



Karonei & another v Sambu & 3 others (Environment & Land Case 74 of 2017) [2023] KEELC 19097 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19097 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 74 OF 2017**

EO OBAGA, J

JULY 26, 2023

BETWEEN

KIPKEMEI ARAP KARONEI 1ST PLAINTIFF

PHILEMON KIMUTAI 2ND PLAINTIFF

AND

SIMEON KIPSOMO SAMBU 1ST DEFENDANT

**REGISTERED TRUSTEE OF AFRICAN INLAND CHURCH
(AIC) 2ND DEFENDANT**

LAND REGISTRAR OF UASIN GISHU COUNTY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. This is a ruling in respect of notice of motion dated March 7, 2023 in which the 1st and 2nd defendants/ applicants seek to have the plaintiffs/respondents who testified as PW1 and PW2 re-called for further cross examination and for stay of further proceedings. This case was filed over six years ago. Hearing did not take off for five years until October 25, 2022 when the case took off.
2. The key witness who is the 2nd plaintiff testified, was cross examined before the case was adjourned to March 6, 2023 for re-examination and taking of further evidence from the 1st plaintiff and one last witness. Come March 6, 2023 neither the counsel for the 1st and 2nd defendants nor the two defendants were in court. The hearing proceeded when the 2nd plaintiff was briefly re-examined and the 1st plaintiff then testified briefly and produced two exhibits. The case was then adjourned to March 28, 2023 to enable the plaintiffs to call their last witness.
3. Before the hearing date of March 28, 2023, the counsel for the 1st and 2nd applicants filed an application in which he seeks to have the two witnesses re-called for cross –examination. He states that on March



- 6, 2023, he went to Kapsabet for hearings and sent a lawyer to come and apply for adjournment. He claims that the said lawyer did not attend court. It is on this basis that he wants the two witnesses recalled for cross examination.
4. The applicants' application was opposed through a replying affidavit sworn by the 2nd respondents. He states that the affidavit in support of the applicants application is not signed dated or sworn. The deponent of the affidavit states that he was examined in chief and was cross examined. What only remained was re-examination which was done on March 6, 2023. He therefore states that there is no basis for him to be re-called for further cross examination.
 5. The respondents further state that there is no affidavit from the advocate who was asked to hold Mr Bitok's brief to confirm that he was asked to do so and that in any case, advocates are asked to confirm from their diaries whether dates given are convenient before the same is confirmed.
 6. I have considered the applicants' application as well as the opposition thereto by the Respondents. I have also considered the submissions by the parties. The applicant is arguing that failure to sign, date and commission the supporting affidavit is a mere technicality which can be cured by article 159 of the Constitution and the overriding objective under section 1A and 1B of the Civil Procedure Act and that this court should promote article 50 of the Constitution which guarantees access to justice. The applicants rely on the case of Pinnacle Projects Limited –Vs- Presbyterian Church of East Africa, Ngong Parish & another (2018) eKLR which interpreted article 50 of the Constitution. The applicants also relied on the case of Wachira Karani –Vs- Bildad Wachira (2016) eKLR which interpreted the discretion given to courts under section 3 A of the Civil Procedure Act.
 7. On their part, the respondents relied on the case of CMC Motors Group Limited –Vs- Bengeria Arap Korir trading as Marben School & another (2013) EKLR where the court held as follows:-

“The merit as I find it in respect of Waudo’s affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black’s Law Dictionary defines an oath as follows:-

‘Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one’s statement is true or that one will be bound to a promise... The legal effect of an oath is to subject the person to penalize for perjury if the testimony is false.’

‘... Bearing that definition the question that needs to be answered is whether Waudo took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of sections 5 of cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.’”
 8. In the CMC Group Motors Limited (supra) the court proceeded to expunge the affidavit which did not comply with section 5 of cap 15. In the same manner, I proceed to strike out the affidavit which was not dated, signed or commissioned. This leaves the applicants' application bare and cannot have any weight. I therefore proceed to dismiss the applicants' application with costs to the plaintiffs/respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 26TH DAY OF JULY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;



Ms. Nderitu for Plaintiff/Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

26TH JULY, 2023

