



Kosgei & 3 others v Geothermal Development Company Limited; KCB Bank of Kenya Limited (Interested Party) (Employment and Labour Relations Petition E077 of 2022) [2024] KEELRC 592 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 592 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E077 OF 2022**

K OCHARO, J

MARCH 8, 2024

BETWEEN

**BEATRICE KOSGEI 1ST PETITIONER
JOANNE WAMUYU 2ND PETITIONER
SIMON KIPLAGAT 3RD PETITIONER
ENG GEORGE KINYANJUI 4TH PETITIONER**

AND

GEOHERMAL DEVELOPMENT COMPANY LIMITED RESPONDENT

AND

KCB BANK OF KENYA LIMITED INTERESTED PARTY

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 7th October 2022 seeking the following orders: -
 - a. That the Honourable Court be pleased to grant leave to the Respondent/Applicant to withdraw the already filed replying affidavit dated 4th August 2022 that has erroneously been commissioned and proceed to file another Replying Affidavit in place of it.
 - b. That costs of this application be provided for.
2. The Notice of Motion application is premised on the grounds thereof and the Supporting Affidavit of Agnes Muthengi sworn on 7th October 2022.



3. The Petitioners/Respondents opposed the application through a Replying Affidavit sworn on 10th February 2023.
4. When the matter came up before this Court for directions on 25th July 2023, I directed that the Notice of Motion be canvassed by way of written submissions. The Respondent/Applicant filed its submissions dated 8th August 2023 in support of the application together with a Digest of Authorities dated 8th August 2023; while the Petitioners/Respondents filed theirs dated 5th September 2022 in opposition of the application together with a List and Bundle of Authorities dated 5th September 2022.
5. The application is expressed to be brought under Section 3 of the *Employment and Labour Relations Court Act*; Rule 17 (1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, and; Articles 25, 50 and 159 of the *Constitution* of Kenya 2010. It is grounded on the following prime grounds: -
 - a. The Respondent/Applicant filed a Replying Affidavit sworn on 4th August 2022 in opposition to the Petitioners' Notice of Motion and Petition both dated 18th May 2022.
 - b. The Replying Affidavit sworn on 4th August 2022 is wrongly commissioned through an oversight, in that it was commissioned by an Advocate known as Chemng'orem Philip Kiptoo alias Phillip K. Chemng'orem of Admission Number P.105/11044/14 who is an employee of the Respondent/Applicant, and who has appeared before this Court on several occasions as counsel for the Respondent/Applicant holding brief for Agnes Muthengi. It therefore offends Section 4 (1) of the *Oaths and Statutory Declarations Act*.
 - c. That the orders sought should be granted so that the correct facts are put before this court to aid it in the determination of the real questions in controversy between the parties.
 - d. The prayers sought will not prejudice the Petitioners and/or the Interested Party herein. It is also in the interest of justice to grant the orders sought.
6. The Petitioners/Respondents resist the application on the following discernable grounds;
 - a. That Commissioning of Affidavits is anchored in substantive law. As a result, the drawing of affidavits is not a procedural thing. Any default in the drawing of an affidavit cannot be simply considered a technicality or a mere irregularity, as the Applicant's application suggests.
 - b. As such, the erroneous commissioning of the stated affidavit is a matter that is not excusable as it offends the provisions of substantive law.
 - c. The reason advanced by Counsel for the Respondent/Applicant concerning the default in the commissioning of the subject affidavit is not valid. Advocate Phillip Chemng'orem knew or ought to have known that the law did not allow him to exercise the power to commission documents in a matter where he was acting as an Advocate.
 - d. Allowing the Respondent/Applicant to substitute the impugned affidavit will greatly prejudice the Petitioners as their submissions on the earlier application are already filed in court for consideration. The submissions address the Affidavit. Further, a delay in the determination of the matter will be occasioned.
 - e. The present application was not lodged timeously, and the Applicant has not given any explanation for the delay. The application should fail on this count.



Analysis and Determination

7. I have carefully considered the Notice of Motion dated 7th October 2022, the Grounds thereof and Affidavit in Support thereof; the Replying Affidavit sworn on 10th February 2023, the submissions of both parties and authorities relied, and a single issue emerge for determination:-
- a. Whether this Court should grant the orders sought in the Notice of Motion dated 7th October 2022.

Whether this Court should grant the orders sought in the Notice of Motion dated 7th October 2022.

8. The provision of Section 4(1) of the [Oaths and Statutory Declarations Act](#) is at the centre of this dispute. It states thus: -

“Powers of commissioner for oaths

- (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 or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

9. The rationale behind commissioning affidavits was set out in the case of [Kaiser Investments Limited v Hua Run Company Limited & 3 Others](#) [2021] eKLR where the Court held that: -

“The Commissioner for oaths takes the personal responsibility of ensuring that the deponent is telling the truth as per the Affidavit”.

10. The statutory ban on Advocates appearing for a party, commissioning the party’s affidavit, may have been guided by a desire to ensure that the Commissioner for oaths who takes personal responsibility for the statements made in the affidavit by the deponent is objective and not biased in any manner. So, does the violation of Section 4(1) aforesaid render the affidavit invalid and warrant the striking out?
11. Judicial attention has been given to matters affidavits that offend the provisions of the above-stated Act. As to whether the offending affidavit should be pronounced invalid, leaving the owner of the affidavit without an affidavit on record for the purpose it was intended, has also received judicial attention, not once, not twice but on several occasions. The general thread in judicial determinations on the issue is that courts should endeavour to exercise their discretion in a manner that does not stifle the dispensation of justice. The decision in [Microsoft Corporation v Mitsumi Computer Garage Ltd](#) [2001] 2 EA 460 by Ringera J [as he then was] is a classic example of a judicial decision on this.
12. There is no contention that the affidavit, the subject matter of the instant application was commissioned in breach of the provisions of the [Oaths and Statutory Declarations Act](#). The question that then springs up at this point is, what could be the effect of failing to grant the orders sought? The straight answer shall be, since the affidavit was sworn and filed as a response to both the earlier



application and the Petition, they shall remain unchallenged. The Petition shall be heard not on merit, therefore. This will not be in accord with the provisions of Article 159 (2) (d).

13. I am persuaded that a withdrawal of the Replying Affidavit sworn on 4th August 2022 and the grant of leave to the Respondent/Applicant to file a substitute is warranted under the overriding objective of this Court under Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 of the Laws of Kenya. Further, I take the view that the Petitioners shall not suffer a prejudice that may not be compensated by way of costs if the orders sought are granted. Inspired by the holding in *National Bank of Kenya Limited v Anaj Warehousing Limited* [2015] eKLR that: -

“Even as stare decisis assures orderly and systematic approaches to dispute resolution, the common law retains its inherent flexibility, which empowers the Courts, as the custodians of justice under the Constitution, to proceed on a case-by-case basis, invoking and applying equitable principles in relation to every dispute coming up. This principle is typically expressed by Sir Thomas Bingham, MR in the United Kingdom’s Appellate Court, in *M. v Newham London Borough Council and X. v Bedfordshire County Council* [1994] 2WLR 554 at p. 572:

I hereby find merit in the Applicant’s application. The Replying Affidavit sworn on the 4th of August 2022, is hereby marked as withdrawn. The Respondent/Applicant shall file a fresh Replying Affidavit within 7 days of this order and pay the Petitioners/Applicants thrown away costs of Kshs. 5,000/- each, before the next hearing date.

14. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8th DAY OF MARCH, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms. Kabele for 1st Respondent

No appearance for Claimants

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

