



**AAD v MED (Matrimonial Cause E002 of 2020)
[2023] KEHC 931 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MATRIMONIAL CAUSE E002 OF 2020
RPV WENDOH, J
FEBRUARY 14, 2023**

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

**IN THE MATTER OF ARTICLE 45 (3) OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

IN THE MATTER OF SECTION 16 (1) OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

**IN THE MATTER OF SECTION 28 (1) AND 93
(2) OF THE LAND REGISTRATION ACT 2012**

BETWEEN

AAD PETITIONER

AND

MED RESPONDENT

RULING

1. The Notice of Motion for consideration is the one dated November 21, 2022. It was filed by the firm of Mwamu & Company Advocates. In the application, AAD is named as the petitioner while MED is named as the respondent. From the representation on the file, the respondent MED commenced this application hence he is the applicant but not AAD as indicated in the application. For the purposes of this ruling, the applicant is MED while the respondent is AAD.
2. By a Notice of Motion dated November 21, 2022, the applicant seeks the following orders:-
 - a. Spent.



- b. That the applicant be allowed to amend his Notice of Motion dated October 13, 2022 and filed in court on October 19, 2022.
 - c. That costs of this application be provided for.
3. The application is based on the following grounds:-
 - a. That while drafting the application the applicant omitted the words applying for “extension of time.”
 - b. That both Section 59 of the *Interpretation and General Provisions Act* cap 2 Laws of Kenya and Order 50 Rule 5 allows the court to extend time.
4. The application is further supported by the affidavit of James Aggrey Mwamu an Advocate of the High Court of Kenya who has conduct of this matter on behalf of the applicant. Counsel deposed that they received instructions to file an application for leave to appeal under Order 43 Rule 3 *Civil Procedure Rules* and they filed the application; that when he was preparing his submissions, he realised that they had inadvertently omitted the words “extension of time” since such applications should be made within 14 days from the date of the order; that this court has powers to extend time under the *Interpretation and General Provisions Act* Cap 2; that the amendment will help the court to resolve the issues in controversy. Counsel urged this court to allow the application as prayed.
5. The application was opposed. The respondent filed a replying affidavit dated December 7, 2022. The applicant recounted her averments in paragraphs 6, 7 and 8 in her response dated November 18, 2022 in the application dated October 13, 2022. In relation to this notice of motion, the respondent stated that the applicant is attempting to steal a march by seeking to amend the notice of motion dated October 13, 2022 by inserting the words “to extend time” belatedly; that the application is an afterthought to cure the glaring deficiencies in the notice of motion dated October 13, 2022; that the conditions upon which an amendment to a pleading should be allowed, is to determine the real questions in controversy between the parties and this application does not qualify, as it does not, even after the amendment clarify the issues between the parties.
6. The respondent further deposed that the application should have been supported by an affidavit sworn by the litigant to demonstrate how the proposed amendment will assist the court to determine the real questions in controversy; that the application does not comply with the provisions of Rule 9 of the Oaths and Statutory Declaration Rules made under Rule 9 of the Act as the annexure referred to as “JAM-3” is not securely sealed under the seal of a commissioner and marked with a serial letter of identification as prescribed by law; that the exhibit should be struck out from the record and as a consequence, the deponent’s affidavit will be rendered incomplete. The respondent urged this court to find that the application is an afterthought, vexatious, an abuse of the court process and it should be dismissed with costs.
7. The application was canvassed by way of written submissions. The applicant filed his submissions dated January 12, 2023 in court on January 13, 2023. The respondent filed her submissions dated January 18, 2023 in court on even date.
8. In his submissions, the applicant urged this court to be persuaded by the various findings of the Court of Appeal to allow the amendments as prayed and find that it has powers to extend time. The applicant relied on the Court of Appeal Cases in *Central Kenya Ltd v Trust Bank Ltd & 5 Others (1996) eKLR*, *Eastern Bakery v Catelino (1958) EA 461*, *JC Patel v Doshi (1952) EACA 12*, *George Gikubu v Consolidated Bank of Kenya Ltd & Another (2016) eKLR*. The applicant also referred to Section 59 of the *Interpretation and General Provisions Act* Cap 2 and Order 50 Rule 5 of the *Civil Procedure Rules*.



9. The respondent submitted on whether failure to mark the annexures to the application offended Rule 9 of the *Oaths and Statutory Declaration*. The respondent referred the court to the decisions in *Fredrick Mwangi Nyanga v Garam Investments & Another* and *Galaxy Paints & Co Ltd v Falcon Guards Ltd*. On whether the court should grant leave to the applicant to amend the notice of motion dated October 13, 2022, the respondent submitted that this application is an afterthought made to cure glaring deficiencies in the notice of motion dated October 13, 2022. It was also submitted that the overriding consideration in an application for leave to amend pleadings is to determine the real questions in controversy as provided for under Order 8 Rule 5 (1) of the *Civil Procedure Rules* as was affirmed by the Court of Appeal in *Central Kenya Ltd* (supra). The respondent asked this court to disallow the applicant's request for leave to amend the notice of motion dated October 13, 2022.
10. I have carefully considered the instant application, the response thereto and the rival submissions. The issues for determination are:-
- Whether the applicant's annexures comply with the requirements of Rule 9 of the *Oaths and Statutory Declarations Rules*.
 - Whether the applicant is deserving of leave to amend the notice of motion dated October 13, 2022.
11. On the first issue, the provisions of the Oaths and Statutory Declarations Rules are contained in the subsidiary legislation to the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya. Rule 9 provides:-
- “All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”
12. The provision uses the word “shall” to denote that there is no discretion on a party to choose whether or not to secure and seal exhibits to affidavits. It is mandatory that all the exhibits be sealed by the commissioner. The essence is that affidavits are an accepted form of evidence in court. Evidence which is produced in court can only be done through marking them as exhibits. In civil proceedings a witness is expected to produce as exhibits documents he intends to rely on to form part of his evidence for the trial court to consider them. Failure to do so, the documents cannot be said to be part of the evidence the witness intended to rely on. The same principle applies to evidence produced by affidavits. The affidavit must be sealed by the commissioner for it to be considered as evidence before this court.
13. In *Solomon Omwega Omache & another v Zachary O Ayieko & 2 others (2016) eKLR*, Mutungi J held: -
- “Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence.”
14. A look at the annexures to the affidavit supporting the notice of motion, they have not been sealed by the commissioner's stamp. Counsel for the applicant has not tried to defend this omission either by a further affidavit or his submissions. The practice of marking and sealing annexures to affidavits has



been there since time immemorial. It is not a new procedure which has caught Advocates practicing in litigation by surprise. There cannot be an explanation why Counsel failed to mark documents he intend to rely on in court. In the words of D K Kemei J, when faced with a similar situation before this court in *Shadrack Muasya Mutunga v St Catherine Schools Ltd & another (2020) eKLR* stated:-

“I quickly add that the failure to mark is indicative of mischief and lack of seriousness by counsel on record for the applicant.”

15. From the foregone, the only order which this court can pronounce itself on is the striking out of all the annexures in the notice of motion dated November 21, 2022. The affidavit relies on the said annexures, without which, nothing can be said about the application as a whole. The affidavit is an empty shell with no evidence or legs to stand on. This being a court of evidence and not speculation, it cannot proceed any further. There is nothing this court can do to breathe life into the application. The affidavit is hereby struck out and the same fate befalls the notice of motion. Costs are awarded to the respondent. The second issue for determination therefore falls by the way.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 14TH DAY OF FEBRUARY, 2023.

R WENDOH

JUDGE

Ruling delivered in presence of:-

Mr Mwesigwa for the Applicant

Ms Nyakwana holding brief Mwamu for the Respondent

Nyauke - Court Assistant

