



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 38 OF 2019 (O.S.)

IN THE MATTER OF STEVE KIMATHI,

ADVOCATES T/A ANDREW & STEVE ADVOCATES

IN THE MATTER OF FILES UNLAWFULLY HELD BY STEVE

KIMATHI, ADVOCATES T/A ANDREW & STEVE ADVOCATES

BETWEEN

PARAGON ELECTRONICS LIMITED.....PLAINTIFF

VERSUS

STEVE KIMATHI T/A ANDREW & STEVE ADVOCATES.....DEFENDANT

RULING

1. On 5th March 2019, through a person named Bulent Gulbahar, the Plaintiff herein filed an Originating Summons of even date seeking the release of several files that were in the custody of the Defendant herein, declaration that the Defendant had given consent to it to change its representation, that the Defendant be reprimanded and costs of the said application.
2. The Defendant did not enter appearance and/or file a defence whereupon the Plaintiff requested for judgment against it on 29th April 2019. The Request for Judgment was dated 17th April 2019. The Plaintiff thereafter wrote to the Deputy Registrar on 20th May 2019 requesting for a date for formal proof. On 22nd May 2019, it wrote to the Deputy Registrar requesting to be issued with the order for the interlocutory judgment that was entered on 17th May 2019. The said order was duly issued on 28th May 2019 and served upon the Defendant herein on 29th May 2019.
3. It was upon being served with this Order that the Defendant filed its Notice of Motion application dated 30th May 2019 on 31st May 2019 in which it sought that there be a stay of execution of the order of the Deputy Registrar Hon Wandia, that the said order and subsequent proceedings be set aside, that time be extended for it to enter appearance and that the Memorandum of Appearance dated 30th May 2019 be deemed as having been properly on record. The said application was supported by the Affidavits of Steve Kimathi that were sworn on 30th May 2019 and 25th June 2019 respectively.
4. In opposition to the said application, on 24th June 2019, the Plaintiff filed Grounds of Opposition of even date. On 22nd July 2019, it filed a Notice of Preliminary Objection of the same date. The grounds of the said objection were that the Affidavits that were sworn by Steve Kimathi were incurably defective as they were sworn by an advocate practising in the firm of M/S Andrew & Steve Advocates that drew the said affidavits which was in contravention of Section 4(1) of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya).
5. Before delving into the merits or otherwise of the Defendant's aforesaid Notice of Motion application, this court deemed it prudent to analyse the arguments in respect of the Plaintiff's preliminary objection in the first instance.
6. In support of its submission that the Affidavits in support of the Defendant's Notice of Motion application were incurably defective, the Plaintiff relied on the case of **Stephen M. Mogaka vs Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR** where the court expunged affidavits that were sworn by a person who had an interest in the matter.
7. On its part, the Defendant argued that the purpose of Section 4(1) of the Oaths and Statutory Declarations Act was to avoid the mischief where the commissioning advocate would be required to testify in case there was a dispute which it contended was not the case herein and that consequently, the Plaintiff did not stand to suffer any prejudice.

8. It relied on the case of Nanak Body Builders Ltd vs Akiba Bank Limited [1998] eKLR where it was held that commissioning of an affidavit does not *per se* affect the contents of an affidavit but rather it was an irregularity which did not call for the striking out of the affidavit.

9. This court noted that Section 4 (1) of the Oaths and Statutory Declarations Act stipulates as follows:-

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:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding (emphasis court) or concerned in the matter, or clerk to any such advocate, or in which he is interested.

10. The key word therein is “**shall**” connoting the mandatory nature of the provision. This court therefore fully associated itself with the holding in the case of Stephen M. Mogaka vs Independent Electoral & Boundaries Commission & 2 Others (Supra) and determined that the affidavits in support of the Defendant’s application herein could not withstand the test set out in Section 4(1) of the Oaths and Statutory Declarations Act and consequently had to be expunged. In the absence of affidavits in support thereof, the application had no legs to stand on and was therefore defective and incompetent *ab initio*.

11. Notably, this court did not therefore go into the merits or otherwise of the Defendant’s application as it was at liberty to file a fresh application to be supported by competent affidavits for consideration. It was best that the dispute between it and the Plaintiff herein be determined on merits as it was clearly a very contentious matter.

DISPOSITION

12. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Preliminary Objection dated and filed on 22nd July 2019 was merited and the same is hereby allowed with costs to it. The effect of this determination was that the Defendant’s Notice of Motion application dated 30th May 2019 and filed on 31st May 2019 be and is hereby dismissed with costs to the Plaintiff herein.

13. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2020

J. KAMAU

JUDGE