



**M'rabu v Mulagui (Environment & Land Case 134 of 2015)
[2024] KEELC 466 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 134 OF 2015
FM NJOROGE, J
FEBRUARY 6, 2024**

BETWEEN

DOMINIQUE LEWA M'RABU PLAINTIFF

AND

AGNES SHAKO MULAGUI DEFENDANT

RULING

The Application

1. The motion dated 20/11/2023 is the subject of this ruling. By it the defendant seeks that the judgment of this court delivered on 22/11/2019 be set aside and that the defendant be granted leave to file its defence in this suit.
2. The grounds for the application are that the defendant was not served with summons to enter appearance and plead and other documents filed by the plaintiff. Regarding the memorandum of appearance filed by the firm of Marende Birir & Co Advocates, the applicant avers that they were filed without her knowledge or authority. The same allegation is levelled against another firm, J.K. Mwarandu regarding their action of filing defence on the defendant's behalf in the matter. The applicant also avers that the judgment was obtained by way of fraud and misrepresentation by the plaintiff, and that he only came to know of the judgment in the matter after he was arrested and charged with the offence of trespass whereupon she immediately instructed the present firm of advocates in this matter. She urges for a full hearing of the matter on its merits inter partes, and believes that no prejudice would be occasioned to the plaintiff if the judgment were set aside.
3. Contemporaneously with the filing of the application, the applicant also filed a statement of defence and counterclaim, irregularly though, as it is not an annexure to the application.



Response by the plaintiff.

4. The plaintiff filed a replying affidavit sworn by Robert Arati Nyachiro, his advocate on 11/1/2024. In that affidavit it is deposed that the deponent of the affidavit in support of the application lacks capacity to swear it on the defendant's behalf, that she is not competent to swear matters regarding whether or not the defendant was served with pleadings and further that the process server was not called to court for cross examination; that on that basis per se, the application should be struck out. He also points out that the deponent does not deny that two firms of advocates filed different documents at different times in the matter on the defendant's behalf but failed to file defence; that judgment was passed in the presence of the second advocate, a Mr Shujaa, and the decree was also served on the defendant later on which was executed and the defendant evicted from the suit property; that the court is thus functus officio; that immediately after execution issued, the defendant lodged a fresh suit being ELC 68 of 2021 suing the plaintiff herein and 3 others, and that is when she ought to have moved this court for a setting aside order and thus the delay is inordinate; that the defendant's counsel ought to have secured leave to come on record after judgment in this matter which she failed to do; that the plaintiff raised the issue that that suit was res judicata owing to the present case and a preliminary objection to that effect was determined on 14/2/23; that the defendant is on a fishing expedition.

Analysis and Disposition.

5. I will address one issue on a preliminary basis which may dispose of the motion in limine, and that is the issue that the deponent of the supporting affidavit lacks capacity to swear to the matters in the affidavit.
6. An application is usually required to be supported by affidavit evidence, though there is a history of applications not so supported being allowed by the Civil Procedure Rules in the past, for example, where a suit was sought to be struck out for not disclosing any cause of action. The affidavit must comply with the provisions of Order 19 of the Civil Procedure Rules. Order 19 Rule (3) 1 provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove

Provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”
7. Rule 9 of the Advocates (Practice) Rules provides: -

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration of Affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration on affidavit, he shall not continue to appear

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”
8. The affidavit supporting the present application was sworn by the advocate for the applicant and at the first paragraph the deponent states that she is authorized to make and swear it but she does not attach her client's written authority to that effect. Counsel must remember that she is counsel and she must distinguish between her general authority to represent her client in litigation from the specific



- authority to swear affidavits in her own name on her client's behalf; they are not one and the same thing in my view.
9. At paragraph 2 counsel for the defendant proceeds to state that she has full knowledge of all the facts concerning this matter and on that basis she is competent to swear the affidavit. There is no bar against an advocate swearing an affidavit in any litigation save that he or she must be having personal knowledge of the matters therein. Matters that have occurred during counsel's participation in a suit are examples of matters that she can depone to.
 10. In *Magnolia PVT Limited v Synermed Pharmaceuticals (K) Ltd* (2018) eKLR, the Court state as hereunder:

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.”
 11. The court in *Oriental Commercial Bank Ltd v Shreeji Contractors Ltd & 2 others* [2021] eKLR, citing *Magnolia PVT Limited*, explained the above principle thus:

“This principle is grounded in the rules governing conflict of interest and the need for counsel as an officer of the Court to retain an appropriate level of professional objectivity. To protect the integrity of the legal process, the Court cannot countenance counsel for a party placing his or her own credibility in issue on an important point of evidence.”
 12. In the case of *Turea Limited t/a Dr. Mattress v Mohamed* (Civil Application E030 of 2022) [2022] KECA 1271 (KLR) (18 November 2022) (Ruling) it was stated that

“...under Rule 9 of the *Advocates Practice Rules*, it is not the mere swearing of an affidavit by an advocate that renders it defective, but the swearing of an affidavit on contentious issues of which he or she has no knowledge of. The said rule has a proviso that expressly states so as follows: “Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears”.
 13. In the *Turea Limited case* (*supra*) the court singled out matters such as failure to file the Notice of Appeal and the cause of delay, which the advocate specifically stated came to his knowledge when he was preparing the memorandum of appeal, and was caused by his clerk and the arguability of the intended appeal, which are arguments of law and stated that they can not be said to be contentious issues.
 14. In the *Oriental Commercial Bank Ltd case* (*supra*) the court stressed that:

“However, countless cases have stated that there [are] certain procedural motions which turn on evidence that counsel can provide, such as the chronology of the action or facts regarding



how litigation has progressed. Indeed, in those types of cases, the factual evidence of the Counsel is preferable to that of the client and is largely considered non-contentious – merely a convenient way to organize and identify evidence already on Court record. Indeed, the affidavit itself might be unnecessary.”

15. However, there are in the present case contentious matters regarding which counsel for the defendant, who has been instructed only recently, can not swear from first-hand knowledge which prominently stick out- the allegation at paragraph 5 that the plaintiff failed to serve the defendant with documents including summons to enter appearance; the allegations at paragraphs 6, 7, 8 and 11 to the effect that the advocates who filed documents on behalf of the defendant lacked her instructions and so the judgment was obtained by fraudulent means against her; the allegation at paragraph 12 that the defendant only caught wind of the present matter after she was charged with the offence of trespass. These are matters which occurred before counsel was instructed by the defendant and they cannot obviously be things that she experienced first-hand or has knowledge of. The evidence of the defendant herself is missing and her counsel’s belief in those matters would have to be premised on information whose source she has failed to disclose, and which this court is not able to presume.
16. Considering that the plaintiff has already made reference to the issue of cross-examination of deponents in his response, and cross-examination can be of deponents from both sides in the matter, the issue arises as to whether truly the deponent would be able to stand by her assertions and prove them if she were put to the task. There is also no indication that her deposition of the matters set out in the paragraphs of her affidavit mentioned herein above are premised on information from her principal, the defendant. And even if they were, there is no merit in a court of law granting very final orders in an interlocutory application that has such wide ramifications as a full retrial of a case on the basis of matters purely of information and belief.
17. This is not an interlocutory application, but one that seeks to set aside the judgment in favour of the plaintiff in the case. This is therefore an application in which I think the deponent of the supporting affidavit should be the defendant herself, who could if placed in the stand answer to the allegations in more detail and present proof thereof if it came to that.
18. I therefore consider that the affidavit of the counsel for the applicant is inadequate to address the most relevant issues in the present application, that she is incompetent to swear to those issues, and that that prejudices the fair trial of the application inter partes.
19. For those reasons I hereby strike out the application dated 20th November 2023 with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF FEBRUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

