



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEL NO 348 OF 2018

BERNARD MWANGALA.....1ST APPELLANT

LOWERHILL APARTMENTS LIMITED.....2ND APPELLANT

VERSUS

KIPKAI ENTERPRISES LIMITED.....1ST RESPONDENT

JANE NYABOKE T/A

NJAGI NYABOKE & CO ADVOCATES.....2ND RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court at Nairobi by the

Hon. D. Ocharo, Senior Resident Magistrate delivered on 30th July 2018 in CMCC 488 of 2011)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 30th July 2018 was filed pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6 (1) and Order 51 of the Civil Procedure Rules and Sections 33 (1) and (2) of the Contempt of Court Act and all enabling provisions of the law. Prayer Nos (1) and (3) were spent. It sought the following remaining orders:-

1. Spent.

2. THAT there be a stay of execution of the Order committing the First Appellant to civil jail pending the hearing and determination of this Appeal.

3. Spent.

4. THAT the costs of this Application be provided for.

2. The Appellants Written Submissions were dated 22nd November 2018 and filed on 26th September 2018 while those of the Respondents were dated and filed on 27th November 2018.

THE APPELLANTS CASE

3. The Appellants present application was supported by an Affidavit of the 1st Appellant herein that was undated.

4. He stated that he was committed to civil jail for five (5) days on the ground that he had disconnected water supply to the Respondents. The Respondents being dissatisfied with the said decision, filed an appeal which he contended would be rendered nugatory if he was not released from civil jail.

5. He pointed out that the blockage that had caused the supply of water to the Respondents was due to water blockage on their meter and that

the same had been resolved and supply restored to the Respondents soon after they had filed the application for contempt.

THE RESPONDENTS' CASE

6. In response to the said application, the 1st Respondent's Director, Edgar Munene swore the Replying Affidavit on his own behalf and that of the 2nd Respondent. It was sworn on 20th August 2018 and filed on 22nd August, 2018.

7. The Respondents were emphatic that the 1st Appellant was in flagrant breach of the orders of the court issued on 29th April 2011, in particular, disconnecting water to their premises. They dismissed the Appellants' assertions that the supply of water was cut from their premises due to a water blockage because there was no explanation why it was only their premises that was affected.

8. They averred that the sentence was too lenient as the 1st Appellant was not remorseful and prayed that the sentence be enhanced.

9. They therefore urged this court to dismiss the Appellant's present application.

LEGAL ANALYSIS

10. Before delving into the merits or otherwise of the Appellant's application, this court noted that the 1st Appellant's supporting affidavit was not dated. This was contrary to the provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Law of Kenya) that stipulates 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.”

11. Whereas the provisions of Article 159 (2) (d) of the Laws of Kenya, 2010 mandates courts to administer justice without undue regard to technicalities, courts should not close their eyes to fundamental flaws that go into the root of pleadings filed in court.

12. It is clear from Section 5 of the Oaths and Statutory Declarations Act that it is couched in mandatory terms. The compliance of that Section is not discretionary and for an affidavit to be deemed to be an oath, it must comply with the Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) failing which the affidavit, has no relevance in a matter. No weight should be attached to such an affidavit as it remains a mere statement. It is also inadmissible within the context of Evidence Act Cap 80 (Laws of Kenya). For any fact to be admissible, it must be presented to court under oath.

13. Bearing the aforesaid into consideration, it was the considered opinion that the Appellants' Notice of Motion application was fatally defective for not having been supported by an affidavit that complied with Section 5 of the Oaths and Statutory Declaration Act.

DISPOSITION

14. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 30th July 2018 was not merited and the same is hereby dismissed. This court therefore declines to grant the Appellants' Notice of Motion application.

15. In view of the fact that the orders that were granted on 30th July 2018 were limited to the pendency of the hearing and determination of the said application, the same stand as automatically discharged and the cash bail of Kshs.50,000/= if deposited by the 1st Appellant be released to him.

16. For the avoidance of doubt, as this court did not delve into the merits or otherwise of the said application, the Appellants are at liberty to file a competent application for consideration by the court.

17. It is so ordered.

DATED and DELIVERED at NAIROBI this 16th day of May 2019

J. KAMAU

JUDGE