



**Kitundu v Sheik (Environment & Land Case E327 of 2021)
[2022] KEELC 3163 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E327 OF 2021**

**JO MBOYA, J
AUGUST 3, 2022**

BETWEEN

ESTHER KATOSI KITUNDU APPLICANT

AND

MUSA ABDULAH SHEIK RESPONDENT

RULING

Introduction and Background

1. Vide the notice of motion application dated the May 10, 2022, the plaintiff/applicant herein has approached the court seeking for the following Reliefs;
 - i.(Spent).
 - ii. The Honourable Court be pleased to issue an order directing the County Government of Nairobi – Umoja Ward to reproduce the file of the subject properties Umoja Innercore Plot A7- Sector 1 (Nairobi/Block 83/14) and of Nairobi/Block 83/14/885 before this Court or produce certified copies of the subject property’s file.
 - iii. That this Honourable Court be pleased to issue an order directing the land Registrar, ministry of Lands to produce the Green Card in respect of the parcel No. Nairobi/Block 83/14/885 or present certified copies of the same to the Applicant.
 - iv. That the honourable court be pleased to make such further and/ or other orders in the Interest of Justice upon examination.
2. The subject application is premised on the grounds enumerated at the foot thereof and the same is further supported by an affidavit in support sworn on May 10, 2022 by one, Kenneth K Mbaabu, and for which the deponent has annexed 6 annextures thereto.



3. Upon being served with the said Application, the Defendant/Respondent herein replied by filing and/or lodging Grounds of opposition dated the 14th day of June 2022, raising various issues, inter-alia, contending that the Plaintiff/Applicant has not complied with and/or exhausted the Statutory mechanisms provided for vide the [Access to Information Act](#) 2016.

Deposition By The Parties

a.Plaintiffs/applicants Case

4. Vide supporting affidavit sworn on the 10th of May 2022, the deponent thereof, who is the advocate for the plaintiff/applicant has averred that the plaintiff/applicant herein bought and/or purchased the suit property from one Harry Gibson Kinuka Ndunda on or about the 23rd July 1993 and that thereafter the assignment pertaining to and/or concerning the suit property was duly witnessed and sealed by the City Council of Nairobi.
5. On the other hand, the deponent has averred that following the purchase of the suit property, the plaintiff/applicant commenced to and has been paying land rates to the City Council of Nairobi, now defunct and thereafter to Nairobi City County.
6. Be that as it may, the deponent has further averred that subsequently the plaintiff/applicant endeavored to pay land rates, but same was informed that the file in respect of the suit property was not available. In this regard, the deponent has further averred that the Plaintiff/Applicant was therefore unable to pay the land rates.
7. Further, the deponent has stated that thereafter same (the deponent) has made several visits to the County Government of Nairobi- Umoja Ward, seeking to ascertain the status of the file/record in respect of the suit property, but same has been unsuccessful.
8. Other than the foregoing, the deponent has further averred that same has made various visits to the Ministry of Land seeking to procure and/or obtain assorted documents relating to and concerning the suit property. However, that the several visits, have also not yielded any positive return.
9. Besides, the deponent has further stated that same has also written to the Ministry of Lands seeking to be provided with a copy of the Green Card in respect of the suit Property, but that despite having requested for copies of the Green Card, the Land Registrar, Ministry of lands, has declined to supply and/or avail the copies of the Green Card contending that same can only be availed vide a Court order.
10. Further, the deponent has averred that same has also visited the offices of the Director of Survey, with a view to procuring and/or obtaining copies of the relevant Cadastral Maps pertaining to the suit property, but the Director of Survey was unable to avail the relevant map touching on and/or concerning the suit property.
11. Nevertheless, the deponent has averred that the Director of Survey was however able to avail a Survey map relating to Nairobi/Block 83/14/885, which relates to the Mother title as opposed to the suit property.
12. The deponent has further averred that despite concerted efforts to procure and obtain assorted documents from Nairobi City County Government and the Registrar, Ministry of Lands, pertaining to the suit property, the said offices have declined and or failed to supply the documents sought, albeit without any lawful basis.



13. Premised on the foregoing, the deponent has therefore implored the Court to make an order directing and/or compelling the Nairobi City County Government – Umoja Ward and the Registrar, Ministry of Land, to supply and/or avail the named documents to the court.

b. Response By The Defendant/respondent

14. The defendant/respondent filed Grounds of opposition dated the 14th of June 2022 and in respect of which same has stated as hereunder;
- i. The prayer sought in the plaintiffs/applicants application do not meet the legal threshold required when seeking and/or demanding access to information/documents to the effect that the plaintiff/applicant has failed to establish and/or demonstrate;
 - a. She has formally sought the information/documents and access to such information has been denied or inhibited .
 - b. There is no evidence that the Plaintiff/Applicant wrote to the county Government of Nairobi – Umoja Ward seeking to access the information and/or documents sought.
 - c. There is no evidence that the letter dated the 19th November 2021 was indeed served upon the Registrar Ministry of Land as the said letter does not exhibit/show the Registrars acknowledgement stamp.
 - ii. That owing to the foregoing, the Plaintiffs/Applicants application has laid is thus misconceived, a nonstarter and amounts to abuse of the court process and hence ought to be dismissed.

Submissions By The Parties:

Plaintiff's/applicant's Subission:

15. The Plaintiff/Applicant filed written submissions dated the 1st June 2022 and same raised two pertinent issues for consideration and determination.
16. First and foremost, Counsel for the plaintiff/applicant submitted that this court is seized of and or possessed of original jurisdiction and thus same is competent to order and or direct the provisions of the documents and information sought by the plaintiff/applicant.
17. It was counsel's further submission that by dint of section 13(7) of the *Environment and Land Court Act, 2011*, the Court is vested with mandate to grant assorted Reliefs that the court may deem fit and just. Consequently, counsel for the Plaintiff/Applicant contended that the said provisions of the law confers upon this court the mandate to grant the orders sought for at the foot of the subject application.
18. Secondly, Counsel for the Plaintiff/Applicant submitted that the Applicant has made various and concerted efforts to procure the documents sought for, but that the concerned Departments/Offices have declined to avail the documents, contending that such documents can only be availed upon service of a court order.
19. Based on the foregoing, counsel for the Plaintiff/Applicant has therefore submitted that unless the court intervenes and grants the order sought, the Plaintiff/Applicant would not be able to access the Documents sought for and in this regard, the Applicant's rights to the documents and essentially, the information required, will be infringed upon and or otherwise breached.



20. In a nutshell, Counsel for the Plaintiff/Applicant has submitted that the subject Application is therefore meritorious and ought to be granted in the Interest of Justice.
21. In support of the foregoing submissions, Counsel for the plaintiff/applicant has relied on various decisions, inter-alia, *Republic versus Sam Nthenya, Chief Executive Officer, Nairobi Women Hospital Ex-parte Christine N Nzula; Commission on Administration of Justice (interested party)* (2021)eKLR and *Katiba Institute versus President Delivery Unit & 3 others* (2017)eKLR.

Defendant's/respondents Submission's

22. On behalf of the defendant/respondent, written submissions were filed on the June 29, 2022 and Counsel for the defendant/respondent, has similarly raised two issues for determination;
23. Firstly, Counsel for the defendant/respondent has submitted that the plaintiff/applicant herein has not complied with and/or adhered to the established provisions of the *Access to Information Act*, 2016, prior to and or before approaching this court.
24. Based on the foregoing, counsel for the defendant/respondent has therefore contended that the subject application has been filed pre-maturely and therefore amounts to an abuse of the Due Process of the court.
25. Secondly, counsel for the defendant/respondent has also submitted that the coercive orders of the court, which are being sought vide the subject application cannot issue until and unless the Plaintiff/Applicant has placed before the court credible evidence of efforts made to procure the documents from the relevant offices/department.
26. Further, counsel added that there being no evidence that the impugned departments and/or offices have declined to avail the information to the plaintiff/applicant, the court therefore ought not to intervene in favor of the plaintiff/applicant.
27. To vindicate the submissions on behalf of the defendant/respondent, counsel has relied on two decisions, namely, *Kenya Society for the Mentally Handicapped versus The Attorney General & others* Petition No. 155A of 2011 and *Ottawa Football Club versus Canada (Minister of Fitness and Armature Sport)* (1989) 2FC 480, respectively.

Issues For Determination:

28. Having reviewed the subject application, the supporting affidavit thereto as well as the grounds of opposition filed in response thereto; and having similarly, considered the written submissions filed on behalf of the Parties, the following issues are germane for determination;
 - i. Whether this court has the requisite jurisdiction to entertain and/or adjudicate upon an application seeking to address breach and or infringement of right of access to information.
 - ii. Whether the plaintiff/applicant has complied with the established Statutory provisions of *Access to Information Act*, 2016 and if not whether the subject Application is premature and misconceived.
 - iii. Whether the supporting affidavit sworn by Counsel for the plaintiff/applicant and which touches on Evidentiary issues is competent.
 - iv. Whether the annexures attached to the said affidavit are in compliance with rule 9 of the *Oath and Statutory Declarations Rules*.



Analysis and Determination:

Issue Number 1:

Whether this Court has the requisite Jurisdiction to entertain and/or adjudicate upon an Application seeking to address breach and or infringement of Right of access to Information.

29. The Plaintiff/Applicant herein seeks for orders of the court to direct the County Government of Nairobi- Umoja Ward to produce and/or avail to the Plaintiff/Applicant the file/record pertaining to the property known as Umoja Innercore Plot No. A7- Sector 1 (Nairobi/Block 83/14 and Nairobi/Block 83/14/885) or certified copies thereof.
30. On the other hand, the Plaintiff/Applicant also seeks an order directed to the Registrar, Ministry of lands to produce to and avail copies of the Green card in respect L.R No. Nairobi/Block 83/14/885 or certified copies thereof.
31. From the nature of orders and/or reliefs sought, there is no gainsaying that what the Applicant is seeking for is an order to compel the designated offices/department, to supply and/or avail unto her documents and/or information, which are held by the said offices/departments.
32. In the premises, the bottom-line of the plaintiff's/applicant's Application, is that the plaintiff/applicant is seeking to exercise her Constitutional Right to Access to Information as enshrined vide article 35 of *the Constitution* 2010.
33. Suffice it to point out that the plaintiff/applicant herein, as one of the citizens of the republic of kenya, is indeed entitled to partake of and or benefit from the rights articulated vide article 35 of *the Constitution*,2010.
34. Towards and in the course of seeking to appropriate and or benefit from the foregoing Rights, it behooves the applicant to approach the concerned offices/departments holding the said information required and/or sought for.
35. For the avoidance of doubt, the manner in which the Applicant is required to apply for the requisite documents and or information, is stipulated and/or provided for under the *Access to Information Act*, 2016.
36. Be that as it may, it is worthy to note that any Applicant, the current Plaintiff/Applicant, not excepted is obliged to write to the concerned Office/Department, enumerating the Documents and/or information required and thereafter to avail the request to the concerned Office/Department, for purposes of consideration and action.
37. Where an Applicant, including the current Plaintiff/Applicant, has complied with the provisions of *Access to Information Act*, but the request has been declined, refused and/or neglected, then such Applicant has a right to apply to the court contending that his/her fundamental of access to information under article 35 of *the Constitution* 2010, have been breached, violated and or infringed upon.
38. However, the question that needs to be addressed is; which court does such an Applicant approach to address and/or remedy the breach and/or violation of the Applicant's Fundamental Rights of Access to documents or information.
39. To my mind, where a Party contends that his/her rights as pertains to Access to Information held by a Government Department/Office, has been breached and/or infringed upon, such a Party is



- obliged to file the requisite Constitution Petition before the High Court, impleading the Government Department and or Officers, chargeable with the Documents in question and who are contended to have deprived the Applicant of the Right of Access to such information/documents.
40. Without belaboring the point, such a Petition would be mounted against the person holding the information and shall contain the requisite particulars of the Documents/Information required, when same were applied for and reasons, if any, why such information was withheld.
41. Once the Constitutional Petition is filed, the High Court in exercise of its Constitutional mandate vide article 165 (3) of *the Constitution*, 2010, would thereafter address the Complaint and the infringement alluded to and thereafter render a determination and make an appropriate Orders.
42. For convenience, it is appropriate to reproduce the provisions of article 165(3) of *The Constitution* 2010 and the same provides as hereunder;
- (3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
43. It is imperative to underscore that this court is given specific powers and/or mandate and such mandate must revolve around the issues that are delineated vide the provisions of article 162 (2) (b) of *the Constitution* 2010 and not otherwise.
44. To the extent that this court does not have unlimited Original jurisdiction, this court cannot therefore seek to encroach onto the jurisdiction which vests elsewhere. To do so, shall be tantamount to the court arrogating unto itself a Jurisdiction that is neither conferred on it vide *the constitution* nor statute.
45. In my considered view, a Court which is created vide statute must confine itself to the Jurisdiction prescribed and not otherwise. Consequently, the issues raised at the foot of the subject Application ought to have formed the basis of a Constitutional Petition, filed against the Government Officers/ Departments; and similarly, same ought to have been placed before the High Court and not otherwise.



46. To this end, it is appropriate to recall the dictum of the Supreme Court in the case of Samuel K *Macharia versus Kenya Commercial Bank Ltd & another* (2012)eKLR, where the Supreme Court observed at paragraph 68 as hereunder;

(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

47. Premised on the foregoing, the grant of the orders sought at the foot of the subject Application would be tantamount to usurping and/or appropriating a Jurisdiction that does not lie with this court.
48. Consequently, I must state that the application herein, whose import and tenor relates to breach, violation and/or infringement of (sic) the Right of access to information under article 35 of *the Constitution* 2010, has been laid and/ or placed before the wrong court.
49. Notwithstanding the foregoing, it is also important to point out that the plaintiff/applicant ought to appreciate that the kind of orders sought can also not issue, even assuming that this court has jurisdiction, without impleading the Persons/Departments who are said to have withheld and/or declined to grant the documents sought for or withheld the information in question.
50. Surely, the Offices/Departments that are being accused by the Plaintiff/Applicant to have withheld and/or declined to avail the impugned documents cannot be condemned without being heard. See article 50 (1) of *the Constitution*, 2010.
51. However, by making the subject application in the instant matter, where neither the County Government of Nairobi nor the Chief Land Registrar, are parties, the plaintiff/applicant is seeking to have the said parties condemned without a hearing.
52. To my mind, such kind of a procedure, would not only be illegal but also unconstitutional. Certainly, this court cannot be blind to the right of a Party accused of non-action, to be heard, in line with the provisions of article 50(1) of *The Constitution* 2010, whose import and tenor are explicit.
53. Be that as it may, I beg to point out that the Plaintiff/Applicant herein ought to have taken the route of seeking for witness summons to issue to the concerned Officer/Departments, to attend court and produce the requisite documents and or information.



54. Nevertheless, the plaintiff/applicant would still be obligated to ensure that prior to and/or before appropriating the right to accrue Summons to Witness, same would have captured the impugned documents at the foot of the List of Documents in line with the provisions of order 3 rule 2 (d) of the Civil Procedure Rules 2010.
55. Other than the foregoing, the Plaintiff would still also be bound to comply with the Provisions of Order 16 Rule 1 of the Civil Procedure Rules 2010, which stipulates the timeline within which such witness summons ought to be sought and applied for.
56. Be that as it may, I must point out that other than the right of the Plaintiff/Applicant herein to extract witness summons and procure the provision of the impugned documents, where the Complaint touches on breach and/or infringement of the right of access to information under Article 35 of the Constitution 2010, such a complaint must be placed before the High Court in an appropriate and established manner.
57. Consequently, my answer to issue number one is that this court is not seized of the requisite jurisdiction to address the breach of the Plaintiff's Rights to access of Information on the impugned documents either in the manner sought or at all.

ISSUE NUMBER 2

Whether the Plaintiff/Applicant has complied with the established Statutory provisions of Access to Information Act and if not whether the subject application is premature and misconceived.

58. Other than the fact that the complaint pertaining to breach, violation and/or infringement of the Plaintiffs/Applicants right to information and documents, has been placed before the wrong forum, there is still yet another incidental aspect to the matter.
59. For clarity, an Applicant seeking to procure documents and information held by the State, State Officer and or Department must comply with the established provisions of the Access to Information Act, 2016.
60. Pursuant to the foregoing Act, an Applicant is obliged to comply with section 8 of the said Act, which provides as hereunder;
 8. Application for access
 - (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
 - (2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.
 - (3) The information officer shall reduce to writing, in a prescribed form the request made under subsection(2) and the information officer shall then furnish the applicant with a copy of the written request.
 - (4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as



to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.

61. From the foregoing, it is therefore important to note that it was incumbent upon the Applicant herein, to lay before the court evidence that same has hitherto applied for the requisite information/ documents, in the established and prescribed manner.
62. However, the Plaintiff/Applicant herein has not availed and placed before the court any evidence that same ever wrote to the concerned officer, Nairobi City County, seeking to be provided with the requisite documents, which are alluded to at the foot of the subject application.
63. Other than the foregoing, the Plaintiff/Applicant has also not placed before the Court any evidence to show that same has hitherto written to the office of the Chief Land Registrar, seeking to be availed certified copies of the requisite Green cards or copy of Register, if any, relating to the suit property.
64. Perhaps, it is essential to mention that the Chief Land registrar, is the statutory officer who has the custody of the requisite records and registration instruments, pertaining to inter-alia the suit property by dint of the provisions sections 9 and 10 of The [Land Registration Act](#), 2012.
65. In the absence of any written request, addressed to the office of the Chief Land Registrar, who is the custodian of the documents, which the Plaintiff/Applicant required, then it is impossible to ascertain whether the Plaintiff/Applicant would have been supplied with such documents in any event.
66. Nevertheless, the Plaintiff/Applicant herein has annexed a copy of a letter addressed to the Registrar, Ministry of Lands, which to my mind does not relate to the office of the Chief Land Registrar.
67. In any event, it is doubtful as to whether there exist any office/ Officer, known as the Registrar, Ministry of Land, either under the offices established pursuant to the [Land Registration Act](#) or at all.
68. At any rate, even assuming that there exists such an office, which is not the case, because the provisions of the [Land Registration Act](#) are explicit, one would have expected the Plaintiff/Applicant to supply evidence that the impugned letter was indeed dispatched to the addressee.
69. Certainly, in the absence of evidence of dispatch, it is not possible to ascertain that such letter, if any, reached the intended office. Perhaps, the letter in question has just been made up to hoodwink the court to believe that there was an attempt to comply with the prescription stipulated vide the [Access to Information Act](#), 2016.
70. Other than the foregoing, it is also appropriate to state that where the request for information is declined and/or not responded to, the aggrieved party is thereafter at liberty to approach the court in exercise of the jurisdiction established vide articles 22, 23, 35, 47 and 165 (3) of [The Constitution](#), 2010.
71. In the premises, even assuming that this court had the requisite jurisdiction, which I have found not to be the case, I would still have declined the Application for want of compliance with the established and/or laid down statutory mechanism provided for under the law.

Issue Number 3

Whether the supporting affidavit sworn by Counsel for the Plaintiff/Applicant and which touches on Evidentiary issues is competent.

72. As pertains to the third issue herein, it is evident and or apparent that same relates to evidence and or facts pertaining to efforts made toward acquisition of various documents and the fact that the various documents are alleged to be unavailable.



73. On the other hand, there is also the contention that several albeit unnamed officers, within the City County Government of Nairobi and the Ministry of Land, have been unwilling to avail and/or supply the various documents sought.
74. Suffice it to note, that the Supporting affidavit herein alludes to and/or adverts to Evidential facts, which may not be factually correct. In any event, the various facts alluded to at the foot of the supporting affidavit, are issues which are in dispute, particularly taking note of the ruling which was rendered by this court on the 18th November 2021, wherein the court noted that the Plaintiff/Applicant had not availed assorted documents to premise an Application for Temporary Injunction.
75. Be that as it may, the point that I am making is that where the issues alluded to and contained in a supporting affidavit relates to Evidentiary facts, which are not primarily within the knowledge of an advocate, such facts are better pleaded to and or deposed by the Party in question as opposed to the advocate, retained in the matter.
76. In any event, it is appropriate to note that where the contents of an affidavit like the one beforehand are disputed and challenged by the persons against whom the accusations have been made, there is a likelihood of the deponent being invited for cross examination on the basis of the impugned assertions and or depositions.
77. In the premises, if such an invitation were to arise, then it would behoove the Deponent of the Supporting Affidavit herein, who is similarly the advocate of the Plaintiff/Applicant, to step down and be cross examined.
78. Certainly, such a scenario would culminate into and/or generate an absurd situation, insofar as one cannot be an advocate and a witness, all in the same matter. Consequently, it is still good law for advocates to eschew swearing affidavits in respect to Evidentiary matters and/or facts, which are in controversy and may very well degenerate into cross examination of the advocate in question.
79. To this end, the dictum in the case of *Simon Isaac Ngugi – Vs – Overseas Courier Services (K) Ltd* (1998) eKLR, where the court citing the holding in *Kisya Investments Ltd & others vs Kenya Finance Corporation Ltd*, is still succinct and spot on. For clarity, the Court held as hereunder;

“it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit”.

In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate’s affidavit creates a legal muddle with untold consequences.
80. In respect of the subject matter, the supporting affidavit which was sworn by counsel for the plaintiff/applicant and which adverts to Evidentiary issues and/or facts, must be frowned upon.

Issue Number 4

Whether the annexures attached to the said affidavit are in compliance with Rule 9 of the Oath and Statutory Declarations Rules.

81. The supporting affidavit, sworn by the counsel for the Plaintiff/Applicant herein also contains various annexures and hence the necessity to comply with the provision of rule 9 of the Oaths and Statutory Declarations Rules.



82. For convenience, the provisions of rule 9 provides as hereunder;
9. All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.
83. My reading of the foregoing rule denotes that the commissioner of Oaths in question is obliged to serialized and seal the anexture on the face thereof and not on an attached piece of paper, which is separate and distinct from the intended anexture.
84. However, in respect of the subject matter the serialization and the sealing has been done on a separate piece of paper, which precedes the annexture. For clarity, the annexture has not been securely sealed by the Commissioner of Oaths, as required vide rule 9.
85. Premised on the foregoing, I am constrained to find and hold that the supporting affidavit to the current Application, which suffers from own lapses, is similarly, not supported by competent annextures, either as required under the law or at all.
86. Suffice it to point out that the necessity to seal the annextures in accordance with rule 9 of the *Oaths and Statutory Declaration Rules* has been the subject of various, albeit numerous decisions. Consequently, it still behooves parties and their advocates to abide by the explicit requirements of rule 9 of the *Oaths and Statutory Declaration Rules*.
87. Without belaboring the point, it is appropriate to restate the holding of the Court vide the case of *Bosongo Medical Hospital & Another versus Mainstream Welfare Association and others* [2016] eKLR ,where the Honorable Court observed as hereunder;
- “Although the point was not taken up by the plaintiffs the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annextures which are neither marked nor sealed with commissioner’s stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection and without the annextures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence.”
88. Premised on the foregoing, it is my finding and holding that the annextures attached to the supporting affidavit, are improper, inappropriate and invalid.
89. In a nutshell, same are hereby expunged and struck out from the record of the court. Consequently, the expunction of the said annextures would thus leave the supporting affidavit bare and without any Evidentiary anchorage.
90. In short, both the supporting affidavit and the annextures thereto are bad in law and hence incapable of founding of the Reliefs sought at the foot of the current Application.

Final Disposition:

91. Having duly considered the subject Application and the response filed thereto, I come to the conclusion that the issues raised therein fall outside the Constitutional mandate and or Jurisdiction of this Honourable Court.



92. In any event, the said Application also suffers from several lapses, inter-alia, being supported by an incompetent supporting affidavit as well as anextures which violates the provisions of rule 9 of the *Oaths and Statutory Declarations Rules*.
93. Consequently, I come to the conclusion that the application dated the May 10, 2022 is not only incompetent, but same is also bad in law and thus Misconcieved.
94. In the premises, the application be and is hereby dismissed with costs to the defendant/respondent.
95. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS __3RD__ DAY OF AUGUST 2022.

OGUTTU MBOYA

JUDGE

In the presence of;

Joan court assistance

Mr. Kinyua Mbaabu for the Plaintiff/Applicant

Mr. Manyara for the Defendant/Respondent

