



**Njagi v Tharaka Nithi County Government (Cause 7 of 2020)
[2023] KEELRC 1696 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1696 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE 7 OF 2020
ON MAKAU, J
JULY 14, 2023**

BETWEEN

STEPHEN MUNENE NJAGI CLAIMANT

AND

THARAKA NITHI COUNTY GOVERNMENT RESPONDENT

RULING

1. The application before me is the petitioner's Notice of Motion dated 1st December, 2022 seeking the following orders:-
 - a. That the Honourable court be pleased to strike out and expunge from the court's record the respondent's replying affidavit dated 24th October, 2022 sworn by one William Micheni M'Birichi.
 - b. That the Honourable court be pleased to allow claimant/applicant's contempt of court application dated 8th December, 2021 as prayed.
 - c. That the cost of this application be borne by the Respondent.
2. The grounds for the application are that the petitioner filed a notice of motion dated 8th December, 2021 seeking to have the respondent's County Secretary cited for contempt of this court's orders and in response the respondent filed a preliminary objection to the motion, dismissed in a ruling delivered on 16th September, 2022. Thereafter the respondent filed a Replying affidavit dated 24th October, 2022 without the leave of the court and contrary to the provisions of Order 51 Rule 14 of the [Civil Procedure Rules](#) that provides for the mode of responding to Notice of Motion applications.
3. It further averred that the Replying Affidavit offends the Legal principle established in the *Mukisa Biscuits Manufacturing Co.Ltd v West End Distributors Ltd* (1969) EA 696 and *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & another* (2016) eKLR. In view of the foregoing the applicant



contends that by filing a preliminary objection without a replying Affidavit, it is presumed that the respondent admitted the facts in the application and is therefore estopped from filing the Replying Affidavit to counter the facts after the dismissal of the objection because that amounts to playing lottery with the justice system.

4. The respondent has opposed the instant motion vide Replying Affidavit sworn on 18th January, 2023 by its Principal Legal Officer Lilian Kiruja. In brief the respondents' case is that the respondent has a right to substantively respond to the contempt application and be heard before adverse orders can be made against it; that a party whose preliminary objection is dismissed has a right to file a substantive response to a pending application; and that the preliminary objection never responded to the merits of the contempt application but rather, challenged its form only.

Submissions

5. From the onset the applicant submitted that a respondent cannot lawfully mount any other response to the contempt proceedings after its notice of Preliminary Objection is dismissed. It was submitted that Under Order 51 rule 14 of the *Civil Procedure Rules*, a party has been provided with options of the kind of response to file against a motion once the party makes a choice, it cannot come back to court with a second response to the same motion after a ruling.
6. It was further submitted that where a party chooses to use a combination of two modes of responding to a motion, then the two should be filed together. In that regard, it was submitted that the respondent is not allowed to file a Replying affidavit after a preliminary objection is dismissed unless it obtains leave from the court under Order 51 Rule 14 (3) of the *Civil Procedure Rules*.
7. It was further submitted that the legal principle established by Mukisa Biscuits case, supra is that a preliminary objection is argued on the assumption that all facts pleaded by the other side are correct. As such it was submitted that the Respondent is bound by the principle of estoppel as explained by the Court of Appeal in *Serah Njeri Mwobi v John Kimani Njoroge* (2013) eKLR thus;

“The doctrine of estoppel operates as a principle of law which precludes a person from ascertaining something contrary to what is implied by a previous action or statement of that person.”
8. It was argued that while prosecuting its objection, the Respondent submitted on the facts raised in the motion and therefore, allowing the Respondent to file Replying Affidavit to the motion amounts to a second assault on the same motion.
9. As regards the right to be heard, it was submitted that the Respondent was indeed heard on the application when he chose to oppose it by filing a preliminary objection. Consequently it was submitted that the Replying Affidavit dated 24th October, 2022 is an abuse of the court process and should be struck out and the application for contempt dated 8th December, 2021 be allowed as prayed with costs.
10. On the other hand, it was submitted for the respondent that the Affidavit sworn in support of the instant motion is invalid because it is sworn by counsel and not the applicant. Several precedents were cited to support the above submissions.
11. It was further submitted that the application is an impediment to the respondents' right to both access justice and to a fair hearing under Article 48 and 50 of *the Constitution*.
12. As regards Order 51 Rule 14 of the *Civil procedure Rules*, it was submitted that the rule used the word 'May' to suggest that a party has options of filing either one or a combination of the three responses



provided by that rule. It was submitted that the impugned Replying Affidavit was filed immediately after the dismissal of the objection. Therefore the court was urged to dismiss the application with costs and give directions on the hearing of the contempt application.

Issues for determination

13. There is no denial that, in response to the petitioner's notice of motion dated 8th December, 2021, the respondent filed a notice of preliminary objection dated 21st March 2022. It is also not in dispute that the objection was dismissed vide a ruling delivered on 16th September 2022. Finally it is not disputed that after the dismissal of the objection the respondent filed Replying Affidavit to oppose the contempt motion. The main issue for determination in the present motion is whether the said Replying Affidavit should be struck out and the motion dated 8th December, 2021 allowed as prayed.

The law

14. The Applicant's contention is founded on Order 51 rule 14 (1) which states as follows;
- “Any respondent who wishes to oppose any application may file only one or a combination of the following documents:-
- a. A notice of preliminary objection: and/or
 - b. Replying affidavit: and/or
 - c. A statement of grounds of opposition.”
15. The Respondent's case is that nothing bars it from filing a replying affidavit to oppose an application if its preliminary objection against the same application is dismissed.
16. The contempt proceedings filed by the Petitioner is in the nature of execution of the judgment of this court rendered on 8th December 2017, and therefore by dint of Rule 32 (2) of the [ELRC Procedure Rules 2016](#), the execution of an order or decree of this court is to be done in accordance with the [Civil Procedure Rules](#).
17. The procedure adopted by the petitioner is a notice of motion and the respondent had an option of responding to it as provided under Order 51 Rule 14 (1) of the [Civil Procedure Rules](#) that is to say:-
- a. a notice of preliminary objection and/or Replying Affidavit.
 - b. It could also file a replying affidavit and/or Grounds of Opposition.
18. In this case the Respondent filed a notice of preliminary objection which as observed above was dismissed by a ruling rendered on 16th September 2022. In my view, the respondent exhausted his right to be heard on the application for contempt proceedings when he filed a preliminary objection only. It cannot have a second bite of the cherry by filing a fresh response to the application. Otherwise it would amount to playing lottery with justice. The said mischief and which would lead to delay in finalizing proceedings, must be the reason why the Rules committee framed Rule 14 (1) of the [civil procedure](#) as it is.
19. The foregoing however does not bar the respective officer of the Respondent who is targeted for the punishment, from being heard in the application. I say so because the proceedings for contempt must be directed at some individual and not the Respondent. Holding otherwise would mean that a person will be condemned unheard.



20. Having so held, I strike out the Replying Affidavit sworn on 24th October 2022. The application dated 8th December, 2021 will now be fixed for hearing on a date to be agreed between the parties or fixed by the court in the absence of the parties. The officers targeted by the contempt proceedings have the liberty to respond to the motion as provided by the law. Costs shall abide the outcome of the notice of motion dated 8th December, 2021.

DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF JULY, 2023.

ONESMUS N. MAKAU

JUDGE

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

