



Chamber of Business Sector in Kenya v County Government of Kiambu & 3 others (Judicial Review Application E009 of 2024) [2024] KEHC 10157 (KLR) (13 August 2024) (Directions)

Neutral citation: [2024] KEHC 10157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
JUDICIAL REVIEW APPLICATION E009 OF 2024
DO CHEPKWONY, J
AUGUST 13, 2024**

BETWEEN

CHAMBER OF BUSINESS SECTOR IN KENYA APPLICANT

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

COUNTY ASSEMBLY OF KIAMBU 2ND RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF KIAMBU 3RD RESPONDENT

KIAMBU COUNTY SERVICE BOARD 4TH RESPONDENT

DIRECTIONS

1. The Applicant initiated Judicial Review proceedings via a Chamber Summons application dated 18th April, 2024, and was granted leave upon which it filed the Substantive Notice of Motion dated 14th May, 2024. In response, the Respondents filed a Replying Affidavit on 24th May, 2024.
2. On 20th May, 2024, parties were given directions on disposal of the substantive Notice of Motion, which directions were to be confirmed on 27th June, 2024.
3. When the matter came up for mention on 27th June, 2024, so that parties could confirm compliance of directions issued on 20th May, 2024, Counsel for the Applicant informed the court that he had already filed their submissions on the application. However, he went on to state that he had been served with a Replying Affidavit with additional Pages 7 to 13. He told court that there was an initial Replying Affidavit which was filed on 24th May, 2024 containing Pages 1- 6 without a jurat and it was thus incomplete. According to the Applicant’s counsel, the Respondent Counsel was in court on 28th May, 2024 when the matter was mentioned and he confirmed that he had filed a Replying Affidavit on record. Mr. Kamoni, counsel for the Applicant submitted that they had addressed the Replying Affidavit filed on 28th May, 2024 and argue that the respondents did not seek leave to file an



amended Replying Affidavit or extension of time to file a Supplementary Affidavit. He urged that the Respondents had also not filed their submissions and yet the period for doing so had lapsed on 25th June, 2024. Counsel for the Applicant contends that the letter of apology cannot purport to amend a substantive application as he had already addressed the Replying Affidavit in its submissions.

4. The Applicant's counsel further argues that the Respondent's Counsel ought to have relied on Section 1A of the [Civil Procedure Act](#) and assist the court to further the overriding objectives, to participate in the process of the court and comply with the directions and timelines issued by the court. He went on to state that the Respondent's Counsel ought to have acted with diligence, followed due process and comply with the set procedure. He has therefore urged the court to expunge the Replying Affidavit from the record and set a ruling date for the application.
5. Counsel for the Respondent, Mr Munyua Ezekiel, stated that he had filed a Replying Affidavit dated 24th May, 2024 but in the process of scanning realised that Pages 7 to 13 of the Affidavit had been inadvertently omitted during the scanning and uploading process. He stated that when this was pointed out by the Applicant's Counsel on 11th June, 2024, they wrote to her and copied the Deputy Registrar by 12th June, 2024 and indicated the said anomalies. He stated that they then uploaded the full Affidavit and served the same upon the Applicant's Counsel. He denied that a fresh affidavit was filed and stated that they had simply resubmitted the full affidavit and hence urges the court to deem it as duly filed and properly on record.
6. He further denied that he had not been served with submissions by the Applicant as alleged. He pointed out that the Applicant also has a pending contempt of court application dated 27th May, 2024, on which the court is yet to give any directions and thus the parties cannot be seeking a ruling date before addressing all the pending applications. He urged the court to deem the Replying Affidavit dated 24th May, 2024 as properly filed.
7. In rejoinder, the Applicant stated that it served the applicant with the submissions on 11th June, 2024. She stated that the Respondents are seeking the court to admit a document which was filed out of time and without leave of the court which is tantamount to an illegality. She has urged the court to expunge the said Replying Affidavit from the court record and issue a Ruling date for the application.

Analysis and Determination

8. The court has considered the two Replying Affidavits filed in court. The first one was that which was filed on 24th May, 2024 and from the Case Tracking system it has 32 pages but it runs from Paragraph 1 to 20. Thereafter, it is followed by the annexures. The court notes that the Replying Affidavit is incomplete as it lacks the jurat.
9. The court has taken note of the Respondent's counsel's explanation that in noting the error, they wrote a letter dated 12th June, 2024 informing the Applicant's counsel and the Deputy Registrar of the omission and or anomaly in the scanning so that only Pages 1 to 6 of the Affidavit were uploaded and leaving out Pages 7 to 13 alongside the 2nd Replying Affidavit containing the all the averments with a jurat sworn on 24th May, 2024. He explained that the anomaly was not premeditated or intentional.
10. It is the argument of the Applicant's Counsel that the 2nd Affidavit was a fresh Affidavit which was filed out of time and without the leave of the court and urged the court to expunge the same from the record. However, the Respondents' counsel has objected the argument and maintains that Pages 7 to 13 were erroneously left out during the scanning and uploading process.
11. Having carefully looked and scrutinized the two documents in question, the court confirms that indeed the first one which was filed on 24th May, 2024 was incomplete as it lacked the jurat which is a core



element in an Affidavit. On the second one filed on 12th June, 2024 the court notes that it is complete and duly signed by the deponent. The court refutes the argument that the second Affidavit was filed out of time and without leave of court as it has gone through the two documents and notes that in the first one, all the annexures including ‘WW-3’ and ‘WW-4’ which do not appear in the body of the first Affidavit had already been annexed and thus cannot be said to have been a fresh affidavit.

12. The court is alive to the fact that a mistake can be made by either the Counsel or his office staff at the time of scanning and uploading so that the same and such mistake cannot be used to penalise the Respondents as there is a possibility of a mix-up which can lead to an incomplete set of documents being filed. In finding so, the court relies on the case of *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR, where 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...”

13. Further, the court finds that it will be against the principles of justice to expunge the whole Affidavit due to such omissions or anomaly which has already been regularised. And on this the court relies on the decision in the case of *Flora Cheronu v Mary Njibia & 9 others* [2021] eKLR which on expunging court records, stated as follows:-

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.”



14. In line with the provisions of Article 159(2)(d) of the *Constitution*, which states that;

“justice shall be administered without undue regard to procedural technicalities”,

the court finds that the incomplete affidavit was a mere technicality and an error which had been regularized, hence the same cannot be expunged from the court record. Therefore, this Court finds that the Replying Affidavit which was filed on 12th June, 2024 as being properly filed in court.

15. As stated by the Respondent, the court further notes that there is a pending application which was filed on 27th May, 2024 and on which directions have not been issued.

16. Therefore, the court declines to have the Replying Affidavit filed on 12th June, 2024 expunged from the record and the court finds that the said Replying Affidavit in contention as duly filed and served. Subsequently, the following direction issue:-

- a. The Respondents to file and serve a response to the application dated 27th May, 2024 within seven (7) days from the date hereof.
- b. Both applications to be disposed of contemporaneously by way of written submissions.
- c. The Applicant to file and serve further affidavits, if need be, alongside written submissions to both applications within fourteen (14) days upon being served by the Respondents.
- d. The Respondents to file and serve written submissions on both applications within fourteen (14) days upon being served with the Applicant’s submissions.
- e. Mention on 30th September, 2024 for parties to confirm compliance and take a ruling date.
- f. Directions and mention Notice to issue upon the Applicant’s counsel.

It is so ordered.

DIRECTIONS DATED, SIGNED AND DELIVERED VIRTUALLY AT KIAMBU THIS 13TH DAY OF AUGUST , 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:-

Munyua Ezekiel counsel for the Respondents

No appearance for and by Applicant

Court Assistant - Martin

