

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

*(Coram; Mwilu (DCJ & VP), Ibrahim, Wanjala, Njoki & Ouko SCJJ)*

**PETITION (APPLICATION) NO. 13 (E019) OF 2020**  
**AS CONSOLIDATED WITH PETITION NO.18 OF 2020**

**BETWEEN**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> PETITIONER**  
**THE ATTORNEY GENERAL.....2<sup>ND</sup> PETITIONER**  
**THE 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 AND BRIDGE CORPORATION.....4<sup>TH</sup> RESPONDENT**

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*(Being an application filed by the 1<sup>st</sup> Petitioner on 23<sup>rd</sup> June 2022 seeking to strike out the 1<sup>st</sup> & 2<sup>nd</sup> Respondents Cross-Appeal dated 10<sup>th</sup> August 2020, 1<sup>st</sup> Respondent's Replying Affidavit sworn on 20<sup>th</sup> May 2022 and the 1<sup>st</sup> Respondent's submissions dated 18<sup>th</sup> May 2022 & 26<sup>th</sup> May 2022 and being a Notice of Motion application filed by the 1<sup>st</sup> Respondent on 12<sup>th</sup> July 2022 seeking to strike out the 1<sup>st</sup> Petitioner's Petition dated 21<sup>st</sup> July 2020 and submissions dated 15<sup>th</sup> March 2021)*

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**RULING OF THE COURT**

**[1] UPON** reading the notice of motion application filed by the 1<sup>st</sup> petitioner dated 6<sup>th</sup> June 2022 and filed on 23<sup>rd</sup> June 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 17<sup>th</sup> May 2022, submissions dated 18<sup>th</sup> May 2022 and 26<sup>th</sup> May 2022 and the 1<sup>st</sup> and 2<sup>nd</sup> respondents' cross-appeal dated 10<sup>th</sup> August 2020; and

**[2] UPON** reading the supporting affidavit sworn on 6<sup>th</sup> June 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 23<sup>rd</sup> June 2022 wherein it contends that; the replying affidavit sworn on 17<sup>th</sup> May 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 6<sup>th</sup> June 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 1<sup>st</sup> July 2022 and 18<sup>th</sup> July 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 17<sup>th</sup> May 2022 does not introduce new factual matters; and that the

cross-petition was served on the 1<sup>st</sup> petitioner on 22<sup>nd</sup> September 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 12<sup>th</sup> July 2022 and the Supporting Affidavit sworn by Mr. Okiya Omtatah Okoiti on 5<sup>th</sup> July 2022 ; and

**[7] UPON** perusing the 1<sup>st</sup> respondent's notice of motion and his written submissions dated 5<sup>th</sup> July 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 Njiru 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 19<sup>th</sup> July 2022 and submissions dated on 25<sup>th</sup> July 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 20<sup>th</sup> July 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 23<sup>rd</sup> June 2022 and 5<sup>th</sup> July 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 17<sup>th</sup> May 2022 on 20<sup>th</sup> May 2022 without leave of the Court and in response to a petition filed on 22<sup>nd</sup> July 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 18<sup>th</sup> May 2022 and 26<sup>th</sup> May 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 21<sup>st</sup> July 2020 and its submissions dated 15<sup>th</sup> March 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 6<sup>th</sup> June 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 6<sup>th</sup> June 2022 is allowed only to the extent that the 1<sup>st</sup> respondent's replying affidavit dated 17<sup>th</sup> May 2022 is struck off.***
- b. The 1<sup>st</sup> respondent's application dated 5<sup>th</sup> July 2022 is dismissed.***
- c. There shall be no order as to costs.***

**[13]** 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**

