



**Kibet v Chelimo (Environment and Land Appeal E016 of 2022)
[2023] KEELC 16265 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E016 OF 2022**

**L WAITHAKA, J
MARCH 13, 2023**

BETWEEN

JOHN KISANG KIBET APPLICANT

AND

PAUL KIMUTAI CHELIMO RESPONDENT

RULING

1. By a notice of motion dated October 4, 2022 and filed on October 6, 2022 John Kisang Kibet (hereinafter after referred to as the appellant/applicant inter alia seeks stay of execution of the judgment delivered on September 14, 2022 in Iten SPMCC No E006 of 2020 and any consequential orders emanating therefrom pending the hearing and determination of the application and the appeal herein.
2. The application is premised on 13 grounds that can be summarized to two namely; that aggrieved by the judgment of the lower court the appellant/applicant appealed to this court; that the appeal has high chances of success and that unless the orders sought are granted the appellant/applicant may suffer irreparable injury as he may be evicted from the suit property.
3. Based on information given by counsel for the appellant/applicant that the application and hearing notice in respect thereof had been served on the advocate for the respondent but not response had been filed and the “affidavits of service” filed by appellant/applicant’s advocate confirming that fact, this court deemed the application as unopposed but saw it fit to consider it on its merits.

Defective affidavits of service

4. As part of consideration of the application on its merits, I have looked at the “affidavits” filed by the appellant/applicant’s advocate, Carey Francis Otieno, filed on November 14, 2022. I note that the affidavits are not legally speaking affidavits as they are not signed by the person who purportedly signed them. The date on which they were signed is also not indicated, making them incurably defective. In



that regard see the case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others (2018) eKLR where it was held:-

“...We have no hesitation in finding that the purported replying affidavit filed by the 1st respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the replying affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no replying affidavit on record filed by the 1st respondent.”

Order deeming the application unopposed unmaintainable

5. Having found the affidavits of service that formed the basis for deeming the application unopposed fatally defective, I find and hold that they are incapable of forming the basis of that determination.
6. The right to a fair hearing being a cardinal right and principle in our legal system, it cannot be taken away or denied the respondent in the circumstances of this case based on an affidavits of service that have been found to be fatally defective.
7. The order that comments itself in the circumstances is to set aside the order/direction deeming the application as an opposed, which I hereby set aside.
8. The appellant/applicant is directed to effect proper service of the application which is set down for interpartes on March 22, 2022.
9. Orders accordingly.

RULING READ, DATED AND DELIVERED, AT ITEN THIS 13TH DAY OF MARCH, 2023

L. N. WAITHAKA

JUDGE

In the presence of:-

Mr. C. F. Otieno for the appellant/applicants

N/A for the respondents

Christine Towett – court assistant

