



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 359 OF 2015

ALEX LOTONDE INGUTIA.....APPELLANT

VERSUS

KENYA WILDLIFE SERVICES.....1ST RESPONDENT

DANIEL KAMAU KIMEMIA.....2ND RESPONDENT

RULING

1. When this appeal came up for mention for purposes of taking directions on how it would be prosecuted, learned counsel for the respondent, *Mrs. Chege* indicated that she intended to file a preliminary objection to challenge its competence on account of late service of the record of appeal. But instead of filing a preliminary objection, *Mrs. Chege* subsequently filed a Notice of Motion dated 27th July 2020 seeking that the appeal be struck out on grounds *inter alia* that the record of appeal was incurably defective and was served out of time.

2. On 18th November 2020 when the application came up for hearing, the court was informed that the appellant had filed an application dated 13th October 2020 under a certificate of urgency. This ruling is in respect of that application. The application seeks the following orders:

i. That this honourable court be pleased to grant leave to the appellant/applicant to file a substitute replying affidavit to the respondent's application dated 27th July 2020 out of time.

ii. That the replying affidavit annexed to the supporting affidavit to this application marked as exhibit "PG1" herein to be deemed duly filed and served.

iii. That costs of this application be in the cause.

3. The application is supported by grounds stated on its face and the depositions made in the supporting affidavit sworn by the appellant's learned counsel Mr. Githinji Mwangi.

Counsel depones that there is need to substitute the replying affidavit sworn in opposition to the respondents' application dated 27th July 2020 as the one filed is defective in that the commissioner for oaths to whom it was presented for commissioning together with another affidavit sworn in support of an application seeking to amend the memorandum of appeal by oversight signed and stamped the other affidavit but omitted to sign and stamp the replying affidavit; that this was an inadvertent error on the part of the commissioner for oaths which ought to be rectified by allowing the orders sought in the application so that the respondents' Notice of Motion dated 27th July 2020 can be determined on merit.

4. The application is opposed through a replying affidavit sworn by the respondents learned counsel, *Mrs. Rosemary Chege*. Counsel deposed that it is not disputed that the replying affidavit dated 15th September 2020 is fatally defective as it was not commissioned; that the respondents have already filed and served written submissions on the application dated 27th July 2020 in compliance with directions issued by this court and in filing the instant application, the appellant was seeking to steal a match to defeat the respondents' submissions that the replying affidavit is fatally defective and should be struck out; that the endless applications by the applicant have delayed determination of the appeal which is oppressive and prejudicial to the respondents' as justice delayed is justice denied.

5. The application was canvassed by way of oral submissions. In his submissions, *Mr. Githinji* reiterated the grounds anchoring the motion and added that the content of the two replying affidavits are exactly the same save for the jurat in the latter one which was signed and commissioned while the replying affidavit which was filed earlier was not signed or commissioned; that allowing the application was not going to prejudice the respondents especially because the appellant was willing to pay costs of the application.

6. On her part, *Mrs. Chege* argued that there was no provision in law that allows for substitution of a defective affidavit. Relying on the authorities of *Githinji Mwangi & 2 Others V Jubilee Party & 11 Others, [2018] eKLR* and *CMC Motors Limited V Ndengeria Arap Kirui T/A Marben School & Another, [2013] eKLR*, counsel submitted that whether or not an affidavit is defective for want of commissioning is a pure point of law not a mere technicality. She urged me to find as much and strike out the initial replying affidavit.

7. I have considered the prayers sought in the application and the oral arguments made by both learned counsel. I have also perused the replying affidavit sworn on 15th September 2020. I agree with both parties that the said affidavit is only signed by the deponent but is not signed or attested by a commissioner for oaths.

8. The making of affidavits is governed by the *Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya (the Act)*. Sections 5 and 8 of the Act provides that a commissioner for oaths or a magistrate before whom an affidavit is sworn must state in the jurat the place and date on which the oath was taken or affidavit was made.

9. The Supreme Court in *Gideon Sitel V Konchellah V Julius Lekeney Ole Sunkuli & 2 Others, [2018] eKLR*, pronounced itself on this matter and held that for an affidavit to comply with the requirements of the law, it must clearly state the place and date it was made and it must be made before a magistrate or a commissioner for oaths. The court also held that an affidavit which fails to satisfy these requirements was of no legal value and was incurably defective.

10. In view of the foregoing, I have no hesitation in finding that the replying affidavit sworn by the appellant's counsel on 15th September 2020 is incurably defective for want of commissioning by either a magistrate or a commissioner for oaths. I therefore agree with *Mrs. Chege* that the said affidavit should and is hereby struck out.

11. The applicant has sought this court's leave to substitute the defective affidavit which I have already struck out with a compliant replying affidavit sworn on 13th October 2020 which is already part of the court record. I have perused the affidavit and I confirm *Mr. Githinji's* submission that it is similar in terms of content to the affidavit that has been struck out.

12. *Mrs. Chege* has opposed the above prayer by the appellant on grounds that there is no provision of the law which allows for substitution of an affidavit. I beg to disagree with this submission. Though I agree that there is no specific provision of the law that provides for substitution of an affidavit, this court being a court of justice is empowered under Section 3 A of the *Civil Procedure Act* to make any orders that may be necessary to meet the ends of justice or to prevent abuse of its process. The court is also required under Section 1A (2) of the Act to give effect to the overriding objective of the *Civil Procedure Act* which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act which includes appeals.

13. In this case, the appellant's learned counsel has been candid in his explanation regarding how the mistake of filing the defective affidavit occurred. He now seeks court's leave to correct that mistake to enable the appellant present his case in opposition to the respondents' application.

14. Taking all factors into account, I am inclined to exercise my powers under Section 3 A of the *Civil Procedure Act* and allow the applicant's prayer in order to give him an opportunity to present his case in opposition to the respondents' application so that the said application can be determined on merit. In any event, allowing the application will not occasion the respondent any prejudice that cannot be compensated by way of costs.

15. Lastly, *Mrs. Chege* has urged me to find that the appellant has filed multiple applications which have procrastinated disposal of this appeal; that the delay is oppressive and prejudicial to the respondents. My perusal of the court record however reveals the complete opposite. The record confirms that the appellant had, prior to filing of the respondent's Notice of Motion dated 27th July 2020, taken all steps that were required by law to facilitate hearing and disposal of the appeal. He had filed a record of appeal, caused it to be mentioned for directions and was ready to prosecute the appeal on 15th and 27th July 2020 when learned counsel *Mrs. Chege* indicated her reluctance to proceed on grounds that she intended to file a preliminary objection to contest late service of the record of appeal. In the premises, the claim that the appellant had unduly delayed prosecution of the appeal is devoid of any factual basis.

16. For the foregoing reasons, I find merit in the Notice of Motion dated 13th October 2020 and it is hereby allowed in terms of prayer 1. Prayer 2 is also allowed save that as it is not clear whether the replying affidavit dated 13th October 2020 was served on the respondent, the same is deemed as filed but should be served on the respondent within the next three days if service had not already been effected.

17. The costs of this application are awarded to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of December 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Githinji for the applicant

Mrs. Chege for the respondents

Ms Mwinzi: Court Assistant