



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 66 OF 2019

MARY GATHONI.....1ST APPELLANT

EMMANUEL JOHN AMBOYE.....2ND APPELLANT

VERSUS

FRIDA ARIRI OTOLO.....1ST RESPONDENT

JOHN MOMANYI.....2ND RESPONDENT

RULING

1. A court of law should consider an application, and indeed any other court process, before it, on its merits, only if the said application, or other court process, is properly before the court.

2. The appellants initially placed before me, under certificate of urgency, on 23rd September 2019, an application of even date, seeking stay of execution of a judgment, but I declined to grant any orders on it, or to consider it on its merits, as the affidavits purporting to support the said application had not been commissioned by a Commissioner for Oaths.

3. The same application was then placed before me on 25th September 2019. The anomaly referred to in paragraph 2, above, had been rectified, for the affidavits which had previously not been commissioned were now commissioned. But there was still a problem. The said affidavits were purported to have been sworn at Eldoret, but before a Commissioner for Oaths at Kakamega. That was a practical impossibility for there was no way the deponents could have executed the affidavits at Eldoret before a Commission for Oaths at Kakamega. The two events could only happen at one place at the same time, for the deponents should present themselves before a Commissioner for Oaths, and execute the affidavits in the presence of the said Commissioner for Oaths. The two, the deponents and the Commissioner for Oaths, must be both present at the same place at the same time. It cannot, therefore, be that one was at Eldoret and the other at Kakamega. I ruled that that application was not properly before me for it was based on affidavits that were not properly commissioned. I declined, once again, to grant the orders sought, and urged the parties to do the right thing at all times.

4. It would appear that the appellants went on to withdraw the application dated 23rd September 2019, through a notice of withdrawal of application, dated 27th September 2019, filed herein on 30th September 2019. On the same date, they lodged a Motion dated 27th September 2019, seeking orders similar to those sought in the withdrawn application. I have looked at that Motion, and noted that the affidavits that support it were sworn at Eldoret, on 27th September 2019, before Muhuyi Kiveu, Commissioner for Oaths, of PO Box 1281 – 50100 Kakamega. In effect, the appellants committed the same mistake that I had pointed out to them on 25th September 2019, when the withdrawn application was placed before me. Alternatively put, the appellants ignored my ruling or orders of 25th September 2019. They are persisting in not doing the right thing, contrary to what I pointed out to them on 25th September 2019. The Motion, dated 27th September 2019, is, therefore, based on defective affidavits. No orders can possibly be granted on it as it is not supported by any evidence.

5. The law on commissioning of affidavits is the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya, which, at section 5, states as follows:

‘Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.’

6. The said law has been the subject of a number of decisions. In *Regina Munyiva Ndunge vs. Kenya Commercial Bank Limited* (2005) eKLR, for example, the court addressed itself to compliance with section 5 of the Oaths and Statutory Declarations Act, in the following terms:

“The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the Oaths and Statutory Declarations Act provides that:

‘Every Commissioner for Oaths before whom any oath or affidavit is taken or made ... shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.’

‘ ... The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed.’

7. Then in *CMC Motors Group Limited vs. Bengeria arap Korir trading as Marben School & Another* (2013) eKLR, the court, while striking out an affidavit on similar grounds, said:

“The merit as I find it in respect of Waudo’s affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black’s Law Dictionary defines an oath as follows –

‘Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that ones’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.’

‘ ... Bearing that definition the question that needs to be answered is whether Waudo took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of Section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.’

8. I need not say more. The affidavits on record, purportedly sworn by Mary Gathoni and Emmanuel John Amboye, on 27th September 2019, were not properly commissioned. They are not on oath. In fact, they are not affidavits at all. I, accordingly, hereby strike them out. They were drawn in support of the interlocutory Motion dated 27th September 2019. The effect of the striking out of the purported affidavits would be that the said application would now be without any evidential foundation. The same is amenable to dismissal, and I hereby dismiss it. The respondents shall have the costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF February, 2020

W. MUSYOKA

JUDGE