



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1396 OF 1999**

**CALTEX OIL (KENYA) LIMITED..... PLAINTIFF**

**VERSUS**

**NEW STADIUM STATION LTD)**

**KARIM ISMAIL SURANI ) .....DEFENDANTS**

**R U L I N G**

On 24th January 2000 as the court was hearing an application dated 14th October 1999 and filed into the court on 15th October 1999 by the Defendant in this case some anomalies were noted in the affidavits of one Oluka and the hearing was adjourned for parties to look into the then alleged anomalies further. On 15th February 2000 when the hearing of the same application resumed Mr. Amin for the Respondent raised an objection stating that the affidavits sworn by Nazir Ismail Surani, the Managing Director of the first Defendant/Applicant Company was sworn before Cyprian M. Wanyonyi Wekesa as the Commissioner for Oaths. Mr. Wekesa was at the relevant time the advocate for the second Defendant who was an interested party. Mr. Amin urged me to treat that Affidavit as a nullity. He also stated further that Affidavits filed on 9.2.2000 in support of the Defendants/Applicants' application were adduced after the close of the same Applicant's submission and so could not be admitted at that stage, and no formal leave of the court was granted to file them. Mr. Rebello for the Applicant, after stating that the affidavits did not prejudice the parties and that they do not alter the evidentiary nature of the application then applied for leave to file a formal application for leave to file further affidavits. This was granted and hence this application dated 13th March 2000 brought under Section 3A of the Civil Procedure Act and Order 18 of the Civil Procedure Rules and all other enabling provisions of the law. The application is seeking the following orders:

- “1. That the first Defendant be granted leave to file the three affidavits of Nazir Ismail Surani sworn on the 11th March 2000 (previously sworn on the 14th October 1999 the 25th October 1999 and 24th November 1999) the affidavit of Nazir Ismail Surani sworn on the 8th February 2000 together with the affidavit of Dr. Justin Erimu Oluka sworn on the 8th February 2000 the affidavit of Mr. Wanyonyi Wekesa sworn on the 8th February 2000 and a new affidavit made by Karim Ismail Surani on the 11th March 2000 all in support of the first Defendant's application dated the 14th October 1999 filed in court on the 15th October 1999 upon such terms as this Honourable court deems appropriate.
2. That the aforesaid affidavits be deemed to have been duly filed upon such terms as this Honourable court deems appropriate.
3. That this Honourable court do make such further orders as it deems appropriate having regard to all the circumstances.
4. That this Honourable court do make such orders as to the costs of this application as it deems appropriate.

The grounds for the application were:

1. That this application seeks to correct an irregularity in the making of the affidavits aforesaid.
2. That the said irregularity is as to form only.
3. That it would be inequitable for the court to dismiss the first Defendant's application of the 14th October 1999 in the absence of evidence in support thereof.
4. That the replying affidavits of the Plaintiff are of no evidentiary value in the absence from the record of the resworn affidavits.

5. That no prejudice has been caused to the Plaintiff.
6. That the application is of grave importance to the first Defendant and ought to be determined upon merit.
7. That conduct of the Plaintiff has been criminal in that the Plaintiff is unlawfully in possession of the suit premises and seeks to gain an advantage by its criminal conduct.
8. That Plaintiff has unlawfully paralysed and brought to a halt the business operation of the Defendant and has ignored the finding of this Honourable court that it obtained an *ex parte* unlawfully.
9. The errors of advocates ought not to prevent the Honourable court from doing substantive justice to the Applicant, and
10. That the Plaintiff can be readily compensated in costs.

There are two Affidavits in support of the application – one sworn by Nazir Ismail Surani and another by Wanyonyi Wekesa. There are also annexures to the same Affidavits.

The Respondent/Plaintiff opposed the application and filed Grounds of Opposition to the same application. It states in its grounds of opposition as follows:

1. That the application is misconceived, incompetent and bad in law.
2. That the purported affidavits of Nazir Ismail Surani sworn on 14th October 1999, 25th October 1999 and 24th November 1999 annexing the purported Affidavit of Dr. Justin Erimu Oluka sworn on 24th November 1999 are a nullity in law as they were sworn in contravention of the mandatory provisions of the Oaths and Statutory Declarations Act (Cap 15 of the laws of Kenya).
3. That the said purported Affidavits do not contain a mere irregularity as to form but were illegally sworn and do not substantially exist as Affidavits in law or in fact.
4. That there exists no provision in law under which the 1st Defendant can apply to this Honourable court for leave to file the three Affidavits of Nazir Ismail Surani sworn on 11th March 2000, on 8th February 2000 annexing the affidavit of Dr. Justin Erimu Oluka sworn on 8th February 2000. The affidavit of Wanyonyi Wekesa sworn on 8th February 2000 and the affidavit of Karim Ismail Surani sworn on 11th 2000 at this stage of the proceedings or at all.
5. That prejudice will be caused to the Plaintiff if this Honourable court grants the 1st Defendant the orders sought.
6. That the application is an abuse of the process of this Hon court.

The Replying Affidavit in support of the same grounds of Opposition was sworn by Edith Malombe on 28th May 2001 and filed into the court on the same day. It mainly repeats the grounds of opposition except it adds a clause that the Orders that the First Defendant is seeking are in effect amendments of evidence which amendment the law does not provide for.

I have considered the application, the affidavits, the annexures to the same affidavits, the able submissions by the learned counsels and the legal authorities to which I was referred.

It is not in dispute that the application by way of chamber summons dated 14th October 1999 and filed into the court by the Applicant herein which was also the Applicant in that application and is the first Defendant was supported by affidavit of Nazir Ismail Surani sworn dated 14th October 1999. It is also not in dispute that that Affidavit was sworn before one Cyprian M. Wanyonyi Wekesa who commissioned it as the Commissioner for Oaths. Mr. Wekesa was at that time the advocate representing the 2nd Defendant Karim Ismail Surani in the matter. (He filed Memorandum of Appearance and Grounds of Opposition to the Plaintiff's application dated 14th October 1999 the which Memorandum of appearance and Grounds were filed on 15th October 1999). This fact is also not disputed. He was thus an interested party and had no business commissioning the Affidavit of the First Defendant and indeed on the very day he was also signing Memorandum of Appearance and grounds of opposition in the very same case. Further, he again was the Commissioner for Oaths before when another Affidavit sworn by Nazir Ismail Surani on 25th October 1999 was sworn. Assuming he had any doubts earlier on, at least by this time he had been into the case for over a week and he should have known better. Equally the same Surani must have known by this time that Wekesa was a counsel in the matter. That he should not have commissioned this Affidavit is not disputed. Again on 24th November 1999, he was the Commissioner for Oaths before when two other affidavits were sworn – one by Nazir Surani and another by Justin Erimu Oluka. These again should not have been sworn before him. This again is not disputed. Indeed Mr. Rebello the learned counsel for the Applicant in his opening remarks of his submission readily conceded the error and said that Wanyonyi Wekesa being an advocate on record should not have acted as Commissioner for Oaths in the circumstances. I do note with respect however that throughout the same circumstances Mr. Rebello was the counsel for the same first Defendant/Applicant and may find it difficult to deny any knowledge of what was going on as he ought to have been aware of who was commissioning his client's Affidavit. Be that as it may these Affidavits, it is conceded were not properly before the court when the matter was partly heard to the extent that Mr. Rebello for the Applicant had completed his submission in chief and Mr. Amin was almost winding up his submission when the anomalies were discovered.

The Applicant has now brought his application under Order 18 Rule 7 and it is seeking that it be allowed to file the Affidavit sworn on 11th March 2000 to replace the same purported Affidavits of 14th October, 25th October and 24th November 1999. He also wants to file fresh Affidavits sworn on 8th February 2000 by Nazir Ismail Surani, together with affidavit of Dr. Justin Erimu Oluka sworn on 8th February 2000, and two affidavits - one by Wekesa sworn on 8th February 2000 and one by Karim Ismail Surani on 11th March 2000 in support of the

application dated 14th October 1999.

Order 18 Rule 7 of the Civil Procedure Rules states as follows:

“7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdirection of the parties or otherwise in the title or other irregularity in the form thereof”.

Second ground of the Applicant's grounds for this application is that the irregularity in the Affidavits sworn on 14th October 1999, 25th October 1999 and 24th November 1999 were “as to form only”. I have carefully perused Mr. Rebello's submission and the authorities he cited and I do find that he based his submission (as far as these three Affidavits are concerned) on the contention that the act of swearing them before a Commissioner of Oaths who was a counsel in the matter is an irregularity which did not render them a nullity and that being the case the court could exercise its discretion and allow replacement.

Before I proceed further, I do feel the affidavits I am being asked to exercise my discretion and admit are in two categories. These are first the affidavits that are meant to replace the affidavits sworn on 14th October 1999 and 24th October 1999 and 24th October 1999. These were the affidavits wrongly sworn before a Commissioner for Oaths who was interested in the matter. The second category are the affidavits that are sought to be added later and these are those Affidavits sworn on 8th February 2000 by Surani, Dr. Oluka and Wekesa respectively and the Affidavit sworn on 11th March 2000. I will deal with the first category first.

As I have stated, it seems to me that these Affidavits are the ones the Applicant wants me to receive under Order 18 Rule 7 on the allegation that the error made in the first Affidavits were mere irregularity. Was the error in commissioning the affidavits sworn on 14th October, 25th October and 24th November 1999 a mere irregularity that would fall under order 18 Rule 7.

With profound respect, I disagree. These affidavits were clearly in breach of the provisions of an Act of Parliament namely The Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya. They were not irregularity as to form only as the Applicant would have me believe. Section 4(1) of the Oaths & Statutory Declaration Act is clear. It states:

“4.(1) A Commissioner for Oaths may, by virtue of his commissioning, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument; whether under an act or otherwise, and take any bail, or recognizance in or for the purpose of any civil proceeding in the court or any subordinate court;

Provided that a Commissioner for Oaths shall not exercise any of the powers given by this Section in any proceeding or matters in which he is the advocate for any of the parties to the proceeding or concerned in the matters, or clerk to any such advocate, or in which he is interested”.

In my humble opinion any attempt to reduce such an Act of Parliament to a mere irregularity is an affront to our laws. Indeed a look at this provision will clearly show that the provisions in Order 18 Rule 7 being provision for taking Oaths for civil proceedings emanates partly from this Section of an Act of Parliament. Breach of this section as happened here cannot be treated as a mere irregularity or as an irregularity as to form only. I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretences whatsoever. I still stand by what I did say in the case of James Francis Kariuki & Another vs. United Insurance Co Ltd HCCC No. 1450 of 2000 that such an Affidavit sworn in violation of section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title. Mr. Rebello has asked me to consider that it was a mistake by a third party namely the advocate and that being the case, the error should not be visited upon the deponents. My answer to that is first that as this was a breach of an Act of Parliament, the deponents cannot hide under the advocate concerned as ignorance of the law is no defence. They chose the person to swear Affidavits before. They knew only too well that the same Commissioner for Oaths was representing second Defendant who is alleged to be a director and shareholder of the first Defendant. They cannot all of a sudden turn round and say they did not know what they were doing. Secondly if they did not know that Wekesa should not have commissioned the affidavits, (and it is possible a person like Dr. Oluka may not have known that) then their counsel who did draw all the offending affidavits knew that Wekesa was involved in this matter and the same counsel as the agent of the deponents had a duty to ensure the affidavits were sworn before the correct person. I feel certain in my mind that whatever way one looks at those affidavits, they were simply not Affidavits at all for purposes of the law. I have considered the affidavits in support and I do not think the errors were inadvertent.

The Applicant now wants to replace them with three other affidavits and is seeking my discretion to allow that to be done. First I do note as Mr. Amin rightly points out that it will be irregular for the application dated 14th October 1999 and filed on 15th October 1999 to state that it is supported by an Affidavit which was filed on 13th March 2000. There is in my mind a wide difference between a supporting affidavit which accompanies the application and any other further, or supplementary affidavits that can follow even much later.

Secondly is the conduct of parties. Assuming for the purposes of argument that Mr. Wekesa acted inadvertently as he and Surani allege in their Affidavits, one may still ask few questions one of which is that the first two Affidavits were sworn on 14th October and 25th October 1999. On 15th October 1999, Mr. Rebello and Mr. Wekesa appeared in court (only one day after the first affidavit of Surani had been “inadvertently” sworn before Wekesa). They appeared for another application which was by the Plaintiff/Respondent. On 22nd October 1999, the two again appeared in court for their respective clients. On 25.10.1999, the day the second Surani's affidavit was sworn before Wekesa, the same two learned counsels did appear again in court. On 26th October 1999, Mr. Wekesa appeared in court and held Mr. Rebello's brief. On 1.11.99, Mr. Rebello and Mr. Wekesa did appear in court and Mr. Wekesa addressed the court after Mr. Rebello. They also appeared on 9.11.99 and lastly on 15.11.99. That being the case can he still claim it was through inadvertence that he did commission the oath sworn on 24th November 1999. Surely that was deliberately done. Further, all this time upto 24th January 2000 when this matter was discovered, why could not the Applicant and its Advocate come out clean and tell the court of the serious errors which had to be discovered only at the hearing of the application. It is now trite law that he who comes to equity must do so with clean hands and that equity

does not aid the indolent.

From the above, it must by now have been clear that I cannot exercise my discretion to grant leave to the First Defendant/Applicant to file the three affidavits of Nazir Ismail Surani sworn on 11th March 2000 replacing the offending Affidavits and that limb of the application is dismissed.

I now turn to the second category of the Affidavits. These are the Affidavits of Nazir Suranis sworn on 8th February 2000, together with affidavit of Dr. Justin Erimu Oluka sworn on 8th February 2000 and a new affidavit made by Karim Ismail Surani on 11th March 2000 and affidavit of Wanyonyi Wekesa sworn on 8th February 2000. Three of these affidavits i.e. Affidavits sworn by Nazir Surani on 8th February 2000, sworn by Justin Erimu Oluka on 8th 2000 and that sworn by Wekesa on 8th February 2000 were all filed on 9th February 2000 without leave of the court. I have perused fully the affidavits in support of the application sworn by Wekesa and Nazir Ismail Surani. It seems to me that these affidavits are sought to be filed so as to correct some mistakes earlier on made in the affidavits of Oluka (which I have already rejected) and a new Affidavit of second Defendant with regard to a recent event that was an acquittal of an accused person in prosecution by Kenya Bureau of Standards. No reason has been given as to why the affidavits sworn on 8th February 2000 were filed without leave of the court. Further as I had stated hereinabove the hearing of the application dated 13th March 2000 was almost being completed when the problem in respect of the mistake in Oluka's affidavit was discovered and when the error on the earlier affidavits was also discovered. The learned counsel for the Applicant had addressed me in chief and the learned counsel for the Respondent/Plaintiff was almost finalising his address to me. In my mind it would be prejudicial to the Respondent to allow the First Defendant to introduce these affidavits at this stage of the case and it would mean no end to the application as the Respondent would need to file affidavits in reply to the same as well.

Justice must be done to all parties to a suit and it would be unfair to allow the Applicant to do what may be in a way opening its case afresh.

Further it was wrong for the Applicant to file these three affidavits without leave of the court and now seek to have the court stamp that irregularity and make it valid. I would not do so. This limb is also dismissed. If the Respondent is acting in disobedience of court orders the Applicant knows only too well what action to take in such circumstances.

For the above reasons, application dated 13th March 2000 is dismissed in its entirety. Costs to the Respondent/Plaintiff. Orders accordingly.

Dated at Nairobi this 16th day of January 2002.

**ONYANGO OTIENO**

**JUDGE**