



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 13 OF 2017

(Before D. K. N. Marete)

RICHARD KIPYEGON KITUR.....PETITIONER

VERSUS

THE GOVERNOR, KERICHO COUNTY.....1ST RESPONDENT

THE KERICHO COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This is an application by way of Notice of Motion dated 24th November, 2017 seeking the following orders of court;

- 1. The Petitioner's Affidavit in support of the Petition filed on 20th November, 2017 without the leave of court be expunged from the court record.*
- 2. Costs of this application be provided for.*

It is grounded as follows;

- 1. On 10th of November, 2017 the Court ordered that hearing of this Petition was set down for 20th November, 2017.*
- 2. The Petitioners herein filed the Petition on 2nd November, 2017 and the Petition and Affidavits in Support of the Petition were served upon the 1st and 2nd Respondents on 8th November, 2017.*
- 3. The 1st and 2nd Respondents filed a Response to the Petition and Affidavits on 17th November, 2017. This marked the close of pleadings.*
- 4. The 1st and 2nd Respondents filed a Response to the Petition and Replying Affidavit were served upon the Petitioner's Advocates on 17th November, 2017.*
- 5. The Petitioner never sought leave to file an affidavit but went ahead and filed the said affidavit*

anyway.

6. *The document filed out of time is the affidavit in support of petition sworn by Kipngeno Geoffrey Bett on 18th November 2017 and filed on 20th November 2017.*

7. *The documents introduce new evidence that was not field with the Petition.*

8. *This is an ambush and a blatant disregard of the court procedures and the principle of material disclosure to the Respondents without seeking leave from the Court to file a further Affidavit in support of the Petition.*

9. *The matter had been set down for hearing on 20th November, 2017.*

10. *At the point of service of the said Affidavit in Response to Petition, the Respondents had already filed and served the submissions on 20th November 2017.*

11. *No explanation has been offered by the Petitioner herein. This is contemptuous to the court.*

12. *The admission of the said affidavit will fundamentally prejudice the Respondents case as they had already filed their written submissions in readiness for the hearing scheduled for 20th November 2017.*

The petitioner/respondent in a Replying Affidavit sworn on some undisclosed date opposes the application and avers that at all times in these proceedings, the filing of the Further Affidavit the subject matter of this application was in order. This is because this was done after an oral application was made and allowed in court on 13th November, 2017, when the application came for hearing. The record of court is therefore testimony of the regularity of this affidavit in support of the petition as required.

When the matter came for hearing on 1st December, 2017 the applicant submitted a case of irregular filing of the Further Affidavit sworn on 18th November, 2017 and filed on 20th Instant. This, they submit was filed after the closure of pleadings and served after their filing of written submissions. It raises new issues and introduces the proceedings of the County Assembly and therefore should be expunged from the record of court.

The petitioner/respondent submitted reliance on their pleadings but added *that rules of procedure are handmaidens: they should not be converted into harsh mistresses*. A failure to observe these should not overshadow the ends of justice – Article 159 of the Constitution of Kenya, 2010 refers. This court has power and authority to validate the act and he prays that this is done.

This matter came for hearing on 13th November, 2017 when it would not proceed due to the unavailability of counsel for the petitioner. It was set for hearing on the following day but again the matter would not take off due to the absence of the respondent's defence to the petition.

On application by the parties, the court made the following directions.

(i) The respondent be and is hereby awarded one (1) day to make, file and serve response to this petition.

(ii) The petitioner is awarded one (1) to make, file and reply to the defence, if at all, and upon service.

(iii) ...

The petitioner/respondent now seeks to rely on order No. ii above to justify the filing of a Further Affidavit on 20th November, 2017 ostensibly as a reply to the defence as served. Again, he argues that

even in the absence of this, it is a matter of procedure and therefore should not be focal in a determination of this application.

I agree with the two fronts of the petitioner/respondent. With the orders of court of 14th November, 2017, an opening was created for the respondent to file a further answer to the defence. It is on record that the applicants herein had delayed the filing of their defence in contravention of the original orders of court dated 11th November, 2017. This is the causative of the issue now complained of. Again, their submission against an application of procedural technicality against their action stands tall - Article 159 (2) (d) of the constitution applies. It is only just and equitable that this court validates the action of the petitioner/respondent other than expunge the petitioners affidavit as filed. The Constitutional provision comes out thus;

159 (2) (d) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

a) ...

b) ...

c) ...

d) Justice shall be administered without undue regard to procedural technicalities; and

e) ...

I am therefore inclined to dismiss the application with orders that each party bears their own costs of this application.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Dr. Bett instructed by Manyonge Wanyama & Associates Advocates for the respondents/applicants.
2. Mr. Kigamwa holding brief for Lando instructed Kamau Lando & Associates Advocates for the petitioner/respondent.