Omondi & another v Ngao Credit Limited (Civil Appeal E082 of 2025) [2025] KEHC 11338 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E082 OF 2025

A MABEYA, J

JULY 31, 2025

BETWEEN

EMMEY ATIENO OMONDI ..... 1ST APPELLANT

JACK DAVID ODHIAMBO ..... 2ND APPELLANT

AND

NGAO CREDIT LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect of the appellant's application dated 20/3/2025. The same was brought under Articles 22, 15, 258 and 259 [1] of *the Constitution*, section 4 of the *Consumer Protection Act* 2012, sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 2 rule 11, Order 13 rule 2, Order 20 rule 1, Order 40 rules 1, 2, 3, 4, 5, 9, 10, Order 41 rule 1, Order 42 rules 1, 4, 5, 7, 25, 32, Order 43 rule 1, Order 44 rule 1, Order 50 rule 4, Order 1 rules 1, 4, 11 & 14 of the Civil Procedure Rules, Regulation 36 of the Central Bank of Kenya [Digital Credit Providers] Regulations 2022 and section 5[2] of the *Movable Property Security Rights Act* 2017.

2. The appellants sought primarily orders of stay of execution of the judgment and decree of Hon. D.K. Matutu [SRM] passed in Kisumu CMCC No. E352 of 2023 on 20/2/2025.

3. The application was based on the grounds set out on the face of the Motion as well as the supporting affidavits of Emmey Atieno Omondi and Jack David Odhiambo both sworn on 20/03/2025.

4. The appellants had sued the respondent before the trial court seeking to restrain them from selling motor vehicle registration number KCV 087M that was used to secure a loan from the respondent but the suit was dismissed and the appellants ordered to pay the respondent Kshs. 987,692/- together with interest.

5. Being dissatisfied with the court's judgment and decree, the appellants filed the instant appeal within which they filed the instant application for stay of execution.

6. The respondent opposed the application vide its replying affidavit sworn by one Julie Ogweno on 28/04/2025 stating that the application was frivolous, vexatious and an abuse of the court process as it is not supported by any evidence.

7. That the application was incurably defective as it was supported by a non-commissioned statements presented as affidavits.

8. That the appellants were not entitled to the orders of stay of execution sought as courts will not grant stay where a money decree is involved as the appellants have no known assets which the respondent can recoup in the event the appeal is unsuccessful whereas the money involved is not substantial and the respondent is a renowned digital credit provider with sufficient fiscal ability to compensate the appellants.

9. That some of the orders sought by the appellant are overtaken by events as the suit motor vehicle has already been sold and the respondent has partially recovered the decretal sum.

10. The application was disposed off by way of submissions that were hilighted on 1/7/2025. I have considered the application, the responses thereto and the submissions on record.

11. There is a preliminary issue to be considered before examining the application on merit. In opposition to the application, the respondent raised the fact that the supporting affidavits filed in support of the application were not commissioned and were therefore fatally defective.

12. Sections 4 and 5 of the *Oaths and Statutory Declarations Act* provides how affidavits are to be commissioned. They also provide the particulars to be stated in jurat or the attestation clause. They require every commissioner for oaths before whom any oath or affidavit is taken to state in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

13. In Geoffrey Githinji Mwangi & 2 others v Jubilee Party & 11 others [2018] eKLR, the court held that: -

> " As we have already seen in the relevant provisions of the *Oaths and Statutory Declarations Act*, the Chief Justice will appoint as commissioners individual advocates in practice, not their firms. Such commission is personal to the particular advocate so appointed. The commission is not issued to his firm. An affidavit therefor ought to show that it was taken by an individual advocate and commissioner for oaths, not by a firm of advocates. If affidavits were to be taken by a firm of advocates, what would prevent any member of that firm, be they advocates who have not been appointed commissioners for oaths, or clerks and secretaries, from purporting to take affidavits on behalf of such firm? That would clearly be against the clear provisions of the *Oaths and Statutory Declarations Act*.
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> This is in line with one of the holdings in the case mentioned by the Appellants in ground 2 of their appeal. That case is David Wamatsi Omusotsi v The Returning Officer Mumias East Constituency & 2 others, High Court Kakamega Election Petition No. 9 of 2017 [2017] eKLR. In that case Njagi, J held inter alia –
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> > " It is clear from the provisions of the said Act that affidavits cannot be commissioned by a firm of advocates as happened in this case. An affidavit can only be commissioned by a commissioner for oaths and other officials of the court allowed to do so under the Act...."

I entirely and respectfully agree with that holding.

The issue therefore was whether, on the face of the document itself, the affidavit in issue was taken by a commissioner for oaths, duly appointed. It clearly was not. The affidavit showed on the face of it that it was taken by Bwonwonga & Co Advocates & Commissioner for Oaths, not by any Bwonwonga, Advocate who could well have been a duly appointed commissioner for oaths. Bwonwonga & Co Advocates could not have been appointed commissioner for oaths under section 2[1] of the Act. Such appointment could only be of an advocate in practice, not a firm of advocates.

Contrary to what was submitted for the Appellants, the issue whether the affidavit was duly taken by a commissioner for oaths was an issue of law, not fact. It was not open to the election court to call any advocate to verify that he or she was the advocate and commissioner for oaths behind the rubber stamp impression and that the signature thereon was his or hers. The affidavit itself ought to have clearly shown on the face of it who the advocate and commissioner for oaths taking the affidavit was. The purported knowledge of the election court of a Mr. Bwonwonga who was said to be a commissioner for oaths was irrelevant."

14. From the foregoing, it is clear that the statements that were made and not commissioned died not amount to affidavits. Those statements cannot be taken to be evidence that support the Motion before Court.

15. What about Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to disregard technicalities?

16. Kiage, J.A in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR held: -

> "... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both 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 succor 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 a 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..."

17. The defects raised on the applicant's supporting affidavit are not mere technicalities but touch on a point law as it is in breach of section 4 and 5 of the *Oaths and Statutory Declarations Act*. They were not commissioned by an advocate recognised under section 2 of the Act. This court therefore strikes out the purported supporting affidavits of the appellants as they are incurably defective.

18. Having struck out the supporting affidavits, the application dated 20/3/2025 is therefore rendered incompetent as it falls short of the content required under Order 51 Rule 4 of the Civil Procedure Rules which provides that: -

> " Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

19. This is a mandatory requirement and without a duly filed compliant affidavit to support the application, the same cannot stand by itself as it requires evidence.

20. In the premises, the Court finds the application dated 20/3/2025 to be incurably defective and hereby strikes it out. Considering that the applicants are lay people who may not have been aware of the strict requirements of the law as to pleadings, I will not make any order as to costs.

21. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE