



REPUBLIC OF KENYA



**KENYA LAW**  
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**Matseshe v Busia Sugar Industry Limited (Employment and Labour Relations  
Petition E008 of 2022) [2023] KEELRC 975 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 975 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2022**

**JW KELI, J**

**APRIL 20, 2023**

**BETWEEN**

**JULIUS NYONGESA MATSESHE ..... PETITIONER**

**AND**

**BUSIA SUGAR INDUSTRY LIMITED ..... RESPONDENT**

**RULING**

1. The petitioner filed a petition dated 12<sup>th</sup> September 2022 lodged by law firm of Calistus & Co .Advocates on the 12<sup>th</sup> September 2022 seeking various reliefs from the court.
2. In addition the law firm filed in court on even date Petitioner’s affidavit in support of the Petition sworn by the Petitioner who stated he was a resident of Busia but at the jurat of the affidavit was indicated sworn at Nairobi on 12<sup>th</sup> September 2022 by the Petitioner . The stamp by the commissioner of oaths indicated address at Busia.
3. The Respondent entered appearance through the law firm of Ipapu P Jackah & Co. Advocates and filed Notice of Preliminary Objection dated 13<sup>th</sup> December 2022 received in court on even date on the following grounds:-
  - “i. The Petitioner’s supporting affidavit’s jurat offends Section 5 of the *oaths and statutory Declaration Act*.
  - ii. The Petitioner’s supporting affidavit is incurably defective and ought to be struck off.
  - iii. that pursuant to No. 2 above the entire petition be struck out and or dismissed with costs.”



4. The Respondent further filed substantive response to the Petition *vide* affidavit of Caleb Anyula dated 20<sup>th</sup> February 2023.
5. The Notice of Preliminary objection was directed to be canvassed by way of written submissions.
6. The court found only submissions of the Petitioner on record despite giving leave to Respondent to file in presence of Mr. Ipapu at last date of mention of 16.3.2013.

### Decision

7. Section 5 of *Oaths and Statutory Declarations Act* provides: -“Every commissioner for oath 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”.
8. The Petitioner counsel submits they have offices at Nairobi and Busia and the commission of the Affidavit was at Busia while pleadings were drafted in Nairobi and attributes the mistake in the jurat to Human innocent mistake. The Petitioner submits the mistakes of Advocate should not be visited on the client and relied on Court of Appeal decision in *Patriotic Guards Limited v James Kipchirchir Sambu* ( 2018 ) eKLR to wit:

‘in this case however the counsel for Appellant explained himself as to why he was late in availing himself in court. The reason was plausible. Clearly this is a case where the sins of the counsel should not be visited on the litigant”.
9. That the mistake of the counsel was not so fatal to warrant striking out of the petition and sought refuge under Article 159 (d) of the *Constitution* to wit :- ‘justice shall be administered without undue regard to procedural technicalities”.
10. The Petitioner further relied on decision in *Hamzan Musuri Kevogo v IEBC & 3 Others* [2017] eKLR where justice Sitati addressed a similar challenge of affidavit sworn at Nairobi and commissioned at Kakamega. That in any event the replying affidavit did not disclose the Respondent was prejudiced by the Jurat issue.
11. The Petitioner further submits in *Hamzan Musuri case* ( *supra* ) on non-compliance with Section 5 Cap 15 laws of Kenya the court held that though Jurat was not compliant with Section 5 of the *Oaths and Statutory Declaration Act*, it was not sufficient ground to expunge it. The court observed:- “There is a stamp of the Commissioner of oaths before whom the affidavit was sworn which gives the address and it is only natural to assume that it was sworn at the place where the commissioner is based”.

### Decision

12. The court finds that it was true the Jurat in the supporting affidavit of the Petitioner did not strictly comply with the provision of section 5 of the *Oaths and Statutory Declaration Act* to wit:- -“Every commissioner for oath 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”. The Affidavit disclosed address of the Petitioner to be Busia and the commissioner stamp indicates Busia but sworn at Nairobi. The Advocate submitted that the error was his of stating sworn at Nairobi which is alluded to the lawfirm being based in Nairobi. The advocate stated that this was a human error and sought refuge in the jurisprudence that mistake of advocate should not be visited on the litigant as held in *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR to wit: ‘in this case however the counsel for Appellant explained himself as to why he was late in availing himself in court. The reason was plausible. Clearly this is a case where the sins of the counsel should not be visited on the



litigant”. The court opines that defence of procedural technicalities were basically eliminated pursuant to Article 159 (2) (d) of the Constitution that the justice shall be administered without undue regard to procedural technicalities.

13. It is the opinion of the court the said Supporting Affidavit was a stand alone document and striking out the Petition would be draconian. The petitioner can always be granted opportunity to file a properly executed affidavit as clearly the said affidavit was not sworn at Nairobi and this being a court of record the same cannot be allowed to stay. The respondent replied to the petition and did not state it was prejudiced by the error. The court upholds similar holding by Justice Sitati in Hamzan Musuri Kevogo v IEBC & 3 Others [2017] eKLR to hold that the error was not fatal as the petitioner stated he was based at Busia and the Commissioner’s stamp indicated Busia.
14. The court nevertheless expunges the said affidavit for offending provisions of section 5 of the Oaths and Statutory Declarations Act and grants leave of 14 days to the Petitioner replace the same without change of facts so as not to prejudice the defence.
15. The court applying Article 159 (2) d of the Constitution finds the error not fatal to the petition which the court found was a stand alone document. The notice of preliminary objection dated 13<sup>th</sup> December 2022 is allowed to the extent that the supporting affidavit by petitioner dated 12<sup>th</sup> September 2022 is expunged and the petitioner granted leave of 14 days to replace the offending document in compliance with Section 5 of the Oaths and Statutory Declarations Act.
16. Costs of the Preliminary Objection to the Respondent in cause.
17. It is so ordered

**DATED, SIGNED AND DELVIERED ON THIS 20TH DAY OF APRIL, IN OPEN COURT IN BUNGOMA.**

**JEMIMAH KELL,  
JUDGE.**

**In the Presence of:-**

**Court Assistant: Lucy Macheso**

**Petitioner: Ms Yegenye**

**Respondent: Absent**

