



**Kuria v Wanjohi & another; Chief Land Registrar (Interested Party) Counter; Claim  
Wanjohi v Kuria & another; Chief Land Registrar (Interested Party) (Environment &  
Land Case E275 of 2022) [2023] KEELC 19953 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19953 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE E275 OF 2022**  
**JO MBOYA, J**  
**SEPTEMBER 21, 2023**  
**MICHAEL MBUGUA KURIA.....PLAINTIFF**  
**VS.**  
**JOSEPH KINGORI WANJOHI.....DEFENDANT**  
**AND**  
**THE CHIEF LAND REGISTRAR..INTERESTED PARTY**  
**TITLE ON COUNTERCLAIM**

**BETWEEN**

**JOSEPH KINGORI WANJOHI ..... PLAINTIFF**

**AND**

**MICHAEL MBUGUA KURIA ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE OGUTU OLUOCH ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. The instant Ruling relates to and/or concerns two (2) Applications; one which has been filed by the Defendant/Counter-claimer and in respect of which same essentially seeks to strike out the amended Plaint filed by and on behalf of the Plaintiff; whilst the other Application is filed by the Plaintiff and



- same essentially seeks liberty to have a verifying affidavit sworn on the 6<sup>th</sup> June 2023, to be deemed as duly filed in place of the previous verifying affidavit.
2. Given the fact that the Ruling relates to two (2) Applications, in the manner alluded to in the preceding paragraph, it is therefore appropriate to reproduce the Reliefs sought at the foot of the various Applicants seriatim.
  3. Vide Notice of Motion Application dated the 19<sup>th</sup> June 2023; the Defendant/Applicant herein has approached the Honorable court seeking for the following reliefs;
    - i. ....Spent.
    - ii. This Honorable court be pleased to strike out the Plaintiff's suit and the entire suit against the Defendant/Applicant with costs for being fatally defective as there is no verifying Affidavit on record to accompany the Plaintiff.
    - iii. This application be heard and determined before any further hearing of the suit.
    - iv. The costs of this Application be provided for.
  4. The instant Application is premised and anchored on the numerous grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of Joseph Kingori Wanjohi; sworn on 19<sup>th</sup> June 2023.
  5. Suffice to point that upon being served with the subject Application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 26<sup>th</sup> June 2023 and in respect of which same has averred that the impugned application under reference is calculated to drive him (Deponent) from the seat of Judgment albeit without being afforded the requisite opportunity to be heard.
  6. The 2<sup>nd</sup> Application is the one dated the 23<sup>rd</sup> June 2023; and which has been filed by the Plaintiff herein. For good measure, the Application herein seek for the following reliefs;
    - i. .... Spent.
    - ii. That pending the further hearing of the main suit on 31st July 2023, the Plaintiff's verifying affidavit dated 23rd January, 2023 be expunged out of court records and the Plaintiff be hereby granted leave to regularize his pleadings by filing the proper and/or compliant verifying affidavit annexed herewith.
    - iii. That pending the further hearing of the main suit on 31st July, 2023, the Plaintiff's verifying affidavit sworn by Michael Mbugua Kuria at Nairobi on the 6th June, 2023 as annexed at paragraph 4 of the supporting affidavit be admitted and considered to be properly on record for purposes of verifying the contents of the Plaintiff's amended Plaintiff dated 23rd January, 2023.
    - iv. The costs of this Application be in the cause.
  7. Similarly, the subject Application is premised on the various grounds which have been stipulated in the body thereof. In addition, the application is supported by the affidavit sworn by the Plaintiff on the 23<sup>rd</sup> June 2023; and in respect of which the Deponent has attached inter-alia the verifying affidavit (sic) sworn on the 6<sup>th</sup> June 2023.
  8. For completeness of record, the Application by the Plaintiff herein is opposed by the Defendant vide Grounds of opposition dated the 6<sup>th</sup> July 2023; and in respect of which the Defendant has contended inter-alia that the impugned Application is intended to sanction and/or validate the commission of an illegality and what is otherwise, perjury.



9. First forward, the two Applications under reference came up for hearing on the 11<sup>th</sup> July 2023; whereupon the court ordered and directed that the two (2) Applications be canvassed and ventilated simultaneously; and further, that the concerned Parties do file and exchange written submissions within the circumscribed timelines.

## **Submissions by the Parties**

### **Defendant's Submissions**

10. The Defendant/Applicant herein has filed two sets of written submissions both dated the 10<sup>th</sup> July 2023. For good measure, the two sets of written submissions relate to the Application dated the 19<sup>th</sup> June 2023; and the Application dated the 23<sup>rd</sup> June 2023, respectively.
11. From the two sets of written submissions, Learned counsel for the Defendant has extracted and distilled three (3) salient issues for consideration and ultimate determination by the Honourable court.
12. Firstly, Learned counsel for the Defendant has submitted that pursuant to and by dint of Order 4 Rule 2(1) of the Civil Procedure Rules 2010, it is incumbent upon the Plaintiff to file a verifying affidavit verifying the correctness of the Plaint and not otherwise. Instructively, Learned counsel has submitted that the clear position of the law is that the verifying affidavit is to be sworn by the Plaintiff and not any other person and that in the event that the verifying affidavit is not sworn by the concerned Plaintiff; then the Plaint in question is rendered invalid and barred in law.
13. Furthermore, Learned counsel for the Defendant has submitted that in respect of the instant matter, the Plaintiff herein admitted, confirmed and acknowledged that the impugned verifying affidavit sworn on the 23<sup>rd</sup> January 2023 and which was indorsed to the Plaint, was not sworn by himself.
14. To the extent that the impugned verifying affidavit was admitted not to have been sworn by the Plaintiff, Learned counsel for the Defendant has therefore submitted that the impugned verifying affidavit is therefore irregular, illegal and unlawful and thus ought to be struck out and/or expunged from the record of the court.
15. In this respect, Learned counsel for the Defendant has cited and relied on inter-alia the case of J P Machira T/a Machira & Company Advocates vs Wachira Waruru & Another (2007)eKLR, Patrick Ochieng Abachi & 6 Others vs Kenya Anti-Corruption Commission (2010)eKLR and Oriental Commercial Bank Ltd vs Shashikant Chandubhai Patel (2011)eKLR, respectively.
16. Secondly, Learned counsel for the Defendant has submitted that where the impugned verifying affidavit is struck out or expunged, the plaint filed by and on behalf of the Plaintiff herein would be left bare and devoid of any legal foundation. For good measure, counsel has pointed out that the verifying affidavit is what vests and/or confers the Plaint with the requisite legal foundation and therefore where the Plaint is expunged, the attendant suit is invalidated and thus ought to be struck out.
17. In support of the foregoing submissions, Learned Counsel has reiterated the ratio decidendi in the case of Oriental Commercial Bank Ltd vs Shashikant Chandubhai Patel (2011)eKLR.
18. Lastly, Learned counsel for the Defendant has submitted that insofar as the verifying affidavit which was filed by the Plaintiff was subsequently disowned by the Plaintiff himself, the said verifying affidavit becomes invalid.
19. Additionally, Learned counsel has also submitted that arising from the proceedings of the court which were taken on the 25<sup>th</sup> May 2023, it became apparent that the Plaintiff herein had uttered a false document, namely, verifying affidavit and in any event; the court proceeded to and made findings



- touching on the falsity of the impugned verifying affidavit, which the court ordered to be referred to the Director of Criminal Investigation for purposes of necessary action and appropriate prosecution.
20. Premised on the foregoing, Learned counsel for the Defendant has therefore submitted that if the court were to grant the orders sought by the Plaintiff herein in terms of the reliefs sought at the foot of the Application dated the 23<sup>rd</sup> June 2023; then the court would be sanctioning and/or validating the commission of an illegality and perjury.
  21. In short, Learned counsel has submitted that the circumstances surrounding the impugned verifying affidavit are such that the court ought not to grant its discretion to and in favor of the Plaintiff herein.
  22. In any event, Learned counsel for the Defendant has contended that the discretion of the court can only be exercised and/or granted to remedy the defect, failure and/or omission, which was inadvertent; but not a deliberate omission, inaction or illegality.
  23. In support of the foregoing submissions, Learned counsel has cited and relied on the case of John Mukuha Mburu vs Charles Mwenga Mburu (2019)eKLR and Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others (2013)eKLR, respectively.
  24. In view of the foregoing, Learned counsel has therefore implored the Honourable court to find and hold that the application dated the 19<sup>th</sup> June 2023; is meritorious; whereas the counterpart Application dated the 23<sup>rd</sup> June 2023; is devoid and bereft of merits.

### **Plaintiff's Submissions**

25. The Plaintiff herein filed written submissions dated the 24<sup>th</sup> July 2023; and in respect of which the Plaintiff has highlighted, amplified and canvassed two (2) salient issues for consideration by the Honourable court.
26. Firstly, Learned counsel for the Plaintiff has conceded and acknowledged that though the Plaintiff herein filed a Plaint dated the 23<sup>rd</sup> January 2023; which was accompanied by a verifying affidavit, however, the impugned verifying affidavit was not signed by the Plaintiff himself.
27. Additionally, Learned counsel has also contended that during the proceedings which were taken by and before the court on the 25<sup>th</sup> May 2023, the Plaintiff herein disowned the signature appearing on the verifying affidavit, which was attached to the amended Plaint dated the 23<sup>rd</sup> January 2023.
28. Other than the foregoing, Learned counsel for the Plaintiff has also conceded that arising from the denial by the Plaintiff that same did not swear the impugned verifying affidavit, the court proceeded to and found that there was evident perjury and indeed an order was made referring the impugned verifying affidavit for investigations by the Directorate of Criminal Investigations.
29. Additionally, Learned counsel for the Plaintiff has indeed intimated that pursuant to and arising from the orders/directions of the court made on the 25<sup>th</sup> of May 2023; the impugned verifying affidavit, which is the subject of the two application, is under active investigations by the directorate of criminal investigations.
30. Notwithstanding the foregoing, Learned counsel for the Plaintiff has still submitted that the court has a discretion to expunge the impugned verifying affidavit and thereafter to grant leave to the Plaintiff to file a compliant verifying affidavit. Instructively, Learned counsel has invited the court to accede to and grant liberty to adopt the verifying affidavit annexed to the supporting affidavit filed in respect of the application dated the 23<sup>rd</sup> June 2023.



31. Secondly, Learned counsel for the Plaintiff has submitted that the Honorable court ought not to strike out the Plaintiff's suit merely because of the defect attendant to and discernable from the impugned verifying affidavit.
32. To the contrary, Learned counsel has submitted that the court is conferred with the requisite discretion to allow the Plaintiff to remedy the defect in question by filing a complaint verifying affidavit.
33. In any event, Learned counsel has contended that the defect attendant to the impugned verifying affidavit has not prejudiced the Defendant herein and hence the court ought to grant liberty so that the justice of the case can be determined and rendered on merits and not by invocation and application of technicalities.
34. In support of the foregoing observation, Learned counsel has invited the Honourable court to take cognizance of the holdings in the case of Agricultural Finance Corporation & Another vs Drive-inn Estate Development Ltd (2006)eKLR, Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another (2001)eKLR, respectively.
35. Finally, Learned counsel has submitted that striking out of a suit should be a last resort and in any event, same should be applied sparingly and with necessary circumspection, taking into account that the Right to be Heard is a Constitutional imperative.
36. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on the decision in the case of D.T Dobbie & Company Ltd vs Joseph Mbaria Muchina & Another (1980)eKLR and Trust Bank Ltd vs Amalo Company Ltd (2002)eKLR, respectively, in an endeavor to persuade the court that striking out of a suit is a drastic action that should be avoided.
37. Premised on the foregoing submissions, Learned counsel has thus implored the court to find and hold that the application by the Defendant and which seeks to have the Plaintiffs suit struck out; is not legally tenable and would in any event, occasion undue injustice. In this regard, counsel has contended that the said application ought to be dismissed.
38. Conversely, counsel has submitted that the court is seized and/or possessed of the requisite discretion to allow the impugned verifying affidavit to be remedied by the substituting same with the one attached to the Application dated the 23<sup>rd</sup> June 2023.

**Issues for Determination:**

39. Having reviewed and analyzed the two (2) Applications beforehand; and upon taking into account the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are thus worthy of consideration and determination.
  - i. Whether the impugned verifying affidavit ought to be struck out/expunged and if so; whether the Amended Plaint ought to similarly be struck out.
  - ii. Whether the Honorable court ought to exercise discretion in favor of the Plaintiff and essentially to allow the Plaintiff to substitute the impugned verifying affidavit, taking into account the obtaining circumstances.



## Analysis and Determination

### Issue Number 1

Whether the impugned verifying affidavit ought to be struck out/expunged and if so; whether the Amended Plaintiff ought to similarly be struck out.

40. Learned counsel for the Defendant has submitted that pursuant to and by dint of the provisions of Order 4 Rule 2(1) of the Civil Procedure 2010, it is incumbent upon the Plaintiff to swear a verifying affidavit and cause same to be indorsed to the Plaintiff in respect of the designated matter.
41. Furthermore, learned counsel for the Defendant has added that the clear provisions of the law are to the effect that the verifying affidavit must be sworn by the Plaintiff and not any other third party or at all.
42. Nevertheless, in respect of the instant matter, Learned counsel has submitted that it transpired and became apparent that the impugned verifying affidavit which was attached to the amended Plaintiff dated the 23<sup>rd</sup> January 2023; was not sworn by the Plaintiff herein. Instructively, the fact that the impugned verifying affidavit was sworn by a third party and not the Plaintiff, was admitted and acknowledged by the Plaintiff himself.
43. Other than the position ventilated by and on behalf of the Defendant herein, it is important to observe that even the Plaintiff himself has conceded and admitted that the impugned verifying affidavit was never sworn by himself and that for good measure the impugned verifying affidavit was sworn by someone/somebody procured by his advocate to copy his signature from his previous documents.
44. For the avoidance of doubt and to put the Plaintiff's position into perspective, it is perhaps important to reproduce the contents of paragraphs 5, 6 and 7 of the submissions filed by and on behalf of the Plaintiff. In this respect, the named paragraphs are reproduced as hereunder;
  5. Your Lordship, the crux of the Plaintiff's application is that when this matter came up for hearing on 25th May, 2023, it came out that the Plaintiff's affidavit verifying the contents of the amended Plaintiff dated 23rd January, 2023 was not compliant. The court asked that the matter be investigated, an order was extracted by the Defendant and the same is under active investigation by the Directorate of Criminal Investigations.
  6. The Plaintiff stated that though he read and understood the contents of the amended Plaintiff and the Verifying affidavit, he did not personally sign the verifying affidavit to the amended Plaintiff. That he instructed the law firm to have somebody copy his signature from his previous documents and to put/sign for him.
  7. It is also material to note that the Plaintiff's Plaintiff was accompanied by a compliant verifying affidavit. The error/mistake only occurred in the 2nd affidavit which the Plaintiff for reasons of an emergency was not able to sign in person. It is also an important fact to note and to consider that the Plaintiff confirmed and adopted the contents of his amended Plaintiff under oath and before this honourable court on 25th May, 2023. The same is available in the court's record
45. From the foregoing observations, three things become evident and apparent and are thus worthy of due interrogation and determination by the Honourable Court.



46. Firstly, there is no gainsaying that the impugned verifying affidavit was never signed nor sworn by the Plaintiff. In this regard, the impugned verifying affidavit, which is sought to be struck out and/or expunged, clearly offends the provisions of Order 4 Rule 2(1) of the Civil Procedure Rules, 2010; which makes it mandatory that the requisite verifying affidavit must be signed by the Plaintiff and not otherwise.
47. Consequently and to the extent that the Plaintiff admits that the impugned verifying affidavit was not sworn by him and in any event; same was disowned by him; the impugned verifying affidavit is therefore illegal, invalid and void.
48. Certainly, the impugned verifying affidavit, which I have found to be illegal, invalid and void is one which must be struck out and expunged, if the integrity of court proceedings, which are solemn in nature; and by extension the rule of law, are to be upheld.
49. Secondly, it is not lost on this court that at the onset of the proceedings which were taken before the court on the 25<sup>th</sup> May 2023, the Plaintiff herein took oath and/or was sworn before the court and in the course of his testimony before the court adopted the contents of the amended Plaintiff dated the 23<sup>rd</sup> January 2023; and the verifying affidavit indorsed thereto and in particular informed the court that the contents of the two named documents were true and correct.
50. Pursuant to and as a result of the intimation by the Plaintiff that the contents of his amended Plaintiff and the attached verifying affidavit were true, the court adopted and constituted the named documents as part of the Plaintiff's evidence in chief, which was certainly taken under oath.
51. Be that as it may, in the course of cross examination, the Plaintiff herein made a complete about turn and said that the signature contained on the verifying affidavit, (which he had hitherto admitted to be his), was not his. Furthermore, the Plaintiff contended that he did not sign the verifying affidavit in question.
52. Arising from the position taken by the Plaintiff, it became apparent and evident that a cognizable offense had been committed and perhaps, was in the process of being committed and in this regard, the court made an order that the impugned verifying affidavit be referred to the directorate of criminal investigations for due investigations and where appropriate, be prosecuted.
53. Thirdly, the Plaintiff himself concedes that arising from the orders of the court, pertaining to and/or concerning the impugned verifying affidavit, the Directorate of criminal investigations has commenced investigations attendant to the said verifying affidavit.
54. Arising from the totality of the foregoing, the question that I must now deal with is whether the striking out of the verifying affidavit should culminate into the striking out of the suit in question or whether this court should exercise mercy, sympathy, leniency and/or discretion and afford the Plaintiff an opportunity to remedy the situation.
55. Sadly and taking into account the events that transpired before the court on the 25<sup>th</sup> May 2023, and in particular, the conscious and deliberate falsehoods that was perpetrated before the court, it would be unconscionable for this court to exercise discretion for allowing the Plaintiff to have a second bite on the issue pertaining to the verifying affidavit, which clearly falls within the purview of Section 113 of the Penal Code, Chapter 63 of the Laws of Kenya.
56. Consequently and to my mind, having struck out and expunged the verifying affidavit and the amended Plaintiff not being duly verified, as required vide the known provisions of Order 4 Rule 2 (1)



of the Civil Procedure Rules, 2010; I come to the conclusion that the amended Plaintiff in question is incompetent and thus deserves to be struck out.

57. In amplification of the foregoing position, I adopt and reiterate the dictum in the case of Oriental Commercial Bank Limited v Shashikant Chandubhai Patel [2011] eKLR citing the case of The Delphis Bank Limited v. Asudi (K) Limited & Another, HCCC No. 82 of 2003; wherein the learned Judge considered the issue of unavailability of a Verifying Affidavit and the consequences for the Plaintiff as filed by stating that: -

“Once a verifying affidavit has been struck out and the defendant applies to have the plaintiff struck out then the court must strike out the plaintiff. I agree with the defendant’s counsel that a plaintiff cannot remain standing after the verifying affidavit is found to be defective and is struck out. A plaintiff is founded on a verifying affidavit and without this foundation, it has no legs to stand on, it collapses and cannot be made to stand or lifted by the stilts of discretion and/or principles of equity.”

58. In a nutshell, the amended Plaintiff dated the 23<sup>rd</sup> January 2023; be and is similarly struck out and expunged from the record of the court.

## **Issue Number 2**

Whether the Honorable court ought to exercise discretion in favor of the Plaintiff and essentially; to allow the Plaintiff to substitute the impugned verifying affidavit, taking into account the obtaining circumstances.

59. Despite the fact that this court has come to the conclusion that the amended Plaintiff dated the 23<sup>rd</sup> January 2023 merits being struck out and has indeed proceeded to and struck out same, it is still imperative that the court deals with the second issue herein.
60. I say it is imperative to deal with the second issues herein because it raises a pertinent and poignant question as to whether a court of law can exercise discretion to sanction, countenance or better still; sanitizing the commission of a criminal offense and/or an illegality.
61. To start with, it is worthy to recall and reiterate that the Plaintiff herein had initially informed the court under oath that he is the one who signed and swore the impugned verifying affidavit and thereafter same implored the court to adopt the verifying affidavit as part of his Evidence in chief.
62. Nevertheless, during the cross examination, the Plaintiff created and took a diametrically opposed position and in fact disowned the signature that was affixed at the foot of the impugned verifying affidavit. Instructively, the Plaintiff added that he did not sign the verifying affidavit.
63. Arising from the subsequent evidence given by the Plaintiff and which position has been replayed vide the written submissions filed on behalf of the Plaintiff herein; the court made an explicit order that there was evident perjury in terms of Section 108 of the Penal Code Chapter 63 Laws of Kenya.
64. Despite the foregoing orders and directions by this court, the Plaintiff is now back and in inviting the court to exercise judicial and equitable discretion to allow him to supplant the previous verifying affidavit which was found to amount to perjury, with a new verifying affidavit.
65. Surely, the question that the court must grapple with; is whether discretion of the court can be exercised in such a scenario. Fortunately for me, I beg to reiterate that the discretion of the court can only be invoked and exercised where the acts and/or omissions sought to be remedied arose from an accident, inadvertence, excusable mistake or error. See the dictum of the Court of Appeal in the case of Phillip Keipto Chemwolo and Another versus Augustine Kubende and Another (1986) eKLR.



66. To the contrary, the discretion of the court cannot be exercised in a clear case of an illegality or where the culprit is keen to defile and/or defraud the pure/clean Provisions of the law; and thereby bring the integrity of court proceedings and by extension the Rule of law, to disrepute.
67. If the latter situation, in terms of the immediate paragraph, were to attract exercise of judicial discretion; then the entire edifice upon which the Rule of Law and General Administration of Justice is premised, would be brought down and left crumbling. Essentially, a pandora box shall have been opened and the Rule of the jungle, will no doubt, take the place/ position of civility.
68. Fundamentally, it is important to bring to the attention of all and sundry; that one must not indulge in commission of (sic) cognizable offense and better still; that when such acts/conducts are done same would not be countenanced, nay, pardoned by the courts; by exercise of Judicial discretion to remedy the illegality; once same becomes evident or is pointed out by the adverse party.
69. At this juncture and without belaboring the fact that court proceedings are very solemn proceedings and must therefore be given the requisite respect and treated with dignity, it is imperative to reiterate the holding of the Supreme Court in the case of Odinga & 16 others versus Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) (Judgment), where the court stated thus;

25. It is our finding that?

- (d) This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed.

We must remind counsel who appear before this court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of the Penal Code, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings.

70. Surely, by making the false affirmation or declaration before the court that the impugned verifying affidavit was sworn by him and thereafter disowning the same affidavit, the Plaintiff herein was indeed abusing, nay, interfering with the proper administration of justice, which cannot be countenanced and/ or pardoned by a conscientious court of law.
71. To my mind, if I were to allow the application by and at the instance of the Plaintiff herein, I would certainly, be sanctioning and/or countenancing the commission of an illegality and thereby bringing the Rule of Law into disrepute; which would be contrary to inter-alia, the Provisions of Article 10(2) of the constitution, 2010.
72. Consequently and arising from the foregoing analysis, I am not disposed to dignify the Plaintiff herein with exercise of discretion and thereby adulterate the Pure stream of Justice.



73. For the umpteenth time, I beg to repeat and reiterate that he who seeks Equity; and for good measure, Discretion is Equity; must come to Court, with Clean Hands and not otherwise.

### **Final Disposition**

74. From the foregoing analysis, it is obvious and evident that the Application by the Defendant/Applicant and which essentially seeks to expunge the offensive verifying affidavit and by extension striking out the Plaintiff's suit; is meritorious.

75. Conversely, there is no gainsaying that this court is neither disposed nor keen to adulterate the Pure Stream of Justice by using equitable discretion to countenance and/or sanction the commission of an illegality.

76. Notably, the court has found and held that the application by and on behalf of the Plaintiff herein is not meritorious and if allowed, shall amount to an absurdity and adulteration of the Pure stream of Justice.

77. In a nutshell, the court therefore makes the following orders;

- i. The Application dated the 19<sup>th</sup> June 2023, be and is hereby allowed.
- ii. Consequently and in the premises, the amended Plaint dated the 23<sup>rd</sup> of January 2023; the verifying affidavit sworn on even date be and are hereby struck out.
- iii. The Plaintiff's suit be and is hereby struck out.
- iv. The Defendant be and is hereby awarded costs of the Application dated the 19<sup>th</sup> June 2023; as well as costs of the Plaintiff's suit which has been struck out.
- v. The Plaintiff's Application dated the 23<sup>rd</sup> June 2023 be and is hereby dismissed.
- vi. Costs of the Application dated the 23<sup>rd</sup> June 2023 be and are hereby awarded to the Defendant.

78. For the avoidance of doubt, the import and tenor of the orders made hereof shall not prejudice, negate and/or in any way affect the orders of the court which were made on the 25<sup>th</sup> May 2023; and essentially which referred the impugned verifying affidavit to the Directorate of Criminal Investigations for necessary actions and where appropriate, suitable prosecution.

79. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> \_\_ DAY OF SEPTEMBER 2023.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of:

Mr. Okoyo for the Plaintiff/Respondent

Mr. Abdiaziz for the Defendant/Applicant

Mr. Allan Kamau for the Interested Party

