



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.74 OF 2016

NAHASHON OYWA AMANGACLAIMANT

VERSUS

BOARD OF MANAGEMENT RIFT VALLEY INSTITUTE OF

SCIENCE AND TECHNOLOGY RESPONDENT

RULING

The claimant filed the Memorandum of Claim on 23rd February, 2016 and the respondent filed Response to Claim and Counter-claim on 20th June, 2016.

During the hearing of the matter on 18th March, 2019 the claimant testified that as the claimant he is conversant with his suit and the Verifying Affidavit which he signed but he did not attend before a Commissioner for Oath in the name of *Elias Ngugi Ng'ang'a Advocate, Commissioner for Oaths, P.O. Box 18005-20100, Nakuru*. That he is not known to such person as he signed all his documents before his Advocates, M/S Ndeda & Associates, and Advocate.

On the record, the Verifying Affidavit is indeed commissioned by *Elias Ngugi Ng'ang'a Advocate, Commissioner for Oaths* but it is not dated. Both parties confirmed they have undated Verifying Affidavits.

The claimant's advocate Ms Cheruto submitted that the Verifying Affidavit in support of the suit was done before Mrs Ndeda Advocate and the claimant may have forgotten who commissioned it. This is a technicality which would not affect the substantive suit.

The respondent's advocate Mr Kipkoech submitted that under the Advocates Act, Cap 15 Laws of Kenya, the claim is not verified. Section 14 of Cap 15 provides that without proper commissioning of the affidavit, there is no suit before the court. This is not a mere technicality as it goes to the foundation of the suit. The evidence that is not founded on a suit should collapse.

Mr Kipkoech for the respondent also submitted that the Law Society of Kenya has no name of *Elias Ngugi Ng'ang'a Advocate* and therefore there is perjury. Such person is not on the Roll of Advocates and puts the claimant's advocates on the brink of perjury. The claimant has also confirmed he never appeared before such person and therefore the suit has no foundation and should be dismissed for being incompetent.

This is the gist of the ruling herein.

As noted above, the Verifying Affidavit before court is not dated. It is commissioned by *Elias Ngugi Ng'ang'a Advocate, Commissioner for Oaths*. The claimant has since confirmed under oath that he never appeared before such person to take his oath. Such is a requirement under the provisions of the Oaths and Declarations Act Cap 15 laws of Kenya.

Even where the claimant may have had his Verifying Affidavit written, signed and witnessed by his advocate who drew it, the matters set out under the Affidavit are that he took his oath before *Elias Ngugi Ng'ang'a Advocate, Commissioner for Oaths*. The dates this was done it not stated.

Moved as above, the court in undertaking due diligence has confirmed that *Elias Ngugi Ng'ang'a Advocate*, is not an *advocate* of this court. There is no person registered as such under the Roll of Advocates. Save there is Nganga Ngugi Elias (deceased) who was registered as P.105/1680/87 and practiced under the name and style of E. N. Nganga & Co. Advocates of P.O. Box No. 34624-00100 Nairobi.

Through the Law Society of Kenya Notices to its members, such advocate and person of Ng'ang'a Ngugi Elias died on the 17th of August,

2016. The suit herein having been filed on 23rd February, 2016 is highly possible it was done during the lifetime of such advocate. However, this cannot be verified as the Verifying Affidavit is not dated.

More fundamentally, the Verifying Affidavit is commissioned by *Elias Ngugi Ng'ang'a* Advocate, Commissioner for Oaths, P.O. Box 18005-20100, Nakuru as against the deceased who practiced at an address in Nairobi as E. N. Ngugi & Company Advocates.

With abundance of caution and to ensure there is substantive justice, even where the court were to take the deceased Nganga Ngugi Elias who practiced in Nairobi as one and the same person who commissioned the Verifying Affidavit herein as *Elias Ngugi Ng'ang'a* Advocate, Commissioner for Oaths, P.O. Box 18005-20100, Nakuru, without the same being dated, this is a fundamental flaw which cannot be cured by the application of Article 159 of the Constitution, 2010. This goes to the very heart of the affidavit. Provisions of section 5 of the Oaths and Statutory Declarations Act Cap 15 are stated on mandatory terms;

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.

Such oath must be taken before and in the presence of the Commissioner for Oaths who administers it. To take the oath before the same advocate who is prosecuting the matter is irregular and in conflict of interest. To then take the same to be commissioned after the fact is manipulation of the law, the Oaths and Statutory Declarations Act.

Even where the technicality may have had remote chance of saving the claim, the claimant under oath stated that the affidavit bears his signature but he never attended before a Commissioner for Oaths or before Elias Ngugi Advocate for taking oath. This is taken as the truth and there is no reason to doubt such evidence. In any event the Verifying Affidavit filed is not dated as set out above.

In this case and more specifically what this Court is dealing with, is not an issue of technicalities but on issue of non-compliance with the law, regarding commissioning of the affidavits under the Oaths and Statutory Declarations Act. The swearing of the aforesaid affidavit done in the presence of the claimant's advocate and not before the Commissioner for Oaths and the same being undated by the said commissioner offends an Act of Parliament and in my view that is not a mere irregularity either in a defect in form neither can it be said to be a technical irregularity as it goes to the root of the substantive issue before court. It is an irregularity that is incurably defective as held in the case of **Stephen M Mogaka versus Independent Electoral & Boundaries Commission (IEBC) & 2 others [2017] eKLR.**

As there is a counter-claim and response to the same, the suit shall remain alive for this purpose only.

The Memorandum of Claim being unsupported for want of a Verifying Affidavit is hereby struck out.

Delivered at Nakuru this 28th day of March, 2019

M. MBARU

JUDGE

In the presence of: