Awil Ogle Abdullahi & Kinsi Salat(Suing as the Administrators & Personal Representatives of the Estate Of Abdullahi Ogle Warsame (Deceased) v School Management Committee St. John's Lokichoggio Primary School & 2 others (Environment & Land Case 50 of 2021) [2022] KEELC 3030 (KLR) (14 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3030 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 50 OF 2021

FO NYAGAKA, J

JUNE 14, 2022

BETWEEN

AWIL OGLE ABDULLAHI & KINSI SALAT(SUING AS THE ADMINISTRATORS & PERSONAL REPRESENTATIVES OF THE ESTATE OF ABDULLAHI OGLE WARSAME (DECEASED) ..... PLAINTIFF

AND

SCHOOL MANAGEMENT COMMITTEE ST. JOHN'S LOKICHOGGIO PRIMARY SCHOOL ..... 1ST DEFENDANT

ASSISTANT COUNTY COMMISSIONER, LOKICHOGGIO TURKANA WEST SUB-COUNT ..... 2ND DEFENDANT

ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

1. The application before me for determination is that of the plaintiffs. It was dated 20/09/2021 and filed the same day. It invoked articles 40 and 64 of the *Constitution* of Kenya, section 3 (1) (b) of the *Land Act*, Sections 1A, 3 and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*. It sought the following reliefs:

    1. ...spent

    2. That a temporary order of injunction do issue (sic) barring and prohibiting the 1st and 2nd Defendants either by themselves or through their servants, agents, employees or any person acting on their behalf from evicting, trespassing, encroaching upon or in any other way interfering with the quiet enjoyment and possession of Market Plot No. 176 (Double) in

Lokichoggio by beneficiaries of the Estate of the late Abdullahi Ogle Warsame, pending the hearing and determination of this suit;

3. That costs of the Application be provided for.

2. The Application was based on the grounds on its face and supported by the Affidavit of one Awil Ogle Abdullahi, a co-Administrator estate of the late Abdullahi Ogle Warsame. The Affidavit was sworn on 20/09/2021. The Plaintiffs deposed that the deceased was allotted a plot at Lokichoggio Market, namely, Market Plot 176 (Double) Lokichoggio. The allocation was made on 14/11/1983, vide minute number PA/83/1/2. To this end, they annexed a copy of the letter of allotment issued on 20/07/1998 and marked it as AOW1. Thereafter, the allottee, now deceased, built a shop and immediately commenced trading in assorted household goods in the premises. Later on, he erected a permanent structure containing one large store and two extra unoccupied spaces that garnered rental income.

3. The Applicants deponed that on 12/01/2004, the deceased passed on in South Africa. Naturally, the Plaintiffs being heirs to the estate of the deceased applied for and obtained a Grant of Letters of Administration on behalf of the estate. The deponent annexed as AOW2, a copy of the Grant of Letters of Administration.

4. According to the Plaintiffs, the 1st Defendant alleged that the deceased's estate amongst others, encroached on its property in 2010. The deceased escalated the dispute to the Administrative authorities. Thereafter, a meeting was called by the then District Commissioner Turkana West District. It was held on 18/01/2011 at the former UN Hall Lokichoggio at 2:30 p.m. In attendance were forty-one (41) individuals. By a resolution of that meeting, the suit property namely Market Plot 176 (Double) situated in Lokichoggio was found to belong to the deceased. In other words, the deceased's estate had not encroached on the 1st Defendant's property as alleged. The other six (6) individuals were however found to have encroached on the said parcel of land. In support of these assertions, the Plaintiffs annexed the minutes of the meeting and marked them as AOW3. Following those findings, the 1st Defendant was advised to approach the deceased's family in good faith to purchase the suit property if they were still interested in the parcel of land.

5. According to the Plaintiffs, the 1st Defendant never expressed interest in acquisition of that parcel of land. Instead, the 1st Defendant tainted the image of the deceased and vilified him as a land grabber who encroached upon the property of the 1st Defendant. In furtherance of the campaign, the Plaintiffs averred that the 1st Defendant engaged the services of the 2nd Defendant to forcefully evict the Plaintiffs from the suit property. To this end, one Kennedy Otieno, an employee of the 1st Defendant, visited their premises and issued a verbal notice to vacate the suit property by 22/09/2021. Instead of issuing a written eviction notice, the 2nd Defendant promised to unleash the entire security apparatus to evict the Plaintiffs and demolish the structures in the suit property.

6. The Plaintiffs deposed that consequently, they filed the present Application. The deponent deposed that unless the orders sought were granted, the Plaintiffs stood to suffer irreparable harm and damage yet no prejudice would be suffered by the Defendants if the orders were granted. They urged this court to allow the Application as prayed.

7. The Defendants jointly opposed the Application. They filed Grounds of Opposition dated 25/11/2011 on 26/11/2011. They posited that the Application was incompetent, fatally defective and made mala fides. Further, they argued that the Application failed to meet the threshold for grant of the orders sought. According to them, the Supporting Affidavit failed to comply with Section 88 of the *Civil Procedure Act* and Sections 5 and 8 of the *Oaths and Statutory Declaration Act*. This, they stated,

was because the Supporting Affidavit was unsigned at the jurat, undated and not commissioned, thus illegal. They added that the annexures were not included in the court record and if so included, they were unmarked and unsealed thus did not constitute evidence. Finally, they stated that the Applicants failed to demonstrate sufficient ground to warrant the issuance of the orders sought. Therefore, they urged this court to dismiss and/or strike out the Application with costs.

Submissions

8. The parties agreed to canvass the Application by way of written submissions. The Plaintiffs submitted that they had satisfied the conditions precedent for the grant of an injunction relief. On whether they had established a prima facie case, they annexed ownership documents to establish the proprietor of Market Plot 176 (Double) Lokichoggio as the deceased's estate. They also submitted that the deceased took ownership immediately upon being allotted the said parcel of land. They stated that the deceased erected permanent structures for business purposes. Also, they summed that the said parcel of land, continues to date, to generate income for the benefit of the Plaintiffs.

9. Consequently, they submitted that, the continued threat of eviction by the Defendants was apparent as the Plaintiffs were apprehensive that their proprietary rights would be extinguished should the court fail to intervene. They fortified their submissions by relying on the case of *Mrao Limited v First American Bank of Kenya Limited* [2003] eKLR.

10. On whether they would suffer irreparable harm that cannot be compensated by an award of damages, the Plaintiffs contended that the subject parcel of land continued to generate income and was their source of livelihood. They stated that if the 1st Defendant proceeded with demolition of the structures erected thereon, they would eventually be rendered destitute. They relied on *Wairimu Mureithi v City Council of Nairobi Civil* Appeal No. 5 of 1979 (1981) KLR 322.

11. Citing the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Plaintiffs submitted that the balance of convenience element should only be a consideration if the court was in doubt as two the first two (2) requirements. Be that as it may, they posited that the balance of convenience tilted in their favor as the proprietors of the subject parcel of land. The Plaintiffs asserted that their intention was only to maintain the status quo and character of the subject parcel of land until the dispute was heard and determined to its logical conclusion.

12. The Plaintiffs dismissed the prayers enumerated in the Defendants' Grounds of Opposition as they only focused on procedural technicalities and failed to address the substratum of the issues espoused. They urged this court to protect their proprietary rights as ascribed in Article 40 of the *Constitution*. They, thus, asked this court to grant the reliefs as prayed in their Application.

13. The Defendants on the other hand submitted that the Plaintiffs failed to satisfy the principles for the grant of temporary injunction. They submitted that no evidence was furthered to demonstrate that the intended evictions were presented to the Plaintiffs. They dismissed them as innuendo. Quoting the case of *Stephen Juma & another v Executive Committee Kenya Sugar Growers Association Kisumu* HCCC No. 5 of 2004, the Respondents submitted that no danger, waste or damage of the suit property has been established to warrant the issuance of an injunction. Theirs was the view that since 22/09/2021, the Plaintiffs had not demonstrated any imminent threat or actualization of the alleged threat. They cited *John Ratika Koini & 2 others v Samson Kipas Ole Koini* [2020] eKLR for the proposition that mere apprehension is not a ground for grant of injunction.

14. They abandoned ground four (4) in the Grounds of Opposition. They maintained that the annexures were unmarked and unsealed and thus did not constitute evidence. They relied on the Supreme Court (sic) decision of *Pharmacy and Poisons Board & another v Mwiti & 21 others* [2021] eKLR for the

holding that unmarked and unsealed annexures are of no value to an Application. They contended that annexures must, of necessity, be marked and sealed by a Commissioner for Oaths as required by Rule 9 of the *Oaths and Statutory Declarations Rules*. They urged this court to dismiss the Application on those technical grounds.

Analysis and Determination

15. I have carefully considered the Application, the Affidavit in support thereof and the Grounds of Opposition. I have also considered the submissions filed by both parties. Before delving into the merits or demerits of the Application, I find it indispensable to deal with the technical objections raised by the Defendants in their Application. I say so because the determination of the technicalities will affect the outcome of the Application in totality as it may terminate the Application.

Whether the Application is fatally defective?

16. In their grounds, the Defendants have condemned the Plaintiffs for failing to comply with Rule 9 of the *Oaths and Statutory Declaration Rules*. They added that the annexures were not included in the court record and if so included, were unmarked and unsealed thus did not constitute evidence. In fact, this is the crux of their defence to the Application. The Plaintiffs on the other hand, albeit in their submissions, urged this court to disregard this defence as they failed to address the substratum of the Application. In essence, they did not counter the grounds as espoused.

17. Indeed, a perfunctory but keen look at the annexures revealed that they were not stamped, marked, sealed and executed by a Commissioner for Oaths. What then is the import of the present Application in its totality? A reading of Rule 9 of the *Oath and Statutory Declaration Rules*, which is the guiding provision of the law, provides thus:

> " All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."

18. Courts in our jurisdiction have addressed this issue time and again. To start with, the Court of Appeal sitting at Nairobi in *Pharmacy and Poisons Board & another; Mwiti & 21 others (Respondent)* (Civil Appeal E144 of 2021) [2021] KECA 97 (KLR) (Constitutional and Human Rights) (22 October 2021) (Ruling) held:

> " Notwithstanding the foregoing, it would be remise of us not to comment on, albeit obiter, to set the law straight on this and other issues that emerge from the application before us. With regard to the unsigned supporting affidavit, the unmarked and unsealed annexures, it would suffice to observe that such an affidavit is fatally defective and of no value to the applicants' Motion. Addressing itself to the effect of an unsigned affidavit, the Supreme Court in Civil Application No. 26 of 2018 *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR observed that such an affidavit is of no legal value to the matter before the court and that, in so far as it is defective, it is deemed that there is no affidavit on record. The same fate befalls unmarked and unsealed annexures. They are of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the *Oaths and Statutory Declarations Rules*."

19. Hayanga J (as he then was) in the case of *Abraham Mwangi v S. O. Omboo & Others* HCCC No. 1511 of 2002 held:

> " Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed."

20. Similarly, in *Francis A. Mbalanya v Cecilia N. Waema* [2017] eKLR, the court held:

> " The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with... in the instant case, the law has provided in mandatory terms the manner in which evidence by way of annexures can be received by court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents. However, considering that the supporting affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the supporting affidavit and the application."

21. Justice Havelock in the case of *Fredrick Mwangi Nganga v Garam Investments & Another* [2013]eKLR in dealing with an annexure marked "A" held:

> " As a consequence of all the above, I find that although the court has power to allow an amendment to the plaintiffs said Notice of Motion dated 14th June 2013 under the provisions of order 8 Rules 5 as well as Section 100 of the *Civil Procedure Act*, the fact that the plaintiff has breached Rule 9 of the *oaths and Statutory declarations rules* necessarily means that his application to amend must fail. As I see it, the only option is to withdraw the same and file a fresh application. Further, as I have refused the plaintiff's application dated 14th June 2013 as currently drawn and presented does not support the interim orders sought therein and the same are lifted accordingly."

22. As seen in paragraph 17 above, the Rule about exhibits to Affidavits is a mandatory one to the effect that such exhibits be securely sealed under the seal of the commissioner, and marked with serial letters of identification. The import of the mandatory nature of the Rule is that when a person takes an oath, he/she is (supposed to be) bound by it in its entirety. For those who care to read the Holy Word in the Bible in Genesis 17, the covenant or oath between God and Abraham was to be everlasting and that is why it required the shedding of blood. One was to be bound by the word of the oath. It was so binding that Abram had to change his name to Abraham. And so it should be for one who decides to take an oath. Thus, whatever depositions of solemnity that the deponent makes if supported by documentary evidence should be proven before the person who is administering the oath or commission so that the one making the oath can be bound fully by them. So much so that in case the documents are found to be untrue, the person who took the oath about them can be held to account on perjury and other consequences. If the documents are referred to and annexed separately to the oath taken by way of Affidavit, nothing would deter the deponent from disowning the documents and escaping responsibility over them.

23. The Plaintiffs argued that it was in the interest of justice that the Application be heard and determined on its merits. They relied on Article 40 of the *Constitution* to persuade this court to uphold the protection of their property as enshrined. It was their ultimate conclusion that of importance was the substratum of the Application and not the procedural technicalities the Defendants' Grounds

of Opposition were hinged on. I will quote the authority of *Solomon Omwega Omache & Another v Zachary O Ayieko & 2 others* [2016] eKLR at this juncture that held:

> " Although the point was not taken up by the plaintiffs, the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wake-up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistant's lack of attention and due diligence." (Underlined emphasis mine)

24. I am further persuaded by the Court of Appeal in *Galaxy Paints Co. Ltd. v Falcon Guards Ltd* Civil Appeal No. 219 of 1998 that held:

> " The Rules are designed to facilitate justice and further its ends. They are not things designed to trip people up. They are not too technical. The Law Society of Kenya is adequately represented in the Rules Committee. But due to rampant inefficiency, negligence, dishonesty and general disregard for professional ethics on the part of the majority of the advocates in the country, the Rules are abhorred."

25. I will continue to urge and caution parties against following rules of procedure. The law remains what it is. No one is above the law. The set of rules established by the Rules committee time and again are not made in vain. The purpose of the provisions as established shall remain principally upheld.

26. A reading of Rule 9 of the *Oaths and Statutory Declaration Rules* reveal that the same has been couched in mandatory terms. There are no exceptions to the Rule. I will continually abhor parties who circumvent the law and attempt to defend their actions or lack thereof by armoring themselves with Constitutional dictates or the "interest of justice" facet. In fact, it is in the interest of justice that a party must comply with rules and procedure enshrined in our jurisdiction. In fact, in this instance, interest of justice connotes that a party respects the meaning and tenor of the provisions set out and the consequences for breach. I will thus not succor any litigant to raise an exception where the provisions of the law are unambiguous as the case before me.

27. Therefore, what is the end result of the arguments herein? The competency of the Application was attacked on two limbs. The first one is that the Affidavit was not proper because the jurat was on a separate page. The second one was that the annextures were not commissioned as the Affidavit hence did not form part of the depositions in the Affidavit hence not evidence to be considered.

28. Before delving into the first limb, I note that in their submissions, the Respondents abandoned that ground. While that may sound plausible, it is trite that submissions are not pleadings. Since the Respondents raised the issue by way of pleadings, they ought to have withdrawn the ground formally, by way of a notice of withdrawal of the same. For the reason that they failed to do so, I will address both limbs herein, that is to say, that I will analyze the merits or otherwise of the ground.

29. In regard to the first limb, it is my view that regarding the position where a jurat of an affidavit is or is not is a matter of form and not substance. I have carefully considered the provisions of the *Oaths and Statutory Declarations Act*, Chapter 15 of the Laws of Kenya. Section 5 of the *Act*, which is the relevant provision on the jurat, is only to the effect that a "commissioner for oaths before whom any

oath or affidavit is taken or made... (should) state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made." The provision does not specify on what part of the Affidavit the jurat should be. Whereas it is natural that the Commissioner is, by administering the oath, signifying that the person taking the oath has done so before him or her and therefore it must come at the end of the depositions in the Affidavit, it does not require that the jurat be 'squeezed' into or placed at the page that contains the (last of the) depositions. The Respondent did not articulate how the position of the jurat on the separate page affected the depositions in the Affidavit. In my view the form should not affect the substance. In any event, Article 159(2) (d) of the *Constitution* calls on the Courts to go beyond the use of technicalities to determine disputed between the parties. Such an objection is one of the technicalities that the constitutional provision sought to take care of. Thus, in my view, the Affidavit in support of the Application was properly drawn and commissioned.

30. About the second limb, the Respondents put forth two thrusts against the competency of the Affidavit. The first prong of the argument was that the Affidavit sworn by Awil Ogle Abdullahi on 20/09/2021 was neither signed nor commissioned. I found that to be false since the Affidavit was both signed by the 1st Plaintiff and commissioned by Mr. David K. Kiarie Advocate and Commissioner for Oaths. It did not need expending much time and energy to see that since it was only a matter of casting the eyes on the Affidavit to confirm the allegation.

31. As for the second thrust of the limb, the Court notes that none of the documents attached to the Affidavit were commissioned by the Advocate who commissioned the Affidavit. Relying on the authorities cited in paragraphs 18-20 above, it is my view that the purported annextures do not form part of the Affidavit. It therefore goes without saying that the depositions on the specific paragraphs that the documents were referred to in remain hollow and unproven. Therefore, the Court cannot base its findings on them. However, in my view, that does not make entire affidavit defective. The Court should look at the entire affidavit and inquire into the facts deponed to therein. It has to ignore the paragraphs whose depositions are unsupported by documentary evidence. The only paragraphs that the Court can rely are those that did not purport to be based on documentary evidence.

32. Looking at each of the remaining paragraphs as stated immediately above, I find that their content, bereft of the documents purported to be referred to as annextures, does not support the Application to the extent of making a finding that the prayers sought can be granted. In the end, I find that the Plaintiffs are in clear breach of Rule 9 of the Oaths and Statutory Declaration Rules.

33. As I see it, the only option that lay for the Applicants was in the withdrawal of the Application in its entirety as is was defective. But they chose not to do so, even upon that anomaly being pointed out to them by way of responses from the Respondents, but prosecuted to the end. Thus, this Court has no option but to find the same unsupported by any meaningful evidence hence a candidate for dismissal. I hereby dismiss. And since the Defendants actively participated in the same, I will award them the costs of the Application.

34. Lastly, for purpose of case management, the Plaintiffs are directed to comply strictly with Order 11 of the *Civil Procedure Rules* and Gazette Notice No. 5178 of 2014 in regard to the Practice Directions in the Environment and Land Court, within the next 21 days and serve the Respondents. The Respondents shall be required to comply with the said provisions within 21 days of service of the Plaintiff's paginated and indexed bundle of documents. The suit shall be mentioned on 28/07/2022 to confirm compliance.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF JUNE, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.