



**Ibrahim v Kenya Revenue Authority (Constitutional Petition E478 of 2022)
[2023] KEHC 18692 (KLR) (Constitutional and Human Rights) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E478 OF 2022**

M THANDE, J

MAY 26, 2023

BETWEEN

HASSAN ALI IBRAHIM PETITIONER

AND

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. By an Application dated January 30, 2023, the Respondent Kenya Revenue Authority (KRA) seeks orders That:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the order issued on December 5, 2022 by this Honourable Court be hereby set aside and/or varied pending the inter partes hearing and determination of the instant Petition.
5. That in the alternative to prayer 4 above, this Honourable Court do order and/or direct the Petitioner to provide security to the Respondent/Applicant for the outstanding fine amounting to Khs 1,000,000/=.
6. That costs of this Application be provided for.
2. The grounds upon which the Application is premised are set out therein, and in the affidavit sworn on even date, by Judith N Kithinji, KRA's advocate. The grounds are that on December 5, 2022 the Court



granted orders for the release of motor vehicle registration no KBT 467P, Hyundai lorry (the vehicle), in the absence of KRA; that failure by KRA's advocate to attend Court on that date was not deliberate but was occasioned by technical difficulties in accessing the Court. Further that the Petitioner obtained the order through non-disclosure of material facts, to wit that upon the vehicle being impounded for conveying excisable goods with counterfeit stamps, the Petitioner admitted the offence made a request to KRA for compounding and was fined Kshs 1,000,000/=, which is yet to be paid. KRA asserts that the vehicle was legally detained having been involved in commission of an offence under the Excise Duty Act. KRA is apprehensive that the fine may be unrecoverable given no attempt has been made by the Petitioner to pay the same. The orders granted will amount to aiding an illegality and thus greatly prejudice KRA while the Petitioner stands to suffer no irreparable harm. KRA's mandate to collect revenue is key to the economic development of the country, and the Judiciary is called upon to assist KRA in the discharge of the same. It is therefore in the public interest that the order of December 5, 2022 is varied to pave way for the Respondent to collect the tax due.

3. In his replying affidavit sworn on March 2, 2023, in opposition to the Application, the Petitioner denied the allegations against him by KRA. He challenged the affidavit sworn in support of the Application on grounds that the deponent is the advocate on record for KRA; that under the law, an advocate should refrain swearing an affidavit on behalf of a party on contentious issues; that the averments in the affidavit are hearsay as the advocate has deposed to matters not directly within her knowledge; that the annexures in the affidavit offend the mandatory rules regarding documentary evidence as they were neither produced by the maker or person involved in the events. The Petitioner further averred that by December 5, 2022, KRA had not filed any response to his Petition and Application in spite of service on October 25, 2022.
4. It is the Petitioner's case that the vehicle is registered in his name and not Bileza Company Limited (the Company), which is named as the offender in the bundle of documents; he hired out the vehicle to Abdi Salan whose driver is one, Mohammed Ali Ibrahim; that he is not aware of, nor party to any compounding or agreement between the Company, Mohamed Ali Ibrahim and KRA; that he is not a shareholder of the Company and no documentary evidence has been produced to link him to the Company and Mohamed Ali; that KRA has not done proper investigations in the matter and seeks to punish him because of a similarity in the name Ali Ibrahim shared by the Petitioner and Mohamed; that Mohamed was not his agent and was not authorized in law to bargain on his behalf; that the Petitioner cannot be held liable for what he did not contract for; that the vehicle is his primary source of livelihood and sustenance; that the continued detention of the vehicle is illegal and without justifiable cause and has impeded his ability to provide for his family; that should the Court find in favour of KRA, there is a mechanism for recovery of the vehicle or the amount demanded.
5. The Petitioner further averred that KRA is guilty of inordinate delay and that the Application is an afterthought; that despite being served with the order on December 7, 2022, KRA sat on its rights until January 31, 2023 to file the application, a period of over 52 days; that this was only 5 days before mention on February 6, 2023 for directions on hearing of the Petition; that no reason has been given for delay in filing the Application; that KRA has abused its powers and authority. He urged the Court to right the wrong and safeguard the Petitioner's rights and freedoms and dismiss the Application with costs.
6. In a further affidavit sworn on April 28, 2023 by Judith N Kithinji in rejoinder, she urged the Court not to strike out her affidavit. She reiterated the contents of her affidavit in support of the Application; that what she deposed in her supporting affidavit are a repetition of the averments of Merciline Oketch, an officer of KRA with knowledge of the facts, in her replying affidavit in response to the competition; that she had indicated that she made the averments on instructions of her client; that not all affidavits



sworn by advocates are defective; that delay in filing the Application is not inordinate; that KRA is not guilty of misconduct as the reason to attend Court is excusable; that KRA is desirous of the expeditious resolution of the Petition; that it is in the interests of both parties that the Application be allowed.

7. I have given due consideration to the submissions filed by the parties and the following issues arise for determination:
- i) Whether the affidavit in support of the Application is competent.
 - ii) Whether the orders sought should be granted.

Whether The Affidavit In Support Of The Application Is Competent

8. Order 19 Rule 3(1) of the [Civil Procedure Rules](#) stipulates the matters to which affidavits shall be confined as follows:

1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

9. I have looked at The Affidavit In Support Of The Application. It is sworn by the advocate on record for KRA. She has not stated that she is an employee of KRA. Accordingly, the matters deposed to can not be of her own personal knowledge. She has also not stated the source of the information contained in her averments as required by law. It is not enough for the deponent to say she has conduct of the matter on behalf of KRA and is authorized and competent to swear the affidavit. Further, the law is that an advocate who has conduct of a matter on behalf of a party in any court or tribunal, is prohibited from appearing as such, if there is a chance that he may be required to give evidence verbally or by affidavit. Rule 8 of the [Advocates \(Practice\) Rules](#) provides as follows:

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

10. By dint of the proviso to the [Rule](#), the prohibition does not apply to non-contentious matters. In the present case however, and as indicated earlier, the facts deposed to in the supporting affidavit are not within the knowledge of KRA's advocate. Further and more significantly, the said facts are contested.
11. It is well settled that an advocate is prohibited from swearing an affidavit on contentious issues of which he has no knowledge. In the case of [Oriental Commercial Bank Ltd v Shreeji Contractors Ltd & 2 others](#) [2021] eKLR, Ngugi, J (as he then was) stated:

26. As a general rule, a lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless they are specifically



permitted by law or the Court to do so or unless the matter is purely formal or uncontroverted.

12. And in *Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi* [2015] eKLR, Odunga, J. (as he then was) stated:

18. Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.

13. The swearing of an affidavit by an advocate on contentious issues in a matter in which the advocate acts as such, presents a legal quandary and robs such advocate of the required level of professional objectivity in a matter. Such advocate may be subjected to cross-examination thereby shifting his role of legal counsel to that of a witness, a scenario which is best avoided. In light of the foregoing, and in view of the fact that the affidavit in support of the Application contains averments of which the deponent had no personal knowledge, and in view of the fact that she deposed to contentious issues, I find that the impugned affidavit is incompetent.

14. What then is the fate of the said affidavit given the finding that the same is incompetent? The Court has power under Order 19 Rule 6 of the *Civil Procedure Rules* to strike out an affidavit as follows:

The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

15. Like Ringera, J (as he then was) stated in the case of *East African Foundry Works (K) Ltd v Kenya Commercial Bank Ltd* [2002] eKLR, I have no hesitation in striking out such deposition as a matter of good practice in our courts. Accordingly, and for the reasons stated, the affidavit sworn on January 31, 2023 by Judith N Kithinji, in support of the Application is hereby struck out.

Whether The Orders Sought Should Be Granted

16. The jurisdiction of this Court to set aside or vary conservatory or interim orders is set out in Rule 25 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 which provides:

An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order.

17. This Court being satisfied that KRA had been served with the Petitioner's application dated October 14, 2022 did on December 5, 2022 grant the impugned order following failure by KRA to file a response and to attend Court. KRA has pleaded that the failure to attend Court by counsel was not deliberate, but inadvertent owing to technical challenges in logging in to the virtual court. KRA urged that the mistake by counsel is excusable and should not be visited upon an innocent litigant.



18. For the Petitioner, it was submitted that KRA was served on October 25, 2022 and when the matter came up before Court on December 5, 2022, KRA had neither entered appearance nor filed a response and the application remained unopposed to date. Additionally, the impugned order was served upon KRA on December 7, 2022, which took no action until January 31, 2023 when the instant Application was filed.
19. The record shows that when the Petition herein and application first came up before the Court on October 19, 2022, the Court directed that the same be served for directions on December 5, 2022. The Petitioner says that he served the Petition, application and directions on October 25, 2022. Notably, no directions had been given for the filing of a response. Although service is not disputed, KRA cannot therefore be faulted for not filing a response before the mention date.
20. As regards the reason given for not attending Court on December 5, 2022, counsel stated that she had technical challenges logging in to the virtual Court. This is disputed by the Petitioner.
21. Article 50 of the Constitution of Kenya, 2010 guarantees to every person a fair hearing. Clause (1) thereof provides:
- Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
22. The fundamental right to a fair and impartial trial is sacrosanct and non-derogable. Any violation of this right undermines all other human rights. The right to fair trial cuts both ways and applies to the interests of an applicant and a respondent in any judicial process. Thus, it is the duty of a court to ensure that this right is not threatened, restricted or jeopardized in any manner.
23. In the case of Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR, Nyakundi, J. stated:
- While the wording of Article 50 of the Constitution on the right to a fair hearing *prima facie* seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time.
24. The learned Judge went on to state:
- Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pre-trial or in the course of the trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing.
25. The Court takes judicial notice of the fact that technical challenges in virtual court proceedings are not unusual and do occur almost on a daily basis in our courts. In order to secure the right of parties to a fair trial, it is necessary that they are accorded an opportunity to present their case before a decision against them is made one way or another. In this regard, I am inclined to give KRA the benefit of the doubt. In any event, the matter herein is still at the interlocutory application stage.
26. Further, failure to attend Court is a mistake of counsel. It is well settled that the mistake of counsel shall not be visited upon his client. In this regard I am guided by the holding in Belinda Murai & 9 others



v Amos Wainaina [1978] eKLR, Madan, JA, addressed the issue of a mistake by counsel in relation to access to justice and famously stated:

A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.

27. On prejudice to be suffered, KRA submitted that none will be occasioned to the Petitioner who still has an opportunity to have the application and Petition heard and determined on merit. It was further submitted that in the replying affidavit to the Petition, KRA has demonstrated that the Petitioner is guilty on non-disclosure of material facts. That had the Petitioner visited KRA's offices, he would be privy to the additional facts adduced on the nature of the offence, request for settlement, the compounding order and outstanding fine of Kshs 1,000,000/= . KRA thus submitted that the Petitioner was undeserving of the Court's discretion to issue the *ex parte* orders obtained as a result of non-disclosure.
28. The Petitioner submitted that the Application is a knee jerk reaction to the date of February 6, 2023 fixed for directions. He asserted that KRA refused to release the vehicle in spite of follow up and has been holding the vehicle for over 1 year. The Petitioner contended that KRA has slept on its rights and its conduct is tainted with mala fides and that the Application is a ploy to derail the conclusion of the Petition. He urged that the impugned order remain undisturbed as KRA has not advanced any sufficient or overwhelming reason for delay is filing the Application.
29. Although the affidavit in support of the Application has been struck out, there is on record the replying affidavit of Merceline Oketch, an officer of KRA. Merceline deposed to the matters in the impugned affidavit, which this Court cannot disregard. According to KRA, the vehicle was seized with excisable goods with counterfeit excise stamps. KRA further stated that the taxpayer Mohamed Ali Ibrahim admitted the offence and made a request for settlement. He was then fined Kshs 1,000,000/= which KRA says is yet to be paid. The Petitioner's case is that the vehicle was hired by one Abdi Hassan and was driven by Mohamed Ali Ibrahim. He thus denied liability for the fine imposed by KRA. He denies any connection with the driver and the Company.
30. The foregoing are facts which require interrogation and which cannot be done at this interlocutory stage but at the hearing of the Petition. KRA has demonstrated a prima facie case for retaining the vehicle and it is necessary to preserve the substratum of the Petition, pending hearing and determination of the same.
31. As regards the security for the fine, the Petitioner has denied being liable to pay the same. This is an issue that will be determined at the hearing of the Petition. Accordingly, the Court cannot at this stage direct the Petitioner to provide security for the fine.



32. In the end and in view of the foregoing, this Court finds that the Application dated January 30, 2023 is merited. The order dated December 5, 2022 is hereby set aside pending the hearing and determination of the Petition. Costs in the cause.

DATED and DELIVERED in NAIROBI this 26th day of May 2023

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M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner**

..... for the Respondent**

..... **Court Assistant**

