REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 169 OF 2013

FLORA CHERONO.....PLAINTIFF

VERSUS

MARY NJIHIA.....1ST DEFENDANT

GRACE ABENI.....2ND DEFENDANT

HAMISI SUMBA.....3rd DEFENDANT

WAWERU NYAGA.....4TH DEFENDANT

JOSEPH BARASA NYONGESA.....5TH DEFENDANT

THE LAND REGISTRAR TRANS NZOIA.....6TH DEFENDANT

ABUBAKARTEMBULA CHANGE.....7THDEFENDANT

KESOGON MOSQUE COMMITTEE.....8TH DEFENDANT

AND

DANIEL NYAGA MUNYAMBO & 7 OTHERS.....APPLICANTS

RULING

1. By an oral application made on **23rd September, 2021**, counsel for the Applicant, in the Application dated (hereinafter referred to as "**the Application**", implored this Court to expunge the Replying Affidavit (hereinafter referred to as "**the Affidavit**") filed by the Respondent on **13th September, 2021**. The Affidavit was in response to the said Application dated **28th July, 2021**. The thrust of counsel's argument was that the Affidavit was filed and served outside of the timelines that the Court gave on **29th July, 2021** when it fixed the Application for herein on **23rd September, 2021**. Counsel pointed out to the Court that the terms of its Order were clear that the parties had to strictly comply with the timelines set by the Court. By the said Orders of **29th July, 2021**, this Court directed, at the relevant part, as follows: "**2.** The respondents shall file a response to the application within **14 days** of service… **4.** Parties to strictly abide by the issued timelines."

2. Counsel for the Respondent submitted that he prepared the Affidavit in readiness for his client to swear it but he was not available for a while to do so. He finally swore it on **10th September, 2021** and counsel filed it on **13th September, 2021** and served the same. Counsel for the Applicant acknowledged service of the Affidavit as at the time the Application came up for hearing. It was on that account that the Applicant's counsel moved this Court orally to expunge the Affidavit from the record since the Respondent had not complied with the "strict timelines" set. She submitted that this is a Court of Justice; the Respondent had not given good reason why he did not comply with the timelines set; that the Affidavit was filed about thirty **(30) days** after the expiry of the time set; that Court orders are not issued in vain; and that the Affidavit be expunged from the record.

3. Counsel for the Respondent, on his part, opposed the oral application. First, he readily acknowledged the fact that the timelines had not been observed. He then apologized for the delay on the part of his client. He gave the reason that the delay was occasioned by the fact that the Respondent was not available to sign and swear the Affidavit. He urged this Court to exercise its discretion to deem the Affidavit duly filed and served although out of time.

4. On the hearing date, the Court was prepared to give further directions regarding the disposition of the Application. However, faced by the oral application, it put on hold the issuance of directions and reserve a date for ruling on it. With the background given above, this court framed two issues for determination:

(a) Whether the Applicant's oral application had merits.

(b) Whether the Respondent has satisfied the requirement of enlarging time for compliance.

ANALYSIS

(a) Whether the Applicant's oral application had merits

5. Where timelines are stipulated by law or given by the Court, parties should endeavor, where humanly possible, to comply with them. In so doing they should employ virtually all their resources to meet the deadlines. The tools to use include time, money, human intellect and technology, among others. Deadlines are not set in vain and they serve a purpose. They are for good order and often for speeding up certain actions. They have to be complied with by all means possible. An analogy, for instance, is where, in the realm of faith, for those who believe in the divine ordering of life, a sinner is given time by God to repent. It is said in the Holy Bible that when the time allotted to him for repentance lapses, the sinner cannot, no matter his "good reasons", come to the Mercy Seat and be heard to plead for more time. But that is in so far as it regards a perfect system - the heavenly realm. In the real world we live in, there are numerous imperfections. Thus, exceptions to the strict requirements are often granted, on a case by case basis, depending on whether the laws that exist or conditions obtaining permit such.

6. In the present case, this Court gave the Respondent **14 days** to file and serve a response if they so wished. They did not do so. What appears to have been the case is that they wished to file and serve their response to the Application, and they did. The only anomaly in their desire is that this was done outside the timelines set. The Applicant faulted this. At this point, it is worth of note that from both the oral presentations in court and the record, the Applicant did not, prior to the hearing, notify the Respondents that they would raise an objection to validity of the Affidavit on record. No evidence was presented to court by the Applicant to the effect that they protested when they were served with the impugned Affidavit. They did not serve the Respondents with a notice that they would raise objections to the validity of the Affidavit.

7. The objection was raised only at the time of the Court handling the matter. This is what amounts to trial or litigation by ambush: it is not good practice. It goes against the main principles of natural justice. One of the basic tenets of natural justice is fairness.

8. Fairness, even as has been enshrined in *Clauses 25(c), 50(1) and 232(5)(d) of the Constitution of Kenya, 2010*, requires that a party is given adequate notice of what is to be argued against or for him before a forum of adjudication and be granted opportunity to prepare for whatever allegations face him or her. It obliges a party to give notice to the opposing side of what shall befall them when they show up for hearing. That is why, for instance, virtually in all civil proceedings witness statements and documents are exchanged nowadays well in advance of the proceedings. And the prosecution, in criminal cases, is obligated to give statements and

other evidence to the suspects well before hearing of a case. In ***Bashir Haji Abdullahi …Vs…Adan Mohammed Nooru & 3 Others (2004) eKLR***, the Court held as follows:

"…if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that 'the Application is bad in law' without saying more does not assist the other parties to the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged".

In the instant case, the objection was neither filed nor notice of it given in advance. If the Court could abhor an instance where both filing and service are done in advance but the problem thereto was lack of particularization of the objection, because it still amounts to ambush on the other party, much more where none of the two is done.

9. In ***Halsbury Laws of England*****, 5th Edition 2010 Vol. 61** at para. 639:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."

10. Lest it be misunderstood that this court took the understanding of procedural fairness as required of non-judicial bodies to be synonymous with fairness as obligated on parties in judicial proceedings, it is vital to note that the two processes differ. In regard to judicial proceedings, the rules of operation are often laid down whereas for non-judicial bodies they are not. However, the common backbone in actions in both cases is that there ought to be advance notice given to the person against whom allegations are being made. In regard to the present case, though they appear obvious, the allegations that a document or documents filed contrary to the rules or orders of a court are invalid and ought to be expunged, ought to be brought to the attention of the other party well in advance of the hearing of the matter.

11. Whereas its meaning may appear simple to the casual reader, in legal circles the term fairness carries with it a deep connotation particularly in the era of expanded human rights. It is a noun which is derived from the adjective "fair". I would define the term as the act of observing rules of fair play. Elsewhere, it could be defined as following, or subjecting oneself to, the due process. On the one hand, rules of fair play oblige every participant in a game to not play a foul; or take advantage of the opponent player, including feigning a foul, and so on. In simple terms it is required of every player in the game to observe the rules that guide it. It presupposes that such rules are laid down in advance and not applied arbitrarily.

12. In the 'game' of the administration of justice through the judicial system, one of the basic tenets applied is the requirement on the parties to give adequate notice to the adverse party about what he/she is meet in Court. In so doing the party will not have taken advantage of the opponent. On the other hand, due process has deeper meaning than being merely fair. One aspect of it imports the idea of each player in the field of justice following to the letter the law in place or rules as agreed upon.

13. The subject due process has been given a wide interpretation particularly by courts in the United States of America. This is noted in cases where the Courts have been called upon to discuss the application of the Due Process Clause as enshrined in the US Constitution, through the Fifth and Fourteenth Amendments thereto. Suffice it to say that while this ruling will not discuss the two limbs of due process, namely substantive due process and procedural due process respectively, as often discussed in the US legal system, it will pick up, in summary, the meaning and aspect of the second one which applies to the present case.

14. Procedural substantive process calls on governmental agencies and courts, to ensure that adjudication processes when being carried out under valid laws are fair and impartial. And that is the point. Thus, in **1975, Judge Henry Friendly** writing in his Article **"Some**

Kind of Hearing"

(https://scholarship.law.upenn.edu/cgi/viewcontent.cgi"article=5794&context=penn_law_review) (last accessed on 26/09/2021) brought out a list of basic due process rights. These include, but are not limited to (only relevant ones selected herein), Notice of the proposed action and the grounds asserted for it (Pg. 1280-1281); The opportunity to present reasons for the proposed action not to be taken (Pg. 1281); The right to present evidence, including the right to call witnesses (Pg. 1282); The right to know the opposing evidence (Pg. 1282); and The right to cross-examine adverse witnesses (Pg. 1282).

15. Having considered above some of the rights that attach the due process, by comparison with the instant case, a party wishing to raise an objection to the retention of documents in the court record ought to give notice to the other party(ies) of the same and the grounds he or she asserts them; that party be given opportunity to present reasons for that action not to be taken by the court; he be given the right to present evidence for his failure to comply with the timelines; and be given opportunity to question or confront the issues raised by the other party. Such rights as accrue to the opposing party cannot and do not obtain in cases where a party shoots up or rises to his feet and raises the weighty issue such as calling upon the Court to expunge documents from the record. The practice is only permitted in the taking of oral evidence where objections are raised in the middle of the proceedings.

16. This Court is not oblivious to the fact that there is a backlog of cases in our courts. For that reason, it would ordinarily discourage adjournments on flimsy grounds and the entertainment of unnecessary applications which would clog the system further. Thus, when considering whether or not to give parties to proceedings an opportunity to raise any issues they may have it has to exercise discretion in a judicious manner. In so doing it must weigh the interest of justice, the parties' interests and use the resources at its disposal.

17. Some of the resources it will employ are the procedural requirements that parties must observe in order for matters to progress effectively and expeditiously. It has been observed by Judge Friendly in the above-cited article that:

"It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially out-weighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving."

In essence, the Judge is stating that the Courts are bereft of resources. These include time. For this reason, from time to time, it will call to its aid the procedural requirements and weigh them against the safeguards that have been provided in order to achieve the best results for parties in the case.

18. In instances where the cost of providing such a safeguard is outweighed by the provision of the resources, then the court will have no option but declare the party seeking the protection undeserving. This is a question of balancing interests, and that is what this court has been asked to do in the present case.

19. It would be and is good practice that when one has issues to raise against another in the Court process, whether in civil, criminal or other proceedings, he should issue notice to the other party. The notice could be in form of a protest, in the case where service is effected, at the time of the service, or a written notice duly served on that other party well in advance of the court appearance or by way of an application filed and served in before the matter comes up before hearing.

20. In the instant case, there is no evidence of any of the above three actions having been taken. If there was a protest at the time of service of the Affidavit, counsel for the Applicant neither raised that at the time of making the oral application nor presented evidence of the same. However, absence of all that does not absolve the Respondent in this matter from the obligation that lay upon him to file a response within the prescribed time. For that to happen, the court has to consider more factors than the above, as is noted from a number of cases where the Court has been called upon to decide on similar issues.

21. Expunging from the record a document that has been filed by a party may be likened to the process of striking out pleadings, as provided under ***Order 2 Rule 15 of the Civil Procedure Rules***, that have been filed though not in compliance with the procedure or law. I say so because in either case (pleading or document filed), a party is desirous of presenting his side of the case before Court. But this view does not elevate documents to the status of pleadings: the two are different. It is the act of doing away with either that is under comparison.

22. Whereas pleadings are the skeleton that give the shape and structure of the case, documents in support thereof clothe the

skeleton: they give the muscle and outward shape of the entire structure of the case. Once they are filed they are part of the body and should not be hastily severed from it just like any part of the body. Such body parts should not be quickly removed therefrom unless the experts, in many cases qualified medical or veterinary practitioners, advise so under clear justifiable circumstances such as when the part is cancerous and could infect rest of the body.

23. Furthering both the analogy and comparison above, on the one hand courts have termed striking out pleadings as a draconian step that should be exercised very sparingly. The case of ***The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa*** **(Civil Appeal No. 54 of 1999)** where the Court of Appeal stated, that "***Striking out a pleading is a draconian act, which may only be resorted to, in plain cases*** is instructive here. On the other hand, expunging a document from the record is a painful whip with hooks applied to a bare body of an individual in order to teach him a lesson for him and others to learn from or to a trying animal to bring it back to the fold or path.

24. Since such a practice is being abhorred in the era of human and animal rights this Court would do well to extend the analogy and be hesitant to expunge documents from the record since that would most likely shut out a party from presenting his cause. But in instances where an act of a party is obviously and openly "cancerous", for instance, where is it repetitive or it is shown that the party had opportunity to follow the law or timelines but deliberately failed in order for him to come to court to ask for it to exercise its discretion in his favour, the Court should boldly and strongly send a signal to him and others of like mind not to abuse its process.

25. The issue of expunging documents from the record for various reasons on account of the parties who sought to rely on them has been decided by courts from time to time. In the case of ***Joel Makori Onsando & another v Independent Electoral and Boundaries Commission & 5 others [2018] eKLR***, the Court of Appeal was moved to consider whether the High Court was right in expunging certain documents that were allegedly not served on the Appellants. It stated that "The right to fair trial is a sword, which cuts both ways and is an entitlement of both the appellants and the concerned respondents." This Court has stated above that fairness is a tenet that is the bedrock of justice. By it, a party is behooved not to ambush the other with issues that they ought to have reasonably presented to them in advance. That is why, in the view of this Court, the Court of Appeal upheld the finding of the High Court in the Election Petition under consideration, that the documents that were not served on the parties who raised objection thereto were properly expunged from the record.

26. In ***Lamanken Aramat v. Harun Maitamei Lempaka, SC Pet. No. 5 of 2014,*** the Supreme Court stated that *"The Court's authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances when the Constitution links certain vital conditions to the power of the Court to adjudicate a matter."* By so explaining, the Court pointed to the existence of instances where a court may, under the Article, excuse procedural failings of a technical character as long as it does not impinge on a fair hearing or trial. In this Court's view **Article 159** of the **Constitution** has given courts wide latitude in the exercise of discretion in favour of a party save for where the procedural failures go to the root of the fair trial, a prejudicial or where the Court's discretion is specifically limited.

(b) Whether the Respondent has satisfied the requirement of enlarging time for compliance

27. In analyzing this issue, this Court takes the liberty to reproduce some excerpts of their Lordships of the Supreme Court of Kenya regarding a situation where counsel made an application to expunge some documents filed in the Court. In ***Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR***, while observing that the law on Presidential Election Petitions had strict timelines for parties to comply, the Court stated thus:

"Though the petitioner remains under a duty to strictly comply with the law and in this case, file all the required documents within time, we recognize that due to the voluminous nature of the materials brought before the Court, …, there is a possibility of a mix-up leading to incomplete set of documents, being filed in some instances."

"… we find that the 3rd Respondent will suffer no prejudice if we admit the contentious documents as properly filed. Having so said however, it would be expected that parties would strictly adhere to the procedural rules of this court…"

28. Their Lordships were of the view that even though the law provides for strict timelines to be observed in certain cases (in Presidential Elections Petitions for that matter), the Court would ask itself whether or not there would arise prejudice in case the Court winked at the lapse and deem a document filed out of time as properly filed. The ***Njonjo Mue*** case presented exactly similar

circumstances as the case in point. The holding of the Supreme Court leads this court to ask itself whether there would be prejudice to the Applicant if it deemed the Replying Affidavit properly filed and served.

29. Although counsel for the Applicant moved this court to expunge the Replying Affidavit from the record, she did not submit that her client would suffer prejudice if the Affidavit was deemed duly filed. Her complaint was, merely, that the document was filed and served out of the strict timelines given by the Court. She did not trudge the path of demonstrating prejudice to her client. In this Court's view the procedural lapse will not occasion any prejudice to the Applicant since the Applicant will have opportunity to read the same and respond to it by way or a supplementary affidavit need be, before the hearing of the Application.

30. Moreover, in ***Trust Bank Ltd v Amalo Company Ltd [2002] eKLR***, the Court of Appeal held that **1.** *The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigate from the pursuits of his right.* **2.** *The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.*

31. Again, in ***Essanji and Another Vs. Solanki [1968] EA*** at page 224. **Georges, CJ** stated as follows: "*The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.*" One way of ensuring that this happens is for a court to be extremely cautious and slow in expunging of a party's evidence or documents thereby shutting him out of the proceedings. Unless there is real prejudice to be occasioned to the other party by the retention of the documents in the record, the court should not disturb the record by mere technicalities being raised as and when they please. This is among the many situations that **Article 159 of the Constitution of Kenya, 2010** included in the country's supreme law to take care of.

CONCLUSION

32. It is this Court's view that the administration of justice requires that it hears the Application on its merits so that both parties are given a hearing. An error such as the one of not observing the timelines that were set out by my brother Judge at the time of fixing the current Application for hearing are of such a magnitude that they will not affect the fair hearing of the Application or prejudice the Applicant. The upshot of the oral application is that it is dismissed with costs to the Respondent and the Affidavit deemed properly filed and served.

DATED, SIGNED AND DELIVERED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2021.

HON. DR. IUR NYAGAKA

JUDGE, ELC KITALE