



**Mohamed v Judicial Service Commission (Cause E645 of 2022)
[2023] KEELRC 2983 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2983 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E645 OF 2022
AN MWAURE, J
NOVEMBER 17, 2023**

BETWEEN

BISHAR ADAN MOHAMED CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The Applicant filed a notice of motion dated 16th February 2023 seeking orders that this Honourable Court: -
 - a. spent
 - b. do direct and compel the Respondent to unconditionally release to the Claimant its Human Resource Disciplinary Committee proceedings of 22nd September 2021.
 - c. be pleased to grant leave to the Claimant to file in court the proceedings in paragraph b above and other documents before the suit comes for pretrial on 26th June 2023.
 - d. be pleased to allow the Applicant file witness statements of Hassan Lakicha and Purity Gakii Muranguri.
 - e. costs be provided for.

Applicant/ Claimant Case

2. The Applicant's application was supported by an affidavit sworn on 16th May 2023 and further affidavit dated 21st July 2023 in which he averred that it has become necessary to request for the Respondent's human resource disciplinary committee proceedings for meeting held on 22nd September 2022 as the Respondent has not served the Applicant/Claimant its list of documents and the documents therein.



3. The Applicant avers that to enable him prepare his case, the Applicant's advocate emailed the Respondent's advocate on 5th May 2023 and sent a follow up letter on 8th May 2023 requesting for the human resource disciplinary committee proceeding/ minutes of the hearing and the committees accompanying report however, the Respondent has never responded.
4. The Applicant avers that unless directed by this court, the Respondent will persist to be silent and the Applicant will suffer irreparable loss. He further avers that he is entitled to information relevant to the case.
5. The Applicant further seeks leave to file witness statements of Hassan Lakicha and Purity Gakii Muranguri as the same are crucial to his case and pre - trial has not been done.

Respondent's Case

6. In opposition to the application, the Respondent filed a Replying Affidavit dated 22nd June 2023 sworn by the Respondent's Chief Registrar, Hon Anne Amadi.
7. The Respondent opposed the application on grounds that the affidavit has been improperly commissioned with a law firm stamp and note of a commissioner of oaths and therefore should be struck out for offending section 4 and 5 of the [Statutory Declaration Act](#).
8. The Respondent further avers the witness statements of Hassan Lakicha and Purity Gakii are of no greater value to the Claimant's case as they constitute material evidence before this court in form of a letter dated 21st January 2021.

Applicant/ Claimant's Submissions

9. It was submitted for the Applicant that the stamp in the supporting affidavit is not defective in form as it clearly shows that it was commissioned by Ndemi Mokaya who is an advocate and commissioner of oaths and the Applicant requested this court to receive it under order 19 rule 7 of the [civil procedure rules](#).
10. The Applicant further submitted that the Respondent failed to show that the defect if any was calculated to mislead.
11. The Applicant submits that on the merit of this application, the court has not held the pre-trial conference and it intends to call Hassan Lakachi and Purity Gakii as witnesses as the Respondents have not demonstrated to this court it will suffer any prejudice if the witnesses statements are allowed.
12. The Applicant submitted that he is entitled to a written reason for the action taken against him and that the Respondent's decision affected his career and that the Respondent has not stated the basis for alleging the documents sought in this application are privileged and being a state agency performing quasi-judicial function, in exercising its administrative authority the Respondent's decision and reasons are contained in the documents sought.

Respondent's Submissions

13. The Respondent submits that the information sought by the Applicant is privileged and touches on its operation. It relied on Section (1) (h) and (i) of the [Access to Information Act](#) which allows withholding of information if it may infringe professional confidentiality or damage a public entity's position in



any actual or contemplated legal proceedings. It was further submitted this court be guided by Section 23 of the 3rd Schedule of Judicial Service Act, 2011 which provides:

“Copies of proceedings

- (1) An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it.
- (2) The officer may also be given a copy of the evidence (including documents tendered in evidence) after the proceedings are closed, on payment of five shillings per page of each document tendered in evidence:

Provided that they shall not be entitled to copies of office orders, minutes, reports or recorded reasons for decisions.”

14. The Respondent submitted that in denying the Applicant the information sought, the Respondent is not in contravention of any law on grounds that the request was made after the Claimant/ Applicant had been dismissed and filed the main suit and there is no record showing the Applicant requested for the minutes prior to filing the suit.
15. The Respondent further submitted that the testimonies of Hassan Lakachi and Purity Gakii constitutes material evidence before this court in the Claimant’s letter dated 21st January 2021 and therefore are of no greater value to the claimant’s case other than saddle the case documentation and waste the court’s time.
16. It is submitted for the Respondent that the Applicant’s supporting affidavit dated 16th May 2023 commissioned by the firm of m/s Ndemo Mokaya & Co. Advocates offends the provisions of section 4 and 5 of the Oaths and Statutory Declaration Act and that noncompliance of the same cannot be cured by article 159 of the constitution and further a firm of advocates can never be admitted to the roll of commissioner of oaths but rather advocates on an individual level in their name and reliance was on Kaiser Investments Limited v Hua Run Company Limited & 3 others [2021] eKLR and Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR.

Analysis and Determination

17. Having considered the motion, grounds, affidavits and the submissions, the issue for the court’s determination is whether the affidavit sworn and filed in support of the application was in breach of the Oaths and Statutory Declarations Act rendering the application fatally defective.
18. The Respondent in opposition of this application raised the fact that the supporting affidavit failed to state the place where the affidavit was made and/or sworn and that the affidavit was commissioned by the firm of Ndemo Mokaya & Co. Advocates in breach of section 4 and 5 of the Oaths and Statutory Declarations Act which states: -

- “(4) A commissioner for oaths may, by virtue of his commission, in any part of
- (1) 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:

.....



Section 5 provides Particulars to be stated in jurat or attestation clause

Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

19. In the decision [Geoffrey Githinji Mwangi & 2 others v Jubilee Party & 11 others](#) [2018] eKLR the court held: -

“As we have already seen in the relevant provisions of the Oaths and Statutory Declarations Act, the Chief Justice will appoint as commissioners individual advocates in practice, not their firms. Such commission is personal to the particular advocate so appointed. The commission is not issued to his firm. An affidavit therefor ought to show that it was taken by an individual advocate and commissioner for oaths, not by a firm of advocates. If affidavits were to be taken by a firm of advocates, what would prevent any member of that firm, be they advocates who have not been appointed commissioners for oaths, or clerks and secretaries, from purporting to take affidavits on behalf of such firm? That would clearly be against the clear provisions of the Oaths and Statutory Declarations Act.

This is in line with one of the holdings in the case mentioned by the Appellants in ground 2 of their appeal. That case is [David Wamatsi Omusotsi – vs – The Returning Officer Mumias East Constituency & 2 others](#), High Court Kakamega Election Petition No. 9 of 2017 [2017] eKLR. In that case Njagi, J held *inter alia* –

“It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a commissioner for oaths and other officials of the court allowed to do so under the Act...”

I entirely and respectfully agree with that holding.

The issue therefore was whether, on the face of the document itself, the affidavit in issue was taken by a commissioner for oaths, duly appointed. It clearly was not. The affidavit showed on the face of it that it was taken by Bwonwonga & Co Advocates & Commissioner for Oaths, not by any Bwonwonga, Advocate who could well have been a duly appointed commissioner for oaths. Bwonwonga & Co Advocates could not have been appointed commissioner for oaths under section 2(1) of the [Act](#). Such appointment could only be of an advocate in practice, not a firm of advocates.

Contrary to what was submitted for the Appellants, the issue whether the affidavit was duly taken by a commissioner for oaths was an issue of law, not fact. It was not open to the election court to call any advocate to verify that he or she was the advocate and commissioner for oaths behind the rubber stamp impression and that the signature thereon was his or hers. The affidavit itself ought to have clearly shown on the face of it who the advocate and commissioner for oaths taking the affidavit was. The purported knowledge of the election court of a Mr. Bwonwonga who was said to be a commissioner for oaths was irrelevant.

The point of law raised regarding whether the affidavit in issue was properly sworn before a commissioner for oaths was thus a pure point of law based on statute.”

20. Additionally, in Kiage, J.A in [Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others](#) [2013] eKLR held: -

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient,



proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

21. Under section 2 of *oaths and statutory declaration act* the chief justice appoints an advocate as a commissioner for oath and the said appointment is published in the Kenya gazettee. That is a statutory requirement and so a firm of advocates cannot be described as a commissioner for oath. Any affidavit witnessed by a general law firm cannot be admitted as evidence as in this case.
22. The defects raised on the Applicant’s supporting affidavit herein are not mere technicalities but touches on a point law as it is in breach of section 4 and 5 of the *Oaths and Statutory Declarations Act* as it was not commissioned by an advocate recognised under Section 2 of the *Act*. This court therefore strikes out the supporting affidavit as it is incurably defective.
23. Having struck out the supporting affidavit, the application is therefore rendered incompetent as it falls short of the content required under Order 51 Rule 4 of the *Civil Procedure Rules* which states: -

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

This is a mandatory requirement and without a duly filed compliant affidavit the application cannot stand.

24. Due to the above reasons the court finds the claimant application dated 16th May 2023 is not proved as the affidavit in support is defective and there is no evidence adduced as to how the aforementioned witnesses Hasan Lakicha and Purity Gakii are relevant to the suit. The application is therefore dismissed and costs are in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 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 Civil 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.

Anna Ngibuini Mwaure

Judge

