



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 3 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER SECTION 70 (a), 72 (3), 74 (1) AND
SECTIONS 77 OF THE CONSTITUTION OF KENYA 1969

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL RIGHTS, THE MATTER OF THE CONSTITUTION OF THE
KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT
PRACTICES AND PROCEDURE RULES, 2013

(Before D. K. N. Marete)

JUSTUS ACHINGA KEBARI & 25 OTHERS.....PETITIONERS

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

This is an application by the respondent dated 17th July, 2018. It comes out as follows;

- a. THAT this Honourable Court be pleased to hear this Application in priority to the hearing of the main Petition herein.*
- b. THAT this Honourable Court be pleased to strike out and/or expunge all the affidavits in Petition No. 3 of 2017.*
- c. THAT consequently this Honourable Court be pleased to strike out in its entirety the petition herein.*
- d. THAT costs of this Application be provided for.*

The application is grounded as follows;

1. That this Petition was filed before this Honourable Court on 16th March 2017.
2. That the Petition is incurably defective as it is supported by defective Supporting Affidavits commissioned by the Petitioner's Advocate contrary to the law.
3. That some of the Signatures on the Supporting Affidavits appear forged while the Petition is also missing the Supporting Affidavits of the 7th Petitioner, 18th Petitioner and the 23rd petitioner.
4. That some of the Petitioners never signed the Supporting Affidavits as unverified signatures have been cut out and pasted in the Petition.
5. That all the affidavits were commissioned by a person who has an interest in the matter contrary to the clear provisions of the law.
6. That the said affidavits are therefore incurably defective.
7. That is in the interests of justice that the Application be allowed as prayed.

The petitioners/respondents in their Grounds of Opposition dated 20th July, 2018 oppose the application as follows;

1. The motion is malicious, vexatious, scandalous and not fit for the ear of a Judge.
2. The motion is premature, frivolous and tantamount to abuse of the process of the court.
3. That the motion is incompetent bad at law and fatally defective.
4. That the motion is an affront to the dignity of the court and tantamount to contempt of court.
5. That the motion is an affront to this courts practices and Procedure Rules.

The matter came for hearing on 23rd July, 2018 when Ms Goro, counsel for the respondent submitted on a reliance of the Supporting Affidavit of Alice Mate sworn on even date. She reiterated her submission that the Supporting Affidavits of the petitioners were commissioned by the petitioner's advocates. This is a contravention of section 4 (1) of the Oaths and Statutory Declarations Acts, Chapter 15, Laws of Kenya. She argued and submitted that the petitioner's advocate has an interest in the matter and particularly its outcome therefore lacking competence to commission the said affidavits. On this, the respondent sought to rely on the authority of **Caltex Oil (Kenya) Limited vs. New Stadium Service Station and Another, 2002, eKLR**.

At this point, counsel for the petitioner objected to the citation of the authority for lack of prior service but this was acknowledged and remedial measures decreed by court.

The respondent further rubbished the petitioner's Grounds of Opposition and submitted that these should only be raised on a pure point of law and based on the assumption that all facts pleaded in the matter are correct. This is not the case here.

The respondents in conclusion submitted that the conduct of the commissioning of the affidavit renders the same *not affidavits as such* and therefore the petition is not supported by an affidavit as is envisaged in law. This is not a mere irregularity but a poignant issue of law and therefore the petition should be struck out for lack of supporting affidavits and also being incurably defective on such basis. She prayed as such.

Mr. Agina, counsel for the petitioners submitted a reliance on their Grounds of Objection and list of authorities. It was his further submissions that the petition is grounded under the provisions of the Constitution of Kenya, Legal Notice No.117 of 2013 – The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

He further submitted that Rule 10 therein provides for the requirement of a petition and that this does not require an affidavit. Rule 11 further provides that an affidavit is only an option – “May be supported by an affidavit.” This, he submits is supported by the Employment and Labour Relations Court (Procedure) Rules 2016 where Rule 7 cites the Mutunga Rules as prerequisites in petitions and Judicial Review Applications.

The petitioner further relies and submits that Order 19 Rule 7 of the Civil Procedure Rules allows courts to entertain affidavits regardless of defects and irregularities. Further, Article 159 (2) (d) of the Constitution of Kenya, 2010 decries regard to technicalities. This is further supported by the Oxygen Rules, section 1 B of the Civil Procedure Act empowering this court to apply the provisions of Article 159 above.

It is his further submissions the affidavit (s) herein are different from those referred to under Order 4 Rule 2 – an affidavit accompanying a plaint. In the instant case, striking out the affidavit does not affect the petition.

In response, Goro, counsel for the respondent sought to rely on the authority of **Nicholas Kiptoo arap Kenga Salat vs Independent Electoral and Boundaries Commission and 6 Others, 2013 eKLR** where it was held that the issues raised (affidavits) are not technicalities but non compliance with the law.

Article 159 cannot be relied on to oust rules of procedure. Again, on striking out the affidavit, the petition remains bare and incurably defective.

The respondent's case suppresses that of the petitioner. 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 validity of the affidavits in support are dubious for want of veracity in their commissioning. The petitioner has failed to controvert the clear provisions of law negating their case in the circumstances. It must fail.

The case of the respondent/applicant is the more feasible of the two. 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.

I am therefore inclined to allow the application, thereby striking out the petition with orders that each party bears their costs of this application and petition.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Goro instructed by State Law Offices for the respondent/applicant.
2. Mr. Ojwang Agina instructed by Agina & Associates advocates for the petitioner/respondent