



**Ongabi v City Gas East Africa Ltd (Miscellaneous Application
50 of 2023) [2024] KEHC 5689 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION 50 OF 2023**

TA ODERA, J

MAY 9, 2024

BETWEEN

CAROLINE NYAMAMBA ONGABI APPLICANT

AND

CITY GAS EAST AFRICA LTD RESPONDENT

RULING

1. The Applicant vide a notice of motion dated March 2, 2023 filed this Application seeking the following orders;
 - a. spent
 - b. This court be pleased to enlarge time and grant the Applicant/intended Appellant leave to file its Memorandum of Appeal out of time against the judgment delivered by Hon. C. A. Ogwenso (SRM) in Kiss Civil Suit No. 410 of 2020 on December 6, 2022.
 - c. Spent
 - d. There be a stay of execution of decree pending the hearing and determination of this appeal
 - e. The Memorandum of Appeal annexed be deemed as properly on record upon payment requisite fee.
 - f. Costs be in the cause
2. The Application is supported by the grounds on the face of the application by the two affidavits sworn by one Ms. Edna Achieng Rweya, the learned counsel acting on behalf of the Applicants. In support of their Application Ms. Rweya averred that;



- a. She is an advocate practicing with the firm of Meritad Law Africa LLP that has been in conduct of this matter on behalf of the Applicant/Appellant and familiar with the facts hence duly instructed to swear the affidavit on its behalf.
 - b. The applicant/appellant is aggrieved by the Judgment of the lower court and thus it intends to appeal against it in this court as per the draft memorandum of Appeal attached to the Application. However, the 30 days window that had been provided by the lower court for it to file its Appeal lapsed on January 6, 2023 thus rendering this Application necessary.
 - c. The reason for the delay was due to the fact that the firm of Advocate was still seeking firm instructions to institute the Appeal which the firm received on 16th February, 2023.
 - d. She is well aware that she is a creature of instruction and though having intimated to the court on December 6, 2022 in the absence of the respondent, the need to Appeal to which she sought leave, she had not obtained written instructions from the Applicant/Intended Appellant and that she only obtained the instruction on February 16, 2023 and proceeded to file this Application. From the time she received the instruction up to the time he filed the Application only 10 days had lapsed and thus it cannot be said to have inordinate delay.
 - e. In the light of the 30 day rule within which they formally filed this Appeal, the Appellant be allowed to file the memorandum of Appeal out of time given that the delay is not inordinate.
 - f. The respondent stands to suffer no prejudice should the Application be granted.
 - g. The Applicant/intended Appellant has an arguable Appeal with high chances of success.
 - h. The Applicant/intended Appellant is ready and willing to comply with the direction of the court on security for Appeal in particular the intended offer by way of bank guarantee.
 - i. It is in the interest of Justice that the Applicant be allowed to file the Memorandum of Appeal can be heard and determined out of time so that his intended Appeal which is arguable can be heard on merits.
3. The Respondents vide a replying affidavit sworn by herself on March 23, 2023, responded to the Application and stated that;
- a. Despite the Applicant's Advocate explicitly admitting that she received instruction on February 16, 2023 this Application was filed on March 3, 2023 with no explanation whatsoever.
 - b. The application was brought with inordinate delay given that if the same was filed more than 2 months after the Judgment had been delivered.
 - c. No reasonable explanation was given by the Applicant for the delay of more 2 months in filing this Application.
 - d. Equity favors the vigilant and not the indolent.
 - e. The said Edna Rweya is bereft of capacity to swear an affidavit in support of the Application.
 - f. The Applicant does not deserve any stay orders with regard to the trial court Judgment delivered on 6th October as no security or intention to offer security has been offered by the Applicant.



4. This court directed that this matter be disposed of by way of written submission. The Applicant filed their submissions on 1 February 3, 2024 while the Respondents filed their submissions on November 8, 2023.

Issues For Determination

5. I have considered this Application, the background of the suit, the response by the Defendants and the written submissions that both parties have filed my finding is that the issues for determination are;
- a. Whether the Ms. Edna Achieng' Rweya, counsel for the Applicant could swear a supporting Affidavit on behalf of the Applicant.
 - b. Whether the Applicant has met the requirement for grant of enlargement of time in order for it to institute the intended Appeal
 - c. Whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.

Analysis And Determination

Whether the Ms. Edna Achieng' Rweya, counsel for the Applicant could swear a supporting Affidavit on behalf of the Applicant.

6. The Respondent learned counsel has reiterated the Respondent's averment that the learned counsel for the Appellant, Ms. Rweya had no capacity to swear the affidavit in support of this Application. In the case *Magnolia Pvt Limited Vs Synermed Pharmaceuticals (k) Ltd* (2018) eKLR where the court cautioned advocates from swearing affidavits on their clients' behalf. The court observed thus;

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deponed 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.”

7. My reading of this Application presents circumstances the court cautioned against in the said *Magnolia case (supra)*. The learned counsel avers that she received written instructions from his client on February 16, 2023 to file an Appeal against the Judgement of the court her client was dissatisfied with. The learned counsel despite making such a statement of facts did not in her two Affidavits to attach the said written instructions to prove that indeed her client was dissatisfied with the decision of the lower court and that it intended to have the same Appealed against. Such a claim from the learned counsel remains bear and it thus raises doubts to this court as to whether she indeed received instructions she claims to have received from the Applicant to file an Appeal leave alone swearing the Affidavit on behalf of the Applicant to support this Application. The same situation befalls his averment that his client is ready and willing to deposit security in form of a bank guarantee in case the court allows an order of stay. The learned counsel deponed that her client will suffer prejudice unless



the application is allowed and that she was instructed late. These are facts which are within the personal knowledge of applicant and not counsel.

8. The Court of Appeal in the case of *Gerphas Alphonse Odiambo v Felix Adiego* [2006] eKLR here Waki JA (as then was) stated as follows:

“An affidavit, by definition, is evidence given on oath and is subject to the provisions of the *Evidence Act*, Cap 80 – see section 2(2). Admissibility of hearsay evidence must therefore be shown to comply with the provisions of that Act. Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all. Even where exception is made to section 2(2) of the *Evidence Act*, as it is in interlocutory proceedings under the *Civil Procedure Rules*, Order 18 rule 3(1), the need to ensure that facts are proved by a person or persons who have personal knowledge of such facts is closely guarded. This Court interpreted that provision in *Kenya Horticultural Exporters [1977] Ltd v Pape (trading as Osirua Estate)* [1986] KLR 705 where it stated:

“Order XVIII rule 3(1) of the *Civil Procedure Rules* is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words “may contain” suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove.”

The requirement of supporting documents as relates to applications before this Court are stated in Rule 43, thus:

“Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts.” – Emphasis supplied

I see no reason, as none is stated, why the court clerk who had personal knowledge of the disappearance of the court file could not swear the supporting affidavit as required under our rules. I will disregard the affidavit in that regard.”

9. I therefore see no reason as to why the Applicant did not swear the affidavit to state the existence of the facts to support of the application. The affidavits herein offend order 18 rule 3 (1) of the *Civil Procedure Rules* and I proceed to I therefore proceed to strike them out.
10. Having struck out the affidavits I need not determine the merits of the application as the same has been left bear.
11. Costs to the respondents.

DELIVERED VIRTUALLY VIA TEAMS PLATFORM

9.5.2024

T.A ODERA

JUDGE



In the presence of;
Oigo Court Assistant
Miss Rweya for Applicant
N/A for Respondent

