



**Sarovima Seven Stars Resort Lodge Ltd v Yetu Sacco Society Limited & another
(Civil Suit E004 of 2023) [2023] KEHC 21953 (KLR) (30 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT E004 OF 2023
EM MURIITHI, J
AUGUST 30, 2023**

BETWEEN

SAROVIMA SEVEN STARS RESORT LODGE LTD PLAINTIFF

AND

YETU SACCO SOCIETY LIMITED 1ST DEFENDANT

VIEWLINE AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiff filed suit against the defendants by plaint dated April 14, 2023 seeking to restrain the exercise of a chargee's power of sale over the suit property LR No Kiamuri 'A'/589. The verifying affidavit in support of the suit was commissioned by M/s Elijah Ogoti, Advocate and Commissioner for Oaths. The plaintiff contemporaneously filed an interlocutory application by notice of motion dated April 14, 2023 supported by an affidavit of its director Eric Lewis Mwenda Kiraithe sworn on the same date before the said commissioner for oaths.
2. On objection taken by counsel for the respondents in a replying affidavit sworn by Diana Kawira, the credit recovery manager of the 1st respondent, that the application was "fatally defective as the supporting affidavit has been commissioned by an advocate without a current practising certificate as required under the relevant law", the plaintiff by a notice of motion dated April 27, 2023 sought to regularize the position by having the supporting affidavit and the verifying affidavit aforesaid commissioned by qualified advocate.
3. Upon considering this matter together with said application of April 27, 2023, the Court on May 3, 2023 made orders in the matter as follows:

- "1. The Court to request the chairman of the Valuers Registration Board to appoint a valuer for purposes of valuation of the suit property LR Kaimuri



“A”/589 situated within Meru County, at the Plaintiff’s cost within 14 days, and file a report by the May 17, 2023 indicating the market value, Forced sale value and the mortgage value.

2. Application dated April 27, 2023 is allowed. The Plaintiff shall file and serve properly commissioned documents within 2 days and serve upon the counsel for the respondent.
 3. Defendant shall within 7 days file Replying Affidavit to the Application.
 4. Thereafter, the parties to file written submissions each taking 7 days starting with counsel for the applicant.
 5. Hearing by way of highlighting of submissions on May 30, 2023.
 6. Interim order extended.”
4. When the matter came up for hearing on May 30, 2023, the plaintiff was now represented by new counsel on record Mr B Gitonga who sought time to peruse the matter before proceeding to the hearing, and the court made directions as follows:
- “ 1. In view of the change of counsel, the new advocate is allowed time to familiarize with the brief and file necessary documentation for hearing on June 5, 2023.
 2. Interim order extended.
 3. Deputy Registrar to request the Chairman of the Valuers Registration Board of Kenya not the Meru County chapter [for appointment of a joint valuer].”
5. On June 5, 2023, when the court did not sit the matter was fixed for hearing by way of highlighting of submissions on June 20, 2023. As shown by Affidavit of service of Martin Maheli Advocate of June 6, 2023 a notice of the highlighting of submissions set for the June 20, 2023 was served on the firm of Basilio Gitonga, Muriithi & Associates on June 6, 2023 and receipt thereof acknowledged by official stamp.
6. On June 20, 2023, there was no appearance for the applicants and the court made an order that-
- “ As the applicants have not filed and served any submissions, ruling is set for July 12, 2023 at 2.30pm.”
7. The matter was not listed on July 12, 2023 and when brought up on July 13, 2023, the court in the absence of parties set the ruling for delivery on July 27, 2023.

Submissions

8. The defendants take a preliminary issue of the competence of the application before the court in view of non-compliance with the orders of the court as to filing of valid affidavit in support of the application urging that-
- “ 4. On May 3, 2023, when the matter was set for hearing, the court issued directions and orders to the effect that the applicant was to file and serve a properly commissioned document within 2 days and thereafter the Respondents had 7 days to file and serve their responses. Equally the parties



were to file and serve submissions within 7 days each commencing with the applicant.

5. As at the time of filing of these submissions, the respondents had not been served with a complete and proper application and /or submissions by the Applicant and thus the submissions are based on the pleadings filed in Court.”
9. It is indubitable that an affidavit commissioned by an advocate who is not qualified to practise as such by compliance with the provisions of the Advocates Act as to practising certificate is invalid. Without a validly commissioned affidavit in support of the application for consideration before the court, there no complete application for injunction upon which the court may take and consider the submissions by the parties.
10. The affidavits in this case subsequently commissioned before another advocate and annexed to the application seeking to regularize the proceedings dated April 27, 2023 upon which the orders for filing and service of valid affidavits were made, were only annexures to the application, and the applicant has, therefore, not complied with the orders of May 3, 2023. The application of April 14, 2023 is, therefore, incomplete and incompetent.
11. Consequently, the Court does not feel obliged to consider the application for injunction dated 14//4/2023 herein on the merits although the respondent has fully responded to it by Replying Affidavit of Diana Kawira and written submissions dated May 30, 2023.
12. Needless to say, the Court considers that the failure of the applicant to file a complete and competent application and file written submissions thereon as directed by the court thereby occasioning delay in the fair determination of the suit while enjoying interim orders, also offends the overriding objective of the civil process under section 1A and 1B of the Civil Procedure Act for determination of disputes in a fair, proportionate and expeditious manner.

Orders

13. Accordingly, for the reasons set out above, the court finds that the application for injunction herein dated April 14, 2023 is incomplete and incompetent, and the same is struck out, and the interim orders made thereunder are discharged.
14. The plaintiff/applicant shall pay to the defendants the costs of the application.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF AUGUST 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Mr. B. Gitonga Advocate for the Petitioners.

Mr. Kimaita Advocate for the Respondents.

