



REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

ELC CASE NO. 262 OF 2013

JAMES NYANGWESO NYAGOL.....PLAINTIFF/APPLICANT

VERSUS

LILIAN ANYANGO OKELLO (sued as the legal representative of

CHILLION RAKWACH (DECEASED).....DEFENDANT/RESPONDENT

RULING

The plaintiff filed the above application seeking to set aside the ex parte proceedings of the 18th October 2018 dismissing their suit for non-attendance together with the judgment entered on 18/10/2018 and all consequential orders thereafter. The Plaintiff averred that he was never served with any mention or hearing notices after the 11th of May 2015. And that even after the deceased defendant died on 13/8/2015 he wasn't aware of any substitution having taken place. It was his further contention that as a result he was denied a fair hearing on the 18/10/2017 when the suit was dismissed for non-attendance. He stated that the plaintiff raises serious triable issues that should be ventilated in court. The defendant on her part filed a replying affidavit dated 2/2/2021 sworn by the Defendant herself, in which she averred that the supporting affidavit was incompetent having been commissioned by a law firm instead of a commissioner for oaths. She further contended that despite being served numerous times, the plaintiff for one reason or the other never attended court. That specifically on the 18/10/2017 when the matter was scheduled for hearing the plaintiff was served but he still did not attend court.

The defendant stated that there was already a judgment and execution process was also at an advanced stage, hence the application was a mere afterthought filed with the sole aim of hijacking the process. She labelled the Plaintiff indolent and undeserving of this court's discretion, and called for dismissal of the application with costs.

WRITTEN SUBMISSIONS

The applicants filed his written submissions on the 9th of April 2021 in which he submitted that he was never served with any hearing or mention notices. That as such in the absence of clear evidence of service then he was condemned unheard. It was his submission that this matter stopped when the defendant was sick, and subsequently when he died he was confused as to who he was proceeding against.

It was his further contention that the firm of Rogo Okelloh, Wangari & Co was not properly on record as there was no notice of appointment. That the mistake of counsel for the Defendant of not filing a notice of appointment should not have the resultant effect of condemning him unheard.

The Applicant concluded his submissions by stating that the respondent will not suffer any prejudice if the application is allowed.

ISSUES FOR DETERMINATION

1. Whether the supporting affidavit is incompetent having been commissioned by a law firm instead of a commissioner for oaths.

WHETHER THE SUPPORTING AFFIDAVIT IS INCOMPETENT HAVING BEEN COMMISSIONED BY A LAW FIRM INSTEAD OF A COMMISSIONER FOR OATHS

It was the Respondent's contention that the supporting affidavit to the application was incompetent having been commissioned by a law firm. They relied on section 5 of the Oaths and Declaration Act. A look at the affidavit shows that the same has a stamp for Ondieki & Ondieki advocates.

Section 2 of the oaths and statutory Declaration Act defines a commissioner for oaths as. It reads;

(1) The Chief Justice may, by commission signed by him, appoint persons being practising advocates to be commissioners for oaths, and may revoke any such appointment.

Section (4) further provides that;

“(1) A commissioner for oaths may, by virtue of his commission, 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 High Court or any subordinate court”

Finally, Section 8 of the act (Supra) reads,

“A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.”

Faced with a similar issue in the case of **David Wamatsi Omusotsi v Returning Officer Mumias - East Constituency & 2 others** [2017] eKLR the court while referring to the above-mentioned provisions had this to say; -

“It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a Commissioner for Oaths and other officials of the court allowed to do so under the Act”

It is clear that an Affidavit cannot be commissioned by a law firm but by a Commissioner for Oaths or other officials of court as provided under the act. Therefore, the Supporting Affidavit is invalid therefore the Application is a non-starter and should be dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE