



**Ochieng & another v Oscar Otieno Odongo t/a Odongo Investment Auctioneers
(Civil Appeal E035 of 2023) [2024] KEHC 17043 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17043 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E035 OF 2023
RPV WENDOH, J
MAY 30, 2024**

BETWEEN

JOSEPH OCHIENG 1ST APPELLANT

RUSHING W. JUDITH 2ND APPELLANT

AND

**OSCAR OTIENO ODONGO T/A ODONGO INVESTMENT
AUCTIONEERS RESPONDENT**

*(An Appeal from the whole of the ruling delivered by the Hon. R.K. Langat Principal Magistrate
(PM) Rongo, dated and delivered on 10/2/2022 in Rongo Misc. Application No. 26 of 2021)*

JUDGMENT

1. Joseph Ochieng and Rushing W. Judith (appellants) filed an application dated 16/11/2021 seeking orders that the ex parte taxation proceedings before the Hon. R. K. Langat (PM) dated 16/11/2021 be stayed and the appellants be granted leave to respond to the application dated 2/11/2021. Oscar Otieno Odongo T/A Odongo Investment Auctioneers (respondent) opposed the application by filing a response dated 22/12/2021. The application was canvassed by way of written submissions and the learned trial Magistrate dismissed the appellants' application with costs.
2. In his decision, the learned Magistrate was of the view that the appellants' application could not stand since the annexures therein were not sealed and marked. The trial court held that the same were expunged thus there was no evidence to support the appellants' assertions.
3. Aggrieved, the appellants filed this appeal challenging the decision of the trial Magistrate on eight (8) grounds. The grounds of appeal can be summarised as follows:-
 1. The learned Magistrate erred in law and misdirected himself when he failed to consider the appellants' submissions on both points of law and facts.



2. The trial court erred by failing to consider the circumstances surrounding the entry of the ex parte application.
 3. The trial court erred by finding that the application dated 16/11/2021 cannot stand without an affidavit that has annexure.
 4. The trial court erred by dismissing the appellants' application dated 16/11/2021 instead of striking it out hence rendering the court functus officio.
4. The appellants asked that this appeal be allowed and the entire ruling of the Hon. R.K. Langat delivered 10/2/2022 be set aside and the ex parte taxation entered on 16/11/2021 be set aside, that the court orders that the respondent's costs be taxed interparties and costs of this appeal and the application awarded 16/11/2021 be awarded to the appellants.
 5. The court directed that the appeal proceeds by way of written submissions. It is only the respondent who complied by filing submissions dated 23/4/2024 which I have duly considered.
 6. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & Another vs Associated Motorboat Co. Ltd* (1968) EA 123.
 7. I have considered the appeal, the respondent's submissions and the trial court's record.
 8. The singular point which the trial court considered in dismissing the application dated 16/11/2021 was the failure to mark the annexures accompanying the appellants' application.
 9. Rule 9 of the Oaths and Statutory Declaration Rules provides as follows:-

All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”
 10. The law makes it mandatory to have the annexures accompanying an affidavit be sealed and marked by a Commissioner for Oaths. I have perused the application dated 16/11/2021 as filed by the appellants. The annexures which the appellants sought to rely on being the letter dated 15/11/2021 and the Auctioneers Bill of Costs were not sealed and/or marked as required under Rule 9 of the Oaths and Declaration Rules.
 11. The Court of Appeal in *Pharmacy and Poisons Board & Another; Mwiti & 21 others (Respondent)* (Civil Appeal E144 of 2021) (2021) KECA 97 (KLR) (22 October 2021) (Ruling) held as follows: -

...With regard to the unsigned supporting affidavit, the unmarked and unsealed annexures, it would suffice to observe that such an affidavit is fatally defective and of no value to the applicants' Motion. Addressing itself to the effect of an unsigned affidavit, the Supreme Court in *Civil Application No. 26 of 2018 Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR observed that such an affidavit is of no legal value to the matter before the court and that, in so far as it is defective, it is deemed that there is no affidavit on record. The same fate befalls unmarked and unsealed annexures. They are of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures



must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules.”

12. Guided by the above decisions and without belabouring this issue, in the absence of properly sealed annexures to the affidavits, there was no evidence which the trial court could have relied on in exercising its discretion of setting aside its order.
13. As to whether the trial court should have struck out the motion instead of dismissing it, the court had observed that the draft response was annexed for the court to consider whether or not there were triable issues. Having made that observation, the court found no merit on the application and the proper decision was to dismiss not strike out.
14. In the end, I find that this appeal is devoid of merit and it is hereby dismissed with costs to the respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF MAY, 2024.

R. WENDOH

JUDGE

Ruling delivered in presence of:-

No appearance for the Appellants

No appearance for the Respondent

Emma & Phelix - Court Assistants.

