that each party bear their own costs of the objection raised by the interested party, as the Court has gone out of its way to state the present legal position in matters canvassed by the parties.

88. Mention on 11/2/2026 in the new term to confirm compliance with these directions and to fix a ruling date on the application for recusal.

89. I so order.

Dated, Signed and Delivered at Nairobi this 16th Day of December, 2025

R.E. ABURILI
JUDGE