



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 166 OF 2013**

**HON. PATRICK SIMIYU KHAEMBA.....PLAINTIFF**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION.....1<sup>ST</sup> DEFENDANT**

**KENYA POWER & LIGHTING CO. LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

**(On whether or not to Expunge Affidavit filed without Leave of Court)**

1. This is a Ruling on an oral application made in this Court on **8/11/2021** to have an Affidavit by sworn by one, **Hon. Patrick Simiyu Khaemba**, on **05/11/2021** and filed on **08/11/2021**, expunged from the record. The background to the ruling is that on **15/10/2021** the Applicant herein filed in this suit an Application dated the same day. Incidentally, the Applicant in the said Application is the one who made the oral application which this ruling is on. The earlier Application (of **15/10/2021**) seeks to have his law firm, **Ms. Sifuna & Sifuna Advocates** enjoined in this suit as an Interested Party. The reason behind that is that the proposed Interested Party was employed by the Respondent herein as counsel in this same matter. It would appear that after some time the Respondent terminated the services of the proposed Interested Party. It would also appear that the termination of this relationship was after the Proposed Interested Party had, on **19/9/2014**, entered into a consent withdrawing the suit against the 1<sup>ST</sup> Defendant in the matter. The Respondent herein argues that the withdrawal was without his instructions. That, however, is a matter to be dealt with later when the merits of the application that raises it comes before the Court.

2. The proposed interested party then filed an Advocate-Client Bill of costs in a separate **Miscellaneous Application**, namely **Kitale ECL No. Misc. Application No. 14 of 2021**. The said proposed Interested Party brought the Application dated **15/10/2021** following one dated **30/08/2021**. The latter Application was filed in this matter by the Respondent herein seeking to stay the execution against him following Party and Party Costs which were taxed against him. In the said Application dated **30/08/2021** the Respondent makes averments that he did not instruct the proposed Interested Party herein to withdraw suit against one of the Defendants, and he wants a reference of the taxed bill made to this Court for it to review the taxation. This prompted the Applicant herein to file the application which has given rise to this oral Application.

3. When the Application came before me on **27/10/2021** for Directions on how it would be canvassed, the position was that the Applicant had just been served with the Respondent's Replying Affidavit and needed seven days to file a Supplementary Affidavit thereto. From the Court record, the Replying Affidavit by the Respondent, one Hon. Patrick Simiyu Khaemba, was sworn on **22/10/2021** and filed in Court on **26/10/2021**. The Applicant sought leave of the Court to file the Supplementary Affidavit. This Court granted him the leave and directed that he files it together with written submissions and serves the Respondent within seven days. The Court directed further that the Respondent files his written submissions on the Application and too serves them within seven days. The Court then gave the mention date of **8/11/2021** for the confirmation of compliance with the Directions.

4. On **8/11/2021** when the matter came up for the mention, both the Applicant and the Respondent's counsel appeared virtually to take a date for ruling. By then, both parties to the Application had filed and served their submissions on either side. It was then that the Applicant raised the issue that the Respondent had "cleverly sneaked" into the matter another Affidavit without leave of the Court. He stated that he had not been served with it but had, due to his diligence and keenness on the matter, discovered the strange document on the court file.

5. Counsel for the Respondent acknowledged the fact the Respondent had filed another Affidavit other than the Replying Affidavit. His reason for doing so was that this Court had, on **27/10/2021**, given leave for him to file both submissions and another Affidavit. An immediate perusal of the Court record then did, and it still does, show that the Respondent was given Directions to file submissions only. That fact was put across immediately to the parties appearing on **08/11/2021**. Counsel for the Respondent still wished to insist that it his client was permitted to file the Affidavit, and to that the Court was ready to retrieve the recording of the Teams Account of the proceedings of **27/10/2021**. But counsel stated that he wished the matter to be left as it was.

6. The Applicant vehemently objected to the admission of the said Plaintiff/ Respondent's Replying Affidavit as part of the court record. He asked that it be expunged therefrom. Following that, the Court permitted the parties to make oral submissions while the session was on, regarding the prayer for expunging the Affidavit from the court record.

7. The Applicant submitted that the said document had been sneaked to the record. He stated further that it was filed without leave of the Court. Further, that it was filed contrary to the rules of procedure. He submitted further that the document was greatly prejudicial to his case. His view was that the Affidavit was a design to deny him of his right to fair hearing. He cited **Section 1A** of the **Civil Procedure Act** which obligates parties assist the Court to arrive at a just process. He also referred to **Order 51 Rule 14(3) Civil Procedure Rules** which he argued it did not provide for room for a Respondent to file another Affidavit after he/she has filed a Replying Affidavit. He stated that to permit the Respondent to have the Affidavit relied on would create a wrong precedent.

8. The Respondent opposed the Application through counsel. Counsel reiterated that to him the Affidavit was fit to be deemed duly filed. He stated that it was only a response to the issues that were raised by the Applicant. Further, he stated that it would be against law to deny a party a hearing by denying chance of giving evidence in support of his case. He argued that this was a technicality which the Constitution takes care of. He then stated that since the Applicant had been granted leave to file another affidavit, he too should have been granted leave otherwise that would be akin to being biased. He stated that the Applicant was directing the Respondent how to conduct his case and that was not permissible. Finally, he said that **Order 51 Rule 14(3)** does not outlaw the filing of another affidavit by the Respondent. That it only provides for a road map on how matters should be conducted. And lastly, that the Court should not deny a party a right to be heard.

9. None of the parties cited any authorities to back their arguments. Nevertheless, at the end of the oral submissions the learned counsel for the Applicant tried to convince the Court to give him a chance to make written submissions. It too was objected to by the Applicant who stated that each party had been given chance to submit and they had done so.

10. The Court did not grant the filing of that second set of submissions. This was because the Respondent's counsel did not indicate from the beginning of the oral submissions that whatever submissions he made orally were to be a precursor of written ones or partial so to state. There was no explanation given by counsel as to why he would have two sets of submissions on the matter. All that counsel stated at the end was that the oral application was an ambush on him. He did not say so when the oral application was made or when parties were invited to submit on the oral application. To this day, the court wonders why, if indeed counsel felt that he was being ambushed, he could not ask for time to prepare a response rather than make his submissions and then at the end he submits that the Applicant ambushed him. Be that as it may, the Court is obligated to look at the merits of the application. This should be done in comparison with both the law and facts or circumstances of the issues before it.

11. I have considered the oral Application. I have also given due regard to the relevant law, the submissions made and the case law. I am of the view that there are only two issues that arise here. They are:

***(1) Whether or not the second Affidavit by the Respondent properly filed***

***(2) Whether the Affidavit should be expunged or on the converse deemed duly filed***

12. I will analyze the issues forthwith, starting with the first one. I have stated above that the Court did not, on **27/10/2021** grant leave to the Respondent to file another Affidavit, by whatever name it would be called. However, that does not of itself stop this Court from considering the issue that is now before it. **Sections 1B** and **3A** of the **Civil Procedure Act** provide for the duty and the inherent powers of the Court respectively to make orders that are aimed at the just disposal of any matter before it. Moreover, even with this Court bearing in mind that **Article 159(2)(d)** of the **2010 Constitution of Kenya** is not a panacea to all ills committed by parties to matters, it has taken due consideration on whether the issue herein is an apt one for that Sub-Article to apply to it.

***(1) Whether or not the second Affidavit by the Respondent properly filed***

13. In determining this issue, this Court is obligated to start with considering whether the law permits the filing of such an Affidavit. This would precede the consideration whether the Court should exercise its discretion to deem it properly filed. The law relating to the manner in which Applications are filed, responded to and finally disposed of (*the emphasis here is on filing*) in this level of Court are **Order 51 Rule 1** and **51 Rule 14** of the **Civil Procedure Rules**. **Order 51 Rule 14** specifically is in regard to the response to an application that has been filed. It provides for the situation relevant to the issues before me in this oral application. It is titled "Grounds of opposition to application in High Court."

14. **Sub-rule 1** thereof provides that any Respondent wishing to oppose an Application should file one or a combination of three documents listed therein. These are a Replying Affidavit, Grounds of Opposition and or a Notice of Preliminary Objection. This has to be done at least three clear days of the hearing of the Application. This Court understands the phrase "clear days" to mean full working days or the days are to be counted in terms of **Order 50** of the **Civil Procedure Rules**. **Sub-rule 4** envisages a situation where the Applicant fails to file one or other of the documents stated above. It provides that in those circumstances, the Application may be heard *ex-parte*. That last **Sub-rule** gives the Court discretion to hear the Application without the Respondent or call on the Applicant to serve again before the Application is heard to the exclusion of the Respondent.

15. Upon the documents referred to in **Sub-Rule 14 (1)** being filed and served on the Applicant, he may, file a Supplementary Affidavit. It is not automatically done. The Court has to grant him leave to do so. Once that is done, the matter proceeds to the next stage: determination. This can be by way of submissions or otherwise as the Court may deem fit. There is no provision for the Respondent filing another Affidavit in response to the Supplementary Affidavit. What then should be done in a situation a Respondent wishes to file (or, as in this case files) another Affidavit in response to the Application? In my view, if the provision is interpreted in the narrowest and strictest sense, then such a party has no right to file such a document. That does not imply, as argued by the Respondent's counsel herein, that it is a denial of the right to fair hearing. Even that right has limits. Each party is given a chance to bite the cherry.

16. However, there may arise situations, in rare and exceptional cases, where an Applicant while responding to the Replying Affidavit, files a Supplementary Affidavit which raises new issues that were not in the Supporting Affidavit. In that case, although the Rules do not provide for granting of leave to a Respondent to file another Affidavit, the Court is invested with discretion under **Section 1B, Section 3A** of the **Civil Procedure Act** and **Article 159(2)(d)** of the **Constitution**, to exercise discretion to grant leave to such a Respondent to file another Affidavit in response there to. Otherwise, to leave the new issues to pass without a response or rebuttal thereto by the Respondent would give the Applicant an undue advantage over to him. Nevertheless, it should be discouraged of parties to have such a practice of piecemeal litigation: an Applicant should endeavor by all means to include all facts and issues in the first Affidavit he files in support of his Application. In a similar way, a Respondent should do likewise and include as many as all issues he is supposed to while responding to an Application.

17. In considering whether or not for a court to exercise its discretion to grant leave of such nature as states above, each case has to be examined on its own merits. In the case of **Assets Recovery Agency v Charity Wangui Gethi & another [2020] eKLR**, Lady Mumbi Ngugi J, as she then was, granted leave to a Respondent to file a Further Affidavit (in response to a Supplementary Affidavit) in the case, because, in the first place, the said Respondent was not represented earlier, secondly, the timelines of the case were not as strict as those of election petitions, and lastly, the case related to forfeiture of assets.

18. The above being this Court's view, the question that follows is whether or not the Respondent has demonstrated that he has brought himself within the "rare cases" alluded to. What the Respondent stated was that to him he heard that the Court granted leave for him to file the Affidavit he did. This Court has indicated that he was in error on that. Further, he stated that it was only a response to the facts raised by the Applicant. However, he did not indicate whether or not he, by the said affidavit, was responding to facts raised in the Affidavit in support of the Application or the Supplementary Affidavit. Had he filed it in response to the Supporting Affidavit, he would have no basis for that since he had the opportunity of answering them in the Replying Affidavit. Had he done that in response to new issues raised in the Supplementary Affidavit, this Court would have been inclined to exercise discretion to accept the Affidavit on record in the interest of justice, and under **Article 159(2)(d)** of the **Constitution**, and guided by the persuasive authority of **Assets Recovery Agency v Charity Wangui Gethi & another [2020] eKLR**.

19. Only when new issues are raised in the Supplementary Affidavit and which issues were not in the Supporting Affidavit can, in my view, a Respondent be permitted, and even so in rare and exceptional case, to file second or Further Affidavit to a Replying one. This is because, the Court shall be departing from the provisions of **Order 52 Rule 14(1)** of the **Civil Procedure Rules** and exercising special discretion to give a party chance to file a rebuttal. Again, when doing so, the Court should consider whether in so doing, any of the parties will be prejudiced.

20. Since the Respondent did not explain to which facts or issues he was responding to this Court had to analyze the Affidavit and find out whether it would fall under the second limb. For these reasons, I have carefully read through the Affidavit in comparison with the Supplementary Affidavit. The Respondent is not responding to anything that may appear to be new in the Supplementary Affidavit. He is only restating what he had said before, apart from restating the law (and which should not be a matter of an Affidavit). Moreover, the Affidavit having been filed after the Applicant had filed submissions on the Application can only, in this Court's view, be held to be prejudicial the Applicant. This is because he will not have opportunity to comment, by way of submissions, on the issues raised therein. To accept it to be on record will thus skew the case against the Applicant.

***(2) Whether the Affidavit should be expunged or on the converse deemed duly filed***

21. There is no doubt that the Affidavit sworn on **05/11/2021** was filed without leave of the Court. It is not an issue that **Order 51 Rule 14(1)** of the **Civil Procedure Rules** does not give room for another Affidavit by a Respondent other than a Replying Affidavit, although the Court has indicated that there can be exceptional circumstances that may warrant the Court to exercise its discretion to grant leave for a Respondent to file a further Affidavit. This Court has found that it does not raise any new issues apart from restating what the law is. The Court has found that it was filed after the Applicant had filed his submissions hence it would be prejudicial to have accept it on the record. This is an Affidavit this Court is unable to exercise its discretion to have it remain on record.

**Conclusion**

22. The upshot is that the objection is upheld, the Affidavit sworn by the Respondent on **05/11/2021** and filed in Court on **08/11/2021** is hereby expunged from the record. Costs on the Application are to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MEDIA THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

**In the presence of:**

**Prof. Nixon Sifuna Advocate for Applicant**

**Mr. Macharia Advocate for the Respondent**