



REPUBLIC OF KENYA



KENYA LAW
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**Jones v Kisangi & another (Civil Suit E080 of 2021)
[2025] KEMC 38 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEMC 38 (KLR)

**REPUBLIC OF KENYA
IN THE MUTOMO LAW COURTS
CIVIL SUIT E080 OF 2021
LK MWENDWA, PM
MARCH 12, 2025**

BETWEEN

ABEDNEGO MUSEMBI JONES PLAINTIFF

AND

ABEDNEGO MUTUA KISANGI 1ST DEFENDANT

VERONICA NGALI 2ND DEFENDANT

RULING

1. The application for consideration is the Amended Notice of Motion dated 15/01/2024 and filed on 25/01/2024. It has been taken out by the Defendants and seeks the following orders;
 - a. That the present Application be certified urgent, service be dispensed with and the same be heard ex parte in the first instance,
 - b. That there be a stay of execution of the exparte interlocutory judgment entered on the 21st of January 2022 against the defendants/ applicants pending the hearing and determination of this application.
 - c. That the exparte judgment entered on 21st of January, 2022, and subsequent orders granted against the defendants/ applicants be set aside and the defendants be granted leave to file their Memorandum of Appearance and Defence out of time.
 - d. That the 2nd Defendant be struck out as a party to the suit,
 - e. That costs of the application be provided for.
2. The application is premised on the grounds set out on the face of the application which are supported by the amended supporting affidavit of Abednego Mutua Kisangi sworn on 15/1/2024.



3. The Respondent opposed the application vide a Notice of Preliminary Objection dated 28/10/2024 and filed on an even date. The Preliminary Objection is raised on the following grounds;
 - a. All applications are supposed to be supported by an affidavit/affidavits.
 - b. An affidavit is evidence on oath and cannot be withdrawn or amended.
 - c. The affidavit in support of the defendants' application sworn on the 15th of January, 2024 is described as an 'AMENDED AFFIDAVIT'.
 - d. Consequently the application is grossly defective and it will be a waste of time for the court to indulge in hearing it.
 - e. The amended application is vexation in that it is the 2nd or 3rd application seeking the same orders by the defendants where:-
 - i. The Previous applications have not been withdrawn or dispensed with.
 - ii. Leave to amend has never been sought and obtained and if so, that ought to be clearly indicated just below the heading "amended notice of motion" which regrettably has not been done.
4. On 4/12/2023, directions were issued, inter alia to canvas the application by way of written submissions. As at 5/2/2025, the Respondent had filed submissions, the applicants were granted leave of 7 days to file their submissions and Ruling was reserved for 12/3/2025. As I draft this Ruling, 7 days have since lapsed and there is no submission on record for the Applicants.

Applicants' Case

5. The applicants allege that they were never served with Summons to Enter Appearance as provided for under the Civil Procedure Rules. Thus, they have been condemned unheard. The Applicants further allege that they were not served with a Notice of entry of exparte judgment as stipulated by Order 22 Rule 6 of the CPR 2010.
6. The Applicants maintain that they have a defence that raised triable issues. They urge the court to allow them ventilate it at the trial. It is the applicants' contention that they have fully settled the Liquidated claim set out in the plaint herein. The Applicants thus take the view that the Respondent is pursuing a non-existent claim and such a pursuit is not in the interests of justice but personal gain.

Respondent's Case

7. The Respondent has filed a Notice of Preliminary Objection in opposition to the application herein. The Respondent take the view that the "amended affidavit" filed in support of amended Notice of Motion is grossly defective. He further contends that leave to amend the Notice of Motion was not obtained and even if it was, the applicants have not indicated the same in the heading of his Notice of Motion.
8. The Respondent further argues that the applicant had filed similar applications which they have not withdrawn or dispensed with. The Respondent thus urges this court to find that the application as drawn and filed is vexatious and an abuse of the court process.



9. As it pertains the issue of amendment of an affidavit, the Respondent takes the position that an affidavit being evidence on oath cannot be amended. The only cure for it is to file a fresh affidavit. In his words as comprised in his submissions he states:-

“Amending an affidavit is tantamount to a witness standing on the witness box testify, walk out and come back to tell the court that I want to change my evidence. That is foreign to our jurisprudence. We therefore submit that even if there was an application, it is not supported by an affidavit”

10. The Respondent supported his arguments with 2 authorities:-

- a. Swaleh Gheithan Saanum Vs Commissioner of Lands & 5 Others (2002) eKLR.
- b. Lewar Ventures Ltd Vs. Equity Bank (Kenya) Ltd (2002) eKLR.

Analyses & Determination

11. I have considered the Application, the Notice of Preliminary Objection filed in response thereto as well as the submission of the Respondent. I will first deal with the propriety of the amended affidavit that has been raised in the Preliminary Objection by the Respondent-and whether there is a duplication of applications and/or whether the present amended Notice of Motion has been filed without the leave of the court.

12. As regards the allegations that the applicants have filed the present amended Notice of Motion without the leave of court, I find that that allegation is unfounded. A cursory look to the orders of court issued in the Ruling of 10th January, 2024 clearly indicates that the court granted leave to the applicants amend the application the court ordered as follows:-

- i. Stay of execution of judgment on admission entered on 21/1/2022 is hereby issued pending the hearing and determination of the applicants’ motion filed in court on 26/6/2023.
- ii. 14 days leave is hereby granted to the applicants to amend their motion.
- iii. Respondent is given corresponding leave to reply.
- iv. Security deposited shall remain in force.
- v. Costs shall be in the cause.

13. Having found that the applicants had authority from the court to amend their application, the next issue for determination is whether, an amended affidavit filed to the amended Notice of motion is incompetent. In answer to this question, I am guided by the finding in Swaleh Gheithan case (Supra), in which Justice Onyancha dealt with the question of whether a party can amend an affidavit to a application. The court held that amendments to an affidavit can be allowed in so far as they do not involve substantive depositions of the subject matter. The court stated:-

“Counsel for the defendants failed to point out to court any reliable authority supporting their stand that an affidavit cannot be amended. The basis for such a view would appear to be mere common sense and/or logic arising from the fact that an affidavit mainly contains of matters of fact sworn to be true upon knowledge, information or belief. Once such facts have been sworn on oath therefore, they cannot be negatived or contorted by the person who deposed them. It is my view what is sworn in the body of the affidavit will thereon be clearly defined. Once it is so stated, and becomes the substance of the oath, it would indeed



be against common sense and logic to amend the substantive express contents in the said affidavit. What about formal errors on the face of the affidavit “if a name or a word or a title is misquoted or misdescribed or misspelt; can such be amended “In my view and I so hold, a title like in a court document can be amended to identify it with the suit as long as it does not in any way alter the meaning and substance of the affidavit. In my further view the same logic and sense that would dictate against amending the substance of an affidavit would be the same that would dictate this court to hold that there is little that should prevent technical amendments from being made to an affidavit. Alternatively, the titled of a case which must appear in every document drawn and filed in a suit may be said not to be a substantive part of an affidavit. It is not that part of the affidavit that is actually sworn nor is it one liable to alteration by either party in the case and I would so hold.

14. Does the amendment of the affidavit herein touch on the substance of the subject matter? One of the substantive issues herein is allegation as to non-service of summons to enter appearance. The amended supporting affidavit introduces at Paragraphs (10) (11) and 12 which are depositions that are material on the question of service of summons to enter appearance upon the Applicants. Same applies to Paragraphs (17) (18) (19) and (20) of the supporting affidavit.
15. I thus find merit in the ground raised by the Respondent that the applicant cannot amend his evidence comprised in an affidavit. The amended supporting affidavit of Abednego Mutua Kisangi is hereby struck of for the aforesaid reasons.
16. What is the face of the amended Notice of Motion upon striking out of the amended supporting affidavit? Order 51 Rule 4 CPR 2010 deals with contents of a Notice of Motion. It is couched in mandatory terms; thus

“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”

17. As was held in University of Nairobi Vs. George Mabele Sifuna (2021) eKLR, the notice of motion herein stands unsupported and ought to be dismissed. In this matter this court held:-

“An application without a supporting affidavit lack in a material way- it is filed against the Rules of the court. Such stands alone as unsupported. This is not a mere technicality that can be cured in any manner by the court. It has to suffer the obvious. Being struck off for want of supporting affidavit”.

Disposition

18. In light of the above analysis and findings, I make the following orders;-
 - a. That the Notice of Preliminary Objection dated 28/10/2024 and filed on an even date is upheld on account of incompetence of the amendment supporting affidavit to the amended Notice of Motion.
 - b. That the amended Notice of motion dated 15/11/2024 and field on 25/6/2024 be and is hereby struck of.
 - c. That the plaintiff/Respondent shall have the costs of this application.

DATED, SIGNED AND DELIVERED THIS12THDAY OF.....MARCH.....2025.



HON. L. K. MWENDWA
PRINCIPAL MAGISTRATE

