



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 878 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**MIRIAM CHARI MBOGHO.....CLAIMANT**

**VERSUS**

**NATIONAL WATER CONSERVATION AND**

**PIPELINE CORPORATION.....RESPONDENT**

**RULING**

Judgment in this matter was delivered on 26<sup>th</sup> October 2018 by myself on behalf of my brother Hon. Justice Mathews N. Nduma. The claimant was awarded the following –

**31. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-**

**(i) Kshs.1,423,260 being equivalent of 12 months' salary in compensation.**

**(ii) Ksh.712,484 being unpaid reimbursable claims.**

**(iii) Grant of any benefits that was forfeited by the**

**Claimant by fact of the unlawful summary dismissal including pension, or gratuity whichever is applicable.**

**(iv) Costs of the Suit.**

**(v) Interest on the award at court rates with effect from the date of filing suit for (ii) above and from date of judgment in respect of (i) & (iii) above till payment in full.**

Vide a notice of motion dated 25<sup>th</sup> September 2019 the claimant seeks the following orders –

**1. Eng. Sammy Mburu the Chief Executive Officer of the Respondent Corporation be and is hereby summoned to appear before the court and explain why they have not satisfied the decree herein.**

**2. Eng. Sammy Mburu the Chief Executive Officer should show cause why they should not be punished for failure to satisfy the decree herein.**

**3. Eng. Sammy Mburu the Chief Executive Officer be and is hereby directed to pay the decretal amount of Kshs.3,335,744.00 forthwith.**

**4. The Respondents be and are hereby directed to pay to the Claimant Kshs.29,816,338.00 in terms of prayer iii) of the Judgment.**

**5. Costs of the suit be provided for.**

The application is premised on grounds that –

i) On 12<sup>th</sup> October 2018 Judgment was entered in favour of the Claimant in the sum of Kshs.2,135,744.00 together with costs at Kshs1,200,000.00 to make a total Kshs.3,335,744.00 payable together with interest in the presence of the Advocates for both parties.

ii) The claimant has lost and forfeited Kshs.29,816,338.00 on account of summary dismissal.

iii) The learned Judge granted to the claimant all other benefits that had been forfeited on account of summary dismissal.

iv) The Respondent is a state corporation subject to the Government Proceedings Act Cap 40 Laws of Kenya.

v) Notice of entry of Judgment has been issued.

vi) No attempts have been made to satisfy the decree.

The application is supported by the affidavit of the claimant MIRIAM CHARI MBOGHO which is sworn but not dated. At paragraphs 10, 12, 13, 13 and 14 she deposes as follows –

10. That I lost salaries Kshs.7,079,120.00 that I would have earned with effect from 2011 to December 2022 when I

would have retired the salaries are computed as hereunder

i) Lost salary

144 months x 118,605.00 Kshs.17,079,120.00

ii) Lost annual salary increment

12 years x 6,000.00 Kshs.72,000.00

iii) Lost annual leave allowances

12 years x 26,868.00 Kshs.322,416.00

iv) Lost medical compensation Kshs.1,500,000.00

v) Damages Kshs.7,000,000.00

vi) Lost pensions contribution

26,686.12 x 144 months Kshs.3,842,802.00

**Total Kshs.29,816,338.00**

11. That I have also lost Kshs.72,000.00 annual salary increment with effect from 2011 to 2022.

12. That I have lost pensions benefits at the rate of 15% of basic salary per month.

13. That I want this Claim to be awarded as directed by the Court.

14. That I also want to be paid an exemplary damages on the account of defamation.

She further deposes that on 1<sup>st</sup> June 2019, His Excellency the President of the Republic of Kenya and the Commander in chief of the Kenya Defence forces directed that all pending government bills be paid by 30<sup>th</sup> June 2019 but to date her claim has not been paid. She avers that the Hon. Attorney General has been dully notified of the Judgment in the matter.

The Respondent opposed the application and filed a notice of preliminary objection dated 28<sup>th</sup> July 2020 as well as a replying affidavit sworn by SHARON OBONYO, the Acting Chief Executive Officer of the Respondent on 27<sup>th</sup> July 2020. The thrust of the replying affidavit is that the orders sought cannot be issued in a vacuum.

The respondent submits that Eng. Sammy Mburu who was formerly the chief executive officer of the Respondent is since deceased, and an advertisement of his death was attached as an exhibit in the replying affidavit of Sharon Obonyo sworn on 27<sup>th</sup> July, 2020.

In the notice of preliminary objection, the Respondent challenges the validity of the affidavit sworn in support of the application which it avers is fatally defective.

The application was disposed of by way of written submissions.

In the applicant's submissions she reiterates the averments in the grounds and affidavit in support of the application and further submits that the Respondent has not computed the decretal sum. That the applicant has made her own computation at paragraph 10 of her supporting affidavit.

For the Respondent, apart from reiterating what is deponed in the replying affidavit, it is submitted that the affidavit in support of the application contravenes Section 5 and 8 of the Statutory Declarations Act which provides as follows –

**5. 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.**

**8. Power to take declarations**

**A magistrate or commissioner for oaths may take the declaration of any person voluntarily making and subscribing it before him in the form in the Schedule.**

The Respondent relies on the decision in the case of **Gideon Sitele Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR** the court stated: -

*"We have no hesitation in finding that the purported Replying Affidavit filed by the 1<sup>st</sup> Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated., as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1<sup>st</sup> Respondent."*

The Respondent avers that there is no legal value in the application dated 25<sup>th</sup> September, 2020 as the supporting affidavit to the application is fatally defective since it contravenes all the legal requirements for making an affidavit and thus there is no affidavit in support of the application on record.

That a supporting affidavit is a principle document that supports and is the basis of the application filed by the claimant and would be the principle document that the Claimant would rely on to testify in court on the application for notice to show cause and in the absence of such affidavit, the application must collapse.

The Respondent submits that the application dated 25<sup>th</sup> September 2019 is fatally defective, frivolous, bad in law, lacks merit, the same is premature and an abuse of court process and the same ought to be struck out in *limine* with costs.

**Determination**

I have considered the application together with the grounds and affidavit in support thereof. I have further considered the grounds in the notice of preliminary objection and the replying affidavit as well as the submissions filed by the parties.

The issue for determination is whether the orders sought in the application are merited and whether the supporting affidavit is fatally defective.

Section 5 of the Statutory Declarations Act requires that the Commissioner for Oaths states the place and date on which the oath is taken. In the instant application the date of the oath is not indicated. The same is however signed and witnessed by a Commissioner for Oaths. Is this fatal to the application?

I do not think so. The deponent of the affidavit has signed it, the Commissioner for Oath also signed it. What was omitted is the date. The case relied upon by the Respondent, that is **Gideon Sitele Konchellah v Julius Lekakeny Ole Sunkuri and 2 Others** is distinguishable. In that case the affidavit was not signed, commissioned or dated. In the instant case it is only the date that is missing. I do not think the lack of date alone would render an affidavit fatally defective. If it was the signature of either the Commissioner of Oaths or the deponent missing, then I would agree that it is fatally defective. This is because both the deponent and the Commissioner for Oaths must attest the document to make it valid.

However, even if this was the case, I would still find the application valid because an affidavit only supports the application. In this case the averments in the affidavit are by way of the Applicant's understanding or interpretation of what the circumstances should be. The facts are not contested that there is a judgment in her favour that has not been satisfied by the Respondent who is the judgment debtor.

On whether the orders sought are merited, I would agree with the Respondent that due to the fact that the person against whom the orders were intended is not only no longer the holder of the office, but is deceased, the orders in the format sought would not be capable of being granted without amendment, which was not done.

I however have other reasons which were not raised in the application that would also invalidate the application. The first is that the

application is essentially an application for execution of a decree. There is no decree attached to the application. There is none in the file meaning it has not been extracted. The decretal sum has not even been ascertained. This would make the attachment premature.

Secondly, the Respondent is a State Corporation that can sue and be sued in its corporate name. There is no reason why the Chief Executive Officer would be called upon to show cause why he has not satisfied a decree that is non-existent. There is no order from the court directed at the Chief Executive Officer that he has failed to comply with. The orders sought against the Chief Executive Officer are in *persona* while the debt was against the Respondent which is a different legal entity. A Chief Executive Officer cannot be arrested for failure to pay the debts of the organisation he works for unless there are orders of the court requiring him to act which have been disobeyed.

It is for the foregoing reasons that the application must fail. The same is accordingly dismissed with no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2021**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**MAUREEN ONYANGO**

**JUDGE**