



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 226 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF ARTICLE 2(1), 10(1), 20(1)(3)(4), 21(1), 22(1)(2)(c), 23(1), (3), 35, 41(1), 159(1),
162(2)(a), 232(1), 260 AND 258(1)(2)(c) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010**

AND

**IN THE MATTER OF THE STATE CORPORATIONS ACT (CAP 446), PUBLIC OFFICER
ETHICS ACT (NO 4 OF 2003), PUBLIC FINANCE MANAGEMENT ACT (NO. 18 OF 2012),
ANTI-CORRUPTION AND ECONOMIC CRIMES ACT (NO 3 OF 2003) AND THE
EMPLOYMENT AND LABOUR RELATIONS ACT (NO 20 OF 2011)**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION AND/OR APPREHENDED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 2(1), 20(1), 22(1), (2)(c), 23(1)(3), 35, 41(1), 162(2)a), 232(1), 260 AND
258(1)(2)(C) OF THE CONSTITUTION OF THE REPUBLIC KENYA, 2010**

AND

**IN THE MATTER OF THE CONSTITUTIONALITY AND LEGALITY OF THE APPOINTMENT OF
MR BERNARD NGUGI AS MANAGING DIRECTOR KENYA POWER ANNOUNCED**

ON 29TH OCTOBER 2019

BETWEEN

MAUREEN NYAMBURA NGIGI WARUI.....PETITIONER

VERSUS

THE BOARD OF DIRECTORS, KENYA POWER

AND LIGHTING COMPANY LIMITED.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

RULING

The petition herein is filed by the firm of D. Muriuki and Company Advocates. The petition which is dated 22nd November 2019 was filed on 26th November 2019 together with a Notice of Motion of even date under Certificate of Urgency of Samuel Ndungu who describes himself as an Advocate of the High Court of Kenya duly instructed by the firm of D. Muriuki and Company Advocates which is on record for the Petitioner/Applicant. The said Samuel Ndungu, Advocate is also the one who signed the Notice of Motion and the Petition. He is also the said advocate who commissioned the affidavit of the Petitioner MAUREEN NYAMBURA NGIGI WARUI in support of the motion.

By its Notice of Preliminary Objection dated 3rd December 2019, the 1st Respondent's advocates seek to be heard *in limine* as a preliminary point of law as follows –

“That the Notice of Motion dated 22nd November 2019 and the Petition are incurably defective as the Commissioner for Oaths who purportedly Commissioned the Supporting Affidavit to the Notice of Motion that was purportedly sworn by the Petitioner on the 22nd November 2019 is the very same Advocate who has signed the Certificate of Urgency dated the 22nd November 2019.”

The Preliminary Objection was disposed of by way of written submissions.

1st Respondent's Submissions

The 1st Respondent submits that on the face of the Petitioner/Applicant's Notice of Motion, the Advocate acting for the Petitioner/Applicant and who signed the Certificate of Urgency is one Samuel Ndungu Advocate who is also the Commissioner for Oaths who commissioned the affidavit supporting the motion.

That **Section 4 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya** gives commissioners for oaths powers, in any part of Kenya to administer oath or take affidavit evidence for the purpose of any court matter in Kenya. That Section 4(1) of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya provides that:

“a commissioner for oaths shall not exercise any of the powers given by this section in any proceedings or matter in which the is the advocate for any of the parties to the proceedings concerned in the matter, or clerk to any such advocate or in which he is interested.”

That any affidavit filed in violation of these provisions would be incurably defective.

That in the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station and Another (2002) eKLR** the court held that:

*“...I still stand by what I did say in the case of **James Francis Kariuki and Another v United Insurance Co Ltd HCC No. 1450 of 2000** that such an affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged by law...it offends a provision of an Act of Parliament and does not represent a mere irregularity....”*

That in similar circumstances to the present case, in the case of **Kenya Federation of Labour and Another v Attorney General & 2 Others Industrial Court of Kenya at Nairobi Case No 735 of 2012** Nzioki Wa Makau J. held:

“The short answer to that is that it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the jurat was not in conformity with the Oaths and Statutory Declarations Act.”

That in the case of **Stephen M. Mogaka v Independent Electoral and Boundaries Commission [2017] eKLR** Makau J. struck out seven affidavits that were commissioned in violation of section 4 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya.

That issues raised regarding affidavits are not mere technicalities that can be cured by reference to Article 159 of the Constitution. That the Supreme Court decision in the case of **Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others [2015] eKLR** in a unanimous decision stated:

*“Although the Appellant invokes the principle of prevalence of substance over form, this Court did single in **Law Society of Kenya v The Centre for Human Rights and Democracy & 12 others, Petition 14 of 2013** that "Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls" Not all procedural deficiencies can be remedies by Article 159...”*

The 1st Respondent further submits that Courts in the past have maintained that the requirement under the Oaths and Statutory Declarations Act must be adhered to citing the case of **Charles Muturi Mwangi v. Invesco Assurance Co. Ltd [2014] Eklr**, a decision made while the Constitution, 2010 was in place, where while dealing with the issue of an undated affidavit the Court rendered the position thus:

“[18] These are mandatory provisions. There is no discretion for this court to vary these provisions as these are statutory provisions

with regard to what constitutes a valid disposition to matters before court. The omission to indicate the date of swearing of the affidavit attached to the application before court renders the same defective and should be struck out which leaves the current application unsupported with regard to averment of Auma Okoth. This was the holding in **Jayantkumar Vrajilal Shah versus Chandulal Mchanlal Shar and another, HCCC 1280 of 1997**. The defect on the affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution. The undated affidavit violates a statutory mandatory provision and thus the striking out. The claimant's advocate stated that the affidavit in his possession was dated, however the affidavit in the court file and the one served on the respondent's advocate is undated a fact that was noted by the respondent's advocate. The court record should be taken as it is and in this case, the official record indicates the supporting affidavit is undated as held in **Duncan Mwangovya versus Meena Bhangwandas Patel, HCCC 196 of 2005**."

It is further submitted by the 1st Respondent that in keeping with the decisions on Petitions by the Superior Courts as in the case of **Justus Achinga Kebari & 25 others v The Attorney General [2018] eKLR** the court emphatically held:

"It is trite law and process that a petition shall be accompanied and supported by a valid affidavit in such support. In the instant case, the affidavits in support are dubious for want of veracity in their commissioning. The petitioner has failed to controvert the clear provisions of the law negating their case in the circumstances, it must fail.... This application does not stand the test of law and process. The affidavits in its support are inadmissible for want of form and compliance with the law. They must be struck out."

It is submitted that the current case is on all fours with the case of **Justus Achinga Kebari & 25 others v The Attorney General [2018] eKLR**. The affidavit is incurably defective and inadmissible for want of form and compliance with the law and ought to be struck out.

The 1st Respondent submitted that the Petitioner cannot be aided by the perceived informality of the rules relating to Constitutional Petitions as the informality does not dispense with the need for evidence in Constitutional Petitions. That the Constitutional and Human Rights Division of the High Court in the case of **Isaac Aluoch Polo Aluochier v The National Alliance and 542 others [2016] eKLR** quoting the earlier decision in **Bryson Mangla v Attorney General & Others Nairobi HC Petition No 284 of 2016** considered Rule 10 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 ("Mutunga Rules")** summarised the law on evidence in Constitutional Petitions in the following manner:

"Want of supporting evidence in the petition

10 ... In *Bryson Mangla v A. G. & Ors Nairobi Pet. No. 284 of 2016*, this court held that

"13. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms;

11. Documents to be annexed to affidavit or petition

(1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit."

14. It is conceivable that a petition which challenge for example constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct."

11. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act...."

The 1st Respondent submitted that in the absence of evidence in a valid Affidavit, there is no evidence to support the Notice of Motion dated 22nd November 2019 or the Petition. That in the absence of evidence, the allegations in the Notice of Motion and Petition are unsupported and there is nothing that the Respondents can be invited to answer to. The absence of a valid affidavit is not a procedural technicality. That it follows therefore that the Notice of Motion dated 22nd November 2019 and the Petition must necessarily collapse and the court should hold so.

2nd Respondent's Submissions

Mr. Kioko for the 2nd Respondent informed the court that the 2nd Respondent will be associating itself with the 1st Respondent's submissions.

Petitioner's Submissions

The Petitioner filed submissions in opposition to the 1st Respondent's preliminary objection in which it submits that the preliminary objection is procedural, that the petition is not supported by an affidavit and a defect in the motion cannot cause the striking out of the petition as the motion and petition are two independent pleadings. That under Rule 10 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)**, a petition does not have to be supported by an affidavit. That Rule 11 of the Mutunga Rules provides that a petition may be supported by an affidavit, making the affidavit optional.

The Petitioner submitted that striking out ought to be a measure of last resort, relying on the decision in **D. T. Dobie and Co. (Kenya) Limited v Joseph Mbaria Macharia (1980) eKLR** where the court held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

That the 1st Respondent has not indicated that the Notice of Motion cannot be cured by attaching a compliant supporting affidavit. That it would be a very draconian measure to strike out the Petition where there are genuine concerns raised about the administration of a vital public entity.

That when dealing with an objection with regards to a defective affidavit, among the locus classicus cases is **Caleb Gulam (Suing as the Executor of the Estate of Sadrudin Shamsudin Esmail Nurani) & another v Cyrus Shakhalaga Kwah Jirongo [2004] eKLR**, Ringera J. in considering an issue of a defective affidavit stated as follows;

“The court has discretion not to strike out a plaint which is accompanied by a defective verifying affidavit. The affected party may make an oral application for the exercise of the court's discretion and the court should exercise its discretion as appropriate in the light of the circumstances.

Rules of procedure should be seen as hand maidens of justice and not its mistress and, accordingly, unless procedural lapses have caused adversely a prejudice that cannot be compensated with costs or there is clear manifestation of an intention to overreach, they should not be accorded fatal consequences.

...

Here I cannot see what prejudice the defendant has suffered for the suit is at its very early stages and the plaintiff far from attempting to overreach has done his incompetent best to comply with the rules. I am accordingly inclined to strike out the verifying affidavit and to grant leave to the plaintiffs to file a proper and compliant affidavit within 7 days of today.”

The Petitioner submitted that in the preliminary objection and their submissions, the 1st Respondent has not demonstrated that;

- (a) *The Petitioner has caused great prejudice to them by filing the impugned affidavit;*
- (b) *There is clear manifestation that by filing the impugned affidavit the Petitioner was overreaching; and*
- (c) *The defect alleged goes to the jurisdiction of the Court.*

That the Court should not strike out the Petition and the Notice of Motion but allow the Petitioner to file a compliant supporting affidavit in order to allow the Petition to proceed for determination on merit.

That in another locus classicus decision on the issue of defective affidavits, **Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR**, Ringera J. stated as follows;

“The next matter for consideration is whether I should consequently strike out the suit itself. Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed, no prejudice has been alleged.”

The Petitioner further submitted that in the case of **Geology Investments Ltd v Rogonyo Njuguna David Njuguna Peter Mwangi All T/A Turuti Service Station [2004] eKLR**, Azangalala J. refused to strike out a suit where there was a defective affidavit, choosing to sustain the suit.

The petitioner urged the court to adopt a determination that will lead to enablement and enforcement of Article 48 of the Constitution of Kenya 2010 on the right to access to justice.

On the submission by the 1st Respondent that the petition is not supported by affidavit, it is the Petitioner's submission that this was never raised in any response by the Respondent and the court has no jurisdiction to determine the same, relying on the decision in **Nairobi City Council v Thabiti Enterprises Limited**. It submitted that a new issue cannot be introduced in submissions.

That in the case of **Republic v Chairman Public Procurement & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR** Korir J. stated as follows;

“The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”

It urged the court to dismiss, the preliminary objection.

Determination

Section 4 of the Oaths and Statutory Declarations Act provides as follows –

4. Powers of commissioner for oaths

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

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

(2) A commissioner for oaths shall, in the exercise of any of the powers mentioned in subsection (1), be entitled to charge and be paid such fees as may be authorized by any rules of court for the time being.

It is clear from the proviso to Section 4(1) that a Commissioner for Oaths cannot commission documents in a matter in which he acts.

It is apparent on the face of the pleadings filed herein that Samuel Ndungu Advocate and Commissioner for Oaths is the Counsel on record for the petitioner and indeed signed the pleadings filed herein. It is also evident from the face of the record that the said Samuel Ndung’u Advocate commissioned the affidavit supporting the motion herein. As was held in the case of **Caltex Oil (Kenya) Limited v New Stadium Service Station and Another (supra)**, such an affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged by law. That this does not represent a mere irregularity, as was stated in the case of **Charles Muturi Mwangi v Invesco Assurance Co. Ltd (supra)**. The court emphasised that a defect in an affidavit is not a mere technicality that can be addressed under Article 159 of the Constitution if it violates a statutory mandatory provision.

For these reasons, I strike out both the motion and the supporting affidavit for being bad in law as the motion, without the affidavit, cannot stand the test of evidentiary proof as required by law.

Should the petition too suffer the same fate as the application?

Under the **Constitution of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013**, it is not mandatory for a petition to be supported by an affidavit. Rule 11 provides –

11. Documents to be annexed to affidavit or petition.

(1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.

There are no documents annexed to the petition herein. It is evident that the petitioner intended to rely on the documents attached to her impugned affidavit to support the averments of fact in the petition. Indeed, at paragraph 4 of the affidavit, the petitioner states as follows –

“That I have read the Application and Petition filed herein and I verify that the matters as set out therein are correct to the best of my knowledge, information and belief, save where otherwise stated the source of which information has been stated.”

It is evident that without the affidavit and the documents attached thereto, the averments of fact in the petition are incapable for proof. It is therefore my considered opinion that the petition will be a hollow shell without the documents attached to the affidavit.

I therefore make a finding that the petition must suffer the same fate as the application.

The upshot is that the preliminary objection succeeds and the petition together with the application are struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2020

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 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.

MAUREEN ONYANGO

JUDGE