



**Mbugua v Nduta & 6 others (Environment & Land Case
298 of 2017) [2023] KEELC 18242 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 298 OF 2017**

JO MBOYA, J

JUNE 16, 2023

BETWEEN

FRANCIS NG'ANG'A MBUGUA PLAINTIFF

AND

RACHAEL WANJIRU NDUTA 1ST DEFENDANT

NG'AMAU MUNGAI MUIGAI 2ND DEFENDANT

SAMUEL NDUNG'U NJOROGE 3RD DEFENDANT

CHIEF LANDS REGISTRAR 4TH DEFENDANT

LIMESWOOD HOLDINGS (K) LIMITED 5TH DEFENDANT

GRAVITEL LIMITED 6TH DEFENDANT

KENYA WOMEN MICROFINANCE BANK LTD 7TH DEFENDANT

RULING

Background And Introduction

1. Vide Notice of Motion Application dated March 21, 2023, the Plaintiff/ Applicant herein has approached the Honorable court seeking for the following Reliefs:
 - i. (Spent).
 - ii. That this Honorable court be pleased to order that a Fresh and complying Verifying Affidavit be filed on the record in placed of the Amended Verifying Affidavit dated the December 21, 2019.
 - iii. That this Honorable court be pleased to order that a Fresh and complying Verifying Affidavit attached herewith be deemed as being properly on record.



- iv. That the costs of this Application be costs in the cause.
2. The instant Application is anchored and premised on various grounds which have been alluded to and enumerated at the foot of the Application. Furthermore, the instant Application is premised and anchored on the supporting affidavit sworn by the Applicant dated the March 15, 2023 and to which the Applicant/Deponent has attached three documents.
3. Instructively, upon being served with the subject Application, the 1st Defendant/Respondent filed a Replying affidavit sworn on the March 29, 2023 and in respect of which same has disputed the claims by and on behalf of the Applicant. In any event, the 1st Defendant/Respondent has averred that the instant Application is intended to sanitize and white wash the commission of a criminal offence.
4. On the other hand, the 5th Defendant/Respondent filed Grounds of opposition and wherein same has similarly opposed the granting of the reliefs contained at the foot of the instant Application.
5. On his behalf, the 7th Defendant/Respondent has also filed Grounds of opposition dated the April 6, 2023; and wherein same has equally opposed the reliefs sought at the foot of the current Application.
6. For good measure, the instant Application came up for hearing on the May 28, 2023, whereupon the advocates for the respective Parties agreed to canvass and ventilate the Application by way of written submissions. Consequently and in this regard, the Honourable court proceeded to and circumscribed timelines for the filing and exchange of the written submissions.

Submissions By The Parties:

A. Applicant's Submissions:

7. The Applicant herein filed written submission dated the May 3, 2023 and in respect of which same has raised, highlighted and canvassed three (3) issues for consideration and ultimate determination by the Honourable court.
8. Firstly, Learned counsel for the Applicant has submitted that the Plaintiff herein instructed, retained and engaged the firm of M/s Odinga Oboe & Company Advocates to take over the conduct of the instant matter from the previous advocate, who were hitherto on record.
9. In addition, Learned counsel has submitted that upon taking over the conduct of the Plaintiff's case, the said firm of advocates proceeded to and crafted an amended Complaint, which was attached with an amended Verifying Affidavit sworn on the December 21, 2019, allegedly by the Applicant.
10. Nevertheless, Learned counsel has submitted that despite the initial contention that the amended Verifying affidavit was signed by the Plaintiff/Applicant, it latter on transpired that the said amended Verifying affidavit was neither signed nor executed by the Applicant.
11. To the contrary, learned counsel for the Applicant has submitted that the impugned amended Verifying affidavit transpired to have been signed and sworn by the Plaintiff's previous advocates, contrary to and in contravention of the provisions of order 4 rule 1(2) of the *Civil Procedure Rules 2010*; as well as the provisions of Sections 4 and 5 of the *Oaths and Statutory Declarations Act*, Chapter 15, Laws of Kenya.
12. In view of the foregoing submissions, Learned counsel for the Applicant has thus submitted that the impugned amended Verifying affidavit is therefore fatally defective and otherwise a nullity.
13. Secondly, Learned counsel for the Applicant has submitted that even though the impugned amended Verifying affidavit is fatally defective and a nullity, the Honorable court is nevertheless bestowed with



the requisite mandate and discretion to excuse the error and to grant liberty to the Applicant to file a fresh and compliant verifying affidavit.

14. For good measure, Learned counsel for the Applicant has invited the Honourable court to take cognizance of and to apply the provisions of Section 3A of the [Civil Procedure Act](#) and Article 159 (2) (d) of the [Constitution of Kenya, 2010](#).
15. Thirdly, Learned counsel for the Applicant has submitted that the execution and signing of the amended verifying affidavit by the Plaintiff's previous counsel was an error and/or mistake by counsel for the Plaintiff/Applicant and that such an error/mistake by counsel, ought not to be visited upon the Plaintiff/Applicant herein.
16. Furthermore, Learned counsel has pointed out that it is trite and established law that the mistake of counsel ought not to vitiate the rights of a litigant, who is keen to pursue his/her claims before the Honourable court.
17. Consequently and in the premises, Learned counsel for the Applicant has contended that the mistake beforehand and the lapses attendant thereto are indeed excusable. In this respect, Counsel has thereafter proceeded to and invited the Honourable Court to excuse the Lapses and to grant the instant Application.
18. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on various decisions including, *inter-alia*, [Hussein Abdala Ataib versus Josephine Mwikali Mwangangi](#) Succession Cause No. 10 of 2014 (UR), [Jamii Bora Bank Ltd versus Earnest & Young LLP](#) Civil Case No. 337 of 2016 (UR), [Tana & Ardhi Rivers Development Authority versus Jeremiah Kimigo Mwakia & 3 Others](#) (2015)eKLR and [Agip Kenya Ltd versus Highland Tyre Ltd](#) (2001)eKLR.

A. 1st Defendant's Submissions

19. The 1st Defendant/Respondent filed written submission dated the 17th May 2023 and in respect of which same has raised, canvassed and amplified four (4) issues for due consideration and ultimate determination by the court.
20. Firstly, Learned counsel for the 1st Respondent has submitted that the Plaintiff/Applicant herein attended court and testified on the 9th June 2022 when same admitted and conceded that the Verifying affidavit was neither signed nor executed by himself.
21. Furthermore, Learned counsel for the 1st Respondent has submitted that having admitted and conceded that same neither signed nor executed the impugned amended verifying affidavit, it was incumbent upon the Applicant to move the Honourable court with reasonable speed and make whatever application, if any, that same would have wanted to make.
22. Nevertheless, Learned counsel has pointed out that the Applicant herein did not move the Honourable court with the requisite speed and took a whopping 8 months, before filing the current Application. In this regard, Learned counsel for the Applicant has thus contended that the impugned Application has been made and mounted with unreasonable delay.
23. Secondly, Learned counsel for the 1st Defendant/Respondent has submitted that insofar as the amended verifying affidavit sworn on the December 21, 2019, was admittedly not sworn by the Applicant, then same was a fraud and a forgery.
24. In addition, Learned counsel for the 1st Defendant/Respondent has submitted that insofar as the impugned amended affidavit was a forgery, then the Honorable court does not have the requisite mandate and/or discretion to sanitize the said affidavit by granting the Leave sought.



25. In any event, Learned counsel has submitted that to the extent that the Verifying affidavit was not sworn by the Applicant, it then means that the amended Plaintiff was filed without the requisite verifying affidavit and same was a nullity ab initio.
26. Thirdly, Learned counsel for the Respondent has submitted that the execution and signing of the amended verifying affidavit by the Plaintiff's previous advocate is a fundamental issue and not a mistake that is capable of being excused and/or remedied by way of filing of a Fresh verifying affidavit.
27. Lastly, Learned counsel for the 1st Respondent has submitted that when the Plaintiff/Applicant herein testified before the Honorable court on the June 9, 2022, same admitted and acknowledged the amended verifying affidavit. In any event, Learned counsel added that the Plaintiff/Applicant even adopted and ratified the amended verifying affidavit.
28. Be that as it may, Learned counsel has thereafter submitted that during cross examination, the Plaintiff/Applicant conceded to the illegality apparent and evident on the face of the amended verifying affidavit.
29. Owing to the foregoing, Learned counsel for the 1st Defendant/Respondent has therefore submitted that the Defendants have accrued a Legitimate right, premised on the fraud and forgery, which cannot be taken away from them, by way of granting liberty to the Applicant to file a fresh and compliant verifying affidavit.

B. 5th Defendant's/Respondent's Submissions

30. On behalf of the 5th Respondent written submissions dated the May 24, 2023 have been filed before the Honourable court.
31. For coherence, Learned counsel for the 5th Respondent has raised, highlighted and canvassed two issues for consideration and ultimate determination by the Honourable court.
32. First and foremost, Learned counsel for the 5th Defendant has submitted that the Plaintiff/Applicant herein has since testified and closed his case. Consequently, counsel has contended that having testified and closed his case, the Applicant herein cannot now be heard to implore the Honourable court to grant Leave to file a fresh and compliant verifying affidavit, either in the manner sought or at all.
33. Secondly, Learned counsel for the 5th Defendant/Respondent has also submitted that having adopted and relied on the previous amended verifying affidavit, which thereafter forms and constituted part of the Applicant's case, it is too late for the Applicant to now purport that same seeks to be allowed to file a fresh and compliant verifying affidavit.
34. Further and in any event, Learned counsel has submitted that the instant Application is merely intended and/or calculated to defeat the legitimate rights and entitlement which has hitherto accrues in favor of the Defendants/Respondents.
35. In view of the foregoing, Learned counsel has thus submitted that the current Application is therefore misconceived and legally untenable and thus same ought to be dismissed with costs.
36. In support of the forgoing submissions, Learned counsel for the 5th Defendant/Respondent has cited and relied on, *inter-alia*, the decision of *Ochieng Oduol versus Richard Kuloba* Nairobi Civil Appeal No. 2 of 2002 (UR), *Kenneth Kariuki Githii versus Royal Media Services Ltd* (2009)eKLR, *Josephat Kipchirchir Sigilai versus Gotab Sanik Enterprises Ltd & 4 Others* (2007)eKLR and *David Jonathan Grantham & Another versus National Social Security Fund* (2007)eKLR.



C. 7th Defendant's/respondent's Submissions

37. The 7th Defendant/Respondent filed written submissions dated the May 18, 2023 and in respect of which same has raised , highlighted and canvassed two issues for consideration by the Honourable court.
38. First and foremost, Learned counsel for the 7th Defendant/Respondent has submitted that the amendment sought by and at the instance of the Plaintiff/Applicant herein is intended to create and occasion an absurdity.
39. In particular, Learned counsel has submitted that the intended verifying affidavit shall constitute an additional verifying affidavit, on the face of an existing verifying affidavit, which has neither been struck out nor withdrawn by the Applicant.
40. Furthermore, Learned counsel for the 7th Respondent has submitted that an affidavit comprises of evidence and that once same has been sworn, such an affidavit (which constitutes evidence on oaths), cannot be withdrawn and/or amended, in any manner whatsoever.
41. In support of the foregoing submissions, Learned counsel for the 7th Defendant/Respondent has therefore cited and relied on, *inter-alia*, the case of [Kenya Union of Entertainment and Music Industry Employee versus Bomas of Kenya](#) (2021)eKLR, [Joseph Kipchirchir Sigilai versus Gotab Sanik Enterprises Ltd & 4 Others](#) (2007)eKLR and [Swalle Gheithan Saanum versus Commissioner of Lands & 5 Others](#) (2002)eKLR.
42. Secondly, Learned counsel for the 2nd Defendant has submitted that the instant Application has been filed and mounted with unreasonable and inordinate delay, which delay has neither been explained nor accounted for in any manner whatsoever.
43. In addition, Learned counsel has submitted that the question of the defect and/or anomaly at the foot of the amended verifying affidavit became apparent on the June 9, 2022; when the Plaintiff/Applicant testified before Honourable court and conceded during cross examination that the signature at the foot of the amended verifying affidavit did not belong to him.
44. In this respect, Learned counsel has submitted that if the Applicant was keen to file a suitable Application to remedy the defect and/or situation, then the Applicant ought to have moved the Honourable court without further and undue delay.
45. Be that as it may, Learned counsel has added that the Plaintiff/Applicant has not even accounted for the delay relating to the lateness in filing of the current application. In this regard, counsel has contended that in the absence of any explanation, the instant application cannot be granted and/or allowed in the manner sought.
46. Based and premised on the foregoing submissions, Learned counsel for the 7th Defendant/Respondent has therefore implored the Honourable court to find and hold that the instant Application is not only misconceived but legally untenable.



Issues For Determination

47. Having reviewed the Application dated the 2March 1, 2023; and the Responses filed in opposition thereto and upon considering the written submissions filed by and on behalf of the respective Parties, the following issues do arise and thus worthy of consideration;
- i. Whether the amended Verifying affidavit was a nullity and if so; whether the court has the requisite discretion to grant Leave for substitution of what is otherwise a nullity.
 - ii. Whether the instant Application is intended to defeat the right of the Defendants/Respondents which have since accrued and arising from the cross examination of the Plaintiff/Applicant.
 - iii. Whether the instant Application has been made with unreasonable and inordinate delay and whether such delay has been duly accounted for.

Analysis And Determination

Issue Number 1; Whether the amended verifying affidavit was a nullity and if so; whether the court has the requisite discretion to grant Leave for substitution of what is otherwise a nullity.

48. Before venturing to consider and analyze whether or not the amended verifying affidavit, which was attached to the amended Plaint dated the December 21, 2019, was a nullity or otherwise, it is instructive to take cognizance of the law that underscores the necessity to file a requisite verifying affidavit with the Plaintiff.
49. Notably and to this end, it is instructive to take into account the provisions of Order 4 Rule 1(2) of the [Civil Procedure Rules 2010](#), which provides as hereunder;
1. Particulars of plaint [Order 4, rule 1.]
- (1) The plaint shall contain the following particulars—
 - (a) the name of the court in which the suit is brought;
 - (b) the name, description and place of residence of the plaintiff, and an address for service;
 - (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
 - (d) the place where the cause of action arose;
 - (e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and
 - (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.
 - (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.



50. My understanding of the provision, which has been cited and alluded to in the preceding paragraph denotes that the verifying affidavit, which envisaged by and under the law is the verifying affidavit sworn by the Plaintiff (namely, the Person filing the case) and not otherwise.
51. Furthermore, the language adopted and employed by the rules committee is explicit, crystal clear and devoid of ambiguity. For good measure, the rules committee did not envisaged an advocate swearing a verifying affidavit for and on behalf of a client for whom same represents.
52. Nevertheless, in respect of the instant matter, the Plaintiff's previous advocate took it upon himself to usurp and/or arrogate unto themselves the authority of the Plaintiff and thereafter swore the verifying affidavit, as if same were the Plaintiff. Clearly, the act of swearing an affidavit on behalf of the Plaintiff was ipso facto, illegal.
53. Notwithstanding the foregoing, when the Plaintiff attended court and testified on the 9th June 2022, same took oath and thereafter tendered evidence in chief, whereupon same adopted the amended Plaint dated 21st December 2019, the amended verifying affidavit sworn on the 21st December 2019; and all the attendant documents which had been filed on his behalf.
54. In my humble view, when the Plaintiff/Applicant adopted and relied on the amended verifying affidavit during his examination in chief, the Plaintiff herein ratified and thus owned the contents/ depositions contained at the foot of the impugned verifying affidavit.
55. Consequently and for good measure, what the Plaintiff/Applicant herein portrayed to the court was that the forged and fraudulent signature affixed on the amended verifying affidavit belonged to him. In this regard, the Plaintiff swore and acknowledged the document.
56. Nevertheless, during cross examination, the Plaintiff herein took and adopted a diametrically diverse position and in particular conceded that when the impugned amended verifying affidavit was signed, same was not in the country.
57. Further and in addition, the Plaintiff ventured forward and conceded that he (Plaintiff) did not appear before the commissioner of oath, for purposes of taking the oath, in the manner alluded to at the foot of the impugned amended verifying affidavit.
58. Instructively, the concession by and at the instance of the Plaintiff/Applicant as pertains to the fraud and forgery in the signing/swearing of the verifying affidavit, arose after intensive cross examination by Learned counsel for the Defendants/Respondents.
59. Simply put, the admissions and concession about the fraud was not volunteered by the Plaintiff/ Applicant. To the contrary, the admission was fished out and extracted from the Applicant, when same had no alternative but to concede.
60. It is the foregoing scenario that the Plaintiff/Applicant herein is now keen to evade and/or wriggled out of by reverting to court and seeking to be granted liberty to file what is termed as a fresh and compliant verifying affidavit. Clearly and to my mind, what the Plaintiff/Applicant is seeking to do is to sanitize and white wash a serious offence, amounting to perjury.
61. For good measure, it is imperative to state and underscore that during his evidence in chief the Plaintiff/ Applicant owned the fraudulent signature whilst knowing that this was not his signature. Clearly, this is perjury.



62. In this respect and to be able to appreciate the meaning, tenor and scope of perjury, it is imperative to take cognizance of Section 108 of the [Penal Code](#) Chapter 63 Laws of Kenya which provides thus;

108. Perjury and subornation of perjury

- a. Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed perjury.
- b. It is immaterial whether the testimony is given on oath or under any other sanction authorized by law.
- c. The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assent to the forms and ceremonies actually used.
- d. It is immaterial whether the false testimony is given orally or in writing.
- (e) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.
- (f) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.

(2) Any person who aids, abets, counsels, procures or suborns another person to commit perjury is guilty of the misdemeanour termed subornation of perjury.

63. Having provided the foregoing background, it is now appropriate to return back and address whether the amended verifying affidavit sworn by advocate for the Plaintiff in contravention of Order 4 Rule 1(2) of the [Civil Procedure Rules 2010](#) is a nullity.

64. In my humble, albeit considered view, there is no gainsaying that a document made contrary to and in contravention of the law is ipso facto a nullity and thus void ab initio.

65. Insofar as the impugned amended verifying affidavit was a nullity and void ab initio, the question that does arise is whether this Honourable court is seized of the requisite discretion to allow the substitution with what is deemed to be a fresh and compliant verifying affidavit.

66. Certainly and to my mind, what is a nullity is void for all intents and purposes; and thus cannot be substituted with a fresh and compliant verifying affidavit. Surely, one cannot substitute a dead thing with a living one and expect to come out with life.

67. Nevertheless, I am not alone in this thinking. Instructively, the Court of Appeal provided a succinct elaboration and exposition of the law in the case of Deposit Protection Fund Board in



Liquidation of Euro Bank Limited (In Liquidation) versus Rosaline Njeri Macharia & another [2016] eKLR, where the court stated thus;

A “suit” that is not instituted by a plaintiff who has no legal personality cannot be said to have a plaintiff as a party and is consequently a nullity. If a suit is a nullity, it is incapable of resuscitation. No life can be breathed into it. It is dead. It does not exist and it is therefore incapable of amendment.

68. Whereas the Honorable Court of Appeal was dealing with a suit that was ipso facto a nullity, the ratio that is discernable from the holding is to the effect that where something is a nullity, it cannot be substituted or otherwise resuscitated, in any manner, either by way of amendment or replacement.
69. Consequently and in the premises, the intended replacement of the invalid and void verifying affidavit by and at the instance of the Plaintiff/Applicant herein, is therefore legally untenable and thus unacceptable, under the law.
70. Furthermore, it is not lost on this court that where the document that is intended to be substituted and/or replaced was a nullity, then one cannot put something on nothing and ultimately expect to come out with something. Clearly, the something which is put on nothing will collapse and will amount to nothing.
71. In this respect, it is worthy and appropriate to recall and reiterate the holding of the Court in the case of *Macfoy versus. United Africa Co. Ltd* [1961] 3 All E.R. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

72. Without belaboring the point, I come to the humble conclusion that what the Plaintiff/Applicant herein is seeking to achieve is to use the Honorable court as a vehicle to sanitize the commission of a criminal offence, inter-alia, perjury, fraud and forgery.
73. Be that as it may, I am afraid that the discretion of this Honorable court cannot be used to sanitize the clear and evident commission of an illegality by and at the instance of the Plaintiff/Applicant. For good measure, the Plaintiff/Applicant herein aided and abated the commission of the criminal offence and outright illegality when same adopted the amended verifying affidavit and pretended to have been the one who swore same, up to and including the time when his credibility was impeached vide cross examination.

Issue Number 2: Whether the instant Application is intended to defeat the Right of the Defendants/ Respondents which have since accrued and arising from the cross examination of the Plaintiff/Applicant.

74. Whilst discussing issues number on herein before, I have had occasioned to state that the Plaintiff/Applicant took oath, swore and thereafter adopted and ratified the amended Plaintiff, the amended verifying affidavit and all the documents which were filed on his behalf by the erstwhile advocates.



75. Additionally, I have also mentioned that the concession and/or admission by the Plaintiff/Applicant concerning and relating to the facts and signature on the verifying affidavit only came to the fore, when the Plaintiff/Applicant was subjected to extensive and intrusive cross examination by Learned counsel for the Defendants/Respondents.
76. Invariably, the Plaintiff/Applicant herein did not volunteer the information and evidence by himself. Furthermore, in the entirety of his testimony before the Honourable court, the Plaintiff/Applicant was never remorseful or otherwise.
77. From the foregoing, it is not lost on this Honourable court that having extracted the critical information pertaining to the perjury, fraud and forgery from the Plaintiff/Applicant, the Defendants/Respondents herein are truly entitled to lay a claim to an accrued right and a legitimate expectation, to use and rely on the adverse information extracted from the Plaintiff/Applicant.
78. However, the Plaintiff herein having realized the legal implication and impact of the admission and concession made; same is now keen to pull the rag from the feet of the Defendants/Respondents and is now endeavoring to use the Honourable court to achieve the intended purpose.
79. In this respect, the question that now arises and which needs to be addressed is whether the Plaintiff/Applicant herein can be allowed to more or less use the Honorable court as investigative forum and thereafter retreat with a view to re-organizing his case, in such a way to defeat accrued rights.
80. Sadly, the provisions of Article 50(1) and (2) of the *Constitution of Kenya, 2010* anticipate and envisages a scenario where Parties litigate at arms-length and/or equal footing as pertains to all issues in dispute and not otherwise.
81. Premised on the import and implication of Article 50(1) and (2) of the *Constitution*, it is my humble view and consideration that the granting of the instant Application would confer upon the Plaintiff/Applicant undue mileage and advantage over the Defendant/Respondents.
82. Additionally, the granting of the current Application would be tantamount to defeating an accrued right and legitimate expectation, which was extracted out of intensive cross examination by the counsel of the Defendants/Respondents.
83. Consequently and in the circumstances, I surmise that the Plaintiff/Applicant herein is not entitled to invoke and in any event partake of equitable discretion, either in the manner sought or at all.
84. Nevertheless, it is also worthy to mention that he who comes to and seeks Equity, must no doubt come with clean hands. Unfortunately, the hands of the Plaintiff/Applicant are soiled with mischief and perjury, which disentitle the Applicant of his Equity.

Issue Number 3: Whether the instant Application has been made with unreasonable and inordinate delay and whether such delay has been duly accounted for.

85. Notwithstanding the deliberations which have been captured in the foregoing paragraphs, it is common ground that the issues pertaining to the fact that the signature on the amended verifying affidavit did not belong to the Plaintiff/Applicant, came to the fore on the 9th June 2022 when the Plaintiff testified.
86. In the premises, there is no gainsaying that if the Plaintiff/Applicant herein was keen to commence and/or take out any steps towards remedying and/or rectifying the anomaly if at all, then same was under obligation to undertake whatever action timeously and with due promptitude.



87. However, despite the fact that the Plaintiff/Applicant became aware of the anomaly attendant to the verifying affidavit on the June 9, 2022, same did not take up the issue up to and including the March 21, 2023.
88. Clearly, the duration between the June 9, 2022 up to and including the March 23, 2023 amounts to more than eight months and fifteen days, which itself constitutes an undue and inordinate delay.
89. Nevertheless, one would have expected the Plaintiff/Applicant herein to account for and/or explain the circumstances culminating into the delay. However, no such explanation has been availed in the body of the Supporting affidavit save for the implausible deposition that the anomaly attendant to the amended verifying affidavit was only discovered by the current advocates for the Plaintiff on the September 27, 2022.
90. Clearly and unmistakably that deposition and averment is misleading and in any event constitute further perpetuation of the perjury being propagated by and on behalf of the Plaintiff/Applicant.
91. To my mind, the Plaintiff/Applicant himself admitted and conceded during cross examination on the June 9, 2022, that same had not signed the impugned verifying affidavit sworn on the December 21, 2019.
92. Consequently, if the Plaintiff/Applicant herein was keen to change advocate and the reasons for such change was (sic) the fraud/forgery committed by his erstwhile advocates, then same ought to have apprised his new advocates of the correct and obtaining position from the onset.
93. I am afraid that one cannot on one hand be seeking equitable intervention in a matter, whereas on the other hand, same is propagating conscious and deliberate falsehood/ misrepresentations.
94. For good measure, he who seeks intervention or equity must place before the Court of Equity clear, cogent, candid and plausible explanation and reasons, which should explain the circumstances under which the lapse complained of arose and the manner in which same has been addressed upon discovery of the anomaly.
95. Short of plausible and satisfactory explanation, a court of law and/or equity has no business in aiding and assisting a Litigant who is otherwise guilty of mis-application of statutory obligation and who in any event, displays a conduct that is wrought and fraught with lethargy.
96. To underscore the importance of plausible and satisfactory reasons in explaining a delay prior to approaching a court of law, it is instructive to take cognizance of the holding in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2020] eKLR, where the court stated and held thus;

If this Court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify exercise of discretion, otherwise the exercise of discretion will be perceived as capricious or whimsical. Clearly what the applicant seeks to rely on is not mistake, but plain indolence and dilatoriness, which is not excusable. It has been accepted by this Court that sheer inaction by counsel does not constitute an excusable mistake. (See *Rajesh Rughani v. Fifty Investment Ltd. & Another* (2005) eKLR).
97. In a nutshell, I am not convinced that the Plaintiff/Applicant herein has been candid with the court. Consequently, where the court entertains doubt as pertains to candour; then the Honourable court must be reluctant in invoking and applying Equity in favor of a person whose conduct does not meet the threshold of Equity.



98. Furthermore and in addition, I am not convinced that the application beforehand has been made timeously and with due promptitude. Consequently and in the premises, I am disposed to invoke and apply the Doctrine of Latches.

Conclusion And Final Disposition:

99. Having calibrated and appraised the issues that were enumerated in the body of the instant Ruling, it must have become crystal clear, nay evident that the subject Application is devoid and bereft of merits.

100. Consequently and in the premises, the orders that commends itself to me is that the instant Application ought to be Dismissed. In this regard, the Application dated the March 21, 2023; be and is hereby Dismissed with costs to the Defendants/Respondents.

101. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JUNE 2023.

OGUTTU MBOYA

JUDGE

In the presence of

Benson Court Assistant

Mr. Banji h/b for Ms. Wangoi Koech for the Plaintiff/Applicant

Mr. Githumbi for the 1st Defendant/Respondent

Mr. Waritumu h/b for Mr. Mongeri for the 3rd Defendant/Respondent

Ms. Mary Wanjiku for the 5th Defendant/Respondent

Mr. Okach for the 6th Defendant/Respondent

Mr. Musili for the 7th Defendant/Respondent.

N/A for the 4th Defendant/Respondent

