



Case Number:	Tribunal Appeal No. Net 189 of 2016
Date Delivered:	31 Jul 2018
Case Class:	Civil
Court:	National Environment Tribunal - Nairobi
Case Action:	Ruling
Judge:	Mohammed S Balala - Chairperson, Christine Kipsang - Vice-Chairperson, Kariuki Muigua - Member, Bahati Mwamuye-Member & Waithaka Ngaruiya-Member
Citation:	Sewenei Limited & another v National Environment Management Authority & another; Aaron Rotich Tuikong (Interested Party) [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE NATIONAL ENVIRONMENT TRIBUNAL AT NAIROBI**

**TRIBUNAL APPEAL NO. NET 189 OF 2016**

**SEWENEI LIMITED..... 1<sup>ST</sup>**  
**APPELLANT**

**RAYMOND BOMETT.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**PETER KIPLANGAT KORIR .....2<sup>ND</sup> RESPONDENT**

**AND**

**AARON ROTICH TUIKONG..... INTERESTED PARTY**

**RULING**

**BACKGROUND**

1. The matter before this Honorable Tribunal is a Notice of Motion Application filed by the Appellants dated 14/03/2017. The application is supported by an affidavit sworn by John K. Kibet.

2. The application is brought pursuant to Rule 19 of the National Environmental Tribunal Procedure Rules, 2003, Articles 21 (1), 47(1) and 159 (2) (a) of the Constitution of Kenya, 2010 and all enabling provisions of the law. The Appellants seek the following orders:

*a) That the 2<sup>nd</sup> Respondent's Reply to the Notice of Appeal dated 14<sup>th</sup> November 2016 and filed on 15<sup>th</sup> November 2016 be struck out in its entirety;*

*b) That the filed Notice of Appeal dated 12<sup>th</sup> August 2016 be allowed by this Honorable Tribunal as prayed therein; and*

*c) That the costs of this application be provided for.*

4. The Appellants' application is premised on the following grounds:

*a) The Honorable Tribunal having issued a Stop Order dated 12<sup>th</sup> August 2016 for the 2<sup>nd</sup> Respondent to stop all activities relating to the construction of two residential houses located at Hardy-Karen in Nairobi County and the same served upon the 2<sup>nd</sup> Respondent, the 2<sup>nd</sup> Respondent has continued to flagrantly disobey the said order;*

*b) The 2<sup>nd</sup> Respondent continued contravention of the provisions of Rule 19 of the Tribunal Procedure Rules, 2003 amounts to gross abuse of the due process of this Honorable Tribunal; and*

c) *It is trite law that he who comes to Equity must come with clean hands, thus the 2<sup>nd</sup> Respondent is contemptuous of this Honorable Tribunal and which act must be estopped forthwith.*

5. In response to the Application, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 22<sup>nd</sup> March 2017. The 2<sup>nd</sup> Respondent denies the allegations made by the Applicants contending that upon the Stop Order being issued by the Honorable Tribunal on 12<sup>th</sup> August 2016, there has been no construction going on at the site and the photos produced as exhibit JKK-3 have no bearing to the suit property. He further contends that the Affidavit in support of the application is bad in law making the present application defective and incompetent.

6. The 2<sup>nd</sup> Respondent avers that the application is actuated by malice owing to the bad blood between him and Mr. Hosea Mundui Kiplagat, a director of the 1<sup>st</sup> Appellant. He asks the Honorable Tribunal not to allow the appellants' application since it amounts to abuse of its process by the Appellants for their selfish motives.

## **SUBMISSION BY THE PARTIES**

### **APPLICANTS' SUBMISSIONS**

7. In support of the orders sought in the Notice of Motion Application dated 14/03/2017, the applicants' filed their written submissions on 05/04/2017. In their submissions, the Applicants' raise the following issues for determination relating to this application:

- a) Whether the Stop Order dated 12<sup>th</sup> August 2016 issued by the Honorable Tribunal is and still in force to date;
- b) Whether the 2<sup>nd</sup> Respondent's actions to continue with the construction in defiance of the said order was illegal and unlawful; and
- c) Whether the 2<sup>nd</sup> Respondent's continued disobedience of the said Stop Order warrants the striking off 2<sup>nd</sup> Respondent's Reply in its entirety.

8. On the first issue, the Applicants submitted that upon an appeal by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants herein, the Honorable Tribunal had a right to issue a Stop Order the consequence of which all activities on the land relating to the appeal in question be stopped pending the determination of the appeal. In support of this argument, the Applicants cited Section 129 (4) of the Environmental Management and Co-ordination Act which states that:

*'Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.'*

9. This Honorable Tribunal did issue a Stop Order on 12<sup>th</sup> August 2016 which effectively meant that all activities on L.R. No. 15065/18 had to be stopped. The Applicants submitted that the 2<sup>nd</sup> Respondent was obligated to comply with the said order in its entirety which he failed/neglected to obey.

10. On the 2<sup>nd</sup> issue, the Applicants submitted that upon receipt of the stop order, the 2<sup>nd</sup> Respondent complied temporarily for a few months until February 2017 when as an afterthought, he decided to fully proceed with the construction notwithstanding the existence of the Said Stop Orders. The Applicants submitted that the actions by the 2<sup>nd</sup> Respondent to defy the said Stop Order were contemptuous, an abuse of due process, illegal and affronts the noble principle that no orders shall be made in vain.

11. On the 3<sup>rd</sup> issue, the Applicants place reliance on **Rule 19 of the National Environmental Tribunal Procedure Rules, 2003** which states that:

*'If any directions given to a party under this part of these rules are not complied with by such a party, the Tribunal may, in addition to other powers available to it before or at the hearing, dismiss the whole or part of the appeal or, as the case may be, strike out the whole or part of a respondent's reply and, where appropriate, direct that a party shall be debarred from participating in the appeal altogether: Provided that the Tribunal shall not so dismiss or strike out or give such directions unless it has sent notice to the party who has not complied with the directions giving him an opportunity to show cause why it should not do so.'*

It was submitted by the Applicants that the Tribunal did issue the said notice to the 2<sup>nd</sup> Respondent pursuant to Rule 19 of the National Environment Tribunal Rules giving him an opportunity to show cause which has since lapsed by effluxion of time, showing lack of respect to the Tribunal by the 2<sup>nd</sup> Respondent.

12. Further, the Applicants relied on the case of **Econet Wireless Kenya Ltd vs. Minister for Information and Communication of Kenya & Another (2005) 1 KLR, 828** where Ibrahim J stated that:

*'It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone the deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.'*

The Applicants urged the Honorable Tribunal to allow the present application in order to protect the dignity and authority of the Tribunal.

## **2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

13. In opposition to the present application, the 2<sup>nd</sup> Respondent filed his written submissions on 12/04/2017. The 2<sup>nd</sup> Respondent framed the following issues for determination:

- a) Whether the application by the Appellants is defective, incompetent and bad in law;
- b) Whether or not the 2<sup>nd</sup> Respondent has disobeyed and continue to disobey the Stop Order issued on 12<sup>th</sup> August 2016; and
- c) Whether or not the Appellants are entitled to the orders sought.

14. On the first issue, the 2<sup>nd</sup> Respondent submitted that the Supporting Affidavit in the application was sworn by **JOHN.K.KIBET** an advocate of the High Court of Kenya appearing for the applicants. It was submitted that the affidavit is bad in law and should be struck out as it is trite law that an advocate appearing for a party in proceedings should not swear an affidavit on contentious matters. Reliance was placed on the case of **Francis Kimutai Bii Vs Kaisugu (Kenya) Ltd (2016) eKLR** where the court in citing the case of **Regina Waithira Mwangi Gitau vs Boniface Nthenge (2015) eKLR** stated that:

*'...the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavits on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which is he (sic) handing merely as an agent which practice is irregular.'*

The court further held that:

*‘.....It is trite law and practice that an advocate cannot and should not depose or engage himself in the realm of evidence in a matter he is appearing. This is more particularly in exercise of deposing on contentious issues thereof. As earlier intimated, the Replying Affidavit by Mr. Oyugi sworn on 4<sup>th</sup> December 2015 cannot stand. It is therefore struck out of the record of court.’*

15. On the 2<sup>nd</sup> issue, which is the subject of another application before this Honorable Tribunal, the 2<sup>nd</sup> Respondent submitted that the Applicants have not proved disobedience of the Stop Order dated 16<sup>th</sup> August 2016.

16. On the 3<sup>rd</sup> issue the 2<sup>nd</sup> Respondent's Reply pursuant to **Rule 19 of the National Environmental Tribunal Procedure Rules**, the 2<sup>nd</sup> Respondent submitted that the issue of disobedience ought to have first been proved but that is not the case. The 2<sup>nd</sup> Respondent contended that Rule 19 cannot be invoked at this stage of the proceedings until after the Appellants have first proved the 2<sup>nd</sup> Respondent has disobeyed the said Stop Order and hence the application is incompetent and bad in law.

17. The 2<sup>nd</sup> Respondent further submitted that the remedy of striking out the 2<sup>nd</sup> Respondent's reply and/or to debar him from participating in the appeal all together is upon the Tribunal making a finding that he has failed to comply with the order and/or any direction of the Tribunal which determination cannot be made as the Applicants had not proved their allegations to the standard required in law. The 2<sup>nd</sup> Respondent urged the Tribunal to dismiss the application with costs.

#### **ANALYSIS AND DETERMINATION BY THE TRIBUNAL**

18. Having considered the applicant's Notice of Motion Application dated 14/03/2017, the 2<sup>nd</sup> Respondent's replying affidavit dated 22/03/2017 and written submissions filed by both parties, the issue for determination by the Tribunal is whether the Applicants are entitled to the orders sought in the application.

19. The application before this Honorable Tribunal is brought pursuant to, inter alia, the provisions of **Rule 19 of the National Environmental Tribunal Procedure Rules, 2003**. The said provision stipulates that:

*If any directions given to a party under this Part of these rules are not complied with by such a party, the Tribunal may, in addition to other powers available to it before or at the hearing, dismiss the whole or part of the appeal or, as the case may be, strike out the whole or part of a respondent's reply and, where appropriate, direct that a party shall be debarred from participating in the appeal altogether. Provided that the Tribunal shall not so dismiss or strike out or give such a direction unless it has sent notice to the party who has not complied with the direction giving him an opportunity to show cause why it should not do so.*

20. The directions referred to under Rule 19 of the National Environmental Tribunal Procedure Rules, 2003 are provided for in part V of the Act. Rule 18 (1) provides that the Tribunal may at any time, on the application of a party or of its own motion, give such directions (including directions for the furnishing of further particulars or supplementary statements) as are necessary to enable the parties to prepare for the hearing or to assist the Tribunal to determine the issues.

21. In order for the Applicants' to succeed in their application they need to show that they made an application for directions to the Tribunal, directions were issued by the Tribunal and that there is breach or disobedience of the Tribunal's directions.

22. In this case, the Applicants argue that the Tribunal issued a Stop Order stopping the construction of two residential houses in Hardy-Karen location pending the determination of NET No. 189 of 2016. The stop order was not granted upon an application made by the Applicants under part V of the National Environmental Tribunal Procedure Rules. Therefore, the Applicants cannot invoke the Tribunal's powers under Rule 19 of the National

Environmental Tribunal Procedure Rules.

23. The Notice of Motion application is supported by an affidavit sworn by **JOHN. K. KIBET**, an Advocate of the High Court of Kenya practicing with the firm of Oruenjo Kibet & Khalid Advocates who are on record for the appellants in this matter. It was the 2<sup>nd</sup> Respondent's contention that it is trite law that an advocate appearing on matters which are contentious should not swear an affidavit. In support of this argument, the 2<sup>nd</sup> Respondent cited the case of **Kimutai Bii v Kaisugu (Kenya) Ltd (2016) eKLR** where the court struck out a Replying affidavit sworn by an advocate.

24. The law governing Affidavits is **Order 19 of the Civil Procedure Rules, 2010. Sub-rule 3 (1)** thereof stipulates that affidavits shall be confined to such facts as the deponent is able of his knowledge to prove. The issue of advocates swearing affidavits in contentious matters has been decided in several court cases.

**In Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi, Miscellaneous Civil Application No. 116 of 2015, [2015] eKLR**, Justice G V Odunga stated that:

*'Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.'*

The court further cited the case of **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463**, where **Ojwang, J** as he then was stated as follows:

*'It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs.'*

**Further, in Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17** it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear of his own. This is also the position in the cases of **Francis Kimutai Bii vs. Kaisugu (Kenya) Ltd, Cause No. 25 of 2015, (2016) eKLR** and **Ndathi Mugunda Company Limited vs. Patrick Matu Githinji & 4 Others, Civil Case No 62 of 2004, (2016) eKLR**, cited by the 2<sup>nd</sup> Respondent.

25. The affidavit in support of the application contains depositions that are contentious in this matter such as the issue of the 2<sup>nd</sup> Respondent proceeding with construction of the said houses despite the existence of the Stop Order dated 12<sup>th</sup> August 2016. The appropriate party to swear the affidavit should have been either a director of the 1<sup>st</sup> Applicant or the 2<sup>nd</sup> Applicant. The affidavit in support of the application is improper and defective. It is hereby struck out. Consequently, the Notice of Motion Application dated 14/03/2017 cannot stand on its own.

**ORDER**

26. For the foregoing reasons the Appellants/Applicants application dated 14<sup>th</sup> March 2017 is hereby dismissed.

**DATED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2018**

MOHAMMED S BALALA..... CHAIRPERSON

CHRISTINE KIPSANG..... VICE-CHAIRPERSON

KARIUKI MUIGUA.....MEMBER

BAHATI MWAMUYE.....MEMBER

WAITHAKA NGARUIYA.....MEMBER



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