

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

MISCELLANEOUS CIVIL CAUSE NO. 127 OF 2016

KENINDIA ASSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

JOHN BROWN SHILENJE

t/a JB SHILENJE & CO, ADVOCATES.....RESPONDENT

RULING

1. This matter came up on 30th July 2020, for hearing of the application dated 21st November 2016. However, the same did not proceed, as the advocate for the respondent, Mr. Abok, drew the attention of the court to the fact, by virtue of orders made on 29th May 2017 that one Ruth Mbalelo was to be cross-examined on the contents of her affidavit sworn in support of the application. It was argued that the orders were made in the presence of the advocate for the applicant, and that the applicant had failed to avail Ruth Mbalelo for cross-examination. Mr. Abok prayed that all her affidavits be expunged from the record, and that the application be dismissed, considering that the same had been pending for four years awaiting the presentation of Ruth Mbalelo for cross-examination.

2. The applicant was granted leave to avail the witness. Ms. Onsongo, indicated that the said deponent had since left the employment of the applicant, and witness summons were necessary for the purpose of procuring her attendance. The court acceded to the request by Ms. Onsongo, and adjourned the matter to 30th September 2020, for cross-examination of the said Ruth Mbalelo. It was directed that witness summons issue for service upon her.

3. Come 30th September 2020, the said Ruth Mbalelo was not availed. Ms. Ojiambo, the advocate in attendance for the applicant, indicated that she was ready to proceed with the matter, only for Mr. Abok to point out that Ruth Mbalelo was to be presented for cross-examination in line with the orders made on 29th May 2017 and 30th July 2020. He stated that he was ready to proceed with the application, once he was through with the cross-examination of Ms. Mbalelo. When that was raised by Mr. Abok, Ms. Ojiambo explained that the said Ruth Mbalelo had left the employment of the applicant, and that she required witness summons to facilitate her attendance. She asked for an adjournment, which Mr. Abok resisted, hence this ruling.

4. The court, in *AKN vs. JMN* [2016] eKLR, addressed itself to the question cross-examination of deponents of affidavits in interlocutory applications, and said as follows:

“An interlocutory application ought to be determined purely on the basis of the affidavits filed in support thereof or opposition thereto, together with the annexures thereto. Where it is directed that an interlocutory application be disposed of by way of cross-examination of the deponents of the affidavits filed in support and opposition thereto, it follows that the determination of the application would be founded on the oral evidence elicited from the examination of the deponents of the affidavits on record. Where a deponent to any affidavit is not called to the stand, then their affidavit would not be exposed to testing and the same should not be taken into account. Parties may agree to dispense with the cross-examination of certain deponents, in which case the affidavits of such persons ought to be admitted as evidence by consent. Where there is no such consent such affidavits, whose deponents are not cross-examined, would count for nothing. In short, directions that an interlocutory application be disposed of by oral evidence founded on the affidavits on record converts the hearing, which ought to be by affidavit evidence, to be a trial founded on oral evidence. The affidavits on record would only count if the deponents are called and cross-examined, or their attendance is dispensed with and the parties consent to admitting the affidavits without calling the makers.”

5. In *Republic vs. Resident Magistrate’s Court at Mombasa [Municipal Court] Ex parte Hussein Maalim Sheikh & Another* [2013] eKLR, the court handed the failure to avail deponents of affidavits as follows:

“The date of 28th November 2012 appointed for cross examination of the Applicants was taken by consent. Whilst I was informed by their Counsel that the Applicants were within the Court precincts, they did not physically present themselves to the Court. They may have had good or plausible reason for failing to carry their passports but it is not excusable that they failed to attend Court even after the Court had indulged them up to 1.00pm. I take it that they were reluctant to present themselves for cross-examination. Having consented to prayers (1) and (2) of the application, they would be well aware of the consequences of their failure to comply. That is the consequence they must put up with. The affidavits allegedly sworn by the Applicants on 20th January 2011 in support of the Chamber Summons of 20th January 2011 are hereby struck out. The result is that all orders granted on 21st January 2011 are hereby vacated.”

6. The instant application was filed on 21st November 2016, the court, while making the order for cross-examination of the deponent of the supporting affidavit, noted that there was need for it to be furnished with information touching on the matters in controversy.

7. When the application came up for hearing on the 30th July 2020, the matter did not proceed because the deponent of the said affidavit was not present, and the applicant sought witness summons to be issued against her. The same was granted, however, the said deponent also failed to attend court on the 30th September 2020, and no explanation was given as to why she did not attend court. It was not explained whether the witness summons was served on her, and if not, what challenges prevented the service. Ms. Ojiambo merely repeated the remarks that Ms. Onsongo had made on 30th July 2020. Clearly, the applicant is not keen on presenting the said witness to the court. All what I was told on 30th July 2020 and 30th September 2020 was that Ruth Mbalelo had left the employment of the applicant. There is no suggestion that she was reluctant to testify. I was not told whether she had been approached with a request to testify for the applicant, and that she had refused, hence the need to have witness summons procured for service upon her. There is no evidence that the applicant ever wrote to her to request that she testifies on its behalf. There is no evidence that she was informed of the hearings scheduled for 30th July 2020 and 30th September 2020, nor of service of the witness summons dated 7th September 2020.

8. It is four years now since the said application was lodged in court. Interim orders of stay of execution were granted on 24th November 2016, and the applicant has been enjoying those interim orders since then. The applicant has not indicated that it has explored the option of filing supplementary affidavits to replace the two affidavits sworn by Ruth Mbalelo, after all the applicant has another legal officer in her place who can act in a similar capacity.

9. From the foregoing, it is clear to me that the applicant is not keen on prosecuting its application, and has utterly failed or refused or neglected to avail the deponent of the affidavits in support of the application. As held in the decisions that I have cited above, the failure to avail the deponent of an affidavit for cross-examination invalidates the said affidavit, and I, therefore, have no option, but to strike out the affidavits, and to expunge them from the court record. The expunging of the affidavits, leaves the application without legs, meaning that the said application cannot stand, and should be struck out. The final order, therefore, is that, as the applicant has failed to avail Ruth Mbalelo, to be cross-examined on the contents of her affidavits, sworn on 21st November 2016 and 8th December 2016, as ordered on 29th May 2017, I do hereby strike out the said affidavits, they shall be expunged from the record. As the striking out of the said affidavits leaves the application, dated 27th November 2016, without any evidential or factual foundation, the same cannot stand, and the same is hereby dismissed with costs. The consequence of the dismissal of the application is that the interim orders made on 24th November 2016, are hereby discharged and vacated.

10. The orders made in paragraph 9, here above, shall apply in equal measure to Kakamega HC Miscellaneous Applications Nos. 128, 129, 130, 135, 138, 139, 141 and 145 of 2016.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF November 2020

W MUSYOKA

JUDGE