



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 21 OF 2016

FRANCIS A. MBALANYAPLAINTIFF/APPLICANT

VERSUS

CECILIA N. WAEMADEFENDANT/RESPONDENT

RULING

1. This Ruling is in respect to the Defendant's Preliminary Objection dated 30th August, 2016.
2. In the said Notice of Preliminary Objection, the Defendant has averred that the Supporting Affidavit of the Plaintiff sworn on 5th July, 2016 and filed in this court is incurably defective because the annexures thereto are not securely sealed under the seal of the Commissioner for Oaths.
3. The Defendant has further averred that the annexures to the Supporting Affidavit are not marked with serial letters of identification as required by Rule 9 of the Oaths and Statutory Declaration Act and that the said Supporting Affidavit and the annexures thereto ought to be expunged from the record.
4. In response, the Plaintiff deponed that he should be allowed to file a Supplementary Affidavit; that Order 19 Rule 7 of the Civil Procedure Rules disregards objections on title, other irregularities in form or any technicality and that the Plaintiff has since filed a Supplementary Affidavit which should be allowed.
5. The Defendant's counsel submitted that Rule 9 of the Oaths and Statutory Declaration Rules is in mandatory language; that *"all exhibits to affidavits shall be secured sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification, and that a breach of the law does not amount to an unprocedural technicality."*
6. Counsel submitted that in law, an Affidavit and the annexures or the exhibits attached to it constitute evidence; that they are not separate from each other and that where exhibits to an affidavit have not been authenticated by a Commissioner for Oaths, the Oath is fatally defective.
7. The Defendant's counsel finally submitted that sealing and marking of annexures to Affidavits is a question of substance not form; that failure to seal and mark annexures to an Affidavit goes to the root of the Affidavit and that an unsealed and unmarked annexures prejudices a party's legal right to cross-examine the other party on the annexures.
8. The Defendant's counsel finally submitted that a defect cannot be cured through a Supplementary Affidavit; that a Supplementary Affidavit only supports existing evidence and that the Notice of Motion dated 5th July, 2016 cannot stand alone without an Affidavit.

9. The Defendant's counsel relied on several authorities which I have considered.

10. The Plaintiff's advocate submitted that striking out of pleadings is a drastic remedy that should be resorted to only where a pleading is a complete sham; that the Supporting Affidavit cannot be expunged because the documents annexed thereto do not form the substance of the Application; that what has been raised is the want of form and that an Affidavit cannot be defeated for want of form.

11. The Plaintiff's counsel submitted that one can file an Affidavit without documents; that the Plaintiff should be given leave to commission the documents on record and that the overriding objective of the Civil Procedure Act and the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

12. The Plaintiff herein filed an Application dated 5th July, 2016 seeking for injunctive orders.

13. The Plaintiff's Application is premised on numerous grounds and supported by the Affidavit of the Plaintiff. The Affidavit by the Plaintiff has a total of 26 annexures, which, according to the Affidavit, are supposed to be marked as MF11-26.

14. Although the annexures have been annexed on the Supporting Affidavit, the same have not been marked and commissioned by the Commissioner for Oaths. The Defendant is seeking to have the said annexures struck off the record. Rules 9 of the Oaths and Statutory Declarations Rules provides as follows-

“all exhibits to Affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.”

15. It is trite in law that an Affidavit and the annexures attached on it constitute evidence. Indeed, where a person seeks to prove a fact by way of Affidavit, he is obligated to exhibit any document on his Affidavit.

16. However, before such a document can be received in evidence by the court, the law requires that such a document must be sealed by the Commissioner for Oaths.

17. The law that requires the sealing and marking of annexures with serial letters is in mandatory terms, and must be complied with.

18. Although the Plaintiff's advocate submitted that the failure to seal and mark the annexures is a defect in form that should be ignored by the court, the law has declared in mandatory terms that annexures must be sealed and numbered. That is the only way they can be allowed on record.

19. It is therefore not true, as submitted by the Plaintiff's counsel, that the failure to seal and number the annexures is a procedural technicality that can be saved by the provisions of Article 159(2) (d) of the Constitution and Sections 1A and 1B of the Civil Procedure Act.

20. The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, delay and to focus on substantive justice (***See Abdirahman Abdi vs. Safi Petroleum Products Ltd & 6 others Civil Application No. 173 of 2010***). However, the overriding objective does not mean that the courts should ignore the law and the rules which are meant to guide the manner in which parties are to move the court.

21. In the instant case, the law has provided in mandatory terms the manner in which evidence by way of annexures can be received by the court. The failure to comply with that law, like in the instant case, can only lead to one thing, the striking out of the offending documents.

22. However, considering that the Supporting Affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the Supporting Affidavit and the Application.

23. Of course, it would not be prudent for the Plaintiff to proceed with his Application in the absence of documents in support of the depositions in the Affidavit. However, and with the leave of the court, the Plaintiff can still exhibit the properly sealed and marked annextures either by filing a Supplementary or Further Affidavit.

24. I say so because under the provisions of Order 51 Rule 4 of the Civil Procedure Rules, an Application can proceed for hearing notwithstanding that it is not accompanied by an Affidavit, meaning that where annextures on an Affidavit are expunged, the Applicant can still introduce those annextures by filing a Supplementary Affidavit without having the Application, or the initial Affidavit, struck out.

25. For those reasons, I partially allow the Defendant's Notice of Preliminary Objection dated 30th August, 2016 and strike out the unsealed and unmarked annextures annexed on the Supporting Affidavit sworn on 5th July, 2016.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE