



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPL. NO. 2 OF 2014

FARKHANDA NURMOHAMED ABDULKADER APPLICANT

V E R S U S

MOHAMED HASHAM BAKARANI1ST RESPONDENT

NASSERPURIA MEMON JAMAT2ND RESPONDENT

RULING

1. The Court on 12th February 2014 received oral submission in support and in opposition to the Notice of Motion dated 9th January 2014. At the end of those submissions the Ruling was reserved for 20th March, 2014. Before that Ruling was delivered the Respondents filed an affidavit on 19th February 2014 which affidavit was brought to my attention. A mention date was fixed for parties to submit whether that affidavit should be considered in the pending Ruling. By the time the parties appeared to make those submissions the Applicant had filed a further affidavit.
2. The Applicant opposed the consideration of affidavit filed on 19th February 2014 on the ground that it was irregularly filed without leave of the Court. Further Applicant submitted that if the affidavit is accepted the Court will not have the benefit of receiving the submissions in regard to its content.
3. The Respondent submitted that the Court should admit the affidavit because to do so would enable the Court to attain the overriding objective set out in Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21.
4. The Applicant in opposing the admission of that affidavit was not heard to say that its admission would be prejudicial to him. It is noted that the Applicant was concerned that the Court do receive submission if the affidavit is admitted. In my view in the interest of justice the affidavit should be admitted. The deponent of that affidavit was the subject of the earlier submissions of the parties and I believe to receive that affidavit will assist the Court to reach a just resolution of this matter. It matters not that it was filed without leave. This I believe is the kind of situation that was envisaged by Article 159(2)(d) of the Constitution. That Article provides-

“In exercising judicial authority, the Courts and Tribunals shall be guided by the following principles-

- a. ...
- b. ...
- c. ...
- d. **Justice shall be administered without undue regard to procedural technicalities;**

Justice J. M. Mutungi in the case **ABDUL AZIZ JUMA V NIKISUHI INVESTMENT & 2 OTHERS (2013)eKLR** stated that Article 159(2)(d) was-

“... intended to ensure that adherence to strict rules of procedure do not lead to miscarriage of justice.”

5. It is for that reason that I grant the following orders-

- a. **The affidavit sworn by FRED ADHOCH on 18th February 2014 and filed on 19th February 2014 is hereby deemed as though filed with the leave of the Court. The said affidavit shall be considered by the Court when the Court retires to consider the Ruling of the Notice of Motion dated 9th January 2014.**
- b. **The Applicant is granted leave to file and serve within fourteen (14) days of today’s date a further affidavit in response to the affidavit of Fred Adhoch.**
- c. **At the reading of this Ruling parties will be given a date when they shall attend Court to submit on the two affidavits the subject of orders (a) and (b) above.**
- d. **The costs hereof shall abide with the outcome of the Notice of Motion dated 9th January 2014.**

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE