



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOBASA
ENVIRONMENT AND LAND COURT
ELC CASE NO.291 OF 2014

**FLORENCE WAIRIMU MBUGUA (suing as Administrator of the Estate of the late
JOSEPH KIARIMBUGUA).....PLAINTIFF**

VERSUS

IBRAHIM A. BAKARI1ST DEFENDANT
THE COUNTY GOVERNMENT OF MOMBASA.....2ND DEFENDANT
PETER KINYUA MUCHENDU T/A
M/S KINYUA & CO. AUCTIONEERS3RD DEFENDANT
HEMEDI HAMADI ABDALLA4TH DEFENDANT
THE REGISTRAR OF TITLES.....5TH DEFENDANT

RULING

1. The plaintiff brought this suit against the five defendants together with the suit, she has filed an application dated 17th November 2014 seeking several orders. This application is opposed inter alia by the 2nd defendant. The 2nd defendant is represented by the law firm of O.M. Robinson & co. who filed a notice of appointment on 2nd December 2014. subsequently the said law firm filed statement of defence on 2nd February 2015. The 2nd defendant did not file a reply to the application until 29. 6. 2015 when two replying affidavits sworn by Robinson Malombo advocate were filed.
2. On receipt of the 2nd defendant's affidavits and before the application could be heard the applicant applied orally to have the two affidavits struck out. Mr. Sifuna for the applicant submitted that the affidavits contravened the provisions of order 19 rule 3 of the Civil Procedure Rules and Rule 9 of the Advocates Practice Rules. The applicant submits that the 1st affidavit responds to facts contained in the supporting affidavit sworn by the plaintiff/applicant, yet the issues in dispute is whether or not the 2nd defendant had given instructions to Mr. Malombo advocate to recover rates on its behalf.
3. On the 2nd affidavit, Mr. Sifuna submitted that the counsel for 2nd defendant has replied to an

- affidavit which was marked as an annexure and which affidavit is not restricted to the character of the counsel only. Mr. Malombo advocate in response submitted that the facts deposed to in his affidavits are very relevant and are within his knowledge. He continued that order 19 (3) (1) requires proof which can only be done at the hearing. He submitted that rule 9 of the Advocates practice rules has no bearing to this applications. He urged the court to disallow the request for striking out his affidavits. Mr. Mutisya advocate for the 4th defendant supported the submissions of Mr. Malombo. He submitted that the affidavits disclosed the source of information and therefore met the threshold set in order 19 (6).
4. In the first affidavit, Mr. Malombo deposed to facts, in reply to the applicants' affidavit in support of her notice of motion. Mr. Malombo deposed that the suit property 2464 was the subject matter in case no. SRMCC no.285 of 2014. On the content of the replying affidavit in question, the applicant has made a general submission that this affidavit has deposed to contested matters contrary to order 19 rule 3. The offending paragraphs have not been specified.
 5. The second affidavit is in response to the affidavit of Jackson N. Mwangi sworn on 11. 4. 15 and filed as an annexure to the supporting affidavit of the plaintiff/applicant. The contents of this replying affidavit discusses the question whether or not the 2nd defendant gave Mr. Malombo instructions to institute proceedings in civil case SRMCC no. 285 of 2014. Mr. Malombo has not been sued in this suit as a defendant. The question whether he had instructions to represent the 2nd defendant in SRMCC no. 285 of 2014 can best be answered between the 2nd defendant and the law firm of O.M. Robinson & co advocates
 6. Once the 2nd defendant denied issuing such instructions through an affidavit of Jackson Mwangi and since the law firm is not sued the best and only forum open for Mr. Malombo to defend himself was to file a response to that affidavit. The applicant cannot hide behind an explanation that Mwangi's affidavit is merely an annexure and therefore issues contained therein should go unanswered.
 7. Further the best placed person to respond to those averments is the person who is accused which is Robinson Malombo advocate. Lastly in this affidavit the applicant did not also disclose the offending paragraphs where the deponent has alluded to facts not within his knowledge. The issues raised by the applicant would be best determined when the application is heard on merits.
 8. In conclusion, I find that there is nothing wrong with an advocate swearing an affidavit to factual matters where the source of such information is within his knowledge and or the source of such information is disclosed.

Consequently, I find the application seeking to strike out the two replying affidavits sworn by Robson O. Malombo to be without merit, and hereby dismiss that prayer.

Ruling dated and Delivered this 16th day of December, 2015

A. OMOLLO

JUDGE