



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge v Kungu (Civil Suit 22 of 2016)  
[2024] KEHC 15008 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15008 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL SUIT 22 OF 2016  
A MSHILA, J  
NOVEMBER 22, 2024**

**BETWEEN**

**HANNAH NJOKI NJOROGE ..... PLAINTIFF**

**AND**

**JOHN NJOROGE KUNGU ..... DEFENDANT**

**RULING**

1. Before court is the application is by way of Notice of Motion dated 20<sup>th</sup> June, 2023 and brought under Section 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The Plaintiff/Applicant sought for orders that:-
  - a. That leave be granted to the applicant to withdraw and remove from court records, the replying affidavit allegedly sworn by the applicant on 18<sup>th</sup> January, 2023.
  - b. That the replying affidavit sworn by the applicant on 9<sup>th</sup> June, 2023 and filed in court on 9<sup>th</sup> June, 2023 be admitted in reply to the Defendant's application dated 21<sup>st</sup> November, 2022.
2. The application is premised on the grounds that the alleged affidavit was filed by the applicant's previous advocate without her involvement and that she did not depone to the contents of the said affidavit.
3. The application is supported by the affidavit of HANNAH NJOKI NJOROGE. She deposed that Tabitha Njeri Advocate from the firm of Mburu Machua advocates her former advocates informed her that an application had been filed by the defendant and that they had replied to the application. She deposed that the affidavit did not address her genuine defence, prejudicing her opposition to the application dated 21<sup>st</sup> November, 2022. She stated that she had prepared her affidavit dated 9<sup>th</sup> June, 2023 in reply to the defendant's application. She urged the court to withdraw the affidavit dated 18<sup>th</sup> January, 2023 as she did not participate and admit her affidavit sworn on 9<sup>th</sup> June, 2023.



4. The application was not opposed.
5. Subsequently, parties filed their written submissions.

### **Applicant's Submissions.**

6. The applicant submits that her previous advocates prepared and filed a replying affidavit dated 18/1/2023 purportedly signed by her which affidavit prejudiced her opposition to the defendant's application dated 21/11/2022. That she only became aware of the impugned affidavit when she filed her affidavit dated 9<sup>th</sup> June, 2023 in opposition to the respondent's application dated 21<sup>st</sup> November, 2022. The court was urged not to visit on the applicant the consequences of her former advocate's mistake. Reliance was placed on the case of CFC Stanbic Limited vs John Maina Githaiga & another (2013) eKLR.

### **Respondent's Submissions**

7. The Respondent submits that the applicant's application is not predicated on any law as there is no rule that provides for withdrawal of an affidavit. It was submitted that one is not allowed to delete or withdraw evidence placed before the court by way of an affidavit. Further, the respondent submitted that the applicant has not demonstrated how the alleged signature is not hers and/or how the affidavit is shoddy. That the allegations of the forged signature have not been forwarded to the Law Society for disciplinary action against her previous advocate and /or to the police for investigation. The respondent contended that in their submissions in regard to their application dated 21<sup>st</sup> November, 2022 they touched on the issues raised in the impugned affidavit as such its withdraw would be prejudicial to the respondent. The court was urged to dismiss the applicant's application with costs.

### **Issues for Determination**

8. Having considered the application herein and the rival submissions, the main issue arising for determination is whether the applicant's replying affidavit dated 18/1/2023 should be expunged from the court record.

### **Analysis**

9. The applicant herein avers that her previous advocate did not involve her when preparing the affidavit dated 18<sup>th</sup> January, 2023 and that the said affidavit does not bring forth her defence properly. She urged the court not to visit the mistakes of her previous counsel on her.
10. The respondent herein contends that no complaints have been made by the applicant against her previous counsel to the LSK for disciplinary action and /or the police for the alleged forged signature. That the respondent's considered the replying affidavit in their submissions as such its withdrawal would be prejudicial to them.
11. The applicant alleges that her previous advocate failed to consult her when filing the impugned replying affidavit and the same does not raise her intended defence to the respondent's application dated 21<sup>st</sup> November, 2022.
12. The respondent's application dated 21<sup>st</sup> November, 2022 seeks an order to transfer a portion of two acres from LR. NO. Githunguri/Githiga/3809 to the Applicant herein among other orders. The applicant through her impugned replying affidavit replied to the said application through her counsel who she contends did not consult her as such did not properly bring out her defence.



13. A perusal of the impugned replying affidavit by this court shows that indeed the response by the applicant is vague as she does not mention which parcel of land she is referring to given that the respondent has several parcels of land. This issue has also been raised by the respondent in his submissions to his application dated 21<sup>st</sup> November, 2022.
14. Subsequently, the applicant seeks for the court to admit her replying affidavit dated 9<sup>th</sup> June, 2023. She contends that her new advocates have filed the said replying affidavit in opposition to the respondent's application dated 21<sup>st</sup> November, 2022 which she avers that the same properly addresses her response.
15. Refer to the case of *In re SMG (A Person Suffering from Dementia) (2022) eKLR* where Achode J had this to say:-

“Needless to say, a party ought not to be prejudiced owing to the acts or omissions of their Counsel on record. Courts serve to administer justice and ought therefore not to be strictly bound by procedural technicalities especially in cases such as this where justice will be better served by allowing the prayer by the applicant. This is demonstrated in Article 159(2)(d) of *the Constitution* where it sought to impress the court to administer justice without undue regard to procedural technicalities. However, this should not be mistaken to mean that parties should disregard laid down rules of procedure, but to acknowledge that the parties herein embarked on a quest for justice and it is the duty of the court to ensure, not only that justice is done, but that justice is seen to be done. See the case of *Johanna Kipkemei Too vs. Hellen Tum (2014) eKLR*.”

16. In the circumstances, the applicant needs not to expunge her Replying Affidavit dated 18<sup>th</sup> January 2023 but instead file a Supplementary Affidavit; The Replying Affidavit dated 9<sup>th</sup> June, 2023 shall be deemed to be a Supplementary Affidavit and admitted by the court and the Respondent shall be at liberty to respond.

### **Findings And Determination**

17. For the forgoing reasons this court makes the following findings and determinations.

- i. The application is found to have merit and it is hereby allowed

SUBPARA ii.

The Applicants R/Affidavit made on 18/01/2023 shall not be expunged from the court record.

SUBPARA iii.

The R/Affidavit dated 9/06/2023 is hereby admitted as a Supplementary Affidavit upon the requisite fees being paid into court within seven (7) days

SUBPARA iv.

Respondent granted leave to file and serve Further Affidavit within seven (7) days of service if new issues arise.

SUBPARA v.

The Applicant shall bear the costs of this application

SUBPARA vi.

Mention on 24<sup>th</sup> March, 2025 for compliance on affidavit and written submissions for 21<sup>st</sup> November, 2022.



Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

Mwangi Chege for Respondent

Njoroge Banga for the plaintiff/applicant

