



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 666 OF 2018**

JACINTA MBITHE.....1<sup>ST</sup> APPLICANT

MULWA CALEB MUSYOKI.....2<sup>ND</sup> APPLICANT

VERSUS

EDWIN MASINGO OKWAKORI.....RESPONDENT

**RULING**

**INTRODUCTION**

1. The Applicants' Notice of Motion application dated 17<sup>th</sup> December 2016 and filed on 18<sup>th</sup> December 2016 was filed pursuant to the provisions of Order 50 Rule 6(1), and (6), 51 Rule 1 of the Civil Procedure Rules, Sections 3A, 63,79G and 95 of the Civil Procedure Act, Chapter 21 Laws of Kenya and all the enabling provisions of the law. Prayer Nos (1) and (3) were spent. It sought the following remaining orders:-

1. Spent.

2. That this Honourable Court be pleased to enlarge the time within which the Applicants may lodge their intended appeal against the judgment delivered on 28<sup>th</sup> September 2018 in Nairobi CMCC 1834 of 2016 Edwin Masingo Okwakori Vs Jacinta Mbithe and Mulwa Caleb Musyoki.

3. Spent

4. That the orders sought under prayer 3 be confirmed upon hearing of the application till the hearing of the intended appeal.

2. Their Written Submissions were dated 28<sup>th</sup> February 2019 and filed on 1<sup>st</sup> March 2019 while those of the Respondent were dated 4<sup>th</sup> March 2019 and filed on 11<sup>th</sup> March 2019.

3. The parties requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

4. The Applicants' present application was supported by the Affidavit of Rita Achola that was filed on 18<sup>th</sup> December 2018. In response to the said application, the Respondent's advocate, Nelson Kaburu Felix, swore a Replying Affidavit on his behalf on 18<sup>th</sup> January 2019.

5. Before this court could delve into the merits or otherwise of the said application, it noted that the Affidavit in its support was unsworn. This was contrary to the mandatory provisions of Section 5 of the Oaths & Statutory Declarations Act Cap 15 (Laws of Kenya).

6. The said Section 5 of the Oaths & Statutory Declarations Act provides that:-

**“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”**

7. It is couched in mandatory terms. Failure by the Commissioner for Oaths to date the said Supporting Affidavit of Rita Achola therefore rendered their application herein incompetent and defective *ab initio* and the prayers could not be granted as had been sought.

8. Whereas Article 159(2) (d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities, it is not a panacea for all technicalities. An undated Affidavit is not a procedural technicality that can be cured by Article 159(2)(d) of the Constitution of Kenya as it goes to the root of the document, which becomes an oath and admissible, only after duly complying with the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act.

9. It was considered view that the Applicants would not suffer any prejudice if the court did not grant the order because they still had the opportunity of filing a proper application before the court for consideration as there was no evidence that execution proceedings had commenced against them.

#### **DISPOSITION**

10. For the foregoing reasons, the upshot of this court's Ruling was that the Applicant's Notice of Motion dated 17<sup>th</sup> December 2016 and filed on 18<sup>th</sup> December 2016 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

11. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 23rd day of September 2019**

**J. KAMAU**

**JUDGE**