



**Kenya Railways Corporation & 2 others v Okiiti & 3 others  
(Petition (Application) 13 (E019) of 2020 & Petition 18 of 2020  
(Consolidated)) [2022] KESC 68 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KESC 68 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION (APPLICATION) 13 (E019) OF 2020 & PETITION 18 OF 2020 (CONSOLIDATED)  
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ  
NOVEMBER 4, 2022**

**BETWEEN**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> PETITIONER  
ATTORNEY GENERAL ..... 2<sup>ND</sup> PETITIONER  
PUBLIC PROCUREMENT OVERSIGHT AUTHORITY ..... 3<sup>RD</sup> PETITIONER**

**AND**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> RESPONDENT  
WYCLIFE GISEBE NYAKINA ..... 2<sup>ND</sup> RESPONDENT  
LAW SOCIETY OF KENYA ..... 3<sup>RD</sup> RESPONDENT  
CHINA ROAD BRIDGE CORPORATION ..... 4<sup>TH</sup> RESPONDENT**

*(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)*

**RULING**

1. Upon reading the notice of motion application filed by the 1<sup>st</sup> petitioner dated June 6, 2022 and filed on June 23, 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 1<sup>st</sup> respondent's replying affidavit sworn



- on May 17, 2022, submissions dated May 18, 2022 and May 26, 2022 and the 1<sup>st</sup> and 2<sup>nd</sup> respondents' cross-appeal dated August 10, 2020; and
2. Upon reading the supporting affidavit sworn on June 6, 2022 by the 1<sup>st</sup> petitioner's Acting Corporation Secretary, Mr. Stanley Gitari; and
  3. Upon considering the 1<sup>st</sup> petitioner's grounds in support of the application and written submissions filed on June 23, 2022 wherein it contends that; the replying affidavit sworn on May 17, 2022 by the 1<sup>st</sup> 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 1<sup>st</sup> Petitioner the opportunity to respond and causing prejudice. And that the cross- petition was never served upon it; and
  4. Noting the 1<sup>st</sup> respondent's notice of preliminary objection that the court lacks jurisdiction to entertain the 1<sup>st</sup> petitioner's notice of motion application dated June 6, 2022 stating that the application is in breach of Rule 13 (1) of the Supreme Court Rules, 2020 and Rule 12 & 17 (b) of the Supreme Court (General) Practice Directions, 2020 as it is not in font size 12; and
  5. Further Noting the 1<sup>st</sup> and 2<sup>nd</sup> respondents' grounds of opposition dated July 1, 2022 and July 18, 2022 where they contend that there is no valid petition before the Court as it was not signed by an authorized signatory of the Board of Kenya Railways Corporation; and that the 1<sup>st</sup> respondent's replying affidavit dated May 17, 2022 does not introduce new factual matters; and that the cross-petition was served on the 1<sup>st</sup> petitioner on September 22, 2020 vide email pursuant to Covid 19 Rules.
  6. Also noting the notice of motion application filed by the 1<sup>st</sup> respondent on July 12, 2022 and the supporting affidavit sworn by Mr. Okiya Omtatah Okoiti on July 5, 2022 ; and
  7. Upon perusing the 1<sup>st</sup> respondent's notice of motion and his written submissions dated July 5, 2022, where he submits that the 1<sup>st</sup> petitioner's petition and supporting affidavit filed before the court is not signed by an authorized signatory of the Board of the Kenya Railways Corporation, thereby filed in breach of Rule 13(1) and Form G of the First Schedule to the Supreme Court Rules 2020, as read with section 3(2) of the Kenya Railways Corporation Act, and that the submissions and notice of motion application was not double spaced and not in font size 12, thereby filed in breach of Rule 13 (1) of the Supreme Court Rules 2020 as read together with Practice Direction number 12 and 17 (b) of the Supreme Court (General) Directions, 2020. The 1<sup>st</sup> respondent further contends that the supporting affidavit was not commissioned by a Commissioner for Oaths and should therefore be expunged from the record; and
  8. Noting the 1<sup>st</sup> respondent's submission, where he argued that the facts of the petition did not bind the 1<sup>st</sup> petitioner as it was not made under the common seal of Kenya Railways Corporation and that Advocate Kuria Njinu is not a Commissioner of Oaths, therefore, the affidavit was not duly commissioned and should be expunged from the court record as it does not comply with the Oaths and Statutory Declarations Act.
  9. Further Noting that the 1<sup>st</sup> petitioner's replying affidavit sworn on July 19, 2022 and submissions dated on July 25, 2022 where it opposes the 1<sup>st</sup> respondent's application to strike out the impugned petition, on the grounds that; the deponent of the impugned supporting affidavit Mr. Stanley Gitari is the acting Corporation Secretary and duly authorized by the 1<sup>st</sup> petitioner to swear the affidavit pursuant to section 3(2) of the Kenya Railway's Corporation Act cap 397; that the petition dated July 20, 2020 was duly executed by an authorized officer of the 1<sup>st</sup> petitioner in compliance with Rule 13(1) and Form G of the First Schedule to the Supreme Court Rules, 2020;



10. Having considered the two notice of motion applications filed by the 1<sup>st</sup> Petitioner and the 1<sup>st</sup> respondent on June 23, 2022 and July 5, 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 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. 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..... Suffice to add, Mr. Ndettoh's objection is at the very least an 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)

iii. Turning to the instant case, we note that the 1<sup>st</sup> respondent filed its replying affidavit dated May 17, 2022 on May 20, 2022 without leave of the court and in response to a petition filed on July 22, 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 1<sup>st</sup> respondent for such delay. Consequently, we expunge the said affidavit from the court record. We however find that the 1<sup>st</sup> respondent's written submissions dated May 18, 2022 and May 26, 2022 were filed only a few days past the court's direction and the 1<sup>st</sup> petitioner did not suffer any prejudice therefore, the prayer to expunge the said documents is dismissed.

iv. Further, Rule 47 (2) (b) of the *Supreme Court Rules, 2020* requires the cross-appeal to be filed within thirty days of service of the petition, therefore, the cross-appeal was filed within the time stipulated and the same was also duly served upon the petitioner through email, as a result, the prayer to expunge it from the court record is dismissed. It is our view that the 1<sup>st</sup> respondent's application to strike out the 1<sup>st</sup> petitioner's petition dated July 21, 2020 and its submissions dated March 15, 2021 is not merited.

v. On the issue raised by the 1<sup>st</sup> respondent that the 1<sup>st</sup> petitioner's supporting affidavit sworn by Mr Stanely Gitari on June 6, 2022 was commissioned by an advocate who was not a Commissioner of Oaths, we take note that the said advocate was admitted in 2008, had a valid practicing certificate for the year 2020 and annexed his certificate of appointment as a



Commissioner of Oaths under the Oaths and Statutory Declarations Act, cap 15. Therefore, the petitioner's supporting affidavit was properly attested to. Consequently, we dismiss the prayer to have the said affidavit expunged from the record.

11. Having carefully considered the 1<sup>st</sup> petitioner and 1<sup>st</sup> respondent's notice of motion applications, responses and submissions by the respective parties, we find as follows:
  - a. The 1<sup>st</sup> petitioner's application dated June 6, 2022 is allowed only to the extent that the 1<sup>st</sup> respondent's replying affidavit dated May 17, 2022 is struck off.
  - b. The 1<sup>st</sup> respondent's application dated July 5, 2022 is dismissed.
  - c. There shall be no order as to costs.
12. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2022**

.....

**P.M MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**M.K IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

.....

**S.C WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**W.OUKO**

**JUSTICE OF THE SUPREME COURT**

*I certify that this is a true copy of the original*

**REGISTRAR,**

**SUPREME COURT OF KENYA**

