



Kinyanjui v Nzioka & another (Suing as the Representative and Administrator of the Estate of Boniface Kyungu Nzioka) (Employment and Labour Relations Appeal E218 of 2024) [2025] KEELRC 303 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 303 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E218 OF 2024**

**JW KELL, J
FEBRUARY 5, 2025**

BETWEEN

PATRICK MUNGAI KINYANJUI APPELLANT

AND

MALIANA SYOMBUA NZIOKA 1ST RESPONDENT

NORAH KATUMBI MUTUKU 2ND RESPONDENT

**SUING AS THE REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE
OF BONIFACE KYUNGU NZIOKA**

RULING

1. Before the Court was the Appellant’s Notice to Cross-examine dated 30th October 2024 the Advocate for the Respondent on the statement of facts contained in the Supporting Affidavit deponed to on 16th October 2024 by the said Advocate. The appeal was against the award of Director Occupational Safety and Health Services. The Notice stated:- Take Notice that Patrick Mungai Kinyanjui, the Appellant/ Respondent herein, requires the attendance of Faith Mutio Mutuku, the Advocate of the Respondent/ Applicant and the deponent to the Supporting Affidavit sworn on 16th October 2024 in court on 12th November 2024 or any other date to be given by the Court, so that counsel for the Appellant/ Respondent can cross-examine the said Applicant on the contents of the Affidavit sworn on 16th October 2024, for reasons inter alia that:
 1. The deponent should provide concise details and proof of the allegations in the Affidavit with respect to paragraphs 3, 4 and 8 of the Affidavit.
 2. This notice is issued pursuant to the provisions of Order 19 Rule 2 of the Civil Procedure Rules 2010.



- a. Paragraph 3 of the Supporting Affidavit: “ that the deceased herein was an employee of the Appellant, on 20th June 2018 sustained fatal injury while in the course of work”; the appellant states this is contested.
- b. Paragraph 4 of the Supporting Affidavit: “ that the Applicant reported the accident to the director of occupational safety and Health services and eventually, with a lot of resistance from the appellant, the DOSH form was filled”; and
- c. Paragraph 8 of the Supporting Affidavit related to ruling dated 24th November 2023.

Appellant’s submissions

2. The Appellant’s Notice to Cross Examine raised the following issues for determination by this Honourable Court, that is:-
 - a. Whether the Honourable Court should call the deponent, Faith Mutio Mutuku, advocate for the Respondent, to be cross examined on the statement of facts; if not,
 - b. Whether the statement of facts should be struck out.
3. The appellant relied on Order 19 rule 3 of the Civil Procedure Rules which provides as follows:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

Further, Order 19 rule 2 provides that: “Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.”
4. The Appellant’s right to fair hearing is enshrined under Article 50 of *the Constitution* of Kenya. Whether the Honourable Court should call the deponent, Faith Mutio Mutuku, to advocate for the Respondent, to be cross-examined on the statement of facts. Advocate for the Respondent swore to facts which are disputed. In particular, in paragraph 3 of the Supporting Affidavit, the deponent declared that the Deceased was an employee of the Appellant. The deponent, an advocate of the High Court of Kenya deponed to fact despite notice that the issue was disputed and formed the basis of the Objection before the Director Occupational Safety and Health Services and this Appeal as shown below:-

Paragraph 3 of the Objection to the Decision of the Objector dated 14th August 2022 wherein the Appellant averred that: “Bonface Kyungu Nzioka was not my employee but an independent contractor...”

Paragraph 2 of the Memorandum of Appeal dated 7th August 2024 that; “The director erred in law by arrogating jurisdiction upon himself to determine a matter between an independent contractor and client, that did not fall within the provisions of the Work Injury Benefits Ac, Cap 236 Laws of Kenya.”
5. Further, the allegations at paragraph 4 of the Supporting Affidavit that the Applicant reported the accident with a lot of resistance, has neither been substantiated nor proved. Also, the contents of paragraph 8 and 9 and the annexure marked FMM-6 being a letter drawn by the deponent herself is not only prejudicial but also injures the integrity of the court. The Appellant was not copied in the purported correspondence despite notice that he was a party to the proceedings. Further, in the letter dated 29th April 2024, addressed to the DOSH, the deponent addressed the directorate contrary to the



Honourable Court's ruling. The letter reads in part: "Please note if at all this objection was filed then it was filed when the days had lapsed which was the required time" These words taken in their natural meaning purported to direct the Office of the DOSH on how to handle the Appellant's Objection and the issue forms a ground of appeal herein.

6. In a ruling delivered on 24th November 2024 before Justice J. N Abuodha in ELRC MISC. E077 of 2023; Norah Katumbi Mutuku And Maliana Syombua Nzioka Vs Patrick Mungai Kinyanjui the Court held as follows: "13. In the circumstances and to do justice the matter, the Court hereby orders that the matter be resubmitted to DOSH to make a decision on the objection lodged by the respondent before the Court can assume jurisdiction over the same." Therefore, for the Advocate, deponent herein, to purport to draw a letter directing the DOSH otherwise and filing the said letter as part of her records, should be subjected to great scrutiny. In the case of Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR, the Honorable Court observed that; "On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular...."
7. The appellant submitted that the Advocate for the Respondent had deponed to facts not within her knowledge to prove. Also, the source of the information had not been disclosed. Therefore, the Honourable Court to call the deponent for cross-examination. By swearing the affidavit on behalf of her client where issues are contentious, the advocate's affidavit creates a legal muddle with untold consequences. In Magnolia Pvt Limited Vs Synermed Pharmaceuticals (K) Ltd (2018) eKLR the court cautioned advocates from swearing affidavits on their clients' behalf: "Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deponed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted." Similarly in the case of G G R vs. H-P S [2012] eKLR, where the court outlined instances where a deponent may be subjected to cross-examination: "The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered...."
8. The Appellant submitted that it was in the interest of justice that the deponent is called upon to prove the statement of facts. That the Advocate should relinquish her role of representation and testify in the matter.
9. On whether the statements of fact should be struck out, the Appellant submitted that the deponed facts were contentious and form the basis of the appeal in the matter. Therefore, admitting unproved facts at the interlocutory stage will prejudice the case of the Appellant against the right to fair hearing. Further, the deponent will not prove the said allegation at cross-examination and it is only fair that the said statement of facts are struck out. The Court should take notice that this is the third time the advocate swore an affidavit in contentious facts in related dispute the other being in Miscellaneous E77 OF 2023 between the same parties. To save the counsel from the embarrassment of being subjected



to cross-examination, the Honourable Court expunged the said two affidavits. In the case of Kenya Horticultural Exporters 1977 Limited v Patrick Pape (Trading as Osirua Estate) the Court of Appeal held the following:- “Supposing an advocate has to be cross examined on an affidavit such as the one sworn by Mr Nyauchi on behalf of the defendant, what further light would an advocate in that position throw on the matter? There is a helpful passage in vol 15, p 266 para 486 Halsbury’s Laws of England, 3rd edition in the following words. A witness cannot be called, in proof of a fact, to state that he heard someone else state it to be one. Care must be taken to distinguish between evidence which is tendered to prove that someone else has spoken certain words when the fact of which proof is required is merely the speaking, and evidence which is tendered to prove that someone else has spoken certain words as leading to a conclusion that the words spoken were true. The former is admissible (as in cases where the uttering of a slander has to be proved); the latter is not.”

Response submissions

10. The Respondent filed an Application dated 16th October 2024 seeking leave to enjoin the Director of Occupational Health and Safety and in response to the Application, the Appellant filed grounds of opposition dated 24th October 2024 and a Notice to Cross-examine dated 30/10/2024. Via this notice to cross-examine the Appellant seeks that the deponent to provide concise details and proof of allegation in the Affidavit with respect to paragraphs 3, 4 and 8 of the Affidavit dated 16th October 2024. Via his submissions, the Appellant raised issues with paragraph 9 of the supporting affidavit dated the 16th of October 2024.
11. The Respondent submitted as herein below:- Is the Affidavit dated 16/10/2024 sworn by the Respondent’s counsel in line with Order 19 Rule 3 of the Civil Procedure Rules 2010. On whether the Respondent/Applicant’s advocate can swear the Supporting Affidavit Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 is relevant, it provides that: “Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.” Courts have overtime upheld the provision of order 19 rule 13(1) of the Civil Procedure Rules. In the case of Salama Beach Hotel Limited V Mario Rossi [2015] e KLR where the Court of Appeal held that:- “As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Muniyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. “The Respondent’s counsel swore an affidavit in support to an interlocutory application, counsel has indeed sworn to statements of information and belief supported by sources as annexed to her affidavit herein, which sources have come to her knowledge, attention and possession as she represented the Respondent before the Director of Occupational Health and Safety, in Milimani ELRCMISC/E077/2023 and in the present matter as herein below demonstrated: -The information contained in paragraph 3 of counsel’s supporting affidavit, is contained in the Dosh 1 form, annexed to paragraph 4 of counsel’s affidavit as annexure FMM-1. Page 1 of this Dosh form contains the employment particulars, at the bottom of page 1 of this Dosh 1 form, it is signed by the Respondent. This page of the copy of the Dosh 1 form annexed to counsel’s supporting affidavit is not clear but to this submission we will annex a clear copy. The upshot of the above is that from page 1 of Dosh 1 form, it is clear that there was an employer-employee relationship between the Deceased and the Appellant. In a nutshell, all counsel did was summarize the contents of page 1 of the Dosh form. The Respondent relied on the decision in Anne Kahiri V Rusinga Investments Company Limited [2006] eKLR where court held:- “The manner of service as described by the process server, seems to be substantially admitted by the defendant. The cross-examination of the deponent of the said supporting affidavit will therefore serve no purpose with regard to the issue of service of the Summons to Enter Appearance upon



the defendant.” Information contained on paragraph 4 of the supporting affidavit is a chronology of events. On this issue the Respondent relied on the decision *Oriental Commercial Bank Ltd V Shreeji Contractors Ltd & 2 Others* [2021] e KLR where the court held as follows:- “However, countless cases have stated that there certain procedural motions which turn on evidence that counsel can provide, such as the chronology of the action or facts regarding how litigation has progressed. Indeed, in those types of cases, the factual evidence of the Counsel is preferable to that of the client and is largely considered non-contentious – merely a convenient way to organize and identify evidence already on Court record. Indeed, the affidavit itself might be unnecessary. Such is the case here.” Paragraph 8 of counsel’s supporting affidavit, counsel is just bringing to the attention of the court what the ruling of the court was in *Milimani ELRCMISC/E077/2023* and is from the ruling dated 24/11/2023, Annexed to paragraph 8 of counsels supporting affidavit. The respondent relied on the decision in *Oriental Commercial Bank Ltd V Shreeji Contractors Ltd & 2 Others* [Supra] “The affidavit by Paul Murimi Kiongo merely makes deductions from matters which are on the Court record in the form of judgment and rulings. For the most part, the impugned paragraphs contain re-phrased sections of the lower court’s judgment of 31/05/2017. The advocate was on record for the Respondent’s in the case before the lower court. These are matters within the court’s record. They cannot be said to be contentious issues. It would probably have been preferable for those matters to have been submitted on rather than deponed to in his affidavit – but none of the matters are contentious, oppressive or scandalous. I therefore decline the invitation to strike them off.”

12. Paragraph 9 of the supporting affidavit was a chronology of events of what happened after the decision of court in *Milimani ELRCMISC/E077/2023*. It is just a description of how counsel moved court upon the decision aforementioned which decision directed that the matter be placed before the Dosh for determination of the respondent’s objection. Someone had to move Dosh, the Appellant did not move Dosh, the people suffering in this matter are and have been beneficiaries of the deceased, whose interest counsel for the Respondent represents. She therefore moved Dosh via the letters marked as exhibit FMM6, Annexed to paragraph 9 of the counsel’s supporting affidavit. The Respondent submitted that our system is an adversarial system and unless a party moves, then a matter just lies. That the letters were purely intended to move Dosh following the ruling of court in *ELRCMISC/E077/2023* dated 24/11/2023 said what counsel has said in paragraph 9 and there is absolutely nothing wrong with that. The court to consider *Oriental Commercial Bank Ltd V Shreeji Contractors Ltd & 2 Others* [Supra] and find Counsel for the respondent has been accused of directing Dosh on how to handle the Appellant’s objection just because in one of the letters to Dosh, counsel indicated an opinion to the effect the Appellant’s objection was filed out of time. That whether or not an objection is filed out of time, is a fact that can be deduced from records available, dates on when the objection was filed are available, dates on when the decision was communicated are also available, as such, counsel formed an opinion based on the information in her possession, which information is also in possession of the Appellant and which forms part of the record of appeal.
13. The Respondent further urged the court to consider the case of *Salama Beach Hotel Limited V Mario Rossi* [Supra] where the Court of Appeal held that:- “In this case, as far as is relevant to this application, Mr. Muniyithya has deposed that his firm, as the advocates on record for the respondent, was not served with the letter bespeaking the proceedings, and that the record of appeal does not contain a certified copy of the order appealed from. Beyond that he has expressed his opinion that the appeal was filed out of time. On the facts of this application, even if the appellant were to swear the affidavit himself, he would most certainly be repeating what he would have been informed by Mr. Muniyithya. In these circumstances, we do not see any legitimate basis for this complaint.”
14. The Appellants had only sought to cross-examine counsel on the contents of paragraphs 3,4 and 8 of the supporting affidavit in support of an interlocutory application. In their submissions, they



have added paragraph 9 of the supporting affidavit. The supporting affidavit herein has 14 other paragraphs, there is no reason for striking out paragraphs 3, 4, 8 or even 9 of the supporting affidavit dated 16/10/2024 as the Respondent's counsel has explained the source of the information therein contained. If however, court was to think otherwise, then there would be no reason for striking out the entire supporting affidavit dated 16/10/2024 when clearly the only paragraphs in issue are 3, 4 8 and 9 of the supporting affidavit dated 16th October 2024. The Respondent urged the court to consider Regina Waithira Mwangi Gitau V Boniface Nthenge [2015] e KLR where it was held:- "In Kamlesh M.A. Pattni – Vs – Nasir Ibrahim Ali & 2 Others [CA 354/2004](#), the Court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel Paul Muite held inter alia: "... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information..." In other words, the mere fact that an affidavit was sworn by an advocate does not render it incurably defective.

Decision

15. The court has its own rules and the Civil Procedure Rules are not applicable save in the process of execution or where the rules state so. The court is further guided by section 20 of the [Employment and Labour Relations Court Act](#) to wit:-

“

(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.”

16. Under its rules, Employment and Labour Relations Court (Procedure) Rules 2024, the form of the affidavit is not stated. Case law is awash with the position that advocates should be restrained from making affidavits on contested issues as they are not litigants. In the case of Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR, the Honourable Court observed that;

“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular....”

17. The court having looked into the Notice to Cross examine there only three contested paragraphs of the affidavit of Faith Mutio Mutuku advocate for the Respondent being:-
- a. Paragraph 3 of the Supporting Affidavit: “ that the deceased herein was an employee of the Appellant, on 20th June 2018 sustained fatal injury while in the course of work”;
 - b. Paragraph 4 of the Supporting Affidavit: “ that the Applicant reported the accident to the director of occupational safety and Health services and eventually, with a lot of resistance from the appellant, the DOSH form was filled”; and
 - c. Paragraph 8 of the Supporting Affidavit related to ruling dated 24th November 2023.
18. The Court found that Paragraph 9 of the affidavit was not contested in the Notice and cannot thus be brought up in the submissions. The court held that there was nothing wrong per se with the advocate swearing an affidavit save for potential descend to the arena of litigation in contested facts inviting cross-examination on the content of their affidavit. In Oriental Commercial Bank Ltd V



Shreeji Contractors Ltd & 2 Others [Supra] it was observed :- “The affidavit by Paul Murimi Kiongo merely makes deductions from matters which are on the Court record in the form of judgment and rulings. For the most part, the impugned paragraphs contain re-phrased sections of the lower court’s judgment of 31/05/2017. The advocate was on record for the Respondent’s in the case before the lower court. These are matters within the court’s record. They cannot be said to be contentious issues. It would probably have been preferable for those matters to have been submitted on rather than deponed to in his affidavit – but none of the matters are contentious, oppressive or scandalous. I therefore decline the invitation to strike them off.”

19. In Paragraph 3 of the Supporting Affidavit:- “ that the deceased herein was an employee of the Appellant, on 20th June 2018 sustained fatal injury while in the course of work”; The appellant states these averments are contested. The court noted the appellant indeed contested the finding that the deceased was its employee. The court proceeded to find that the facts being contested, the advocate could not state that as a fact without disclosing the source of the information. That was an issue for the appeal and the paragraph is struck out.
20. In Paragraph 4 of the Supporting Affidavit: “ that the Applicant reported the accident to the director of occupational safety and Health services and eventually, with a lot of resistance from the appellant, the DOSH form was filled”; The court found the words “with a lot of resistance” were argumentative and subjective and the advocate was out of line to make the statement without disclosing source of the information. The paragraph is struck out.
21. Paragraph 8 of the Supporting Affidavit related to ruling dated 24th November 2023. The advocate brought to attention of the Court a ruling. There is nothing untoward about that.
22. In the upshot, on the appellant’s Notice to Cross-examine the Advocate for the Respondent on statement of facts contained in the Supporting Affidavit deponed to on 16th October 2024 by the said Advocate, the court strikes out paragraphs 3 and 4 of the affidavit sworn by Faith Mutio Mutuku Advocate on the 16th October 2024 for being argumentative and for failure of the deponent to disclose the source of facts as stated.
23. The Court orders the parties to file submissions in pending application in 14 days concurrently. Mention on the 19th February 2025 to issue a ruling date.
24. Costs in the cause.
25. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant Sila h/b kotonya

Respondent – absent

