

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**HCCA NO. E014 OF 2024**

SAMMY KIRIMI MURUNGI .....APPELLANT/CONTEMNOR

VERSUS

DAVIES GITONGA MBAE.....RESPONDENT/APPLICANT

FRANK ANO KADASIRA....INTENDED INTERESTED PARTY

**RULING**

1. For determination is the Application dated 17<sup>th</sup> December 2024 seeking the following orders: -

i. Spent

ii. That the honourable court cites the Appellant for being in contempt of a court order.

iii. That an order of committal to prison be made against the Appellant/Alleged contemnor for a period of 6 months as he

blatantly disobeyed the express orders made herein by this honourable court.

- iv. That the honourable court be pleased to order that the motor vehicle Toyota Axio registration number KCW 296X reverts back from the intended interested party herein, Frank Ano Kadasira to the Appellant/Alleged Contemnor.
- v. That this honourable court be pleased to grant an order to join the intended interested party herein Frank Ano Kadasira in this suit as an interested party forthwith before inter partes hearing of the Respondent/Applicant's application dated 16<sup>th</sup> December 2024.
- vi. That the OCS Chuka Police station ensure that the above orders are adhered to.

vii. That this honourable court be pleased to issue any other or further relief as it may deem fit.

viii. That costs of this application be paid by the Appellant/Alleged contemnor herein.

2. The application is founded on the grounds set out on its face and on the supporting affidavit of even date deposed by Davies Gitonga Mbae the Applicant. He averred that this court issued orders on 5<sup>th</sup> November 2024 restraining the Appellant/ Alleged contemnor from selling, charging or otherwise interfering with motor vehicle Toyota Axio Registration number KCW 296X pending the hearing and determination of this Appeal.

3. He stated that despite service of the said orders, the Appellant/Alleged contemnor herein proceeded to sell the said motor vehicle to one Frank Ano Kadasira

who appears as the current owner of the motor vehicle while the Appeal and the Application dated 4<sup>th</sup> November 2024 are still pending before this honourable court.

4. He also stated that on 16<sup>th</sup> December 2024, the said court order was served upon the said Intended Interested party via his phone number as per the motor vehicle records. Further, that the Intended Interested Party has an identifiable stake, interest and duty in these proceedings as a purchaser of the said motor vehicle.

5. He added that unless this honourable court intervenes, the Appellant/Alleged contemnor's actions will continue unchecked rendering the case before this court a mere academic exercise occasioning him great prejudice.

6. The Appellant filed a replying affidavit dated 30<sup>th</sup> January 2025. He stated that the order dated 5<sup>th</sup> November was never served upon him.

7. He also stated that motor vehicle registration number KCW 290X was not placed as collateral for the amount allegedly advanced to him by the Applicant. Further, that the Applicant has not demonstrated that the motor vehicle was transferred while the order issued on 5<sup>th</sup> November 2024 was in force. That copy of motor vehicles records attached to the Application bears the date 13<sup>th</sup> December 2024 which technically is the date of issue and not the date of transfer.

8. The Appellant stated that the contempt of orders of this honourable court and the bid to have him punished is an effort by the Applicant to force him

into conceding to the payment of money that he maintains he did not receive.

9. Further, Appellant stated that the entire application is fatally defective for having been commissioned by the advocate who also drew it and who appears for the Applicant.

10. The Application was canvassed by way of written submissions. The Applicant filed written submissions dated 18<sup>th</sup> March 2025 raising the following issues for determination: -

- i. Whether the Appellant/Respondent should be found in contempt of court.
- ii. Whether the Appellant/Respondent ought to be committed to jail and/or be ordered to pay a fine for contempt of court.
- iii. Who should bear the costs of this application.

11. The Respondent filed his written submissions dated 28<sup>th</sup> March 2025 submitting on the following: -

- i. That the supporting affidavit by the Applicant was defective.
- ii. That the Application is not properly founded on law.
- iii. Whether the Applicant has satisfied the ingredients for contempt of court.

12. I have considered the Application, the rival affidavits as well as the submissions by the parties. I find the following issues for determination: -

- i. Whether the supporting affidavit sworn by the Applicant is defective and fatal to the Applicant's case.
- ii. Whether the Application is properly founded on law.

- iii. Whether the Respondent is in contempt of court to warrant committal to civil jail.

**(i) Whether the supporting affidavit sworn by the Applicant is fatally defective.**

13. The Respondent submitted that the Applicant's affidavit was commissioned by his (Applicant's) advocate contrary to Section 4 (1) of the Oaths and Statutory Declarations Act. He relied on the case of **Lee Njiru v J.K Lokorio & Another [2019] KEELRC 371 (KLR)** where the court held that a verifying affidavit commissioned by an advocate from the same firm representing the claimant contravened the provisions of Section 4 (1) of the Statutory Oaths and Declarations Act.

14. He also relied on the case of **Mary Gathoni & Another V Frida Ariri Otolu & Another [2020] KEHC 8391 (KLR)** where the court struck out an application on the basis of defective affidavits. He urged the court to strike out the application for reason that it was supported by a defective affidavit.

15. **Section 4(1), Oaths and Statutory Declarations Act (Cap 15)** provides:-

**“A commissioner for oaths shall not exercise any of the powers conferred by this Act in any proceedings in which he is the advocate for any of the parties or in which he is interested.”**

16. **Order 51 Rule 4 of the Civil Procedure Rules, 2010** provides that where a motion is “grounded on evidence by affidavit,” the supporting

affidavit must be served and form part of the notice of motion. This means that motion without a proper supporting affidavit is incompetent as an Affidavit contains evidence on oath. If not properly commissioned, it lacks evidentiary validity and the Court may not act on it.

17. This position was stated in the case of **Kenya Federation of Labour & Another versus Attorney General & 2 Others Cause No. 735 of 2012** where it was held that:

***“... it would be against the provisions of the Oaths and Statutory Declarations Act. A Lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the claimants was defective in form as the***

***jurat was not in conformity with the Oaths and Statutory Declaration Act***

***The claimant herein having filed the suit with a Verifying Affidavit commissioned by an advocate from the same law firm representing him in these proceedings contravened the mandatory provisions of section 4(1) of the oaths and Statutory Declarations Act. The person of Ndeke Gatumu is unauthorised to commission the verifying affidavit. This cannot be cured by application of Article 159 of the constitution. I agree with position taken in James Mangeli Musoo versus Ezeetec Limited [2014] eKLR which held that:-***

***A technicality, to me is a provision of law or procedure that inhibits or limits***

***the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”***

18. Article 159(2)(d) of the Constitution and the overriding objective of the Civil Procedure Rules allow courts to overlook harmless procedural errors where no prejudice arises and substantive justice requires it. However, these principles do not override clear statutory provisions concerning affidavits as an affidavit contains evidence on oath.

19. The Court of Appeal in addressing the issue of whether article 159 of the constitution should override procedure in the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** held that:-

*“... **Article 159 of the Constitution command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner***

***and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-***

***handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned. [underline added]. The affidavit in the claim having been commissioned by an unauthorized person is contrary to the is and in my view defective.”***

20. In the present case, the Applicant’s supporting affidavit was commissioned by the Applicant’s counsel serving as both advocate and commissioner of oaths, contrary to Section 4(1) of the Oaths and Statutory Declarations Act. On its face, it cannot be recognized as a legally commissioned affidavit

because it was not sworn before a duly appointed individual commissioner for oaths.

21. As such, it is incompetent and incapable of providing an evidentiary basis for the Application dated 17th December 2024. No supplementary or corrective affidavit has been filed to cure this defect.

22. The outcome is that I find that the supporting affidavit having been improperly commissioned in violation of Section 4(1) of the Oaths and Statutory Declarations Act is fatally defective and void in law. It provides no evidentiary support for the Application. Consequently, the Application dated 17th December 2024 is therefore struck out.

23. Having found that the supporting affidavit is fatally defective for contravening Section 4(1) of the Oaths and Statutory Declarations Act, and consequently that the Application is incompetent for

want of a valid evidentiary foundation, this Court need not delve into the remaining issues framed for determination. An Application unsupported by a competent affidavit is bereft of evidential anchorage and incapable of sustaining determination on the merits.

24. The Application is thus struck out. Costs shall be in the appeal.

Orders accordingly.

**Ruling delivered, dated and signed at Chuka this 17<sup>th</sup> day of February, 2026.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Ms Kariuki for the Applicant and in the absence of the Respondents. Muriuki (Court Assistant.)**

ORIGINAL