



**Kenya Union of Domestic Hotels, Educational Institutions and Hospital
Workers [KUDHEIHA] v Shimba Hills Secondary School (Cause
84 of 2019) [2022] KEELRC 1470 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

CAUSE 84 OF 2019

AK NZEI, J

MAY 26, 2022

BETWEEN

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS [KUDHEIHA] CLAIMANT**

AND

SHIMBA HILLS SECONDARY SCHOOL RESPONDENT

RULING

1. The application before me is the Respondent's Notice of Motion dated 1st October 2021, and is expressed to be brought under Rules 4(2) and 17 of the *Employment and Labour Relations Court (Procedure) Rules* 2016. The following orders are sought.
 - a. that the Claimant's suit against the Respondent be struck out with costs; and
 - b. that costs of the application be provided to the Respondent.
2. The application states in general terms the grounds upon which it is based, which are set out in the body of the application. The grounds are:-
 - a. that the purported verifying affidavit accompanying the statement of claim filed on 15th November 2019 is an affront to Rule 4(2) of the *Employment and Labour Relations Court (Procedure) Rules* 2016.
 - b. that the impugned verifying affidavit is a false affidavit as the deponent thereof falsely describes himself as the grievant.
 - c. that the Honourable Court has zero tolerance of a statement of claim accompanied by false affidavits.



- d. that it is the interest of justice to allow the application.
3. The Notice of Motion is not supported by an affidavit, but a reading of Rule 17(8) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 appears to permit this. Rule 17(8) provides:-
- “ A Notice of Motion shall state in general terms the grounds of the application and where the Motion is supported by an affidavit, both the Notice of Motion and a copy of the affidavit shall be served on the other party.”
4. Rule 17(1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 on the other hand provides:-
- “ An interlocutory application shall be made by Notice of Motion and shall be heard in open Court.”
5. Although the Rules of this Court do not mandatorily require that a Notice of Motion be supported by an affidavit, filing or otherwise of a supporting affidavit will be, in my view, be depended on the nature of the subject matter in any given application, and particularly where matters of fact are involved.
6. In the present application, what is involved is a matter of both law and fact, and one which is not disputed. Rule 4(2) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides:-
- “ A statement of claim filed under paragraph (1) shall be accompanied by an affidavit verifying the facts relied on.”
7. The foregoing provision of this Court’s Procedure Rules does not state by whom the verifying affidavit shall be sworn, but the use of the word “verifying” means that the affidavit shall be sworn by a person most conversant with the facts of the dispute presented to the Court, and this is the Claimant or grievant in any given case or dispute.
8. It is stated in the Notice of Motion before the Court that the verifying affidavit accompanying the statement of claim herein is a false affidavit, and is an affront to Rule 4(2) of this *Court’s Procedure Rules*.
9. Whereas paragraph 3 of the Claimant’s statement of claim dated 22nd October 2019 and filed in Court on 15th November 2019 describes the grievant therein as one Isaac Nyamasyo Nganda, the affidavit verifying the facts relied on in the suit is sworn by one Francis Omondi Oluoch, who describes himself as the grievant in the suit. This alone makes the suit herein frivolous and incompetent.
10. The application was opposed by the Claimant, Kenya Union of Domestic Hotels Educational Institutions Workers (KUDHEIHA), which on 29th November 2021 filed a Replying Affidavit sworn by Francis Oyondi, who described himself in the Replying Affidavit as an employee of the Claimant Union, and deponed that the Verifying Affidavit accompanying the statement of claim herein was sworn by Francis Omondi who is the Claimant’s Branch Secretary, and that this was a clerical error and/or a mix up.
11. It was further deponed on behalf of the Claimant/Respondent that the present application was filed after the Claimant made an oral application in Court on 27th September 2021 to substitute the verifying affidavit and was ordered to file a formal application.



12. In persuading the Court not to strike out the suit herein, the Claimant cited, in the said Replying Affidavit; the case of *Jefitha Muchai Mwai v Peter Waiganjo Thuku* [2015] eKLR where the Court stated as follows:-

“...Courts of law in the spirit of Article 159 of the *Constitution* should try as much as possible to sustain causes in Court rather than striking out suits for reasons that are merely technical and curable by a simple step that does not prejudice the other party.”

13. The Claimant further cited the case of *Microsoft Corporation v Mitsumi Computer Garage Limited & Another* [2001] KLR 470 where the Court held:

“Rules of procedure are hand maidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it...”

14. I have noted from the Court’s record that on 29th September 2021, the Claimant orally sought the Court’s leave to amend the verifying affidavit filed herein, which the Claimant said was signed by the Claimant’s Branch Secretary instead of the grievant. The oral application was opposed by the Respondent and I made the following order:-

“The Claimant’s oral application for leave to file an amended verifying affidavit is declined. Claimant may file a formal application, to which the Respondent will have an opportunity to respond.”

15. The present application was filed on 4th October 2021.

16. Filing of a verifying affidavit to accompany a statement of claim is a crucial matter under Rule 4(2) of this *Court’s Procedure Rules*, as subrule(2) is couched in mandatory terms. Filing of a wrong verifying affidavit cannot be trivialized and referred to as a clerical error as the Claimant purports to do. I will, however, not strike out the suit herein without giving an opportunity to the Claimant to file a proper verifying affidavit.

17. Article 50(1) of the *Constitution of Kenya* 2010 provides as follows:

“Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

18. I have noted from the Court’s record that the named grievant herein, Isaac Nyamasyo Nganda, recorded and signed a witness statement on 22nd January 2019, which was filed together with the suit documents herein. He should swear an affidavit in verification of facts relied on in the suit filed by the Claimant herein.

19. Consequently, I make the following orders:-

- a. The Respondent’s Notice of Motion dated 1st October 2021 is dismissed with no order as to costs.
- b. The Claimant shall move the Court on an appropriate application as ordered on 29th September 2021 within ninety (90) days, failing which the suit herein shall stand struck off with costs.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Otieno. for Claimant

Mr. Masore for Respondent

