



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC NO. 13 OF 2021(O.S)

(FORMERLY HCC 29/2018)

JACKLINE NYAWIRA NJIRU & OTHERS.....PLAINTIFF

-VERSUS-

ALIMA CHERONO RAMADHAN.....DEFENDANT

RULING

Introduction:

1. This is a ruling in respect of a Chamber Summons dated 26th November, 2020 in which the Defendant/Applicant seeks leave to file afresh affidavit in response to the Plaintiffs/Respondents' originating summons dated 9th July, 2018.

Background:

2. The Respondents herein had purchased various portions out of LR No Pioneer/Langas Block 1 (Malel)/379 (suit property) through an agent known as Uasin Gishu Real Estate and Property Management which had authority of the registered owner of the suit property one Allan Kipchumba Malel now deceased.

3. The deceased died as a result of a tragic road accident on 15th November, 2011 aged 23 years. The Applicant who is mother to the deceased took out a limited grant in respect of the deceased's estate for purposes of defending this suit.

4. The Applicant who is based in Germany was advised by her lawyers to execute a power of attorney so that the donee of the power of attorney could proceed with this suit on her behalf. The Applicant then donated a power of attorney to one Celine Chelel Pohland who swore an affidavit in opposition to the originating summons. This affidavit was struck out in a ruling delivered on 1st October, 2019 on grounds that a person who had been appointed as administrator cannot delegate her authority to someone else through power of attorney to do what the administrator is permitted to do.

5. It is after the affidavit was struck out that the Applicant filed the present application seeking leave to file a fresh affidavit in opposition to the originating summons.

The application by the applicant:

6. The Applicant contends that upon the affidavit of the donee of her power of attorney being struck out, her erstwhile advocate did not inform her of the position. She only came to learn of the striking out of the affidavit after the originating summons was set down for formal proof. The Applicant contends that she has a strong defence to the Respondents' claim and that she should be given an opportunity to defend the same.

7. The Applicant states that she did not bother to follow up on the status of her case as she had donated a power of attorney to someone who was to conduct her affairs regarding the case filed herein. She blames what happened on her erstwhile advocate and pleads with the Court to allow her an opportunity to file a fresh affidavit arguing that mistakes of an advocate should not be visited on her.

Response by the respondents:

8. The Applicant's application was opposed by the Respondents based on a replying affidavit sworn on 22nd December, 2020. The Respondents contend that order 19 Rule 9 of the Civil Procedure Rules pursuant to which this application has been brought is only a procedural law and not a substantive law conferring jurisdiction upon the Court to grant the orders sought.

9. The Respondents further argue that order 37 of the Civil Procedure Rules does not confer upon this Court jurisdiction to entertain an application filed by the Applicant and that the Applicant has not explained why she brought this application over a year later after the striking out of the affidavit.

10. The Respondents also state that affidavit in support of the present application is incompetent as the same has not been duly sworn and notarized as the Applicant is based in Germany. The Respondents further argue that the orders being sought cannot be granted as the Applicant has not sought for extension of time within which to file the affidavit.

Analysis:

11. The parties were directed to file written submissions in respect of the application. The Applicant filed her submissions dated 6th January, 2021. The Respondents filed their submissions dated 8th February, 2021.

12. I have carefully considered the submissions by the parties. The only issue for determination is whether the Applicant has made out a case for grant of leave to file a fresh affidavit. There is no contention that the Applicant's first affidavit was struck out on a technicality. It was not struck out as lacking merit or substance. The Applicant was therefore at liberty to move the Court for leave to file a fresh affidavit.

13. The Applicant has explained that she was advised by her erstwhile lawyer to prepare a power of attorney. Once she prepared the power of Attorney everything was left in the hands of her erstwhile lawyer and the donee of the power of attorney. When the affidavit was truck out, she was not informed. She only became aware after the suit had been set down for formal proof. It is therefore understandable that the Applicant having donated power of attorney and having a lawyer, she was not expected to actively follow up the matter again.

14. The Applicant's situation is therefore different from the situation in the case of **Rajesh Rughadir -Vs- Fifty Investment Ltd & another (2005) ECLR** and **Bi mech Engineers Limited -Vs- James Kahoro Mwangi** where the Judges in the two cases held that the mere fact that the litigants blamed their advocates for their predicament is not an excuse which would be looked at with sympathy.

15. There is a contention that the affidavit in support of the Applicant's application was not commissioned or notarised as required. I have looked at the supporting affidavit. It is clear that the affidavit was sent to Germany where the same was signed by the Applicant before a notary public who confirmed that he had witnessed the Applicant sign the supporting affidavit. There was therefore no need for the Applicant to have a Commissioner of oaths in Kenya to Commission the same document.

16. The mere fact that the application did not cite the correct provision of law pursuant to which the same was brought cannot defeat the application. The substance of the application is clear and the Court cannot be tied down to procedural technicalities. The context in which the Supreme Court observed that a Court of law has to be moved under the correct provisions of the law in the case of **Hermanns Philipus Steyn -Vs- Giovanni Gneccchi Ruscons** in application No. 2 of 2012 is different from the circumstances in the present case.

17. Equally, in the case of **Aviation Allied Workers Union Vs Kenya Airways Limited & 3 others (2015) eCLR**, the Court was discouraging parties from bringing omnibus applications without citing specific provisions granting the Court jurisdiction to hear the application. In the instant case, the Applicant is merely being blamed for citing wrong provisions of law which cannot defeat the application.

Disposition:

18. From the above analysis it is clear that the Applicant deserves to be heard on her defence. In **Mbaki & others -Vs- Macharia & another (2005) 2 EA 206**, it was held as follows:-

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

19. I therefore find that the Applicant's application is well merited. I allow the same with costs. The Applicant shall file and serve a fresh replying affidavit within 14 days from the date of this ruling.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 24TH DAY OF FEBRUARY, 2022.

E. OBAGA

JUDGE

In the absence of parties who were aware of the date of delivery of ruling.

Court Assistant –Albert.

E. OBAGA

JUDGE

24TH FEBRUARY, 2022