



REPUBLIC OF KENYA



KENYA LAW
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**Olow v Republic (Thru DPP) & another (Criminal Revision
E122 of 2023) [2024] KEHC 14973 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E122 OF 2023
DO CHEPKWONY, J
NOVEMBER 27, 2024**

BETWEEN

MUKTAR SAMAN OLOW APPLICANT

AND

REPUBLIC (THRU DPP) PROSECUTOR

AND

PIUS NGUGI COMPLAINANT

RULING

1. This ruling determines the Accused/Applicant's Notice of Motion Application dated 3rd November, 2023 filed by the Applicant/Accused in which he is seeking a Revision of the trial Court's ruling delivered on 12th October, 2023. The Applicant specifically seeks the following orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. The Honourable Court be pleased to review and/or set aside the ruling, and or orders of the subordinate court (Hon. Emily Ominde (CM) issued on 12th October, 2023 in the Chief Magistrates Court at Kiambu Criminal Case No. 1170 of 2016 Republic -vs- Muktar Saman Olow, disallowing production of the Replying affidavit and its annexures by the one Gordon Ochieng;
 - e. This Honourable Court be pleased to order that the replying affidavit by the one Gordon Ochieng be admitted for purposes of production by the accused in support of his case.



- f. That further this Honourable Court be Pleased to review or set aside the ruling and or orders of the subordinate court dated 14th June, 2023 by Honourable Emily Ominde in the Chief Magistrate Court at Kiambu, Criminal Case No. 1170 of 2016, Republic -versus- Muktar Saman Olow.
2. The application is premised on the grounds on its face and reiterated in the affidavit sworn by the Accused/Applicant, Muktar Saman Olow on the 3rd November, 2023. The Applicant argues that there is an underlying land dispute involving him and the Complainant thus leading to several cases, including Milimani Civil Case No. 424 of 2011 and Petition No. 277 of 2011. He avers that in the trial, subject of this application, being Kiambu CM's Criminal Case No. 1170 of 2016, the Accused/Applicant faces charges of forgery. In his defense, he sought to rely on a replying affidavit sworn by one Gordon Ochieng on 29th March, 2011, which forms part of the record in Milimani Civil Suit No. 424 of 2011.
 3. On 6th April, 2023, the trial court ruled that the Applicant could produce the affidavit provided it was certified. The court reaffirmed this position in its ruling delivered on 14th June, 2023, wherein it was stated that the certified affidavit could be admitted as evidence. The Applicant claims he wrote to the Deputy Registrar of the Environment and Land Court to obtain certification of the affidavit which was eventually provided on 30th June, 2023. However, during the defense hearing on 12th October, 2023, the trial court disallowed the production of the certified affidavit, citing Section 65 of the Evidence Act, which requires primary evidence unless exceptional circumstances are demonstrated.
 4. The Applicant contends that the trial court's ruling delivered on 12th October, 2023 contradicts its earlier decisions, which permitted reliance on the certified affidavit. He argues that the court failed to formally review or set aside its prior rulings before arriving at a contradictory determination. The Applicant maintains that he is entitled to present evidence in his defense, provided it does not prejudice the Respondents, who, according to him, have not demonstrated any prejudice that they will suffer from this evidence. He therefore urges the court to revise the ruling and allow him present the said affidavit in evidence in support of his defence.
 5. The Application was vehemently opposed by the Prosecution and the Complainant. Through an affidavit sworn by Benjamin Kelwon on 7th December, 2023, the prosecution took the position that the application is a calculated effort to delay the conclusion of the criminal trial. The Prosecution went on to highlight the procedural history of the trial, pointing out that the Applicant is facing multiple counts of forgery and theft, with the prosecution having closed its case and the Applicant placed on his defense as far back as 25th September, 2018.
 6. The Prosecution provided a detailed chronology of events, including the events of 17th February, 2022, when the Applicant first sought to produce various documents, including the replying affidavit sworn by Gordon Ochieng and its annexures, as part of his defense. These annexures comprised letters from the Commissioner of Lands, the Director of Physical Planning, the Director of Surveys, the Director of City Planning, and the Ministry of Lands, among others. The prosecution objected to the admissibility of these documents, and on 6th April, 2022, the trial court ruled that the Applicant could produce a certified copy of the Replying Affidavit and annexures thereto if originals were not available.
 7. Despite this clear directive, the Prosecution observed that the Applicant repeatedly delayed the defense proceedings, citing inability to proceed either on account of his counsel falling sick or other grounds. On 9th May, 2023, the Applicant attempted to rely on an uncertified version of the affidavit, arguing that a letter from the Deputy Registrar had confirmed its authenticity as part of the court file. However, on 14th June, 2023, the trial court reaffirmed that the affidavit and its annexures could only be admitted



if properly certified, with the annexures requiring further authentication or presentation by their respective authors.

8. On 12th October, 2023, during the defense hearing, the Applicant once again sought to rely on the affidavit, now certified, but the trial court declined to admit the document. The court emphasized that the annexures had been previously expunged from the record and that the affidavit was insufficient without being authenticated. The Prosecution contended that the Applicant's continued attempts to reintroduce these documents constituted an abuse of the court process and argued that the proper recourse would have been to appeal or seek review of the ruling delivered on 14th June, 2023 rather than filing a fresh application.
9. Similarly, the complainant opposed the application by filing grounds of opposition dated 18th December, 2023 and an affidavit sworn on 19th December, 2023. The Complainant asserted that the application does not meet the threshold for a Revision as provided for under Section 362 of the Criminal Procedure Code, which is intended to address jurisdictional errors or glaring procedural irregularities by the subordinate court. According to the Complainant, the issues raised by the Applicant had already been addressed comprehensively in the trial court's earlier rulings.
10. The Complainant further argued that the application is essentially a disguised appeal against the ruling of 14th June, 2023, which had resolved the admissibility of the documents in question. He averred that the proper remedy for the Applicant, if aggrieved, would have been to lodge an appeal or seek review in accordance with the law.
11. Additionally, the Complainant provided contextual background to the dispute, explaining that the case arose from events of September, 2011 when the Applicant and others allegedly invaded the Complainant's property, identified as LR No. 1870/1/24, under the pretext of holding a valid title. Following the invasion, the Complainant reported the matter to the Directorate of Criminal Investigations (DCI), leading to the Applicant being charged with the offence of forgery in Criminal Case No. 1170 of 2016.
12. Regarding the Replying Affidavit sought to be introduced by the Applicant, the Complainant noted that the annexures therein, had been discredited by the Commissioner of Lands in a letter dated 7th April, 2014, which declared them to be falsified documents. The Complainant urged the court to consider the Applicant's history of filing numerous applications in the trial court, arguing that these were intended to frustrate the prosecution and delay the final determination of the case.
13. By consent of the parties, the application was canvassed through written submissions. The written submissions filed by the Applicant, Prosecution, and Complainant essentially reiterated the arguments summarized above. The court will therefore focus on the key legal issues arising from the application without delving into repetitive details of the submissions.

Analysis and Determination

14. Before delving into the merits of the Accused/Applicant's application, it is important to reiterate this court's role in revision applications under which the jurisdiction is anchored in Section 362 of the Criminal Procedure Code (CPC), which provides: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding, sentence, or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”



15. This provision empowers the High Court to intervene where a subordinate court has made an error of law or procedure thus resulting in an injustice. The purpose of revision is not to substitute the High Court's view for that of the trial court but to ensure that the trial court acted within the bounds of the law. The court in the case of *George Aladwa Omwera –vs- Republic* [2016] eKLR emphasized this principle of holding that:-

“The High Court’s revisionary jurisdiction is only exercisable where there are glaring acts or omissions but not where the trial magistrate has acted within his jurisdiction and discretion unless the discretion was wrongly exercised.”

16. It is also well established that revision cannot serve as a substitute for an appeal, particularly where the law provides for an appeal as the appropriate remedy. In the case of *Public Prosecutor –vs- Muhari bin Mohd Jani and Another* [1996] 4 LRC 728, the Court stated:-

“The power of revision is not to be invoked as a backdoor method to appeal.”

17. Guided by these principles, this court must confine itself to assessing whether the trial court’s rulings of 14th June, 2023 and 12th October, 2023 meet the threshold of correctness, legality, and propriety. Therefore, the sole issue arising for determination is whether the trial court erred in disallowing the production of the replying affidavit sworn by Gordon Ochieng and its annexures.

18. The Applicant argues that the trial court acted inconsistently by refusing to admit the replying affidavit despite having previously ruled that certified copies of the affidavit were admissible. The Applicant further contends that the affidavit and its annexures are crucial to his defense and that the refusal to admit them undermines his right to a fair trial under Article 50 of the *Constitution*. On the other hand, the Respondent submitted that the trial Court declined to admit the production of the documents stating that the same had been expunged from its record on 14th June, 2023 and this decision had not been opposed against. The complainant submitted that the decision of the trial Court on 14th June, 2023 and 12th October, 2023 were made in consideration of the law and evidence. That what is in issue is the authenticity of the said documents.

19. Having read and considered the rulings, this Court finds that the trial Court’s decision to disallow the annexures in the affidavit was based on the provision of Section 65 of the *Evidence Act*, which limits the admissibility of secondary evidence unless specific conditions are met. The court had earlier ruled that the Applicant could produce a copy of the certified affidavit sworn by Gordon Ochieng. The court then clarified that the annexures to the affidavit, being letters from various government offices, required further authentication or production by their authors. Thus, without any certification on the said annexures the court proceeded to expunge them from the court record.

20. In this Court’s view, an affidavit and its annexures are inherently part of a single composite document. The annexures serve to substantiate the averments made in the affidavit and provide the factual basis upon which the affidavit’s contents can be evaluated. The affidavit, by itself, is not sufficient to prove the facts it purports to establish unless the annexures supporting its assertions are admitted alongside it. This principle is grounded in the understanding that affidavits are, in essence, sworn statements, and the attached annexures serve as corroborative evidence.

21. In this case, the replying affidavit sworn by Gordon Ochieng includes annexures consisting of various letters from Government offices and provide the evidentiary foundation for the claims made in the affidavit. The trial court’s attempt to separate the affidavit from its annexures, that is, admitting one while excluding the other, defeats the purpose of the affidavit as a cohesive document.



22. The probative value of the annexures can only be considered in the context of the averments made in the affidavit. Without the affidavit to explain their relevance, the annexures lack context and may have little or no evidentiary value. Similarly, without the annexures to support its assertions, the affidavit may be rendered a mere statement of unsubstantiated claims.
23. It is the role of the trial court to assess the credibility and relevance of the annexures based on the content of the affidavit and any rebutting evidence provided by the opposing party. It is a trite principle in law that all evidence must be weighed in totality rather than in isolation as was observed by the court in the case of Raghbir Singh Chatte –vs- National Bank of Kenya Limited [1996] eKLR, where the Court emphasized the importance of considering the probative value of evidence in context by stating that:-
- “Evidence must be evaluated holistically, taking into account its relationship to other evidence on record and the case’s broader context.”
24. It is this Court’s finding that the trial Court’s decision to exclude the annexures while addressing the affidavit separately was legally and procedurally flawed. The annexures, though requiring proper authentication, are inseparable from the affidavit, which relies on them to establish the factual basis of the averments made therein. Therefore, by failing to consider the affidavit and its annexures as a single document, the trial court undermined the Applicant’s ability to present his case coherently.
25. While the annexures require further authentication as per the *Evidence Act*, it must be noted that the annexures cannot be presented separately but as part of the affidavit. However, if the Applicant wishes to present each annexure separately, then the need to comply with Section 65 of the *Evidence Act* would arise. The affidavit and annexures ought to have been admitted conditionally, with their probative value assessed based on the content of the affidavit and any rebutting evidence provided by the Respondents in order to uphold the Applicant’s constitutional right to adduce evidence under Article 50(2)(k) of the *Constitution*.

Conclusion

26. Thus it is this court’s conclusion that the affidavit and its annexures form an inseparable document that must be considered together. The trial court erred in its decision of treating the affidavit separately from the annexures, which resulted in a failure to assess the probative value of the annexures in light of the averments in the affidavit and the Respondents’ rebutting evidence. This misstep would undermine the Applicant’s ability to present a coherent and complete defense, warranting this court’s intervention to rectify the resultant injustice.
27. As such, this Court finds merit on the Accused/Applicants Revision Notice of Motion application dated 3rd November, 2023 and the same is hereby allowed in the following terms:-
- a. That an order to review and/or set aside the ruling, and or orders of the subordinate court (Hon. Emily Ominde (CM) issued on 12th October, 2023 in the Chief Magistrates Court at Kiambu Criminal Case No. 1170 of 2016 Republic -vs- Muktar Saman Olow, disallowing production of the Replying affidavit and its annexures by the one Gordon Ochieng be and is hereby granted.
 - b. That the Replying affidavit by the one Gordon Ochieng be admitted for purposes of production by the accused in support of his case.



- c. That an order to review or set aside the ruling and or orders of the subordinate court dated 14th June, 2023 by Honourable Emily Ominde in the Chief Magistrate Court at Kiambu, Criminal Case No. 1170 of 2016, Republic – versus- Muktar Saman Olow be and is hereby granted.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF NOVEMBER, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Cohen Amanyua counsel for Applicant

Mr. Gacharia holding brief for Mr. Keluon counsel for the Respondent

Mr. Adan holding brief for Mr. Ochieng counsel for Complainant/Interested Party)

Court Assistant - Martin

