



**Republic v Counselors & Psychologists Board & another; Ndinda
& another (Exparte Applicants) (Judicial Review Application
E002 of 2023) [2024] KEELRC 2689 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2689 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E002 OF 2023
M MBARŪ, J
OCTOBER 31, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNSELORS & PSYCHOLOGISTS BOARD 1ST RESPONDENT

**THE REGISTRAR OF TRADE UNIONS, MINISTRY OF LABOUR & SOCIAL
PROTECTION 2ND RESPONDENT**

AND

JOSEPHINE NG'ANG'A NDINDA EXPARTE APPLICANT

HENRY SANYA MANGENI EXPARTE APPLICANT

RULING

1. The *ex parte* applicants filed an application dated 17 July 2024 seeking orders that;
 1. Spent.
 2. This court be pleased to issue an order that all the Replying Affidavits filed by the 2nd Respondent are incurably defective.
 3. All the Replying Affidavits filed by the 2nd Respondent are untenable in the matter and therefore need to be struck out.
 4. This court be pleased to issue an order that all the Replying Affidavits filed by the 2nd Respondent are incompetent and otherwise an abuse of the process of the court.



5. This court be pleased to strike out and/or expunge all the Replying Affidavits filed by the 2nd Respondent.
6. Costs of this application be provided for.
2. The application is supported by the Replying Affidavit of the first *ex parte* applicant because the second Respondent filed two Replying Affidavits on 5 March 2024 and subsequently on 9 July 2024. Both affidavits do not stand the test of law and process. They are fatally defective for want of form and compliance with the law.
3. In the Supporting Affidavit, the 1st *ex parte* applicant aver that the Replying Affidavit of 5 March 2024 filed by the 2nd Respondent did not honestly state the date the oath or Affidavit was taken or made. The Affidavit filed on 9 July 2023 was filed without leave or directions from the court, circumventing procedural rules of practice. All these affidavits were commissioned by a person with no interest in the matter, contrary to clear provisions of the law. Some annexures supporting the Replying Affidavit appear to have fictitious dates and annexures.
4. The *ex parte* applicant also averred that the issues raised in both Replying Affidavits are not mere technicalities but relate to non-compliance with the law and are, therefore, incurably defective. The affidavits be struck out, and the application be allowed with costs.
5. In reply, the second Respondent filed the Replying Affidavit of Anne Kanake, the person holding the second Respondent's office, averring that the Replying Affidavits dated 5 March and 9 July 2024 are the same. The applicant raised an issue of the date of these affidavits. The issues raised are mere technicalities, which were dealt with on 17 June 2024 when the matter was in court.
6. Anne Kanake averred that the Replying Affidavits alleged that they were commissioned by someone interested in the matter. These allegations are grievous, and the applicant has not shown how the said person has an interest in the matter. The alleged defects in the affidavits are not demonstrated, and what is raised are mere technicalities that can be cured under Article 159 of the Constitution.
7. The 1st respondent opted not to file any responses.
8. The parties attended and made oral submissions in court. These are analysed, and the issue for determination is whether the Replying Affidavits filed by the 2nd Respondent on 5 March 2024 and subsequently on 9 July 2024 are defective and whether they should be struck out.
9. First, a background to this matter is imperative.
10. The *ex parte* applicants opted to move the court through judicial review proceedings. Directions for the hearing of the main application were issued without compliance. The *ex parte* applicants opted to file an application dated 15 November 2023, challenging the records and affidavits filed by the respondents.
11. This application was heard, and the ruling was delivered on 5 February 2024. It was dismissed. The *ex parte* applicants were directed to proceed and prosecute the main application. There was no attendance, leading to the court issuing a notice to show cause why the application should not be dismissed. Instead, the *ex parte* applicant filed the instant application challenging the Replying Affidavits filed by the 2nd Respondent.
12. This background shall suffice.
13. The *ex parte* applicant's case is that the Replying Affidavits dated 5 March 2024 and subsequently one dated 9 July 2024 are defective for want of form because she was first served with the Replying Affidavit



of Beatrice Mathenge without stating the date the oath was taken. The attachments to the affidavits are at variance and speak to different dates post the affidavit date; hence, they are fictitious and should be expunged.

14. Other grounds are that these Replying Affidavits are commissioned by the same advocate who drew the same contrary to the [Oaths and Statutory Declarations Act](#). The Affidavit by Beatrice Mathenge is drawn by the office of the Attorney General and commissioned by a State Counsel.
15. The affidavits are undated, and subsequent affidavits are filed without leave of the court, contrary to the Civil Procedure Rules.
16. On their part, the 2nd Respondent admitted that the Replying Affidavit had errors, but these are mere technicalities that can be cured under Article 159 of the [Constitution](#). However, an Affidavit is regulated under the [Oaths and Statutory Declarations Act](#) and must adhere to the requirements of the law. The provisions of Article 159 of the [Constitution](#) are not a panacea to every malady that faces the people of Kenya as held in [Said Sweilem Gheithan Saanum v Commissioner Of Lands \(Being Sued Through The Attorney General\), Municipal Council of Mombasa, Norman Taberali Dawoodbhai, Hassan Taberali Dawoodbhai, Ali Ramandhan Mwatsau & Mohamed Naman Mohamed](#) [2015] KECA 284 (KLR).
17. Where a procedure is regulated in law, such is not ousted by the provisions of Article 159 of the [Constitution](#). Under the [Oaths and Statutory Declarations Act](#), a jurant should attend before a Commissioner for Oaths who should state the date and place of taking the oath.
18. It is trite that the deponent cannot commission the Affidavit. In this case, the 2nd respondent is the office appointed as State Counsel serving at the Registrar of Trade Union. Such office cannot be divested outside the Attorney General. An affidavit commissioned by the same office is invalid under the [Oaths and Statutory Declarations Act](#).
19. However, this lapse in the Replying Affidavit dated 5 March 2024 is addressed, and the 2nd respondent filed the Replying Affidavit dated 9 July 2024.
20. Under Rule 14 of the Employment and Labour Relations Court (Procedure) Rules, no leave is necessary to be sought in filing documents before pleadings close. The technicalities applied relate to matters filed under the provisions of the Civil Procedure Rules while applied in a different context.
21. The background outlined above comes alive in that the *ex parte* applicants have failed to expedite this matter with numerous applications and adjournments. Cumulatively, this is a matter for the *ex parte* applicants. Continued delay only ends up in unnecessary costs.
22. For completeness, the Replying Affidavit dated 5 March 2024 is hereby expunged. The 2nd respondent is allowed the next 14 days to file a comprehensive response, attaching all the necessary documents. Equally, the *ex parte* applicants are to file all the necessary records within the next 21 days to allow pleadings to close in the next 28 days. Costs to abide by the outcome of the application.
23. The notice to show cause why the application should not be dismissed is placed in abeyance to allow parties to comply as above.

Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 31ST DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

