



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 135 OF 2018**

**(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> June, 2019)**

**AGNES WACU GATOTO.....PETITIONER**

**VERSUS**

**KENYA KAZI SERVICES LIMITED.....RESPONDENT**

**RULING**

1. The Respondent raised a Preliminary Objection dated 28.1.2019, stating that the Petitioner's application dated 13.12.2018 is hopelessly misconceived, frivolous, total devoid of merit, malafides and incurably defective and the application and Petition should be dismissed with costs for the reason that the Petitioner's advocate has sworn the supporting affidavit on contentious matters which risks determining the rights of parties and that the Petition is not supported by an affidavit.

2. The Petitioner filed Grounds of Opposition in response to the Preliminary Objection on the grounds that the objection is based on a misinterpretation and that the objection does not meet the threshold of a Preliminary Objection as it cannot be addressed without examining the facts surrounding the issues before the Court. The Petitioner urges the Court to dismiss the same as it is an affront to Court's practices.

**Submissions**

3. On 30<sup>th</sup> April, 2019, the Petitioner withdrew the application dated 13.12.2018 leaving the only issue to be addressed in the Preliminary Objection as whether a Petition not supported by an affidavit is competent.

4. The Respondent on the issue submitted that the Petition is fatally defective for not being accompanied by a Supporting Affidavit. That Rule 11 of the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules 2013 provides:-

***“The Petition filed under these rules may be supported by an affidavit***

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

5. That even though the rule uses the word may it has been settled that where the facts are in dispute and when the Petitioner intends to rely on evidence, the same must be supported by an affidavit. They rely on the case of **Susan Bosire Vs Serah Wekesa Welime & 2 Others (2017)eKLR** where it was held:-

***“It is thus my finding that failure by the Petitioner to attach any documents to her Petition or to file a supporting affidavit alongside her petition to attach any documents she wished to rely on, rendered her petition incompetent... I would concede that there will be cases where the dispute in the petition may be determined on the basis of submissions on law where the facts are not in dispute or where the facts in issue are matters of public notoriety as to attract judicial notice without proof. In such cases there would be no need for an affidavit in support of a petition. However, in cases such as the present where the serious charges of unprofessional conduct and fraudulent accounting are made such allegations must consistently with the fair hearing principles be supported by an affidavit so that the defendant knows the case he has to meet.”***

6. That the Petitioner has the general burden of proof and thus they ought to file an affidavit to support the Petition to demonstrate the allegations made against the Respondent. That the instant Petitioner has not been supported by evidence by way of affidavit and thus the allegations by the Petitioner are baseless and thus the Petition should be dismissed.

7. The Petitioner on the other hand submits that the word may as used under Rule 11 of the Constitution of Kenya (Protection of Rights and

Freedoms) Practice and Procedure Rules 2013 does not make it mandatory to file an affidavit in support of a Petition. They rely on the case of **Karamorah Impex and Transport Company Vs Kenya National Highway Authority & Others (2017)eKLR** where the Court confirmed that a Petition does not need to have an affidavit to be competent. That it is not a must for a Petition to be accompanied by an affidavit.

8. That failure to file an affidavit is a technicality since it is not mandatory under the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules 2013. The Petitioner urges the Court to dismiss the Preliminary Objection with costs.

9. I have considered the averments of the Parties. As stated in Rule 11 of the Constitution of Kenya (Protection of Rights & Freedom) Practice and Procedure Rules 2010, the filing of a Supporting Affidavit is not mandatory hence the use of the word 'may'.

10. I have also considered the nature of the Petition itself – the prayers sought by the Petitioner and I find no prejudice that would be suffered by the Respondent by the Petitioner failing to file an Affidavit.

11. I therefore find the Preliminary Objection unmerited and I dismiss it accordingly.

12. Costs in the cause.

**Dated and delivered in open Court this 20<sup>th</sup> day of June, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Sanana holding brief Anyoka for Petitioner – Present

Mwaniki holding brief Kimathi for Respondent – Present