



REPUBLIC OF KENYA



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Kariuki & another v Nyotta & another (Environment & Land Miscellaneous Case E135 of 2022) [2022] KEELC 13504 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E135 OF 2022**

**JO MBOYA, J
OCTOBER 6, 2022**

BETWEEN

DANIEL KIMANI KARIUKI 1ST APPLICANT

BEBADIS COMPANY LIMITED 2ND APPLICANT

AND

JASPAL NYOTTA 1ST RESPONDENT

SEDCO CONSULTANTS LIMITED 2ND RESPONDENT

RULING

Introduction And Background:

1. Vide the notice of motion application dated the September 23, 2022, the 2nd applicant herein has approached the court seeking for the following reliefs;
 - i. Spent.
 - ii. The 1st applicant/respondent (Daniel Kimani Kariuki) be removed and barred from acting for and/or on behalf of the 2nd applicant in the proceedings herein.
 - iii. This honourable court be pleased to strike out and expunge from the record all the pleadings filed by the Daniel Kimani Kariuki on behalf of the 2nd applicant to wit certificate of urgency, notice of motion application and supporting affidavit all dated the July 26, 2022 and consequent court order emanating from the said pleadings.
 - iv. Any other order that this court honourable court deems fit and just to grant in the circumstances.
 - v. The costs of this application be provided for.



2. The subject application is premised on the various, albeit numerous grounds which have been enumerated in the body thereof and same is further supported by an affidavit (sic) sworn on the August 19, 2022. For clarity, the supporting affidavit predates the subject application.
3. Upon being served with the subject notice of motion application, the 1st applicant herein attended court but however same did not file any formal response, whether by way of replying affidavit or grounds of opposition.
4. Similarly, the respondents herein also did not file any formal response to the subject application or at all.

Deposition By The Parties:

i. 2nd Applicants case

5. Vide supporting affidavit sworn on the August 19, 2022, one Silvia Wambui Karanja (hereinafter referred to as the deponent), has averred that the 1st applicant herein is neither a director of the 2nd applicant nor is same authorized and mandated to act, appear and execute documents on behalf of the 2nd applicant at all.
6. Further, the deponent has averred that though the deponent was previously a director of the 2nd applicant, alongside Ruth W Muigwa, same seized to be directors of the 2nd applicant. Consequently, the deponent has clarified that the 1st applicant herein cannot therefore purport to file pleadings and documents on behalf of the 2nd applicant.
7. In any event, the deponent has added that as pertains to the subject dispute, the 2nd applicant has already filed and or lodged an appeal *vide* Milimani ELC A E050 of 2022, arising from the impugned orders issued by the Chief Magistrate's court on the May 24, 2022.
8. To the extent that the 2nd applicant herein has already filed and or lodged an appeal against the impugned decision, the deponent has averred that the subject proceedings by and/or on behalf of the 1st applicant amounts to and/or constitute an abuse of the due process of the court.
9. On the other hand, the deponent has added that currently the 2nd applicant herein only has one director and that is herself and not otherwise. For clarity, the deponent has clarified that by virtue of being the sole director of the 2nd applicant, it is only herself who is authorized and mandated to file pleadings and execute documents on behalf of the 2nd applicant.
10. Notwithstanding the foregoing, the deponent has added that the pleadings and documents which have been filed by and on behalf of the 1st applicant herein are merely calculated to prejudice the rights and interests of the 2nd applicant.
11. Other than the foregoing, the deponent has averred that as pertains to the subject matter, the 2nd applicant has instructed the firm of M/S Kamau Chege and Kagunyi Advocates to act for the 2nd applicant and therefore it is in appropriate for the 1st applicant herein to purport to be acting on behalf of the 2nd applicant.
12. Premised on the foregoing, the 2nd applicant has contended that it is appropriate and desirable to have the documents and pleadings filed by the 1st applicant herein to be expunged and struck out from the record of the honourable court.



13. In any event, the deponent has also added that the honourable court should also proceed to bar the 1st applicant herein from purporting to act on behalf of the 2nd applicant, even though same has no such mandates and authority, whatsoever.

Response by the 1st Applicant

14. The 1st applicant herein did not file any formal response, either by way of replying affidavit or grounds of opposition.

Response by the Respondents:

15. Similarly, the respondents herein also did not file any formal response, either by way of replying affidavit or grounds of opposition.
16. Essentially, the subject application was urged on the basis of the factual deposition alluded to in the supporting affidavit as well as the annexures attached thereto.

Submissions By The Parties:

a. 2nd Applicant's submissions:

17. When the subject application came up for hearing, counsel for the 2nd applicant sought to canvas and ventilate the application *vide* oral submissions.
18. Pursuant to and in line with the request, the subject application was canvassed *vide* oral submissions and counsel for the 2nd applicant raised two salient issues for determination.
19. First and foremost, learned counsel for the 2nd applicant submitted that the 1st applicant herein was previously a director of the 2nd applicant company alongside Ruth Wanjiru Muigwa and Silvia Wambui Karanja, respectively.
20. Nevertheless, counsel for the 2nd applicant added that the directorship of the 1st applicant and that of Ruth Wanjiru Muigwa lapsed and same were removed as directors of the 2nd applicant on the September 4, 2018.
21. Premised on the foregoing, counsel for the applicant has therefore submitted that having been removed as directors of the 2nd applicant, the 1st applicant herein can no longer hold himself out as a director of the 2nd applicant, for purposes of execution of any pleadings and documents to that effect.
22. Secondly, counsel for the 2nd applicant also submitted that though there has been a dispute pertaining to the directorship of the 2nd applicant herein, the issue as pertains to the directorship, is clear and apparent on the basis of the documents from the Business Registration Service, which underline that the 2nd applicant herein has only one director.
23. As concerns the nature, import and tenor of the orders that were issued *vide* Milimani Commercial and Tax Division Case No E115 of 2018, counsel for the 2nd Applicant submitted that the said orders only related to the management and control of the premises known as Ridgeways Inn- The Yard, but had nothing to do with the directorship of the 2nd applicant.
24. In respect of the propriety and probative value of the annexures that have been attached to the supporting affidavit, counsel for the 2nd applicant submitted that same complied with the provisions of rule 9 of the *Oaths & Statutory Declarations Rules*.



25. At any rate, counsel for the 2nd applicant added that the serialization of the annexure was done on a separate sheet of paper for purposes of neatness. However, same pointed out that the said serialization, does not negate and affect the probative value of the annexures.
26. Be that as it may, learned counsel for the 2nd applicant added that even assuming that the annexures were not properly serialized, which same contended was not the case, then the defect is curable by dint of the provisions of article 159 2(d) of the *Constitution* 2010.
27. In short, learned counsel for the 2nd applicant implored the court to find and hold that the 1st applicant herein has no mandate and authority to purport to act for and on behalf of the 2nd applicant.

b.Submissions by the Respondents:

28. Though the respondents did not formally file any replying affidavit or grounds of opposition, same nevertheless made submissions in support of the application on behalf of the 2nd applicant.
29. The respondents herein submitted that the 1st applicant ceased to be a director of the 2nd applicant and that the cessation of the 1st applicant to be a director is duly captured and reflected in the letter dated the March 11, 2022 issued by the Business Registration Service.
30. Premised on the fact that the 1st applicant ceased to be a director of the 2nd applicant, counsel submitted that any pleadings and documents filed by the applicant on behalf of the 2nd applicant, would thus be invalid and without the requisite authorization.
31. Secondly, counsel for the respondents also submitted that though there were proceedings at the High Court relating Milimani HCC E115 of 2018, culminating into the orders issued on the November 21, 2018, the said proceedings and the resultant orders did not concern or affect the directorship of the 2nd applicant.
32. For the avoidance of doubt, counsel for the respondents contended that the said proceedings and the resultant orders only related to the control and accesses to the premises known as the Ridgeways Inn-The Yard as opposed to the affairs of the 2nd applicant.
33. Finally, counsel for the respondents submitted that the annexures attached to the supporting affidavit by the deponent, are valid, lawful and legitimate.
34. At any rate, counsel for the respondents added that the commissioner of oaths serialization was securely fixed to the annexures and therefore the impugned annexures are compliant with the provisions of rule 9 of *Oaths and Statutory Declarations Rules*.
35. In the premises, counsel for the respondents therefore submitted that the pleadings filed by the 1st applicant herein and whereby same purports to be an authorized officer on behalf of the 2nd applicant ought to be struck out and expunged from the records.

c. Submissions by the 1st Applicant

36. On his behalf, the 1st applicant herein submitted that Ruth Wanjiru Muigwa and himself have lawfully remained as directors of the 2nd applicant. Consequently, the 1st applicant contended that by virtue of being a director of the 2nd applicant, same is authorized and mandated to act and appear on behalf of the 2nd applicant in the subject proceedings.



37. Secondly, the 1st applicant has contended that the dispute pertaining to the control and operation of the affairs of the 2nd applicant was the subject of Milimani HCC E115 of 2018, whereby the court issued orders authorizing himself to access and control the operation and affairs of the 2nd applicant herein.
38. At any rate, the 1st applicant added that vide the court orders issued on the November 21, 2018, the court also confirmed that it is himself (1st applicant), who was authorized and permitted to run the business and the affairs of the 2nd applicant herein.
39. Essentially, the 1st applicant has thus submitted that by dint of the orders of the honourable court issued *vide* Milimani HCC No E115 of 2018, same is the only authorized and mandated person to act on behalf of the 2nd applicant.

Issues for Determination

40. Having reviewed the application dated the September 23, 2022, the supporting affidavit thereto and having considered the submissions ventilated by and on behalf of the respective parties, the following issues do arise and are thus germane for determination;
 - i. Whether the annexures attached to the supporting affidavit comply with the provisions of rule 9 of *Oaths and Statutory Declarations Rule* and if not whether same ought to be expunged.
 - ii. Whether the 1st applicant herein is lawfully authorized and mandated to act for and on behalf of the 2nd applicant or otherwise.

Analysis and Determination

Issue Number 1. whether the annexures attached to the supporting affidavit comply with the provisions of rule 9 of oaths and statutory declarations rule and if not whether same ought to be expunged.

41. The supporting affidavit sworn by one Silvia Wambui Karanja, has attached and or exhibited various annexures thereto, which annexures the deponent is keen to rely upon for purposes of vindicating the claim and contention that same is the only director of the 2nd applicant and thus authorized to execute pleadings and document on her behalf.
42. To the extent that the supporting affidavit and the incidental annexures are intended to be relied upon and utilized in the course of the legal proceedings herein, it was incumbent upon the deponent or better still her advocates, to ensure that the annexures to the supporting affidavit are securely sealed thereto by the commissioners seal.
43. Suffice it to point out, that the sealing of the annexures, is important for purposes of identification thereof and authentication of the annexures in question. I may add, that the sealing of same in accordance with the law also speaks to the probative value of such annexures.
44. At any rate, it also worthy to underscore that it is the sealing of the annexures by the commissioner seal, which by law must be securely affixed thereto, that enables the annexures to have legal meaning and thus probative value before a court of law.
45. Consequently, where the annexures to be used and relied upon in the legal proceedings are not securely sealed thereto by the commissioner's seal, then the impugned annexures become invalid, devoid of probative value and are thus of nominal importance, if at all.



46. To this end, it is important to take cognizance of the provisions of rule 9 of the *Oaths and Statutory Declarations Rules*, whose import and tenor are essential, paramount and critical as far as serialization of annexures is concerned.
47. For convenience, the provisions of rule 9 provides as hereunder;
- “ All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”
48. In respect of the subject matter, the deponent has alluded to various annexures, which are intended to fortify and vindicate the various averments in the supporting affidavit. However, the annexures that have been alluded to have not been securely sealed thereto with the commissioners seal, either as required or at all.
49. Contrarily, what the deponent has done is to place a trendy piece of paper on top of the annexure and thereafter proceeded to affix the commissioner seal on the trendy piece of paper, which precedes the annexures. For clarity, the impugned seal is not endorsed upon or securely affixed on the annexure, but on the piece of paper which precedes the annexure.
50. To my mind, the law is explicit, clear and devoid of ambiguity. Simply put, the commissioner’s seal is required to be securely affixed on the annexure, for purposes of identification and authentication and therefore to eliminate instances where a separate document could be placed before the commissioner for purposes of identification and thereafter same is replaced by a separate and distinct document which was not placed before the commissioner for sealing.
51. Despite the requirement of rule 9, counsel for the 2nd applicant contended that same had chosen to affix and or cause the affixation to be done on a trendy piece of paper for purposes of neatness.
52. Notwithstanding the foregoing, the clear provisions of the law, do not give any window and latitude for litigants, their advocates or the commissioner of oath to do as same pleases. To my mind, the law speaks and same is obligatory on all and sundry to obey and comply with the law, without adulteration thereof.
53. Consequently and in the premises, it is my finding and holding that the annexures attached to the supporting affidavit, which have not been securely sealed by the commissioner’s seal are therefore incompetent, invalid and devoid of any probative value.
54. In short, the said annexures are amenable to be expunged and same are hereby expunged.
55. Having expunged the impugned annexures for want of compliance with the mandatory provisions of rule 9 of *Oaths and Statutory Declarations Rules*, it then means that the paragraphs alluding to the said annexures are also devoid of any legal anchorage and same also courts expunction.
56. In the premises, I proceed to and do hereby expunge paragraphs 2, 7, 15, 18, 21 and 24 of the supporting affidavit sworn on the August 19, 2022.
57. To underscore the importance of the provisions of rule 9 of the *Oaths and Statutory Declarations Rules* (whose terms have been reproduced elsewhere herein before) it is imperative to take cognizance of the decision in the case of *Abraham Mwangi v S O Omboo & others* HCCC No 1511 of 2002 , where the court observed as hereunder;

“ Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits



are therefore rejected and struck out from the record. That marks the affidavit incomplete and hence also rejected...”.

58. Similarly, the importance of the serialization of annexures and essentially compliance with rule 9 of the *Oaths and Statutory Declarations Rules*, was also revisited in the holding in the case of *Solomon Omwega Omache & another v Zachary O Ayieko & 2 others* [2016] eKLR, where the court (Hon Justice Mutungi, Judge) observed as hereunder;

“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 wakeup 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 assistants lack of attention and due diligence”.

59. Respectfully, the dictum in the foregoing decision underscores the importance and peremptory nature of the provisions of rule 9. Consequently, any party who breaches or fails to comply with the requirement thereof, shall only have him/her to blame, where the impugned annexures are expunged or struck out.
60. At any rate, it is appropriate to observe that compliance with the rules of procedure is still essential, critical and mandatory, for all persons who seek to partake of Justice before the various courts of law.
61. As concerns the need and necessity to adhere to the mandatory rules of procedure, it is appropriate to revisit the words of the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* civil appeal No 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (cap 9). Procedure is also a handmaiden of just determination of cases.”

62. Premised on the foregoing, I find and hold that the impugned annexures are devoid of probative value, invalid and same are therefore expunged.
63. Having expunged the impugned annexures, it therefore means that there is no credible basis upon which the deponent of the supporting affidavit can claim to be the (sic) only legitimate director of the 2nd applicant. For clarity, such allegation would be in vacuum and devoid of legal anchorage.
64. In a nutshell, the application dated the September 23, 2022, but supported by the affidavit sworn on the August 19, 2022, (which affidavit predates the application) is therefore incompetent.

Issue Number 2. whether the 1st applicant herein is lawfully authorized and mandated to act for and on behalf of the 2nd applicant or otherwise.

65. Notwithstanding the defects that inflict the subject application and the supporting affidavit thereto, there is still one other critical issue worthy of determination.



66. Suffice it to point out, that the deponent of the supporting affidavit has observed and stated that there is a dispute pertaining to and concerning the directorship, control and operations of the 2nd applicant company. For clarity, it was pointed out that the said dispute is pending hearing and determination before Milimani HCC E115 of 2018.
67. Further, it was also stated that on the November 21, 2018, Lady Justice Mary Kasango, judge issued certain orders pertaining to and concerning the affairs of the 2nd applicant company.
68. For purposes of appreciating the nature and terms of the orders which were issued by Lady Justice Mary Kasango, judge, it is appropriate to reproduce some segments/clauses of the orders of the court.
69. For coherence, the terms of the said order are reproduced as hereunder;
 - a. That an Injunction is hereby issued restraining Silvia Wambui Karanja and Ridgeways Yard Company Ltd by themselves, their servants or agents or anyone acting on their behalf from interfering in any manner with Daniel Kimani Kariuki's access and control of the operations and affairs of the Bebadies Company Ltd premises known as Ridgeways Inn – the Yard pending the hearing and determination of this suit.
 - b. Spent
 - c. Spent
 - d. That for the avoidance of doubt, Daniel kimani Kariuki is the sole person permitted by this honourable court to run the business of The Bebadies Company ltd at LR No 27/272 along Kiambu Road until further orders of this court.
70. My understanding of the orders that were issued by Lady Justice Mary Kasango, judge is to the effect that the 1st applicant herein is the sole person mandated to run, operate and control the operations and affairs of the 2nd applicant herein, pending the hearing and determination of the impugned suit.
71. On the other hand, during the hearing of the subject application, counsel for the applicant admitted that the suit *vide* Milimani HCC No E115 of 2018, was still pending hearing and determination. Effectively, it then means that the orders whose details have been reproduced herein before are still operational and in existence.
72. Notwithstanding the foregoing, submissions were also made by counsel for the applicant that the terms and tenor of the orders of Lady Justice Mary Kasango, judge which I have alluded to herein before were ambiguous and equivocal.
73. However, despite the contention that the said orders were ambiguous and equivocal, counsel for the 2nd applicant did not address the issues as to whether the said orders have since been reviewed, varied and discharged.
74. To my mind, the import and tenor of the orders of Lady justice Mary Kasango, judge, which were rendered on the November 21, 2018 are clear and explicit. In short, the said orders denote that the 1st applicant herein remains the sole and lawful person mandated to control the operations and affairs of the 2nd applicant company.
75. In view of the foregoing, the 1st applicant herein is therefore authorized and mandated to sign pleadings, documents and to appear in a court of law, in any matter wherein the operations and affairs of the 2nd applicant company are concerned and involved.



76. Essentially, by dint of the orders of Lady Justice Mary Kasango, judge which were rendered on the November 21, 2018, the 1st applicant herein is therefore lawfully mandated to file, originate and maintain the subject proceedings, on his own behalf and on behalf of the 2nd applicant company.
77. Certainly, the said capacity shall exist, continue and remain for as long as the orders in question have not been set aside, varied and impeached.
78. It must be observed that court orders are never issued in vain. Consequently, where the court has issued orders, it behooves all and sundry to comply with and adhere to the terms of the said orders, until and unless same are lawfully vacated and discharged.
79. To this end, it is appropriate to adopt and endorse the words of the court in the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 others* (2013) eKLR, where the court held as hereunder;

“A court order is not a mere suggestion or an opinion or a point of view.

It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this court will not be the one to open that door.

If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

Final Disposition

80. Having reviewed the issues for determination that were isolated, amplified and highlighted in the body of the ruling herein, it is imperative to observe that the subject application, is not only incompetent to the extent that same is anchored on an invalid affidavit, but same is similarly devoid of merits.
81. Consequently, I come to the conclusion that the application dated the September 23, 2022 courts dismissal. In this regard, same be and is hereby dismissed with cost to the 1st applicant.
82. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant.

Mr. Daniel Kariuki for the 1st Applicant

Mr. Okulo for the 2nd Applicant

Mr. Desmond Otwal for the Respondents

