



**Njagi v Murathi (Environment and Land Case Civil Suit  
44 of 2018) [2022] KEELC 3045 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 3045 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 44 OF 2018  
EC CHERONO, J  
APRIL 22, 2022**

**BETWEEN**

**DICKSON BUNDI NJAGI ..... APPLICANT**

**AND**

**JAMLECK KIURA MURATHI ..... RESPONDENT**

**RULING**

1. The Applicant vide a Notice of Motion on 17<sup>th</sup> January, 2022 seeks the following orders:
  - a. Spent.
  - b. Spent.
  - c. That the Honourable Court be pleased to set aside and/or expunge the Applicant's Replying Affidavit filed on 21<sup>st</sup> October, 2021 from the court record.
  - d. That upon grant of prayer 3 above, the applicant's replying filed on 16<sup>th</sup> November 2021 annexed to the supporting affidavit be deemed to be part of the official record duly and regularly filed and served upon the parties herein.
  - e. That the Honourable Court upon granting prayer do allow the Plaintiff/Applicant leave to amend the few errors in the said affidavit filed on 16<sup>th</sup> November 2021.
  - f. The costs of the application be in the cause.
2. The application is premised on the grounds set out on the face of the application and is supported by the affidavit of the applicant.
3. The Respondent did not oppose the said application.



### **Applicant's Case: -**

4. The Applicant's case is that upon receiving a hearing Notice dated 20<sup>th</sup> September 2021, and an application dated 27<sup>th</sup> July, 2021, he filed a replying affidavit on 21<sup>st</sup> October, 2021 in response thereto.
5. He stated that the parties by consent agreed to canvass the said application by way of written submissions and that it was at this juncture they realized that they had inadvertently filed the incorrect replying affidavit on 21<sup>st</sup> October, 2021.
6. He further stated that the court was notified of the said error, and filed another replying affidavit dated 19<sup>th</sup> October, 2021 on 16<sup>th</sup> November, 2021.
7. He stated that the failure to seek leave and serve the second Replying Affidavit was an honest and inadvertent mistake which ought not to be visited upon an innocent party.
8. He stated that the respondents will not suffer any prejudice if the application is allowed and that the Replying Affidavit raises important issues which will assist the court have a wholesome view of the matter and would help the Honourable Court in determination of the Application dated 27<sup>th</sup> July, 2021.

### **Analysis: -**

9. I have considered the application, the grounds set out on the face thereon and the supporting affidavit.
10. The Respondent has not opposed the instant application.
11. The Applicant is seeking that this Honourable Court expunges his Replying Affidavit sworn on 19<sup>th</sup> October, 2021 on grounds that the same was filed incorrectly as upon swearing that affidavit, he on the same day made some changes and requested his advocate to file the second affidavit.
12. The Applicant has argued that the second affidavit raises important issues which will assist the court have a wholesome view of the matter and would help the Honourable Court in determination of the Application dated 27<sup>th</sup> July, 2021.
13. In a nutshell, the Applicant seems to be blaming the error on his advocates on record. I note that the current application was made after directions were taken to have the same canvassed by written submissions and the Respondent has even gone ahead and filed his submissions.
14. Having carefully considered the factual issues given on oath which is not opposed, I find that the Applicant has given satisfactory explanation to warrant expunging the Affidavit sworn by the Applicant and filed in court on 21<sup>st</sup> October 2021 from the court record.
15. I also find that the Respondent will not suffer irreparable injury which cannot be adorned by an award of damages.
16. The applicant has also sought an additional order that the affidavit filed on 16<sup>th</sup> November, 2021 be amended as it contains errors on the top part, clause 9 and in clause 19. An Affidavit is not a pleading like a plaint that can be amended by the leave of the court. I am guided by the case of *Swaleh Gheithan Saanun v Commissioner of Lands & 5 others* [2002] eKLR where the Honourable Court held that: -

“Counsel for the defendants failed to point out to court any reliable authority supporting their stand that an affidavit cannot be amended. The basis for such a view would appear to be mere common sense and/or logic arising from the fact that an affidavit mainly contains of matters of fact sworn to be true upon knowledge, information or belief. Once such facts



have been sworn on oath therefore, they cannot be negative or controverted by the person who deponed them. It is my view what is sworn in the body of the affidavit will thereon be clearly defined. Once it is so stated, and becomes the substance of the oath, it would indeed be against common sense and logic to amend the substantive express contents in the said affidavit.”

17. In view of the foregoing, I am of the view that once an affidavit is sworn, the same cannot be amended. However, a litigant can file a supplementary or further affidavit with leave of the court so as to add or rectify any information deponed in the particular affidavit.

**Conclusion: -**

18. In conclusion, I find the undated application filed on 17<sup>th</sup> January, 2022 merited and the same is allowed partly as follows:-
- a. The Applicant’s Replying Affidavit filed on 21<sup>st</sup> October, 2021 be and is hereby struck out from the court record.
  - b. The applicant’s replying affidavit filed on 16<sup>th</sup> November 2021 be and is hereby deemed to be part of the official record duly and regularly filed and served upon the parties herein.
  - c. Leave to amend the replying affidavit filed on 16<sup>th</sup> November 2021 is hereby declined.
  - d. The costs of the application assessed at Kshs. 10,000 to be paid by the Applicant to the respondent within 21 days from today.

**READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 22ND APRIL, 2022.**

**HON E. C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. Ms Makazi for the Plaintiff
2. Defendant/Advocate – absent
3. Kabuta – Court clerk.

