



Lakeview Development Limited v Belgo Holdings Limited & another (Environment and Land Case E064 of 2020) [2023] KEELC 19199 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E064 OF 2020**

**JO MBOYA, J
JULY 27, 2023**

BETWEEN

LAKEVIEW DEVELOPMENT LIMITED PLAINTIFF

AND

BELGO HOLDINGS LIMITED 1ST DEFENDANT

THE LAND REGISTRAR 2ND DEFENDANT

Authentication and proof of the signature of a deponent in an affidavit taken outside the Commonwealth can be done other than by way of an affidavit

In the instant case, counsel for the 1st defendant implored the court to find that the plaintiff had failed to comply with terms of the court’s order directing them to respond to interrogatories within seven days. The court held the fact that the affidavit predated the interrogatories did not ipso facto invalidate the affidavit in response. The court further held that the authentication and proof of the signature of the deponent in affidavit taken outside the Commonwealth, could certainly be done other than by way of an affidavit.

Reported by Kakai Toili

Civil Practice and Procedure – affidavits – validity of affidavits - validity of affidavits taken outside the Commonwealth - authentication and proof of the signature of the deponent - whether the authentication and proof of the signature of a deponent in an affidavit taken outside the Commonwealth could be done other than by way of an affidavit - whether an affidavit in response of interrogatories which predated the interrogatories invalidated the affidavit – Civil Procedure Rules, 2010, order 19 rules 7 and 8.

Brief facts

The 1st defendant took out and served interrogatories dated June 21, 2023; and in respect of which the plaintiff’s response to the interrogatories was sought within the timelines prescribed and/or alluded to thereunder. The plaintiff failed to respond and or answer the interrogatories within the prescribed timeline. Consequently, counsel for the 1st defendant implored the court to set and circumscribe timelines for purposes of filing the requisite response to the interrogatories. The court issued among other orders; that the plaintiff was granted 7 days within which to file and serve the requisite response.



On July 17, 2023, the matter came up for mention with a view to ascertaining and/or confirming whether the plaintiff had duly complied and filed the requisite response/ answer. In the course of the proceedings, counsel for the 1st defendant implored the court to find and hold that the plaintiff had failed to comply with the express terms of the court order made on the July 6, 2023. Counsel for the 1st defendant urged the court to invoke the default clause and mark the suit as dismissed.

Issues

- i. Whether an affidavit in response of interrogatories which predated the interrogatories invalidated the affidavit.
- ii. Whether the authentication and proof of the signature of a deponent in an affidavit taken outside the Commonwealth could be done other than by way of an affidavit.

Relevant provisions of the Law

Civil Procedure Rules 2010

Order 19 - Affidavits

Rule 7 - Irregularity in form of affidavit

The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

Rule 8 - Affidavit sworn before suit filed

Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.

Held

1. From order 19 rules 7 and 8 of the Civil Procedure Rules, an affidavit was not rendered invalid and inadmissible in proceedings before a court of law, merely because an affidavit was taken earlier than the suit or better still prior to the event, which it sought to respond to. Even though the affidavit in response predated the interrogatories; which were being responded to, the fact that the affidavit predated the interrogatories did not *ipso facto* invalidate the affidavit in response.
2. The question of the date when the affidavit in response was taken, could not by itself deprive the court of the jurisdiction to admit that affidavit and to refer thereto. The court was bestowed with discretion to admit and rely upon any such affidavit in an endeavor to achieve substantive justice. Additionally, to find and hold that the predating to the affidavit would render it inadmissible, would be tantamount to superseding and/or disregarding the express provisions of the law.
3. The anomaly and defect, relating to predating of an affidavit, did not render the impugned affidavit invalid. In any event, the court was bestowed with the requisite discretion to accept and admit any such affidavit. Consequently, the wider interests of justice and in particular, the provisions of article 159(2) (d) of the Constitution obliged the court to admit the impugned affidavit despite the anomaly relating to the date thereunder.
4. The *ratio decidendi* in the case of *Pastificio Lucio Garofalo S. PA v Security & Fire Equipment Company Zazeco (K) Ltd* (2001)eKLR, did not exclude verification of the signature by such other document generated and made/executed by the designated notary public before whom the affidavit in question was taken and/or sworn. From the *ratio decidendi*, the proof of execution of the affidavit taken outside the Commonwealth and the authentication thereof, could be undertaken by way of an affidavit made by the notary public before whom the affidavit was taken or by such other manner, in the instant case, vide a document, which must nevertheless have the signature of the notary public and the seal thereof affixed thereto.
5. The verification/authentication could either be proved by affidavit or otherwise. For good measure, the inclusion of the term otherwise, denoted that the law allowed the usage of such other document, so long as the document under reference bore the signature and the seal of attestation affixed by the



- designated notary public. The authentication and proof of the signature of the deponent in affidavit taken outside the Commonwealth, could certainly be done other than by way of an affidavit.
6. A court of law dealing with an affidavit taken and/or sworn outside the Commonwealth was called upon to ascertain whether the signature of the deponent had indeed been authenticated and in that regard, the court was obligated to ascertain the existence of an authentication document; which must bear the signature and the seal of attestation affixed thereto by the notary public.
 7. In respect of the subject affidavit in response to the interrogatories, there was a document which had been attached thereto and wherein the notary public authenticated that the deponent of the impugned affidavit in response indeed appeared before him and that upon ascertaining the identity of the deponent, the notary public proceeded to and notarized the affidavit in question. The document which had been attached to the affidavit in response to the interrogatories, did not only bear the signature of the notary public in authentication, but the same also had the seal affixed thereto.
 8. The authentication of the signature of the deponent of the affidavit in response to the interrogatories vide the documents attached thereto met and complied with the prescription of section 88 of the Evidence Act, Chapter 80 Laws of Kenya. Nevertheless, even assuming that the provisions of section 88 were stringent on the verification being done by way of an affidavit (which was not the case), the decision in the case of *Pastificio Lucio Garofalo S. PA v Security & Fire Equipment Company Zazeco (K) Ltd* (2001)eKLR and by extension section 88 must be read in accordance with the provision of the Constitution of Kenya, 2010 and in particular, articles 48, 50(1) and (2) and 159 (2) (d).
 9. The drafters of the Constitution endeavored to and indeed underscored the necessity of a court of law to venture forward and to render substantive justice and not be held hostage by procedural technicalities, including form of documents to be filed, in certain instances and particularly, where form did not go to the root of the issue in dispute.
 10. There were instances where undue adherence to procedural technicalities, may very well end up driving litigants from the seat of justice and thereby infringing upon the constitutional right of access to justice in terms of article 48 of the Constitution. The impugned affidavit in response to the interrogatories had been duly verified and authenticated vide a suitable document duly signed and sealed by the designated notary public. The impugned affidavit complied with and satisfied the ingredient espoused vide section 88 of the Evidence Act.
 11. The plaintiff ventured forward and duly filed and served an affidavit in response to the interrogatories. The affidavit in response to the interrogatories was filed and served within the stipulated 7 days period. If the court had to ascertain whether there was a compliance with the court order or otherwise; then what the court had to authenticate was the filing and service of an affidavit in response to the interrogatories. In that regard, there was an affidavit in response, which had been duly filed and served within the stipulated timeline. Consequently, the plaintiff had complied with the orders of the court made/issued on July 6, 2023.
 12. In answer to interrogatories, the concerned party against whom interrogatories had been served; had freedom of expression as espoused and entrenched in article 33 of the Constitution. In responding to the interrogatories, the plaintiff must not be put in a straight jacket and panel-beaten to adopt a particular perspective or set of answers that favored the adverse party. Simply put, the plaintiff whilst responding to the interrogatories had and enjoyed the constitutional rights and fundamental freedoms relating to expression.
 13. The court was never invited to strike out and/or expunged the impugned affidavit in answer to the interrogatories. A court of law could not ignore a legal document which had been duly filed by a litigant. The established position of the law/ jurisprudence was that any offending document ought to be struck out and/or expunged from the record of the court. However, and to the extent that the court was never invited to expunge and/or strike out the impugned affidavit in response to the interrogatories, the affidavit in question remained alive and thus formed part of the record of the court.



- In the premises, there was no way that a court of law could be invited to shut/close his/her eyes to such a document and thereafter disregard same.
14. Compliance was separate and distinct from validity. Instructively, the court at that juncture was only concerned with whether there was an affidavit in response to the interrogatories that was filed within the stipulated timelines and not its validity. The court was not at that juncture called upon to undertake a mini-trial to examine in minute details, whether each and every question had been answered and say, answered in the manner that pleased and/ or found favour with the adverse party.
 15. The impugned affidavit was admissible/acceptable, taking into account the provisions of order 19 rules 8 of the Civil Procedure Rules. Consequently, even if the court were to venture forward and make a determination on the basis of the validity of the affidavit, it would still have come to the same conclusion.

Application dismissed.

Orders

- i. *The plaintiff had duly responded to the interrogatories served by the 1st defendant in terms of the affidavit in response to the interrogatories sworn on June 12, 2023.*
- ii. *The court declined the invitation to deem the suit beforehand as dismissed for want of compliance with the orders of the court issued on the July 6, 2023.*
- iii. *The instant suit remained alive and the parties and their respective advocates were implored to take suitable steps for purposes of progressing the hearing and eventual disposal of the suit in the conventional way; unless deemed otherwise by the parties.*

Citations

Cases

Kenya

1. *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* (Petition 1 of 2015; [2016] KESC 2 (KLR) — Explained
2. *Oriental Commercial Bank Limited v Shashikant Chandubhai Patel* (Civil Appeal 221 of 2006; [2011] KECA 119 (KLR) — Explained
3. *Pastificio Lucio Garofalo SPA v Security & Fire Equipment Co & another* (Civil Suit 966 of 2000; [2001] KEHC 840 (KLR) — Applied
4. *Peeraj General Trading & Contracting Company Limited, Kenya & Peeraj; General Trading Company, LLC, UAE v Mumias Sugar Company Limited* (Civil Case 192 of 2015; [2016] KEHC 8119 (KLR) — Applied
5. *Salat v Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014; [2014] KESC 12 (KLR) — Explained

Statutes

Kenya

1. Civil Procedure Act (cap 21) sections 1A, 1B — (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 19 rules 7, 8 — (Interpreted)
3. Constitution of Kenya articles 33, 50(1)(2); 159(2)(d) — (Interpreted)
4. Evidence Act (cap 80) section 88 — (Interpreted)

Advocates

Mr. James Ochieng' Oduol for the 1st defendant

Mr. Allan Kamau for the 2nd defendant



RULING

Introduction and Background

1. The 1st defendant herein took out and served interrogatories dated the June 21, 2023; and in respect of which same sought to have the plaintiff herein to respond to the Interrogatories in accordance with the Law; and in any event within the timelines prescribed and/or alluded to thereunder.
2. Be that as it may, the plaintiff herein failed to respond and or answer the Interrogatories within the prescribed timeline. Consequently, when the instant matter came up for mention on the July 6, 2023, Learned counsel for the 1st defendant implored the honorable court to set and circumscribe timelines for purposes of filing the requisite response to the Interrogatories by the 1st defendant.
3. Pursuant to and arising from the Application by Learned counsel for the 1st defendant, the Honorable court proceeded to and made the following orders;
 - i. The plaintiff be and is hereby granted 7 days within which to file and serve the requisite response to the Interrogatories filed by the 1st defendant.
 - ii. In default to file and serve the requisite response to the interrogatories within 7 days, the pleadings filed by the plaintiff herein shall stand struck out and the suit dismissed without any further application to court.
 - iii. The matter shall be mentioned on the July 17, 2023 to ascertain/confirm compliance and thereafter to issue further orders/directions.
4. First forward, on the July 17, 2023, the instant matter came up for mention with a view to ascertaining and/or confirming whether the plaintiff had duly complied and filed the requisite response/ Answer to the Interrogatories dated the June 21, 2023.
5. In the course of the proceedings, learned counsel for the 1st defendant sought to and indeed addressed the honorable court on various topical issues and thereafter implored the honourable court to find and hold that the plaintiff had failed to comply with the express terms of the court order made on the 6th July 2023.
6. Instructively, learned counsel for the 1st defendant contended that on the face of failure and or default to comply with the terms of the court order, it was imperative/ incumbent upon the Honourable court to invoke the default clause and mark the suit as dismissed.

Submissions by the Parties

a .1st defendant's submissions

7. Learned counsel for the 1st defendant made pointed submissions touching on Five salient issues, which same implored the Honourable court to take into account and to consider, whilst crafting the ruling as pertains to the subject matter.
8. Firstly, learned counsel for the 1st defendant submitted that the interrogatories which were served on the plaintiff's advocates are dated the June 21, 2023. In this regard, learned counsel pointed out that there is no way that the named interrogatories could be answered and or responded to vide an affidavit sworn on the June 12, 2023 or otherwise.



9. Further and in addition, learned counsel submitted that insofar as the interrogatories were dated the June 21, 2023, same could not therefore have been answered by any document (read affidavit) purportedly sworn long before the interrogatories were generated and served.
10. In this respect, learned counsel therefore implored the court to disregard the purported affidavit in response to the interrogatories and deem it that the interrogatories have not been responded to.
11. Secondly, learned counsel for the 1st defendant has submitted that the impugned affidavit in response to the interrogatories, which is sworn on the 12th June 2023; long before the date of the interrogatories, was in any event taken in Israel, which is outside the commonwealth.
12. Owing to the fact that the impugned affidavit was taken outside the commonwealth, learned counsel for the 1st defendant has submitted that such an affidavit required to be verified/ proved by another affidavit sworn by the Notary Public, authenticating the signature of the Deponent in accordance with the provisions of section 88 of the [Evidence Act](#), chapter 80 laws of Kenya.
13. Nevertheless, learned counsel for the 1st defendant contended that the impugned affidavit in response to the interrogatories, has not been verified/ proved by an affidavit of the Notary Public, who authenticated the signature of the deponent in accordance with section 88 of the [Evidence Act](#). In this regard, counsel therefore invited the Honourable court to find and hold that the impugned affidavit is therefore a nullity and cannot be treated as a valid document in response to the interrogatories.
14. Furthermore, learned counsel for the 1st defendant cited and relied on the decision in the case of [Pastificio Lucio Garofalo S PA versus Security & Fire Equipment Company Zazeco \(K\) Ltd](#) (2001)eKLR, in support of the contention that the affidavit in question, which was taken outside the commonwealth needed to be verified by an affidavit authenticating that same was indeed taken before a Notary Public.
15. Thirdly, learned counsel for the 1st defendant has submitted that in any event the plaintiff herein has failed, neglected and/or otherwise refused to answer the questions enumerated in the interrogatories. In this regard, Learned counsel has contended that it was not within the mandate/ competence of the plaintiff herein to choose which of the questions/interrogatories to respond to or which ones to declare irrelevant.
16. Insofar as the plaintiff has not responded to and/or answered all the interrogatories, learned counsel for the 1st defendant has contended that there is non-compliance with the orders of the honourable court and thus the default clause ought to be invoked and actualized.
17. Fourthly, learned counsel for the 1st defendant invited the court to take cognizance of the antecedent conduct of the plaintiff and her counsel, essentially in the manner in which same have acted in respect of the subject matter.
18. In this respect, learned counsel contended that the conduct of the plaintiff and her counsel has been one that militates against the overriding objectives of the court and more particularly, the provisions of section 1A and 1B of the [Civil Procedure Act](#), chapter 21 Laws of Kenya.
19. Taking into account the conduct of the plaintiff and her counsel, Learned counsel for the 1st defendant has submitted that the court should take stern action against the plaintiff by striking out the entire suit for want of compliance with the court order.
20. Lastly, learned counsel for the 1st defendant has submitted that it behooved all parties, the plaintiff herein not excepted to comply with the directions of the court and essentially the interrogatories, if any, served for purposes of helping/ assisting the Honourable court in the management of Judicial time.



21. Nevertheless, insofar as the plaintiff herein has not been keen to abide by and or comply with the orders of the court, Learned counsel for the 1st defendant has therefore contended that this is a proper suit to be terminated by way of dismissal on account of violation of express orders of the court.

b.2nd defendant's submissions:

22. Learned counsel for the 2nd defendant raised, canvassed and highlighted Four (4) salient issues in response to the submissions ventilated by and on behalf of the 1st defendant.

23. First and foremost, learned counsel for the 2nd defendant has submitted that the honorable court gave directions on the July 6, 2023, whereupon same directed the plaintiff to file the requisite answer to the interrogatories within 7 days from the date of the order.

24. Additionally, Learned counsel for the 2nd defendant has submitted that pursuant to and arising out of the orders of the court, same was duly served with a response/ answer on behalf of the plaintiff on the July 12, 2023.

25. Secondly, learned counsel for the 2nd defendant has also submitted that the response to the interrogatories, though dated June 12, 2023; same were however served within the set and circumscribed timeline.

26. In the premises, learned counsel for the 2nd defendant has underscored that there was due compliance with the directions of the court. Consequently and in this regard, Learned Counsel contended that it could therefore not be stated that the plaintiff had failed to abide by the orders of the Honourable Court, either as alleged by the First defendant, or otherwise.

27. Thirdly, learned counsel for the 2nd defendant has submitted that insofar as the Plaintiff has filed an answer/response to the interrogatories, the question of non-compliance and/or default; cannot therefore arise and or ventilated before the court.

28. Further and in addition, learned counsel contended that the question of compliance cannot and ought not to be confused with the issues of validity, the latter which goes into the substance.

29. Fourthly, learned counsel for the 2nd defendant has submitted that the affidavit in response to the interrogatories, though sworn on the June 12, 2023; can very well be adopted and relied on by the court. In this regard, Learned counsel pointed out that the fact that the affidavit pre-dates the interrogatories does not render same invalid.

c.Rejoinder submissions by the 1st defendant

30. Learned counsel for the 1st defendant responded to the submissions by the 2nd defendant by raising three pertinent issues. In this regard, I shall endeavor to highlight the three issues.

31. Firstly, learned counsel for the 1st defendant contends that the Honorable Attorney General acts for the Chief Land Registrar and hence same cannot purport to act for and/or defend the plaintiff, as pertains to compliance or otherwise with the orders of the court.

32. Secondly, learned counsel for the 1st defendant has submitted that where interrogatories are issued and served, like in the instant case, it behooves the addressee of the interrogatories to answer same by way of a Competent affidavit and not otherwise.



33. Lastly, learned counsel for the 1st defendant has submitted that the counsel for the 2nd defendant has however failed to address and or respond to the reasons/circumstances why the affidavit in question would pre-date the interrogatories which were sought to be answered.

d.Plaintiff’s submissions:

34. On the scheduled date, the plaintiff herein was represented by a counsel, who had purported to have filed a Notice of Appointment of advocate, despite the fact that the plaintiff herein had hitherto retained and engaged an advocate to act on her behalf.

35. Given that the duly instructed counsel had not been replaced by the filing of the requisite Notice of Change of Advocates in terms of order 9 rule 5 of the *Civil Procedure Rules*; the Notice of Appointment by the impugned advocate was evidently incompetent and a nullity.

36. Consequently and in the premises, the Honorable court proceeded to and struck out the strange document, namely; the Notice of Appointment of Co- Advocate; and thereafter denied the impugned advocate a right of audience.

37. Suffice it to point out that on the floor of the court, no submissions were ventilated by and on behalf of the plaintiff. However, during the intervening period, the plaintiff filed written submissions dated the July 19, 2023 and in respect of which same has alluded to a plethora of issues and case law.

38. Nevertheless, insofar as the said submissions were filed without leave of the Honourable court and coupled with the fact that the adverse parties did not have a right of response; it would be inappropriate to delve into the impugned submissions and even to consider them.

39. In the premises, it is imperative to underscore that the impugned submissions filed by and on behalf of the plaintiff are a nullity and would otherwise constitute a gross violation and/or infringement of the Right to Fair Hearing and fair trial as entrenched in article 50(1) and (2) of the *Constitution*. For good measure, the same be and are hereby struck out in compliance with the Dictum of the Supreme Court of Kenya in the case of *Nicholas Kiptoo Korir Arap Salat versus Independent Electoral and Boundaries Commission and 7 Others*, Civil Application No 16 of 2014 (2014) eKLR.

40. In the premises, I shall venture to consider the issues raised by and on behalf of the learned counsel for the 1st defendant and responded to by counsel for the 2nd defendant, albeit without taking into account of the contents of the impugned written submissions dated the July 19, 2023.

Issues for Determination:

41. Having reviewed the oral application that was made and mounted by counsel for the 1st defendant and upon taking into consideration the response thereto; the following issues do arise and are therefore worthy of determination;

- i. Whether the affidavit in response of the Interrogatories sworn on the June 12, 2023 is invalidated merely on the basis that same pre-dates the interrogatories.
- ii. Whether the affidavit in response to the Interrogatories; which was taken outside the commonwealth has complied with the provisions of section 88 of the *Evidence Act*, Chapter 80 Laws of Kenya.
- iii. Whether the plaintiff herein has duly complied with the orders of the court made on the July 6, 2023 or otherwise.



Analysis and Determination

Issue Number 1

Whether the affidavit in response of the Interrogatories sworn on the June 12, 2023 is invalidated merely on the basis that same pre-dates the Interrogatories.

42. It is common ground that the 1st defendant herein took out and served interrogatories dated the June 21, 2023; wherein same sought to have the plaintiff to respond to various issues that were enumerated and or alluded to at the foot of the interrogatories. For good measure, the interrogatories were dated the June 21, 2023.
43. Upon being served with the interrogatories and following the orders of the court which were issued on the July 6, 2023; the plaintiff herein filed an affidavit in response to the interrogatories, but the impugned affidavit indicates that same was sworn on the June 12, 2023.
44. Notably, the date shown in the Jurat of the affidavit in response to the interrogatories, namely, the June 12, 2023, certainly predates the interrogatories, the latter which was issued on the June 21, 2023.
45. To the extent that the affidavit in response pre-dates the interrogatories, learned counsel for the 1st defendant has submitted that the impugned affidavit in response to the Interrogatories is therefore invalid and thus inadmissible in respect of the subject proceedings.
46. Furthermore, learned counsel has submitted that there is no way that the affidavit in response can prophetically pre-date the interrogatories. Consequently, learned counsel for the 1st defendant has invited the Honourable court to invalidate the impugned affidavit in response.
47. Arising from the submissions by learned counsel for the 1st defendant, the question that deserves to be interrogated and responded to is whether an affidavit which predates the interrogatories or better still pre-dates the proceedings is invalidated merely because same was taken, made and or sworn prior to the suit; and in this case the interrogatories.
48. Before venturing to and answer the questions raised in the preceding paragraph, it is instructive and pertinent to take cognizance of order 19 rules 7 and 8 of the [*Civil Procedure Rules 2010*](#).
49. For good measure, the provision order 19 rules 7 and 8, states as hereunder;

Order 19 rule 7

The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality

Order 19 rule 8

Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.

50. My reading and understanding of the foregoing provisions drives me to the conclusion that an affidavit is not rendered invalid and inadmissible in proceedings before a court of law, merely because an affidavit was taken earlier than the suit or better still prior to the event, which same seeks to respond to.



51. From the foregoing, it is instructive to point out that even though the affidavit in response predates the interrogatories; which are being responded to, the fact that the affidavit predates the interrogatories does not ipso facto invalidate the affidavit in response.
52. In my humble view, the question of the date when the affidavit in response was taken, cannot by itself deprive the honourable court of the Jurisdiction to admit the said affidavit and to refer thereto. For coherence, the honourable court is bestowed with Discretion to admit and rely upon any such affidavit in an endeavor to achieve substantive Justice.
53. Additionally, to find and hold that the predating to the affidavit would render it inadmissible, would be tantamount to superseding and/or disregarding the express provisions of the law, whose details have been enumerated herein before.
54. Furthermore, the question as to whether the dating of an affidavit prior to the suit or prior to the event being responded to, would invalidate the affidavit was canvassed and highlighted by the Court of Appeal in the case of *Oriental Commercial Bank Limited Versus Shashikant Chandubhai Patel* [2011] eKLR, where the court stated and observed as hereunder;

“So that, there was an affidavit filed together with the plaint as required by the rules in this matter. But the affidavit was sworn and dated earlier than the date the plaint was drawn and dated. In our view, that was a situation envisaged under the rules which is amenable to the exercise of the court’s discretion to admit or reject the affidavit. In this case the affidavit was accepted on record when it was filed together with the plaint and stated specifically in paragraph 2: “That I wish to state the averments of this plaint are true.” That could only be reference to the plaint filed with the verifying affidavit. In the circumstances, we agree with Maraga J. that order VII rule 1 (2) was not violated. The subsequent verifying affidavit filed six months later purporting to serve the same purpose was superfluous and of no effect. Having so found, we doubt the legal reasoning in the Delphis Bank case (*supra*) as it made no reference to the provisions under order XVIII of the rules. We are persuaded that the High Court properly exercised its discretion in this matter and we have no reason to interfere therewith”.

55. From the *ratio decidendi* espoused in the decision (*supra*), there is no gainsaying that the anomaly and defect, relating to predating of an affidavit, does not render the impugned affidavit invalid.
56. Further and in any event, the honourable court is bestowed with the requisite discretion to accept and admit any such affidavit. Consequently and in this regard, the wider interests of justice and in particular, the Provisions of article 159(2)(d) of the *Constitution*, 2010; obliges me to admit the impugned affidavit despite the anomaly relating to the date thereunder.

Issue Number 2

Whether the affidavit in response to the Interrogatories; which was taken outside the commonwealth has complied with the provisions of section 88 of the *Evidence Act*, Chapter 80 Laws of Kenya or otherwise.

57. Other than the point that the impugned affidavit in response to the interrogatories was taken, made and or sworn (sic) prior to the date of the interrogatories; which has been discussed in the preceding paragraphs, learned counsel for the 1st defendant has also canvassed the question of non-compliance with the provisions of section 88 of the *Evidence Act*, chapter 80 Laws of Kenya.



58. In this respect, learned counsel for the 1st defendant has submitted that the impugned affidavit in response was taken and/or sworn in Israel, which is a National State outside the commonwealth.
59. Owing to the fact that the impugned affidavit in response was taken in a country/state outside the commonwealth, learned counsel for the 1st defendant has thus contended that the signature of the deponent of the affidavit needed to be verified by an affidavit in accordance with the provisions of section 88 of the Evidence Act.
60. Nevertheless, learned counsel has contended that there is no such affidavit verifying and authenticating the signature of the deponent as required under the law and in this regard, learned counsel has thus submitted that the impugned affidavit is therefore invalid, unlawful and incapable of constituting a valid and competent affidavit in answer to the interrogatories.
61. Though learned counsel did not venture forward to have the impugned affidavit in response struck out and/or expunged, learned counsel invited the honourable court to disregard and ignore the impugned affidavit on account of violation of the express provision of the law.
62. Having considered and re-evaluated the submissions ventilated on behalf of learned counsel for the 1st defendant and having taken into account the *ratio decidendi* in the case of Pastificio Lucio Garofalo S. PA versus Security & Fire Equipment Company Zazeco (K) Ltd (2001)eKLR, I therefore seek to render myself as hereunder;
63. Firstly, it is instructive to underscore that the *ratio decidendi* in the case of Pastificio Lucio Garofalo S. PA versus Security & Fire Equipment Company Zazeco (K) Ltd (2001)eKLR, did not exclude verification of the signature by such other document generated and made/executed by the designated Notary Public before whom the affidavit in question was taken and/or sworn.
64. For good measure, it is imperative to reproduce the holding of the learned judge, which relates to the pertinent aspect requiring authentication of the signature of the deponent by the Notary Public, before whom the affidavit was made. In this regard, I reproduce the ratio as hereunder;
- “However section 88 of the Evidence Act, cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp and seal or the official position of the person taking the affidavit. It accordingly follows that the same position obtains in Kenya.
- As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Napoli, Italy, has to be proved by affidavit or otherwise to have been taken by a Notary Public in Italy and that the signature and seal of attestation affixed thereto was that of such Notary Public. There is no such proof here. It may very well be that the certificates in Italian and the other writing in Italian was meant to do that”.
65. From the *ratio decidendi* and more particularly the segment which I have highlighted, it is evident that the proof of execution of the affidavit taken outside the commonwealth and the authentication thereof, can be undertaken by way of an affidavit made by the Notary Public before whom the affidavit was taken or by such other manner, in this case, vide a Document, which must nevertheless have the signature of the Notary Public and the seal thereof affixed thereto.



66. In my humble understanding, the holding in the decision in the case (*supra*), clearly highlights the position that the verification/authentication can either be proved by affidavit or otherwise. For good measure, the inclusion of the term otherwise, denotes that the law allows the usage of such other document, so long as the document under reference bears the signature and the seal of attestation affixed by the designated notary public.
67. Instructively, the *ratio decidendi* in the case of [Pastificio Lucio Garofalo S. PA v Security & Fire Equipment Company Zazeco \(K\) Ltd](#) (2001)eKLR, was further reiterated and highlighted in a subsequent decision, namely, the case of [Peeraj Genral Trading & Contracting company Ltd & Another versus Mumias Sugar Company Ltd](#) (2016)eKLR, where the court stated and held thus;
11. I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the [Evidence Act](#), cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public.
12. There is proof herein that this was done. The stamp of Ahmed Tamim is affixed on the affidavit as well as a stamp from the Dubai Court Notary Public dated April 15, 2015. It may very well be that in Dubai such stamps are sufficient to show that such a document has been authenticated. Indeed the verifying affidavit is equally translated into Arabic, which is the official language of the High Court in UAE. In the result it is my finding the verifying affidavit of Pramit Verma is valid and admissible in evidence as the same has been notarized accordingly.
68. Invariably, the learned judge who dealt with the decision in [Mumias Sugar Company Ltd](#) (*supra*), shared the same position that the authentication of the affidavit and the signature of the deponent of the affidavit taken outside the commonwealth can be proved by way of an affidavit or otherwise.
69. To my mind, the obtaining Jurisprudence, which is vindicated by the *ratio decidendi* espoused in the two named decisions; denotes that the authentication and proof of the signature of the deponent in affidavit taken outside the commonwealth, can certainly be done other than by way of an affidavit.
70. Furthermore, what I understand the two decisions to be underscore is that a court of law dealing with an affidavit taken and/or sworn outside the commonwealth is called upon to ascertain whether the signature of the deponent has indeed been authenticated and in this regard, the court is obligated to ascertain the existence of an authentication document; which no doubt must bear the signature and the seal of attestation affixed thereto by the Notary Public.
71. In respect of the subject affidavit in response to the Interrogatories, there is certainly a document which has been attached thereto and wherein the Notary Public; namely, Yakir Mandel, authenticates that the deponent of the impugned affidavit in response indeed appeared before him and that upon ascertaining the identity of the deponent, same (Notary Public) proceeded to and notarized the affidavit in question.



72. Additionally, the Notary Public proceeds and thereafter makes a further statement wherein same states as hereunder;

“In witness whereof, I hereby authenticate the signature of Mr Zeevi Gadi, by my own signature and seal this day; July 12th 2023”

73. Arising from the foregoing, it is my humble finding and holding that the document which has been attached to the affidavit in response to the interrogatories, does not only bear the signature of the Notary Public in authentication, but same also has the seal affixed thereto.

74. To surmise, it is my humble position that the authentication of the signature of the deponent of the affidavit in response to the interrogatories vide the documents attached thereto meets and complies with the prescription of section 88 of the Evidence Act, chapter 80 Laws of Kenya.

75. Nevertheless, even assuming that the provisions of section 88 of the Evidence Act, is stringent on the verification being done by way of an affidavit (which with humility is not the case), it is imperative to underscore that the decision in the case of Pastificio Lucio Garofalo S. PA versus Security & Fire Equipment Company Zazeco (K) Ltd (2001)eKLR and by extension section 88 of the Evidence Act, must now be read in accordance with the provision of the Constitution 2010 and in particular, articles 48, 50(1) and (2) and 159 (2) (d) thereof.

76. For good measure, the drafters of the Constitution endeavored to and indeed underscored the necessity of a court of law to venture forward and to render substantive Justice and not be held hostage by procedural technicalities, including form of documents to be filed, in certain instances and particularly, where Form does not go to the root of the issue in Dispute.

77. Evidently, the borne of contention beforehand is whether the proof of execution/authentication of the signature of the deponent of the affidavit in response to the Interrogatories could only be undertaken by way of an affidavit of the Notary Public and not by any other document.

78. Honestly, what I discern from the discourse is a question of form of the document through which the verification/authentication must be taken. Must it be an affidavit by the Notary Public or can it be any other document, provided that the signature and the seal of the Notary Public are affixed thereto in attestation of the execution of the impugned affidavit by the deponent.

79. Finally and before departing from this particular issue, it is my humble position that there are instances where undue adherence to procedural technicalities, may very well end up driving litigants from the seat of Justice and thereby infringing upon the Constitution Right of Access to Justice in terms of article 48 of the Constitution 2010.

80. In this respect, I beg to underscore and reiterate the succinct exposition of the law as espoused by the Supreme Court in the case of Moses Mwigigi versus IEBC & Others [2016] eKLR, where the court stated and held thus;

“(65) This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.



- (66) Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of article 159(2)(d) of the Constitution, which proclaims that, “... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.
- (67) As an instance, there are times when the disregard of Rule 33 of the Supreme Court Rules clearly undermines the Court’s ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of article 159(2)(d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the Court was not without all the requisite documentation, for undertaking a consideration of the matter.

81. In a nutshell, it is my finding and holding that the impugned affidavit in response to the interrogatories has been duly verified and authenticated vide a suitable document duly signed and sealed by the designated Notary Public. In this regard, the impugned affidavit complies with and satisfies the ingredient espoused vide section 88 of the Evidence Act.

Issue Number 3

Whether the plaintiff herein has duly complied with the orders of the court made on the July 6, 2023 or otherwise.

82. Following the issuance and service of the interrogatories, it was incumbent upon the plaintiff herein to file the requisite/appropriate response to the interrogatories by way of an affidavit.
83. Nevertheless, despite having been duly served with the interrogatories, the plaintiff failed and/or neglected to comply with the terms thereof. Consequently and as a result of the failure by the plaintiff, it was incumbent upon the Honourable court to give directions, relating to compliance.
84. In this respect, the honorable court proceeded to and issued directions on the July 6, 2023 and in respect of which the court *inter-alia* directed that the plaintiff does file and serve the requisite response/answer to the interrogatories with 7 days and in default the suit to stand dismissed without further reference.
85. Pursuant to and as a result of the orders by the honorable court, the plaintiff proceeded to and filed an affidavit in response to the interrogatories (sic) sworn/taken on the June 12, 2023.
86. However, there is no denial that the affidavit in response to the interrogatories was indeed served on the 1st and 2nd defendants, respectively. For good measure, learned counsel for the 1st defendant conceded during his submissions that same had been served with the impugned affidavit in response to the interrogatories, save that the impugned affidavit was in his view incompetent and invalid.
87. On the other hand, learned counsel for the 2nd defendant admitted that same was duly served with the affidavit in response to the interrogatories on the July 12, 2023 and by extension conceded that same



was served within the circumscribed timeline set by the court in terms of the orders made on the July 6, 2023.

88. Having made the foregoing observations, what I must now deal with relates to whether the plaintiff complied with the terms and tenor of the orders of the Honorable court made on the July 6, 2023; and which essentially, called upon the plaintiff to file an affidavit in answer/response to the interrogatories, within 7 days of the order.
89. From my end, there is no gainsaying that indeed the plaintiff ventured forward and duly filed and served an affidavit in response to the interrogatories. For good measure, the affidavit in response to the interrogatories was filed and served within the stipulated 7 days period.
90. Arising from the foregoing, it is my very humble finding that if I have to ascertain whether there was a compliance with the court order or otherwise; then what I have to authenticate is the filing and service of an affidavit in response to the interrogatories. In this regard, there is certainly an affidavit in response, which has been duly filed and served within the stipulated timeline.
91. Consequently and in view of the foregoing, my answer as to whether or not the plaintiff has complied with the orders of the honourable court made/issued on the July 6, 2023; is in the affirmative.
92. Other than the foregoing, learned counsel for the 1st defendant ventured forward to suggest that the affidavit in response to the interrogatories which has been filed by and on behalf of the plaintiff is incompetent and invalid and thus cannot constitute compliance.
93. What I hear learned counsel for the 1st defendant to be saying is that the court needs to interrogate the affidavit in response to the interrogatories and to examine whether same is valid; and whether same has positively answered to all the issues alluded to in the interrogatories.
94. However, I beg to underscore that in answer to interrogatories, the concerned party against whom Interrogatories has been served; still has a freedom of expression as espoused and entrenched in article 33 of the [Constitution, 2010](#), which stipulates as hereunder;

33. Freedom of expression

- (1) Every person has the right to freedom of expression, which includes—
 - (a) freedom to seek, receive or impart information or ideas;
 - (b) freedom of artistic creativity; and
 - (c) academic freedom and freedom of scientific research.
- (2) The right to freedom of expression does not extend to—
 - (a) propaganda for war;
 - (b) incitement to violence;
 - (c) hate speech; or
 - (d) advocacy of hatred that—
 - (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
 - (ii) is based on any ground of discrimination specified or contemplated in article 27 (4).



(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

95. Taking into account of the context of article 33 of the *Constitution 2010*, I beg to underscore that in responding to the interrogatories, the plaintiff must not be put in a straight jacket and panel- beaten to adopt a particular perspective or set of answers that favors the adverse Party.
96. Simply put, the plaintiff whilst responding to the interrogatories still has and enjoys the Constitutional rights and fundamental freedom relating to expression.
97. Finally, I had pointed out that learned counsel for the 1st defendant merely invited the court to ignore and disregard the affidavit in response to the interrogatories, because in his view same was incompetent and invalid. However, I beg to repeat that this honorable court was never invited to strike out and/or expunged the impugned affidavit in answer to the interrogatories.
98. Premised on the forgoing, I must state and reiterate that a court of law cannot ignore a legal document which has been duly filed by a litigant. For good measure, the established position of the law/ Jurisprudence is that any offending document ought to be struck out and/or expunged from the record of the court.
99. However and to the extent that this court was never invited to expunge and/or strike out the impugned affidavit in response to the interrogatories, I must state that the affidavit in question remains alive and thus forms part of the record of the Honourable court.
100. In the premises, there is no way that a court of law can be invited to shut/close his/her eyes to such a document and thereafter disregard same.
101. Owing to the foregoing, I come to the conclusion that the affidavit in answer to the interrogatories remains as part of the record of the honourable court and shall therefore be relied upon by the honourable court as well as the parties, albeit for whatever its worth.
102. Finally, I adopt the position that compliance is separate and distinct from validity. Instructively, the court at this juncture is only concerned with whether there was an affidavit in response to the interrogatories that was filed within the stipulated timelines and not its validity. For good measure, the honourable court is not at this Juncture called upon to undertake a mini-trial to examine in minute details, whether each and every Question has been answered and say, answered in the manner that pleases and/ or finds favour with the Adverse Party.
103. However, whilst discussing issues number 1 and 2; and for the avoidance of doubt, this court ventured and considered the validity of the affidavit as well as its admissibility in the subject proceedings. Notably, the court arrived at the conclusion that the impugned affidavit was admissible/acceptable, taking into account the provisions of order 19 rules 8 of the *Civil Procedure Rules 2010*.
104. Consequently, even if I were to venture forward and make a determination on the basis of the validity of the affidavit herein, I would still have come to the same conclusion.

Final Disposition

105. Having calibrated upon the various perspectives, which were addressed and ventilated by learned counsel for the 1st defendant and having taken into account the relevant and obtaining case law, I have come to the conclusion that the oral application that was made before the court is not meritorious.



106. Consequently and in the premises, I proclaim that the plaintiff has duly responded to the interrogatories served by the 1st defendant in terms of the affidavit in response to the interrogatories (sic) sworn on the June 12, 2023.
107. In a nutshell, I decline the invitation to deem the suit beforehand as dismissed for want of compliance with the orders of the court issued on the July 6, 2023.
108. For good measure, the instant suit remains alive and the parties and their respective advocates are implored to take suitable steps for purposes of progressing the hearing and eventual disposal of the suit in the conventional way; unless deemed otherwise by the parties.
109. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023.

OGUTTU MBOYA,

JUDGE.

