



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.64 OF 2019

[Formerly Nakuru HCC No.23 of 2018]

LEE NJIRU .....CLAIMANT

VERSUS

J.K. LOKORIO.....1<sup>ST</sup> RESPONDENT

PETER NG'ETICH .....2<sup>ND</sup> RESPONDENT

RULING

The suit was initiated under Nakuru HCC No.23 of 2018. By Ruling delivered on 11<sup>th</sup> July, 2019 the High Court, Nakuru transferred the suit to this court following finding that the High Court had no jurisdiction.

From the pleadings and the ruling, two issues were up for determination being question of jurisdiction and which is now determined and the question whether the Verifying Affidavit sworn in support of the plaint is in violation of section 4 of the Oaths and Statutory Declarations Act and if so if this renders the entire suit fatally defective.

On the single issue for determination both parties relied on the written submissions.

The respondents as the movers of the objections submitted that Order 4 of the Civil Procedure Rules, 2010 demands that every plaint be accompanied by a Verifying Affidavit verifying the averments in the claim in accordance with the rules and in default the court has jurisdiction to strike out the plant and by extension the suit. The Verifying Affidavit filed by the claimant does not conform to the law.

The respondents also submitted that the claimant's pleadings have been drawn by the firm of M/s Sheth & Wathigo Advocates and no known law bars them from doing so. The Verifying Affidavit in support of the claim is commissioned by one Ndeke Gatumu an advocate who practices in the same law firm of Seth & Wathigo Advocates and from the records of the Law Society of Kenya such advocates confirm the advocate is a legal practitioner in the law firm.

Section 4 of the Oaths and Statutory Declarations Act provides that a Commissioner for Oaths can commission any document provided that such a Commissioner for Oaths shall not exercise any of the powers given by the law to commission documents in proceedings in which he is the advocate for the parties or concern in the matters or clerk to any advocate or in which he is interested.

The respondents have relied on the cases of **Stephen M Mogaka versus Independent Electoral & Boundaries Commission (IEBC) & 2 others [2017] eKLR; Kenya Federation of Labour & another V. Attorney General and 2 Others [2014] eKLR; and Caltex Oil (Kenya) Ltd V. New Stadium Station Ltd & Another [2002] eKLR** where the court struck out affidavits filed in contravention of section 4 of the Oaths and Statutory Declarations Act for being commissioned by an advocate and Commissioner for Oaths in conflict of interest.

In this case, the Verifying Affidavit having been commissioned by Ndeke Gatumu Advocate and by virtue of being a PR actioner under the firm of Set & Wathigo Advocates appearing for the claimant, the affidavit is defective and should be struck out leaving the suit without a verifying affidavit and thus incompetent.

The claimant on his part submitted that Order 4 Rule 2 of the Civil Procedure Rules provides that a plaint shall be accompanied by a Verifying Affidavit sworn by the plaintiff verifying the correctness of the averments therein. Order 4 Rule 1(6) provides that the court *may* on its own motion of upon application order to be struck out any plaint which does not comply with sub-rule 2, 3, 4 and 5 with the operative word being *may* and creating a possibility of striking out as this is not mandatory as held in **M'impwi M'ikiugu versus Joseph Kithinji & another HCC 153 of 2002 (Meru)**. Striking out of pleadings is draconian and extreme measure which may only b resorted to where court is of the view that the process of the court has been abused.

The claimant also submitted that he should be allowed to file a fresh affidavit instead of the entire suit being struck out as such discretion exists. Such mandate is secured under article 159(2) (d) of the constitution 2010 the court called to administer justice without undue regard to technicalities as held in **Stephen Boro Gitiha versus Family Building Society & 3 others Civil Appeal No.263 of 2009**.

Determination From the written submissions, the objections by the respondents with regard to the Verifying Affidavit in support of the claimant being commissioned by an advocate in the practice under the same law firm representing the claimant, Seth & Wathigo Advocates is not dispute in any material way save to urge the court to apply its discretion and apply the provisions of Article 159 of the Constitution, 2010 to ensure justice is achieved instead of application of technicalities.

A search by the court from the Law Society of Kenya search engine returns that Ndeke Daniel Gatumu and being number P.105/2513/93 is an active legal practitioner under the firm of Seth & Wathigo Advocates, Nakuru. Such law firm of Seth & Wathigo Advocates are on record for the claimant.

**Section 4 (1) of the Oaths and Statutory Declarations Act**, which provides as follows;

*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.* [Underline added].

These provisions are couched in mandatory terms.

The claimant has sought to rely on Order 4 Rule (2) to (6) and which provides at sub-rule (6) as follows;

*The Court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2), (3), (4) and (5).*

Context must also be given to the substantive legislation, the Oaths and Statutory Declarations Act under which a Commissioner for Oaths can commission any documents for use in judicial proceedings but cannot commission documents and affidavits where he is conflicted being part of the law firm attending for one of the parties. The Rules being subsidiary to the legislation cannot have an overbearing effect to the law as held in **Anthony Wandeto Mwangi versus Agba Motors Limited, Cause No.369 of 2012**. Rules of procedure cannot override the mandatory provisions of a statute.

As submitted by the respondents, in the case of **James Francis Kariuki & Another versus United Insurance Co. Ltd Civil Appeal No. 1450 of 2000** the court held that;

*... the verifying affidavit sworn by the plaintiffs is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the Oaths and Statutory Declarations Act.*

This position is reiterated in the case of **Kenya Federation of Labour & Another versus Attorney General & 2 Others Cause No. 735 of 2012** and the findings 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 Declaration Act*

**The claimant herein having filed the suit with a Verifying Affidavit commissioned by an advocate from the same law firm representing him in these proceedings contravened the mandatory provisions of section 4(1) of the oaths and Statutory Declarations Act. the person of Ndeke Gatumu is unauthorised to commission the verifying affidavit. This cannot be cured by application of Article 159 of the constitution. I agree with position taken in James Mangeli Musoo versus Ezeetec Limited [2014] eKLR held that;**

*A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.*

The Court of Appeal in addressing the issue of whether article 159 of the constitution should override procedure in the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** held that;

*... Article 159 of the Constitution ... command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure*

*and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned. [underline added]. the affidavit in the claim having been commissioned by an unauthorized person is contrary to the law and in my view defective.*

**I accordingly strike out and expunge the Verifying Affidavit from the Court records. The suit is left without a foundation. The suit is struck out. Each party shall pay own costs.**

Delivered at Nakuru this 9<sup>th</sup> day of October, 2019.

**M. MBARU**

**JUDGE**

In the presence of: .....