



Kotut & 3 others v Attorney General & 2 others (Petition 63 & 42 of 2015 & 67 of 2017 & 93 of 2016 (Consolidated)) [2022] KEELRC 1253 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1253 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 63 & 42 OF 2015 & 67 OF 2017 & 93 OF 2016 (CONSOLIDATED)**

SC RUTTO, J

JULY 8, 2022

IN THE MATTERS OF THE CONSTITUTION OF KENYA 1969

BETWEEN

**MOSES KEMBOI KOTUT 1ST PETITIONER
ONYANGO ODENY 2ND PETITIONER
PIUS LEYARO LOBUK 3RD PETITIONER
ROBERT NDEME MUTUI 4TH PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
CABINET SECRETARY DEFENCE 2ND RESPONDENT
DEFENCE COUNCIL 3RD RESPONDENT**

RULING

1. What comes up for determination is the Petitioners' Notice of Preliminary Objection dated 14th February, 2020 and which is expressed to be brought pursuant to the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice & Procedure Rules*, 2013, the *Armed Forces Act* No. 60 of 1968, the *Oaths and Statutory Declarations Act*, Chapter 15 Laws of Kenya and all enabling provisions of the law.
2. The Preliminary Objection seeks to:-
 - a. Strike out the Respondents' Replying Affidavit and witness statements by Franklin Oyese Omuse and Major Nicholas Mutuku Mulinge.
 - b. Judgement to be entered be in favour of the Petitioners against the Respondent (s).



- c. Costs of the objection and the suit to be to the Petitioners.
3. The Objection further listed the grounds upon which it was premised upon, as follows: -
- i. That these proceedings are founded upon the former Constitution of 1969 and the Constitution of Kenya of 2010 and the rules of procedure made thereunder.
 - ii. That the Replying Affidavit and witness statement are made by officers without locus standi.
 - iii. That the witness statements are hearsay.
 - iv. That the affidavits are fatally defective.
 - v. That the deponents do not distinguish which of the averments therein are known to them personally and which are sourced from elsewhere and the sources are not stated nor annexed.
 - vi. That the deponents are not authorized by the Cabinet Secretary, Principal Secretary, Defence Council in writing to swear the affidavits in this case on behalf of the Ministry of Defence.
 - vii. The Deponent joined the Kenya Defence Forces on unknown dates and have been records officers from unknown dates, they do not state that they were in Kenya Air Force as of 1st August, 1982.
 - viii. That the Deponents purport to interpret the law on their affidavits.
 - ix. That there are a Multiplicity of affidavits without any explanation and they are intentional.
 - x. That the affidavits are not molded in precise terms.
 - xi. That none of the Deponents is responsible for overall policy, conduct and supervision of the Kenya Defence Forces to be qualified to swear an affidavit on behalf of the Ministry of Defence.
4. The Respondents responded to the Objection through the Relying Affidavit of Mr. Symon Cheberek Yator, sworn on 15th April, 2020. Briefly, that: -
- i. It is not true that the Replying of Affidavits and Witness Statements in this matter is made by Officers without locus to the contrary, the Officers have locus by virtue of being serving Officers of the Kenya Defence Forces whose appointments allow them access to Service records and they have been authorized to swear the Affidavits and make Witness Statements on behalf of the Respondent.
 - ii. It is not true that the contents of the Witness Statement are hearsay, to the contrary the witnesses are versed with the matter by virtue of their appointments.
 - iii. The Replying Affidavit is not defective as alleged or at all.
 - iv. The Deponents of the Affidavits are Officers of the Kenya Defence Forces with access to service records by virtue of the appointments.
 - v. The Deponents have been authorized to swear the Affidavits on behalf of the Respondents and they have expressly stated so in the Replying Affidavits.
 - vi. Neither the Respondent nor the Kenya Defence Forces have complained that the Deponents are not authorized to swear the Affidavits.
 - vii. The Officers are serving in the Defence Forces and have access to public documents as part of their appointments.



- viii. It is customary and lawful to plead the law as part of a party's pleadings and that does not take away the constitutional role vested in the courts to interpret the law.
- ix. From the Respondent's court attendance docket records, on 15th July 2019, the Court gave directions that this matter be proceeded on by way of viva voce evidence where the Respondent was allocated time of One (1) hour.
- x. When the matter came up for hearing on 27th November 2019, all the Petitioners did not turn up in Court and it is in the interests of justice that the matter proceeds to full hearing in order for the Court to ascertain whether the Petitioners are interested in proceeding with the matter.

Submissions

5. The Objection was canvassed by written submissions. On their part, the Petitioners submitted that Major Daniel Muu Kiama and major Frankline Oyese Omuse did not have *locus standi* to make and swear the Replying Affidavits and witness statements as the allegations complained of had emanated from infringement of their rights, by the officers/ agents of the Kenya Army and Kenya Prisons officers who were in service in the year 1982 when the *coup d'état* occurred. Reliance was placed on the case of *Law Society of Kenya vs Commissioner of Lands & others* Nakuru High Court Civil Case No. 464 of 2000 and *Alfred Njau and others vs City Council of Nairobi* (1982) KAR, 229.
6. The Petitioners further submitted that the Respondents' Replying Affidavits do not conform to the best evidence rule under Order 19 Rule 3(1) of the *Civil Procedure Rules*, 2010. That further, the Respondents' Replying Affidavits are defective as some of the facts that were adopted and relied upon could not be proved by the deponents based on their knowledge hence remained hearsay and of no probative value. To support this position, the Petitioners cited several authorities including *Subramaniam vs Public Prosecutor* (1956) WLR 965, *Simon Kitavo & another vs Owenga Anjere* Civil Appeal No. 170 of 1995 and *Cammille vs Meralii* (1966) EA 411 and *Mayers & another vs Akira Ranch Ltd* (1974) 169.
7. The Petitioners urged the Court to strike out the Respondents' Replying Affidavits, Further Replying Affidavits and witness statements from the record.
8. On the other hand, the Respondents submitted that the objection raises points of fact which require determination in a full hearing. That further, the officers have been authorized to swear the Affidavits on behalf of the Respondents by virtue of being serving officers of the Kenya Defence Forces hence have *locus standi*. That further, the deponents have expressly stated that they have been authorized to swear the Replying Affidavits on behalf of the Respondents.
9. It was further submitted on behalf of the Respondents that the averments by the deponents are not hearsay as the information was obtained by virtue of their appointments and responsibilities.
10. That further, the jurisdiction to strike out pleadings is discretionary and must be exercised judicially. That the response raises triable issues and that claims must be resolved on merit even where undefended. To buttress this position, the Respondents relied on the cases of *Simon Kirima Mwiaguri & another vs Equity Bank (Kenya) Limited & another* (2021) eKLR, *Yaya Towers Limited vs Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000, *DT Dobie & Company Kenya Limited vs Joseph Mbaria Muchina & another* (1980) eKLR, *Wellington Nzioka Kioko v Attorney General* (2018) eKLR and *Monica Wangu Wamwere v Attorney General* (2019) eKLR.
11. The Respondents in further submission stated that the Replying Affidavits were not defective as there is nothing therein that is illegal to warrant them to be struck out.



Analysis and Determination

12. I have carefully considered the preliminary objection as well as the Replying Affidavits by the Respondents, the submissions by both parties and the authorities relied upon. Evidently, the singular issue to be determined is whether the Respondents' Replying Affidavits should be struck out.
13. The first point of attack of the Respondents' Replying Affidavits by the Petitioners is that, the officers who have deponed the Affidavits lack *locus standi*.
14. I have considered the Respondents' Replying Affidavit sworn by Major Daniel Muu Kiama and the Further Replying Affidavit sworn by Mr. Frankline Oyese Omuse. Major Daniel Muu Kiama has introduced himself as Staff II Records at the Kenya Defence headquarters while Mr. Frankline Oyese Omuse introduces himself as a Staff Officer II, Welfare at the Kenya Defence Forces. Both deponents have stated that they are authorized to swear the respective Affidavits on behalf of the Respondents and the Ministry of Defence, in response to the Petition.
15. Locus standi is defined in *Black's Law Dictionary*, 9th Edition (page 1026) as "the right to bring an action or to be heard in a given forum".
16. It is therefore evident that the said deponents have sworn the Affidavits in their respective official capacities and notably, no evidence was presented before the Court to discount their authority to swear the Affidavits on behalf of the Respondents.
17. Further, the period of the cause of action cannot be wished away being slightly over 33 years before the institution of the Petitions. As such, it is almost impracticable to have the officers who were then serving at the then Kenya Armed Forces as of 1982, to personally appear in Court and testify.
18. The Petitioners further attacked the Respondents' Replying Affidavits on the basis that the averments are hearsay and that the deponents do not distinguish which averments are known to them and which ones are sourced from elsewhere.
19. In its response to that assertion, the Respondents state that the deponents obtained the information by virtue of their appointments and responsibilities. That further, the deponents will be available to testify in Court during viva voce hearing of the matter.
20. It is notable that on 15th July, 2019, the Court directed that the matter will proceed through viva voce evidence. Indeed, there are witness statements by the aforesaid two deponents, Major Daniel Muu Kiama and Mr. Frankline Oyese Omuse which will presumably, be presented in Court during the trial by the Respondents. At that juncture, the Petitioners will have the opportunity to test the averments of the Respondents' witnesses in cross examination.
21. In the circumstances I find that the Affidavit by Major Daniel Muu Kiama and the Further Replying Affidavit sworn by Mr. Frankline Oyese Omuse, to be competent and properly before the Court.
22. Over and above, this Court is enjoined to serve substantive justice and specifically, under Section 3 (2) of the *Employment and Labour Relations Court Act*, it is to give effect to its Principle Objective which is to facilitate the just, expeditious, efficient and proportionate resolution of disputes.
23. I further gather support from the determination by the Court of Appeal in *Kenya Commercial Finance Co. Ltd vs Richard Akuesera Onditi* (A) 329/2009, where it was emphasized that: -

"In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. In applying the principle or concept of



overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court provisions of Sections 3A and 3B of the *Appellate Jurisdiction Act*. The court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the court has wide powers and will not automatically strike out proceedings. The court, before striking out, will look at the available alternatives.”

24. And Further in *Stephen Boro Gitiba vs Family Finance Building Society & 3 Others* CA 363/2009, the Court of Appeal held inter alia: -

“The overriding objective overshadows all technicalities precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible.”

25. I am fully aligned to the pronouncements by the Court of Appeal and find that it will not be in the interests of justice to strike out the Affidavits by the Respondents.

26. In the premises the Preliminary Objection dated 14th February, 2020 by the Petitioners is disallowed.

27. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Agina for the Petitioners

Mr. Yator for the Respondents

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE

