



**Ogwah v Odhiambo (Suing as the Legal Representative of the Estate of Sunday Kennedy Odongo)
(Miscellaneous Application E101 of 2024) [2025] KEHC 1071 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS APPLICATION E101 OF 2024
GL NZIOKA, J
FEBRUARY 13, 2025**

BETWEEN

MARK OCHIENG OGWAH APPLICANT

AND

GRACE AUMA ODHIAMBO RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SUNDAY
KENNEDY ODONGO**

RULING

1. By a notice of motion application dated 23rd August 2024, the applicant is seeking for the following orders: -
 - a. Spent
 - b. That there be a stay of execution of the Honourable court's judgment/decreed dated 6th May 2024 delivered in Naivasha CMCC No. 720 of 2018 Grace Auma Odhiambo (Legal Representation) vs Mark Ochieng & 2 others pending the inter parties hearing and final determination of this application.
 - c. That this Honourable court be pleased to grant the applicant leave to lodge an appeal from the judgment/decreed delivered on 6th May 2024 in Naivasha CMCC No. 720 of 2018 Grace Auma Odhiambo (Legal Representative) vs Mark Ochieng & 2 others, out of time.
 - d. That this Honourable court be pleased to order that the said attachment is irregular, null and void by dint of the respondent executing for the entire sum, against the applicant while a portion of the same was already settled.
 - e. That the costs of the application be provided for.



2. That the application is premised on the provisions of section 79G, 95, 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya; section 59 of the *Interpretation and General Provisions Act* (Cap 2) Laws of Kenya; Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules 2010, and Articles 48 50(1) and 159 of *the Constitution* of Kenya, 2010.
3. It is supported by the grounds thereto and the affidavit dated 20th February 2024 sworn by of Ngola Makau, an Advocate of the High Court and Legal Officer with M/S Britam Insurance Company Limited, that had insured the applicant's vehicle at the material time.
4. He averred that, the suit CMCC No. 720 of 2018; Grace Auma Odhiambo (Legal Representative) vs Mark Ochieng & 2 other was fully heard at the Chief Magistrate's court at Naivasha and judgment scheduled for the 4th December 2023. However, on the said date the parties were informed that judgment would be delivered on notice.
5. That subsequently judgment was delivered on 6th May 2024 without notice to the applicant and therefore he was unable to apply for stay of execution in order to give him ample time to consider the merits of the judgment and whether or not to prefer an appeal.
6. That, the applicant is aggrieved by the decision of the trial court and is desirous of appealing against the same as he has a competent appeal with appreciable chances of success. However, the time for filing the appeal has since lapsed.
7. Further, the respondent is in the process of executing the judgment and has instructed Betabase Auctioneers to attach and advertise for sale the applicant's property. That, on 24th August 2024 the said auctioneers proclaimed the applicant's property including his tools of trade thus necessitating the granting of conservatory orders.
8. Furthermore, the proclamation is irregular as it seeks to execute for the entire decretal sum despite a portion of the same having been settled.
9. That, the applicant is faced with irreparable harm as there is no legal impediment to the sale of his properties through auction and he is willing to comply with conditions of stay pending the hearing and determination of the application and the intended preferred appeal.
10. Further, the respondent does not stand to suffer any harm or prejudice if the application is granted and urged the court to allow the same in the interest of justice.
11. However, the respondent filed a replying affidavit sworn on 5th September 2024; wherein she confirmed that the judgment herein was delivered on 6th May 2024. That on 28th May 2024 her Advocate prepared party and party bill of costs and served upon the applicant's Advocates. However, the applicant's Advocate never responded to the same.
12. Subsequently, on 30th July 2024, her Advocates obtained the judgment and served it upon the applicant's Advocate and on 5th August 2024, her counsel wrote to the applicant's Advocate requesting for a settlement but once again they never responded.
13. That on the same date, her Advocates forwarded the judgment and decree to the applicant's insurer, Britam Insurance Company Limited, but they also never responded.
14. Consequently, on 21st August 2024 her Advocate instructed Betabase Auctioneers to proceed and execute against the applicant. That, it is only after the said auctioneers proclaimed the applicant's goods that he filed the instant application.



15. The respondent denied attaching the applicant's goods but stated conceded proclaiming them and averred that the applicant has not informed the court which tools of trade have been proclaimed.
16. The respondent denied the allegations of part payments as no evidence of the same has been adduced and averred that the claim against the applicant is Kshs. 2,202,850 consisting of 60% of the judgment amount, interest, costs of the suit and costs of execution.
17. The respondent further averred that, based on the foregoing the applicant is duly aware of the judgment and decree but has ignored the same, and failed to give any sufficient reason for the court to enlarge time for filing the intended appeal.
18. She argued that, the suit having been in the trial court for six (6) years and that any further delay is prejudicial to her. Further the application is an attempt to delay execution.
19. The respondent filed a notice of preliminary objection dated 29th August 2024 on the ground that the supporting affidavit to the notice of motion application dated 23rd August 2024 offends section 5 of the Oaths and Statutory Declaration Act and as such the said application is incurably defective and should be dismissed with costs.
20. The court directed that the preliminary objection be disposed of by way of written submissions. The respondent in submissions dated 2nd October 2024 cited section 5 of the Oaths and Statutory Declaration Act that provides that every commission of oath shall state truly in the date the affidavit was taken or made.
21. She argued that the affidavit of Ngola Makua in support of the applicant's application was sworn on 20th February 2024, which date was before judgment in the trial court was delivered on 6th May 2024 and which judgment is the subject of the intended appeal before the court. That in the circumstances the jurat of the affidavit was fatally defective and therefore the application should be struck out with costs.
22. That, in the case of, *Mary Gathoni & Another v Frida Ariri Otolu & Another* [2020] eKLR the High Court found that the affidavit in support of the application was defective and struck it out and held that there was no evidence to support the application and then proceeded to dismiss the application.
23. Further, that in the case of *Shukra Hussein Gare v Independent Electoral and Boundaries Commissions & 2 Others* [2017] eKLR, the High Court struck out the affidavits in support of the petition for offending section 5 and 7 of the Oaths and Statutory Declaration Act and held that the petition was not competent and struck it out.
24. Furthermore, the Supreme Court in *Gideon Situla Konchella vs Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR found that the replying affidavit was fatally defective and/or contravened the legal requirements of making an affidavit and deemed there was no replying affidavit on record.
25. The respondent urged the court to apply the tests developed by the court(s) in the afore cases and strike out the affidavit and thereafter dismiss the application with costs.
26. However, the applicant in response submissions dated 14th October 2024 conceded to the argument that the affidavit in issue bears a date preceding the application but explained that it is a honest mistake made while drafting the affidavit. That the applicant could not cure the anomaly having been raised by way of a preliminary objection which was canvassed by way of written submissions.
27. The applicant submitted that, despite the mistake, the court has power to receive the affidavit by dint of Order 19 Rule of the Civil Procedure Rules notwithstanding irregularity in form thereof or on



any technicality. Further, that the respondent will not suffer any prejudice due to the anomaly in the supporting affidavit.

28. However, if the affidavit is struck out, the applicant will suffer more prejudice as he will be condemned unheard, noting that the respondent had already proclaimed his tools of trade.
29. The applicant relied on the case of, *Kenyua v national Commercial Bank of Africa Limited & another* [2023] KEHC where the High Court found the explanation offered by the 1st respondent was plausible and held that the anomalies in the replying affidavit were not prejudicial to the applicant.
30. The applicant urged the court not be bound by technicalities of procedure but be guided by the quest of justice as prescribed under Article 159 (2)(d) of *the Constitution* of Kenya and dismiss the preliminary objection.
31. I have considered the preliminary objection and the submissions by both parties. It is settled law that a preliminary objection is based on points of law per se as stated in the case of; *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 by D-F Law JA as follows: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

32. In the present case, the respondent contends that the supporting affidavit of Ngola Makau contravenes the express provisions of section 5 of the *Oaths and Statutory Declarations Act*. The subject provision states 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”.

33. The applicant has conceded to the error and explained the same. The explanation is possible as the date on the application and the supporting affidavit are different.
34. In that regard the Court of Appeal in the case of *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] KECA 598 (KLR) while considering whether the High Court erred in declining to dismiss an application on the ground that the supporting affidavit undated the court stated as follows: -

“We have examined the impugned document ourselves and find no reason to differ from the factual findings made thereon. In any case, the Saggiu case (supra) which was relied on by the appellant does not support the proposition that any defect in the supporting affidavit is fatal. The case instead declared that an affidavit cannot be vitiated by an irregularity in form in view of the Ugandan Constitution, which is in pari materia with Article 159 (2) (d) of the Kenya Constitution. The Ugandan Court of Appeal held as follows:

“the defect in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (8), of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities. I should perhaps mention that the jurat is the short statement at the foot of the affidavit indicating when, where and before whom it was sworn. It would follow that the learned judge had the



power to order that the undated affidavit be dated in court or that the affidavit be re-sworn before putting it on record. He was also correct to penalize the offending party in costs”.

The Court further held:

“..the statutory provision which renders it mandatory to date the affidavit before tendering it in court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors and omissions regarding the date, place and the commissioner cannot vitiate an application”.

We think for ourselves that the approach adopted by the Ugandan Court is persuasive and applicable in this case. We reject the first issue.”

35. I fully associate myself with the afore holding and find that the date on the subject affidavit does not vitiate it and cannot render the entire application defective and/or ripe for striking out. To the contrary I find that pursuant to the provisions of Article 159 of *the Constitution* of Kenya, 2010 that implores the courts to promote substantive justice, it is in the interest of justice to allow the applicant prosecute the application and should simply amend the date on the impugned affidavit or file another one with appropriate date
36. Consequently, the preliminary objection is dismissed. I direct that, the applicant files an appropriate affidavit within three (3) days to enable the court proceed with the main application.

DATED, DELIVERED AND SIGNED THIS 13TH DAY OF FEBRUARY 2025.

GRACE. L NZIOKA

JUDGE

In the presence of:

Mr. Kami for the applicant

Ms. Kawira for the respondent

Mr. Komen: court assistant

