



REPUBLIC OF KENYA



**Gitau v Njuguna & 4 others (Environment & Land Case 45 of 2023)  
[2023] KEELC 22366 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22366 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 45 OF 2023**

**BM EBOSO, J**

**DECEMBER 13, 2023**

**BETWEEN**

**AGNES WARINGA GITAU ..... PLAINTIFF**

**AND**

**BONIFACE NDIRANGU NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**MUSTI INVESTMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**SF CAPITAL HOLDINGS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR - RUIRU ..... 4<sup>TH</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Two applications fall for determination in this ruling. The first application is the plaintiff's notice of motion dated 15/5/2023, through which the plaintiff seeks interlocutory injunctive orders against the defendants in relation to land parcel number Ruiru/Ruiru West Block 3/508. The second application is the 3rd defendant's notice of motion dated 29/6/2023, through which the 3rd defendant seeks orders striking out both the plaint dated 15/5/2023 and the plaintiff's notice of motion dated 15/5/2023. In addition, through the application dated 29/6/2023, the 3rd defendant seeks an order striking out the 1st defendant's replying affidavit dated 6/6/2023. In view of the fact that the application dated 29/6/2023 raises the question of the competence of this suit, I will dispose it first.
2. The gist of the case of the applicant in the application dated 29/6/2023 is that the suit and the application dated 15/5/2023 are fatally defective because the verifying affidavit accompanying the plaint and the supporting affidavit accompanying the notice of motion were both commissioned by Anita W Njoroge, an advocate practising law in the firm of Mbiyu Kamau & Company Advocates, which law firm prepared and filed the suit and the application on behalf of the plaintiff. It is the case



of the 3rd defendant that commissioning of the verifying and the supporting affidavits by Anita W Njoroge is a fatal violation of the requirements of section 4(1) of the [Oaths and Statutory Declarations Act](#), chapter 15 of the Laws of Kenya.

3. The 3rd defendant further contends that the supporting affidavit dated 15/5/2023 offends the requirements of order 19 rule 5 of the [Civil Procedure Rules](#) because the said affidavit was not numbered consecutively. It is the case of the 3rd defendant that the said affidavit contains paragraphs 1 to 14 and 16 to 17 but does not contain paragraph 15.
4. The 3rd defendant adds that the replying affidavit sworn on 6/6/2023 by the 1st defendant [Boniface Ndirangu Njuguna] should be struck out on the ground that it was commissioned by Anita W Njoroge who practices law in the firm of Mbiyu Kamau & Company Advocates who are on record for the plaintiff in this suit. It is the case of the 3rd defendant that the said replying affidavits violates the mandatory requirements of section 4(1) of the [Oaths and Statutory Provisions Act](#).
5. I have considered the application dated 29/6/2023. Four issues emerge for determination in the said application. The first issue is whether the plaintiff's suit is fatally defective by dint of the fact that the verifying affidavit which accompanied the plaint was commissioned by an advocate practising in the firm of Mbiyu Kamau & Company Advocates who act for the plaintiff in this suit. The second issue is whether the plaintiff's notice of motion dated 15/5/2023 is fatally defective by dint of the fact that the affidavit in support of the notice of motion was commissioned by an advocate practising in the firm of Mbiyu Kamau & Company Advocates who act for the plaintiffs in this suit. The third issue is whether the 1st defendant's replying affidavit dated 6/6/2023 is fatally defective by dint of the fact that it was commissioned by an advocate practising in the firm of Mbiyu Kamau & Company Advocates. The last issue is whether the notice of motion dated 15/5/2023 is fatally defective by dint of the fact that the supporting affidavit is not numbered consecutively.
6. The first, second and third issues raise the question of legality of the three affidavits that were commissioned by Anita W Njoroge who is alleged to be practising law in the firm of Mbiyu Kamau & Company Advocates. The three issues will, in the circumstances, be disposed simultaneously.
7. The applicant exhibited a print-out from the Law Society of Kenya public online portal showing that Njoroge Anita Wangui P.105/15990/19 was an active advocate in 2023 and practised law in the firm of Mbiyu Kamau & Company Advocates of P. O. Box 1287 Thika. The above evidence has not been controverted.
8. Section 4(1) of the [Oaths and Statutory Declarations Act](#) which the 3rd defendant invokes provides as follows:

“(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”



9. It is clear from the proviso in Section 4(1) of the *Oaths and Statutory Declarations Act* that an advocate who is acting for a party in proceedings before a court of law is expressly prohibited against commissioning affidavits that are to be filed in the proceedings. Indeed, a reading of the prevailing jurisprudence on the subject indicates that affidavits that have been commissioned in violation of the above law have suffered the fate of being struck out. [See: (i) *Kenya Federation of Labour and another v Attorney General & 2 others* Industrial Court of Kenya at Nairobi Case No 735 of 2012]; and (ii) *Lee Njiru v J. K Lokorio & another* [2019] eKLR.]
10. Regrettably, the 3rd defendant having demonstrated that Anita W. Njoroge who commissioned the three affidavits is an advocate practising in the firm of Mbiyu Kamau & Company Advocates, the three affidavits stand to be struck out. They are hereby struck out. What are the ramifications of the striking out order?
11. Under order 4 rule 1(6) of the *Civil Procedure Rules*, a plaint or counter-claim which is not accompanied with a verifying affidavit is fatally defective and is liable to be struck out. That is the fate which befalls the plaint dated 15/5/2023.
12. As for the notice of motion dated 15/5/2023, the striking out of a supporting affidavit does not necessarily render an application incompetent. If the application is one that can be properly canvassed without evidence, the application would proceed to hearing and would be disposed on its merits. Where the application raises factual issues that require proof through affidavit evidence, it suffers fatal incompetence.
13. The application dated 15/5/2023 is a plea for an interlocutory injunctive order. It is definitely an application that requires supporting evidence demonstrating, among other elements, a prima facie case with the probability of success. Consequently, without a supporting affidavit, the application is fatally incompetent and ought to be struck out.
14. The court's view on the plaintiff's failure to consecutively number the paragraphs in the affidavit is that, omission of a number may be a genuine typographical error. Where it is demonstrated that indeed the omission is a typographical error, the error does not attract an order striking out a suit or an application.
15. For the above reasons, it is the finding of this court that the plaintiff's suit is fatally defective. The suit is accordingly struck out. The application dated 15/5/2023 is similarly struck out alongside the main suit for the same reasons. For avoidance of doubt, given that the substantive dispute and the plea for interlocutory reliefs have not been disposed on merits, the plaintiff will be at liberty to bring a competent suit and a competent application to ventilate his claim.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF DECEMBER 2023**

**B M EBOSO**

**JUDGE**

**In the presence of:**

Mr Mugo holding brief for Mbiyu Kamau for the Plaintiff

Mr Mathenge for the 1st Defendant

Ms Kiiru for the 2nd Defendant

