



**Paragon Electronics Limited v Apex Steel Limited (Civil Appeal
361 of 2019) [2023] KEHC 4099 (KLR) (Civ) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 361 OF 2019

AN ONGERI, J

MAY 3, 2023

BETWEEN

PARAGON ELECTRONICS LIMITED APPELLANT

AND

APEX STEEL LIMITED RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 31/5/2022 brought under Article 159 (2) (d) of the *Constitution of Kenya*, Section 3A of the *Civil Procedure Act* Cap 21, Order 42 rule (3) (2) of the *Civil Procedure Rules 2010* seeking for leave to amend the appellant/applicant memorandum of appeal.
2. The applicant is also seeking for orders that the proposed amended memorandum of appeal be deemed as duly filed and served upon payment of the requisite court fees.
3. The respondent filed grounds of opposition dated September 12, 2022. In it the respondent stated that the supporting affidavit of Bulent Gulbahar sworn in Istanbul, Turkey which is outside the commonwealth is ex-facie incompetent and inadmissible in evidence in the Kenyan courts by dint of the provisions of Section 88 of the *Evidence Act* (Cap 80) Laws of Kenya in the absence of proof by affidavit certificate or otherwise that the said supporting affidavit was taken or sworn before a Notary Public or Commissioner for Oaths in Turkey and that the signature affixed thereto was that of such a Notary Public or a Commissioner for Oaths.
4. That some of the handwritten word exhibited below the Jurat in the Supporting Affidavit of Bulent Gulbahar are in a language other than that of the High Court of Kenya, contrary to the provisions of Section 86 (1) of the *Civil Procedure Act*.



5. It was added that the Supporting Affidavit of Bulent Gulbahar is not securely sealed under the seal of the Notary Public or Commissioner for Oaths contrary to the provision of Rule 9 of the *Oaths and Statutory Declaration Act* Chapter 15 Laws of Kenya which requirement is mandatory.
6. The applicant filed a supplementary affidavit by Valentine Ataka dated November 14, 2022 and indicated that the matters forming the basis of the application and contained in the exhibits are matters that are ascertainable from the lower court file. In furtherance of the just determination of the appeal under order 14 rule 6 of the *Civil Procedure Rules* this court is enjoined to call for its own motion, consider the full record and content of the lower court file which will confirm the basis and content of the grounds and facts giving rise to the application.
7. On the issue of whether or not the supporting affidavit was commissioned properly it was averred that under section 88 of the *Evidence Act*, one of the tests for admissibility of an affidavit before the court is whether it is admissible under the laws of England. That the supporting affidavit having been commissioned by a solicitor, Ian C McGrath who is duly licenced in England, is admissible as the confirm that the supporting affidavit would be admissible in the courts of England
8. He further indicated that Section 3(2) of the English *Commissioner for Oaths Act* provides that judicial and official notice is to be taken of the seal or signature affixed, impressed or subscribed to or any such oath or affidavit by a person having such authority to administer an oath in a place out of England. She added that the intention and purpose of Rule 9 of the *Oaths and Statutory Declaration rules* is for the annexures to be clearly marked and identifiable which has been done herein as per the markings provided with the exhibits in strict compliance with the rule.
9. The parties filed written submissions which I have duly considered. The applicant in its submissions argued that the lower court on June 7, 2019 entered judgement in favour of the respondent and the applicant having been aggrieved preferred an appeal. The applicant being a layperson omitted some crucial grounds in the memorandum of appeal which would bring out all the issues in dispute and help this court to determine the matter in a fair and just manner.
10. The fact that the trial court found that the applicant did not call any evidence while there is a witness statement on record and if fact the witness testified and further that the trial court did not make any findings on the applicant's counter claim deprived off the applicant a fair and just decision in its favour.
11. In support the applicant cited *George Gikubu Mbutia -vs- Consolidated Bank of Kenya Ltd & Anor* (2016) eKLR the Court of Appeal expressed itself a follows;

“As regards the law, the High court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that court should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other.”



12. The applicant further stated that the respondent did not controvert the facts of the application thus making the application undefended and in support cited [Sukari Sugar Industries Ltd v Ochola Peter Ariyo](#) [2021] eKLR where the court relied on the below cases while faced with a similar issue;

“In CA 95/2016 Mutai and Others =vs= A G the court of Appeal observed at paragraph 34”
An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flows from this. First, by the mere fact of the affidavits not having been controverted there is an assumption that what was averred in the affidavit as factual evidence is admitted....”

13. Finally, on whether the affidavit in support of the application was properly commissioned the applicant submitted the affidavit is admissible in England as per the [Commissioners for the Oaths Act 1889](#) and the [Solicitors Act](#). The supporting affidavit therefore was competently commissioned and is admissible in the Kenyan Court as per Section 88 of the [Evidence Act](#).
14. That further the Exhibits annexed to the supporting affidavit are matters that are ascertainable for the Trial Court record and that in furtherance of a just determination of the appeal the court can call for the trial court record to confirm and ascertain the basis of the appeal.
15. The respondents in its submission argued that the application as drawn is a nonstarter for reason that it offends the mandatory provisions of the [Evidence Act](#) and the [Civil Procedure Rules](#). It submitted that the supporting affidavit sworn in Istanbul Turkey by Bulent Gulbahr is incompetent and inadmissible in evidence by dint of Section 88 of the [evidence Act](#) which provides that;

“When any document is produced before any court, purporting to be a document which, by the law in force for the time being in England, would be admissible in proof of any particular in any Court of Justice in England, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed—

- (a) the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims in such document; and
- (b) the document shall be admissible for the same purpose for which it would be admissible in England.”

16. It was the respondent contention that turkey being outside the commonwealth, in the absence of proof by affidavit certificate or otherwise that the said supporting affidavit was taken or sworn before a notary public or a commissioner for oaths in turkey and that the signature affixed thereto was that of such a notary public or a commissioner for Oaths is incompetent and inadmissible. That therefore the purported attestation to the execution of the supporting affidavit is invalid, unlawful and incompetent to the extent that it does not bear the seal or stamp of a Notary public of commissioner for Oaths.
17. The respondent submitted that some of the handwritten words exhibited in the supporting affidavit are in a language other than that of the High Court contrary to Section 86(1) of the [Civil Procedure Act](#) that provides that;

“The language of the High Court and of the Court of Appeal shall be English, and the language of subordinate courts shall be English or Swahili.”



18. It was indicated that the annexure marked ‘BG’ which is an affidavit was also not sealed under the seal of a Notary Public of Commissioner of Oaths contrary to Rule 9 of the *Oaths and Statutory Declaration Rules* which provides that;
- "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letter of identification."
19. The respondents placed reliance on the case of *Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 Others* [2018] eKLR wherein the court citing with approval the case of *Omusotsi -V- The Returning Officer Mumias East Constituency, Independent Electoral and Boundaries Commission and Benjamin Washiali Jomo*, Election Petition No 9 of 2017, High Court Kakamega held that;
- “An affidavit can only be commissioned by a commissioner for oaths and officials of the court allowed to do so under the Act.....the petition as filed is not supported by the affidavit of the petitioner as required by rule 12 (1) (b), of the Elections Rules.” The petition does not comply with the mandatory provisions of the law. The petition filed without the said documents is not a competent petition. The petition is a still birth that should not be allowed to see the light of day. The petition is accordingly struck out with costs.”
22. The Court was stating that the affidavits which were not commissioned by a Commissioner for Oaths were not affidavits. I agree with the holding as affidavits which are not commissioned by a commissioner of Oaths appointed as provided by the Oaths and Statutory Declarations Act are not affidavits but mere statements.”
20. It was therefore the respondent’s submission that by dint of lack of the seal of commissioner for oaths, the supporting affidavit is a mere statement and therefore the instant application is without any evidential foundation. That this is a fairly old matter and allowing amendments of the memorandum of appeal at this stage, more that 3 years later, would be prejudicial to the respondent who has been tied on litigation over the same subject matter for what is now, over 10 years.
21. I find that in the absence of any affidavit to controvert the supporting Affidavit that the affidavit in support of the application was properly commissioned and that the affidavit is admissible in England as per the *Commissioners for the Oaths Act 1889* and the *Solicitors Act*, I direct that the said issue be handled in the main appeal.
22. The sole issue for determination in this ruling therefore is whether the appellant should be granted leave to amend the memorandum of appeal.
23. The legal provision for amendment is as follows; Order 8 Rule 5(1) of the *CPR* provides as follows;
- “For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
24. I find that there is merit in the application dated 31/5/2022. I allow it and direct that the amended memorandum of appeal be deemed as duly filed and served upon payment of the requisite court fee.
25. In view of the delay in the disposal of this appeal, the Appellant is granted 60 days to fully prosecute the appeal.



26. Failure to comply, this appeal to stand dismissed with costs to the Respondent upon the elapse of 60 days from this date.

27. The costs of the application to abide the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
3RD DAY OF MAY, 2023.**

A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

