



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 93 OF 2017

JANE WANJIRU KARONDO.....PLAINTIFF/APPLICANT

VERSUS

CLARE NJERI GITHUNGURI....DEFENDANT/RESPONDENT

RULING

There is pending in this file the plaintiff's Notice of Motion filed under certificate of urgency on 19th June 2017 seeking injunctive relief pending trial with respect to land parcels No. MWERUA/BARICHO/720, 721, 722, 723, 724, 2060, 2102, 2103 and 2104.

Upon service on the respondent, she filed a replying affidavit on 13th July 2017.

The application was first placed before **HON. ANGIMA J.** on 28th June 2017 who, upon perusal of the application, certified it as urgent and granted an interim order of injunction pending inter-parte hearing before me on 13th July 2017.

Later, the same day however, **HON. ANGIMA J.** vacated and discharged the earlier order.

When, the matter came before me on 13th July 2017 as directed, **MR. MWAI** for the plaintiff protested that **MR. MARETE** for the defendant had only served him that morning with the replying affidavit which he urged me to expunge from the record.

MR. MARETE's response was that there had been a deliberate contempt of the orders issued in another case being ELC No. 102 of 2017 and that is why there was a delay in filing and serving the replying affidavit.

Since ELC case No. 102 of 2017 was set for mention on 2.10.2017, I directed that the two files be mentioned on that day and meanwhile, I would make a ruling on whether or not to expunge the affidavit sworn by the defendant and served on 13th July 2017. This ruling is therefore with respect to the plaintiff's prayer that I expunge the defendant's replying affidavit filed on 13th July 2017.

It is of course correct, as submitted by **MR. MWAI**, that the defendant should have filed and served her replying affidavit not less than three clear days from the date of hearing of the plaintiff's application dated 19th June 2017. That is not denied. It is indeed conceded by the defendant that the replying affidavit was filed and served on the morning of the hearing. **MR. MARETE's** explanation for that lapse is that after **HON. ANGIMA J.** had made orders on 28th June 2017, circumstances arose that made it impossible to place proper evidence before this Court until the very last minute. Counsel therefore prayed that since the replying affidavit is already on the file and has been served, I should not expunge it. My view of the matter is that Courts should aim at doing substantive justice to the parties by hearing their respective

cases on their merits. The replying affidavit is an important document if this Court is to do justice to the parties. It is already on the record and **MR. MARETE** has given an explanation, which I accept, as to why it was filed and served late. It is not suggested that it is an illegal document nor do I discern any intention on the part of the respondent to overreach or steal a match over the plaintiff. It is a genuine response filed in opposition to the plaintiff's application and if it is expunged, the defendant will be highly prejudiced. On the other hand, the plaintiff can always be granted leave to file a supplementary affidavit if he so desires. I am emboldened in this view by the recent decision by the Supreme Court of Kenya in **RAILA AMOLO ODINGA & ANOTHER VS INDEPENDENT ELECTION & BOUNDARIES COMMISSION PETITION No. 1 of 2017** where the Court allowed affidavits by both parties though filed and served late. That would also accord with the objective of **Article 159 (2) (d) of the Constitution** which demands that the Courts eschew "**undue regard to procedural technicalities**" while administering justice. I am also guided by the decision in **CENTRAL BANK OF KENYA VS UHURU HIGHWAY DEVELOPMENT LTD & OTHERS CIVIL APPEAL No. 75 of 1998** where the Court of Appeal took the view that even if documents are filed late, a Court is obliged to consider them unless for reasons other than mere lateness, it considers it undesirable to do so. In the circumstances of this case, I would not consider it to be in the interest of justice to expunge the defendant's replying affidavit solely on account of lateness and in any event, **Order 51 Rule 14 of the Civil Procedure Rules** does not state in any mandatory terms that documents filed late will not be considered. **Order 51 Rule 14 (4)** which reads:

"If a respondent fails to comply with sub rule (1) and (2), the application may be heard ex-parte"
Emphasis added

seems to me to suggest that the Court has a discretion to decide whether to allow documents filed late or to disregard them all together. In the circumstances of this case, I am not persuaded that I should expunge the defendant's replying affidavit though filed and served out of time.

The application to expunge the defendant's replying affidavit for being filed and served out of time is therefore dismissed. The plaintiff will however be allowed seven (7) days from to-day within which to file and serve any supplementary affidavit if he so wishes. Thereafter, this application be listed for hearing at the earliest opportunity having been filed under certificate of urgency.

B.N. OLAO

JUDGE

2ND OCTOBER, 2017

Ruling delivered, dated and signed in open Court this 2nd day of October 2017

Mr. Marete for the Respondent present

Mr. Muyodi for the Applicant present.

B.N. OLAO

JUDGE

2ND OCTOBER, 2017