



**IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION**



*(Coram: Yohane B. Masara, PJ; Charles O. Nyawello, DPJ;
Richard Muhumuza, Richard Wabwire Wejuli, Léonard Gacuko, JJ)*

**APPLICATION NO. 32 OF 2022
(Arising from Reference No. 34 of 2022)**

**THE ATTORNEY GENERAL OF THE
REPUBLIC OF KENYA..... APPLICANT**

VERSUS

**MIKE SONKO GIDEON
KIOKO MBUVI RESPONDENT**

21ST NOVEMBER 2023

RULING OF THE COURT

A. INTRODUCTION

1. This Application arises from **Reference No. 34 Of 2022**. It was filed on 7th October 2022 by the Attorney General of the Republic of Kenya (“the Applicant”) against the Respondent. The Application was preferred under Rules 4, 5 and 13 of the East African Court of Justice Rules of Procedure, 2019 (“the Rules”).
2. The Application seeks extension of time to file and serve a Response to the Statement of **Reference No.34 of 2022** filed by Mike Sonko Gideon Kioko Mbuvi (“the Respondent”) on 18th July 2022. The Applicant also prays that in the event the requested extension is granted, the Court be pleased to deem the Response to the Statement of Reference appended to this Application as having been duly lodged and filed within the prescribed time frame.
3. The Applicant is the Attorney General of the Republic of Kenya, sued in his capacity as the Principal Legal Adviser to the Republic of Kenya, a Partner State of the East African Community. His address of service is c/o Sheria House, 7th Floor, Harambee Avenue. P.O. BOX 40112-00100.
4. The Respondent is a natural person, a citizen and a resident of the Republic of Kenya. His address of service for purposes of the Reference is C/o Wanyanga & Co. Advocates P.O. BOX 3897-00200, Rose Avenue Apartments. Suite A4. Off Argwings Kodhek Road. Adjacent to 4 Points by Sheraton, Car Park, Hurlingham, Nairobi.
5. The Application seeks for orders that:

- a) This Application be certified as extremely urgent and it be heard electronically via video conference forthwith in the first instance and in priority to any other matter in this Reference;
- b) This Honourable Court be pleased to extend time for the Hon. Attorney-General of the Republic of Kenya to file and serve a Response to the Statement of Reference;
- c) Pursuant to the grant of prayer 2 above, this Honourable Court be pleased to deem the Response to the Statement of Reference annexed to the instant Application as having been duly lodged and filed on time;
- d) This Honourable Court do make such further order(s) and/or direction(s) as it may deem necessary in the circumstances to meet the ends of justice;
- e) The costs of this Application be in the cause.

6. The Application is supported by an Affidavit deponed on the 30th September 2022 by Peter Thande Kuria, Counsel for the Applicant.

B. REPRESENTATION

7. At the hearing, the Applicant was represented by Mr Peter Thande Kuria, State Counsel, while Mr Kennedy Wanyanga and Mr Arnold Ochieng Oginga, learned Advocates, appeared for the Respondent.

C. GROUNDS FOR THE APPLICATION

8. The grounds for the Application are contained in the Notice of Motion and in the Affidavit of Peter Thande Kuria, Counsel for the Applicant, filed in Court on 7th October 2022.
9. The present Application is premised on the grounds that the Reference from which the Application arises was lodged in this Court on 18th July 2022, and the Honorable Attorney General of the Republic of Kenya was duly notified of this on 29th July 2022.
10. That as per the Rules, the Applicant herein was required to respond to the Reference within Forty-Five (45) days from the day of service.
11. Counsel for the Applicant averred that there were circumstances beyond their control, as delineated below, which rendered it impracticable to adhere to the stipulated time frame for responding to the Reference. Specifically, he highlighted the following:
 - a) **That the filing and service of the Statement of Reference coincided with the General Elections year in Kenya, conducted in the month of August every five years;**
 - b) **That the General elections in Kenya, by their nature, give rise to pre-election and post-election disputes, many of which are initiated against the Attorney General as a substantive party;**
 - c) **That these disputes, in accordance with constitutional provisions and pertinent laws and regulations, encompass matters pertaining to various stages of**

the electoral process, including nominations for individuals aspiring to contest political offices;

- d) That the law mandates the resolution of these disputes within specific timeframe that are statutorily defined;**
- e) That the filing and service of the Statement of Reference occurred during the vacation period of the superior court, during which a significant number of counsel in the office of the Attorney General's Litigation Department take their annual leave. This timing is crucial due to the impracticability of such leaves at other times, given the court-related workload;**
- f) That the deponent herein was assigned the responsibility of handling the Statement of Reference; however, timely response became unfeasible due to the heightened workload associated with election disputes, compounded by the fact that a substantial portion of the staff was on annual leave during the aforementioned period;**
- g) That as a consequence of the aforementioned circumstances, the Applicant found it necessary to thoroughly consult with the Judiciary regarding the matter in response to the current Reference; and**
- h) That, except for the challenges posed by an election year, encompassing pre-election and post-election**

disputes, coupled with their consequential impact on the workload and time constraints, the Applicant would not have encountered any impediment in promptly and punctually addressing the present reference within the stipulated time frame, as prescribed by the Rules.

12. Hence, the Applicant firmly maintains that the delay in submitting and filing a Response to the Statement of Reference neither exhibits undue delay nor demonstrates any deliberate intent.

13. Consequently, the Applicant requests this Honorable Court to exercise its inherent powers as prescribed in Rules 4 and 5 of the Rules, and consider a Response to the Statement of Reference, which was lodged beyond the stipulated deadline, as having been timely filed within the purview of Rule 32 of the Rules.

D. THE RESPONDENT'S REPLY AND SUBMISSIONS

14. The Respondent's response to the Application is set out in the Affidavit of Gidion Mbuvi Mike Sonko, the Respondent herein, lodged in Court on 23rd November 2022.

15. In the said Affidavit, the Respondent opposes the Application, calling the Notice of Motion an afterthought and an abuse of Court process as no justification was given to warrant the grant of the Orders sought in the Application. The Respondent also alludes to the defect of the Affidavit in support of the Application, having been sworn by the Applicant's Advocate.

16. Similarly, Counsel for Respondent, through the oral submissions, vehemently contested the prayers sought in the Application.

17. Counsel submitted that with respect to the Applicant's assertions regarding judicial interruptions, specifically related to electoral disputes and court recess, the Office of the Attorney General, in common with all public entities, was duty-bound to uphold institutional continuity. That it is this institutional continuity that was supposed to ensure the uninterrupted provision of services, even during critical periods such as elections.
18. That in contemplation of legal proceedings, the scheduling and arrangement of court proceedings in the Kenyan Supreme Court and other courts are diligently established in advance, preventing any unforeseen circumstances. Consequently, that the Applicant bore a responsibility and a prerequisite to proactively prepare for the forthcoming caseload.
19. Counsel for the Respondent further submitted that the Applicant had failed to provide specific evidence regarding the Court personnel who were purportedly on leave during the court vacation, as well as details of electoral cases or petitions that allegedly caused an excessive workload, thereby resulting in insufficient time for the Applicant to respond to the Respondent's Statement of Reference.
20. Concluding on their submission, Counsel for Respondent urged the Court to deem the Application an abuse of the Court process, contending that it violates the equitable doctrine of 'delay defeats equity'. They prayed for the dismissal of the Application.

E. COURT'S DETERMINATION

21. Having considered the evidence and submissions from the parties, it is imperative for the Court to first deliberate on the legal issue

concerning the dual participation of Counsel Peter Thande Kuria as both the deponent of the Affidavit and prosecuting Counsel in this case. Although this matter was not contested during the hearing, the Court finds it crucial and just to address it, as it was alluded to, albeit slightly, by the Respondent in his Affidavit.

22. Rule 52(5) of the Rules, states that:

“Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts, in accordance with Form 3 of the Second Schedule.”

23. It is evident that the said Rule does not delineate specific qualifications or exclusions for individuals acting as deponents, provided that the said person possesses pertinent knowledge of the facts in question.

24. In the case of the **Attorney General of Burundi vs Secretary General of the East African Community, EACJ Reference No. 2 of 2018**, it was stated that:

“As a general rule, affidavits may include matters within a deponent's knowledge or matters of which s/he has been informed, provided that such deponent distinguishes between the 2 categories of averments and discloses the source of information in the case of the latter category.”

25. Again, in the above case, the Court emphasized that the qualification for a deponent was not restricted to specific individuals, provided that they possess first-hand knowledge of the relevant facts and/or

matters they have been informed of, with a clear distinction between the two.

26. In **Mpozayo Christophe vs the Attorney General of Rwanda, EACJ Application No.9 of 2022**, the Appellate Division of this Court had this to say on the issue:

“As regards affidavits sworn by counsel, the general principle is that counsel is required to refrain from deposing to an affidavit in contentious matters, particularly where he risks being subject of cross-examination. However, counsel is not precluded from swearing an affidavit on formal and non-contentious matters which are within his personal knowledge.”

27. The Court cited the case of **Kamlesh Mansukhlal Damji Patti Ibrahim Ali & 2 others [2005] eKLR**, in which the Court of Appeal of Kenya held that **“There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client.”**

28. Furthermore, in **Meadows vs Grant's Auto Brokers, 71 Wash. 2d 874, 431 P.2d 216 (1967), Supreme Court of Washington, Department Two**, it was held that an affidavit by an attorney submitted in support of his client's cause in a summary judgment proceeding and based on personal knowledge of the facts set forth, is entitled to the same consideration as any other affidavit based on testimonial knowledge.

29. Similarly, in **Stockman Bank of Montana vs Morris, August 26, 2010, Twenty-First Judicial District Court of Montana, Ravalli**

County, the Court upheld the foregoing stance in which the Court stated that an attorney's affidavit in support of a motion is admissible only to prove facts that are within his personal knowledge and as to which he is competent to testify.

30. Upon careful perusal of Mr Peter Thande Kuria's affidavit and after due consideration of the relevant authorities, this Court finds that the deponent provided testimony within the purview of his personal knowledge. It is evident that the deponent was directly involved in the events that gave rise to the facts of this case. Consequently, the contents of his affidavit pertain to the occurrences and facts directly experienced by him rather than being based on hearsay or personal belief.

31. Further, and as it was stated in the case of **Secretary General of East Africa Community vs Rt. Hon. Margaret Zziwa, EACJ Application No. 12 of 2015**, the core value of an affidavit is that it is made under oath, and therefore its statements are truthful. In the present matter, the deponent duly deposed the affidavit, affirmed its contents, and submitted it as evidence before this Court.

32. In light of the above, this Court discerns no procedural irregularity in the submission of the Affidavit, thereby finding no grounds for its inadmissibility. Consequently, the affidavit of Mr Peter Thande Kuria is properly on record.

33. We now turn to the merits of the Application, which is whether the Court may exercise its inherent powers as delineated in Rules 4 and 5 of the Rules to extend the stipulated time for the Attorney General of the Republic of Kenya to submit and serve a Response to the Statement of Reference out of time.

34. For clarity, the Court reproduces the aforementioned invoked Rules here under:

Rule 4:

“Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders or give such directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Rule 5:

“The Court may, for sufficient reason, extend the time limited by these Rules or by any decision of itself for the doing of any act authorized or required by these Rules, whether before or after the expiration of such time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to such time as so extended.”

35. As was rightly stated by both parties, this Court has had several occasions to consider the interpretation and application of the inherent powers in question. See **Prof. Anyang’ Nyong’o & 10 Others vs Attorney General of Kenya, EACJ Applications Nos. 1 & 2 of 2010**

36. The conditions for invoking the inherent powers in question lie in whether the Court finds ‘sufficient reason’ in the Applicant’s case.

37. During the hearing and in his submissions, Counsel for the Applicant argued that the convergence of a substantial volume of electoral disputes and the unavoidable court recess happened to coincide with

the submission of the Response to the Statement of Reference under consideration.

38. This situation left Counsel representing the Attorney General of Kenya, who was involved in the electoral petitions in question, with insufficient time to respond to the Applicant's Statement of Reference, as all the petitions had been assigned to him.
39. In response to this assertion, Counsel for the Respondent challenged it, citing lack of supporting evidence. The Court, in turn, requested the Applicant to provide evidence regarding the substantial allocation of electoral disputes as claimed. Counsel for the Applicant subsequently presented details of the pending electoral cases and petitions against the Attorney General of Kenya.
40. He further raised concerns about the delayed instructions from the Attorney General of Kenya, who is the Applicant in this case and Respondent in the Statement of Reference in question, which hindered his ability to respond promptly.
41. The aforementioned situation left Counsel representing the Attorney General of Kenya, whom the electoral petitions in question were against, with inadequate time to respond to the Applicant's (in the Reference) Statement of Reference as all the petitions were allocated to him.
42. In determining whether the reason is sufficiently enough to prompt the Court's inherent powers provided in Rule 4 and 5 of the Rules, the Court has, in **Godfrey Magezi vs National Media Stores, EACJ Appeal No. 2 of 2016**, adopted a "broad purposive approach" noting that the Court should take into account not only the considerations

relevant to the applicant's inability or failure to take the essential procedural step in time, but also any other considerations that might impel a Court of Justice to excuse a procedural lapse and incline to a hearing on the merits.

43. In the cited case, the Court noted that such "circumstances of individual cases include, but are not limited to, such matters as:

- a) **the promptitude with which the remedial application is brought;**
- b) **whether the jurisdiction of the Court or the legality of the decision sought to be challenged on the merits is in issue;**
- c) **whether there was manifest breach of the rules of natural justice in the decision sought to be challenged on the merits;**
- d) **the public importance of the said matter; and**
- e) **the prejudice that may be occasioned to either party by the grant or refusal of the application for extension of time."**

44. The Court also, taking a broad purposive approach in its view of judicial discretion, ruled that **"in dealing with procedural lapses, the only relevant sign post is the beacon of justice,"** which **"the Court's eyes must remain firmly fixed on."**

45. Further, in the case of **Prof. Anyang' Nyong'o & 10 Others vs Attorney General of Kenya** (supra), it was held that the Court "is pre-eminently a Court of Justice" and will *"administer substantive justice without undue regard to technicalities – especially technicalities of practice, process or procedure."*

46. Viewed in context, and after a thorough examination of reasons for the delay in responding to the Respondent's Statement of Reference and after a careful assessment of these reasons in relation to any potential prejudice that may be inflicted upon the opposing party by extending the time for filing the Response to the Statement of Reference out of time, this Court finds that the proffered reasons hold sufficient merit to warrant the exercise of our discretionary authority as stipulated in Rules 4 and 5 of the Rules.

47. On the exhibited effort within the Application, wherein the Applicant not only requested an extension of time but also demonstrated a willingness to address the procedural oversight by appending the Response to the pertinent Statement of Reference, it is reasonable to acknowledge the explanation for the delayed filing as valid.

48. In a conscientious weighing of the procedural deficiency in question against the overarching imperative of achieving substantial justice, we conclude that the extension of time to submit a Response to the Respondent's Statement of Reference is in harmony with the principles of justice applicable to this specific case.

F. CONCLUSION

49. In the result, we grant the extension of time to the Applicant to file and serve a Response to the Statement of Reference.

50. The Response to the Statement of Reference attached to the present Application is hereby validated.

51. The Applicant to serve the Respondent his Response to the Statement of Reference with immediate effect.

52. The Costs of the Application shall abide the outcome of the Reference.

53. It is so ordered.

Dated, signed and delivered at Arusha this 21st Day of November 2023



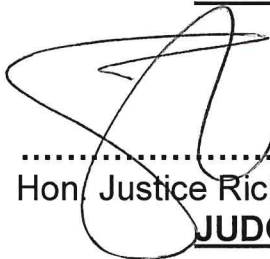
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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE



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Hon. Justice Dr Charles O. Nyawello
JUDGE



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Hon. Justice Richard Muhumuza
JUDGE



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Hon. Justice Richard W. Wejuli
JUDGE



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Hon. Justice Dr Léonard Gacuko
JUDGE