



**Dardanelli & 6 others v Tilito & 3 others (Land Case E041 of 2024)
[2025] KEELC 392 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE E041 OF 2024
FM NJOROGE, J
FEBRUARY 6, 2025**

BETWEEN

**ELENA DARDANELLI & 6 OTHERS & 6 OTHERS & 6 OTHERS & 6 OTHERS
& 6 OTHERS & 6 OTHERS PLAINTIFF**

AND

**PASQUALE TILITO & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3
OTHERS & 3 OTHERS DEFENDANT**

An affidavit transmitted to a deponent online, executed, downloaded then commissioned, requires a certificate under section 106B of the Evidence Act

In the instant case a supporting affidavit of an application was challenged for among others that it misled the court by stating that it was sworn in Kenya while the deponent was not in Kenya as at the date of its swearing. The court highlighted the effect of commissioning of an affidavit whose deponent did not appear before the commissioner for oaths. The court noted that there was an omission to present a certificate to prove the online activity. The court held that if the affidavit was transmitted to the deponent online, executed and returned and downloaded then commissioned, then the certificate under section 106B of the Evidence Act was required. Further, the court would have to be satisfied that there was a live online appearance of the deponent before a commissioner for oaths for it to accept the execution of the affidavit was by that deponent.

Reported by Kakai Toili

Evidence Law – admissibility of evidence – admissibility of oaths and statutory declarations – where an affidavit was transmitted to the deponent online, executed, returned and downloaded then commissioned - whether the certificate under section 106B of the Evidence Act on admissibility of electronic records was required to prove that the affidavit was transmitted to the deponent online, executed, returned and downloaded then commissioned - Evidence Act (cap 80), section 106B.

Civil Practice and Procedure – pleadings – affidavits – supporting affidavits – claim that a supporting affidavit was not executed in the presence of a commissioner of oaths - what was the effect of commissioning of an affidavit whose deponent did not appear before the commissioner for oaths.



Civil Practice and Procedure – suits – filing of suits by companies – swearing of affidavits by advocates on behalf of companies – mandate of directors to authorize the swearing of affidavits by advocates on behalf of companies - whether a director of a company had the mandate to authorize an advocate to swear an affidavit in support of an application where a board resolution was not a requisite for an advocate to file a suit on the company's behalf.

Brief facts

The instant case related to the defence of a suit filed against a company, in which an application had been made and a supporting affidavit attached thereto. It was that supporting affidavit that was under challenge for the reason of the deponent's apparent want of authority from the company to swear it. The 1st and 2nd defendants' application sought a stay of all proceedings therein and that the matter be referred to arbitration. The application was supported by the affidavit of the 1st defendant sworn on May 23, 2024. The affidavit was attacked on two main fronts: first that the deponent lacked authority from the company to swear it and secondly, that it misled the court by stating that it was sworn in Kenya while the deponent was not in Kenya as at the date of its swearing.

Issues

- i. Whether the certificate under section 106B of the Evidence Act on admissibility of electronic records was required to prove that an affidavit was transmitted to the deponent online, executed, returned and downloaded then commissioned.
- ii. What was the effect of commissioning of an affidavit whose deponent did not appear before the commissioner for oaths.
- iii. Whether a director of a company had the mandate to authorize an advocate to swear an affidavit in support of an application where a board resolution was not a requisite for an advocate to file a suit on the company's behalf.

Relevant provisions of the Law

Evidence Act (cap 80)

Section 106B - Admissibility of electronic records.

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—



- (a) by combination of computers operating in succession over that period; or*
- (b) by different computers operating in succession over that period; or*
- (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,*

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;*
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*
- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and*
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),*

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

Held

1. The deponent was a director of the 2nd defendant. If a board resolution was not a requisite for an advocate to file suit on a company's behalf and a director could instruct him to undertake that task, there was no good ground upon which the court could hold that a director had no mandate to authorize an advocate to perform a lesser task of swearing an affidavit in support of an application such as the instant one unless the contrary was shown.
2. No evidence had been presented by the plaintiffs to the effect that there was any objection from the rest of the directors or shareholders to the swearing of the affidavit. The allegation that the 2nd defendant had not granted authority granted to the 1st defendant to swear the affidavit dated May 23, 2024 was dismissed.
3. From a perusal of the affidavit evidence of the plaintiffs regarding whether or not the 1st defendant was in Kenya, the allegation that he was not in Kenya on the date of swearing of the affidavit was not challenged. It had been admitted by the advocates for the 1st and 2nd defendant that the 1st defendant was abroad on the date of the purported swearing.
4. In the instant digital era many things could be done virtually. Even the requirement of court attendance could be fulfilled virtually. However, the contents of an affidavit were statements under oath which may lead to the offence of perjury if care was not taken; it was not surprising that affidavits were usually required to be commissioned when a deponent was present and was satisfied that the contents were correct. The commissioner too needed know if the deponent understood what he was swearing to.
5. Meetings had organizers and platforms on which they were held and only the concerned attendees were allowed in. Organizers of online meetings had means of safeguarding their meetings from intruders and since the attendance was live, such unwarranted gatecrashing cold be detected and addressed in real time. The same applied for online court sessions which in a way were highly organized and solemn meetings convened by constitutionally or statutorily empowered institutions, governed by strict rules as to conduct and content, for the trial and determination of disputes between citizens.



6. The swearing of an affidavit was neither an adjunct of nor a main live court session in which all the parties and court could witness the deponent acknowledge that the statements in the affidavit were true as well as see him affix his signature on the depositions. It was a session that would, if at all it took place, be privy to a commissioner and the deponent as they were the only actors named in the document.
7. An admission had been made by the advocates for the 1st and 2nd defendant that it was common and normal practice, custom and usage for parties to execute documents before their advocates and given that the advocates could not commission their own documents they presented to colleague advocates for commissioning. However, whether it had been the normal practice or custom, that did not absolve the deponent from appearing before the commissioner for oaths, and the instant court did not sanction anything that was contrary to the law.
8. In legal practice as in other sectors, shortcuts may have been adopted to make work easier, but that did not give them the stamp of propriety. In respect of swearing of affidavits certain fundamental issues sprung from the commissioning of an affidavit whose deponent did not appear before the commissioner for oaths.
 1. The deponent may not have confirmed to the commissioner that he approved of and owned up to all the statements made in the document. If at any point after the purported commissioning the deponents who never appeared before commissioners ever disputed the veracity of the statements in affidavits filed in legal proceedings or the signatures thereon and the court upheld their objections thereto, there may be a lot of backpedalling that may occasion, contrary to public policy, the deleterious effect of bloating the backlog of cases before court.
 2. In view of the provisions of section 5 of the Oaths and Statutory Declarations Act, the commissioner in affixing his stamp in the absence of a deponent while stating at the place and on what date the oath or affidavit was taken or made would be in effect uttering a falsehood.
9. It was not stated if the commissioner, who was alleged to have had an online interaction with the deponent before commissioning the document, knew the deponent prior to the alleged interaction, whether deponent's advocates were present during the online interaction and whether they identified the deponent to the commissioner, whether the statements of the draft affidavit were read to the deponent and if he confirmed he understood the same, or even which online platform was used yet statements in an affidavit were evidence and submissions of counsel were mere statements from the Bar. If the commissioning of the affidavit took place online, it was not clear why all the answers to the immediately preceding questions were not contained in the affidavit.
10. Whether or not it was an established custom or practice to execute the affidavits and pass them on to the nearest commissioner for oaths to commission in the absence of a deponent, if the court were to put stock into mere submissions by counsel for the 1st and 2nd defendant from the Bar and without counsel's own affidavit, that would be admitting hearsay evidence into the proceedings which the court was disinclined to do. Submissions were not evidence.
11. There was a clear omission by either the commissioner or the deponent of the impugned affidavit to present a certificate to prove the online activity. If the affidavit was transmitted to the deponent online, executed and returned and downloaded then commissioned, the certificate under section 106B of the Evidence Act.
12. The electronic signature and the contents of the affidavit of the deponent were pieces of information for the purposes of section 106B(1) of the Evidence Act that had been stored electronically. The court would have to be satisfied that there was a live online appearance of the deponent before a commissioner for oaths for it to accept the execution of the affidavit was by that deponent.
13. An affidavit procured in the manner alluded to by the counsel for 1st and 2nd defendants would only qualify as a proper affidavit provided it was accompanied by the appropriate certificate under section 106B of the Evidence Act. Lack of a certificate or certificates under section 106B with respect to



the process followed in procuring the instant affidavit or the procurement of the attendance of the deponent at the commissioning table was fatal and that affidavit must be struck out.

Application allowed.

Orders

- i. *The supporting affidavit of Pasquale Tirito dated May 23, 2024 struck out.*
- ii. *As the application, dated May 23, 2024, could not stand without any supporting affidavit, the same was struck out with costs.*
- iii. *Noting the centrality of the issue of arbitration in the application and in the determination of the suit, the applicant was however granted leave to file a fresh application in the proper manner and supported by a proper affidavit within 21 days from the date thereof.*
- iv. *The matter shall be mentioned on February 2, 2025 for issuance of further directions.*

Citations

Cases

1. Al-Alyaan Motors Limited & another v Ngala Civil Appeal E191 of 2021; [2023] KEHC 19745 (KLR) — (Mentioned)
2. Arthi Highway Developers Limited v West End Butchery Limited & 6 others Civil Appeal 246 of 2013; [2015] KECA 816 (KLR) — (Explained)
3. Cassiede v Peter Kimani Kairu t/a Kimani Kairu & Co. Advocates; Directorate of Immigration Services & another (Interested Parties) Civil Suit 39 of 2007; [2022] KEHC 474 (KLR) — (Mentioned)
4. Clifton Bay Limited v Chivatsi (Suing as the Administrator of the Estate of Jefwa Kalama Lewa - Deceased) & 2 others Environment and Land Appeal E001 of 2024; [2024] KEELC 13544 (KLR) — (Explained)
5. County Government of Kirinyaga v African Banking Corporation Ltd Civil Case 3 of 2018; [2020] KEHC 5213 (KLR) — (Mentioned)
6. Kambi, Samwel Kazungu v Nelly Ilongo the Returning Officer, Kilifi County & 2 Others Election Petition 4 of 2017; [2017] KEHC 2257 (KLR) — (Explained)
7. Laikipia University College v Kibia (Suing as the Legal Representative of the Estate of Peter Maina Mwaura - Deceased) Civil Appeal E0022 of 2023; [2023] KEHC 26705 (KLR) — (Mentioned)
8. Makupa Transit Shade Limited & another v Kenya Ports Authority & another (Civil Appeal 44 of 2014; [2015] KECA 721 (KLR)) — Mentioned
9. Moi, Daniel Toroitich Arap v Mwangi Stephen Muriithi & another Civil Appeal 240 of 2011; [2014] KECA 642 (KLR) — (Explained)
10. Muthami, William Muthee v Bank of Baroda Civil Appeal 21 of 2006; [2014] KECA 591 (KLR) — (Mentioned)
11. Niazsons (K) Ltd v China Road & Bridge Corporation Kenya Civil Appeal 157 of 2000; [2001] KECA 376 (KLR) — (Mentioned)
12. Panchal Trading (K) Limited v NF Metals Corporation Civil Case 35 of 2020; [2021] KEHC 12901 (KLR) — (Mentioned)
13. Spire Bank Limited v Land Registrar & 2 others Civil Appeal 52 of 2018; [2019] KECA 530 (KLR) — (Explained)

Uganda

United Assurance Co. Ltd v Attorney General (Civil Appeal 1 of 1986; [1986] UGSC 18) — Explained

South Africa

Namasthethu Electrical Pty Ltd v City of Cape Town & Another (No 201/19 2020 ZASCA 74) — Mentioned

Statutes

1. Arbitration Act (cap 49) — section 6 — (Interpreted)



2. Civil Procedure Act (cap 21) — sections 1A, 1B, 3A — (Interpreted)
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — order 19 rule 3, 7; order 51 rule 2 — (Interpreted)
4. Constitution of Kenya — articles 65, 159 (2)(d) — (Interpreted)
5. Evidence Act (cap 80) — section 106, 106B (1)(4)(5) — (Interpreted)
6. Kenya Information And Communications Act (cap 411A) — (Cited) In general
7. Oaths And Statutory Declarations Act (cap 15) — section 5 — (Interpreted)

Advocates

None mentioned

RULING

Application

1. This ruling is in respect to the 1st and 2nd defendants' application dated 23/8/2024 which seeks that there be a stay of all proceedings herein and that the matter be referred to arbitration. The application is premised on the following grounds: -
 1. The plaintiffs entered into long term lease agreements with the 2nd defendant in respect of villas located on LR No Chembe/Kibabamshe /1114;
 2. Clause 5.4 of the said long term lease agreements states that any dispute arising therefrom shall be referred to arbitration and so the parties are bound by that cause to proceed to arbitration and that the suit has thus been filed prematurely;
2. The application is supported by the affidavit of the 1st defendant sworn on 23/5/2024 in which the above grounds are reiterated.

Response.

3. The application is opposed by the plaintiffs through the replying affidavit of the 1st plaintiff sworn on 5/6/04. In that affidavit the deponent states that there exists no agreement between the plaintiffs and the 1st defendant and the application is thus misconceived; that there is no authority placed before the court to show that the 1st defendant is authorized to represent the 2nd defendant; that any attempt to file the authority after the application is null; that the supporting affidavit is defective and the advocates who drafted the same are guilty of misconduct and ought to face disciplinary proceedings and be denied audience before this court; that there is no evidence to support the affidavit; that upon advice from his advocates the deponent believes that :
 - a. it has been admitted by the advocate for the applicants that the land 1114 had been subdivided and no longer exists;
 - b. that the subdivision of plot 387 was an illegality this court ought not rubberstamp; that the long term leases on 1114 are null and void;
 - c. that the subject matter no longer exists and is not identifiable both physically or in the land records;
 - d. that since the 2nd defendant purported to grant a lease over freehold property which property it can not legally own being a company wholly owned by foreign individuals, the contract is unenforceable.



4. This court finds the matters listed as (a)-(d) immediately herein above to be only relevant to a substantive hearing of the suit, while the present is an application that seeks to avert a hearing on the basis that an alternative dispute resolution method has been provided for in an agreement, and it will therefore not delve into them in this ruling.

1st and 2nd Defendant's Submissions

5. The two defendants identified three issues for determination in the present application as follows:
 - a. Whether the 1st defendant has authority to act on behalf of the 2nd defendant;
 - b. Whether the affidavit sworn by the 1st defendant is proper in law;
 - c. Whether the application by the 1st and the 2nd defendants has merit.
6. It was submitted that by dint of being directors, they have ostensible authority to act for a company in matters litigation and do not require distinct and independently filed authority. It was further submitted that the 1st defendant swore the affidavit on his own behalf and on behalf of the 2nd defendant; that directors are the directing body and mind of a company; that directors being the company itself and they do not require to give authority to themselves. They cited the case of [*Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another*](#) 2015 eKLR for that proposition.
7. Also, citing the case of [*Spire Bank Ltd v Land Registrar & 2 Others*](#) 2019 eKLR they submitted that lack of authority to act for the company does not invalidate a suit or application brought on behalf of the company.
8. Regarding the second issue it was submitted that, just as parties appear before court virtually in this age digital age, the 1st defendant appeared virtually before his counsel based in Nairobi and swore the affidavit electronically; that the [*Kenya Information and Communications Act*](#) and the [*Evidence Act*](#) allow electronic signatures and those signatures can be appended virtually from any corner of the globe. It was also argued that it is common practice custom and usage for parties to execute documents before their advocates, and given that those advocates can not commission those documents themselves; they present them to their colleagues for commissioning. The advocates then act as guarantors for their commissioning colleagues that the documents were executed by or through them or that the deponents are known to them. It is stated that the affidavit can not be contested unless the 1st defendant disowns the signature thereon. The defendants submitted that this point is a mere technicality; they relied on order 19 rule 7 [*CPR*](#), order 51 rule 2 [*CPR*](#), article 159 (2)(d) and the decision in [*Panchal Trading K Ltd v NF Metals Corporation*](#) 2021 eKLR for the said proposition.
9. It was further submitted that the plaintiffs replying affidavit goes beyond the matters that the deponent is able of his own knowledge to state and thus offends order 19 rule (3) [*CPR*](#).
10. Regarding the last issue, the applicant cited section 6 of the [*Arbitration Act*](#) 1995 and [*Niazsons K Ltd v China Road & Bridge Corporation*](#) 2001 eKLR and [*William Muthee Muthami v Bank of Baroda*](#) 2014 eKLR and asserted that there is a valid agreement between the parties and that the application seeks only to stay and not to dismiss the suit and that the applicants have complied with the provisions of the said Statute. The defendants pleaded with the court to consider that section 1 A and 1 B and section 3A [*CPA*](#) call for determination for cases on merits and grant the court discretion to make orders necessary for the ends of justice and to prevent abuse of court process, and thus pray that their application be allowed in the interests of justice.



Plaintiffs' Submissions

11. The plaintiffs in their submissions dated 18/6/2024 submitted that there are only 2 issues for determination in the present matter: whether or not there exists any legally valid or enforceable agreement over Land Reference No 2091 and whether the affidavit filed in support of the application is admissible.
12. The plaintiffs first gave a brief background of the suit, stating that the 1st – 7th plaintiffs seek compensation for fraud on the part of the 1st and 2nd defendants; that the 1st and 2nd defendants are not Kenyan citizens; that they purported to own freehold property here in Kenya and to enter into sale agreements with the plaintiffs which culminated in long term leases being issued to the plaintiffs; that 6 leases were registered after the year 2016; that the 2nd plaintiff has not had his villa's lease registered in his name yet; that the properties were built on Plot No 1114; that Plot No 1114 was thereafter subdivided and title closed and the plaintiff's villas are now located on Plot No 2091; that there is no agreement between the parties in respect of such a plot as No 2091; that the 1st and 2nd defendants harassed the plaintiffs and interfered with their quiet use and possession, contravened zoning permissions, and leased out a part of Plot No 2091 to the 3rd defendant who operates a tourist hotel thereon.
13. Regarding the first issue identified by the plaintiffs it is submitted that there exists no agreement between them and the 1st and 2nd defendants in respect of Plot No 2091. The defendants added that even if the plaintiff's leases were found by this court to be enforceable against that plot, some alleged admissions by the defendants and their advocates would render the said agreements null and void, inoperative and incapable of being performed. Those admissions are that the 1st and 2nd defendants are not Kenyan citizens; that the agreements offend the provisions of article 65 of the *Constitution*; that the defendants' advocates had admitted to the alleged fraud in writing, and fraud vitiates a contract. The plaintiffs cited *Namastbethu Electrical Pty Ltd v City of Cape Town & another* Case No 201/19 2020 ZASCA 74 (29 June 2020) and submitted that the court can not bind a party to an agreement which they did not enter into or agree to be bound by; that the subdivision of Plot No 1114 rendered the agreements unenforceable. Citing *County Government of Kirinyaga v African Banking Corporation Ltd* 2020 eKLR, the plaintiffs averred that the 1st and 2nd defendants had admitted the issues of fraud pleaded. They stated that though there was no agreement in respect of plot no 2091, the plaintiffs had beneficial interest over the same.
14. Regarding the second issue, the plaintiffs reiterated the matters in the replying affidavit analyzed herein above and cited a number of High Court decisions to support their propositions, those cases being: *Casside v Peter Kimani Kairu Directorate of Immigration Services and another* Civil Suit No 39 of 2007 2022 KEHC 474 KLR, *Laikipia University College v Kibia* Civil Appeal 20022 of 2023 2023 KEHC 26705 KLR, *Al Alyaan Motors Ltd & another v Ngala* Civil Appeal E 191 of 2021 2023 KEHC 19745 KLR.
15. They stated section 5 of the *Oaths and Statutory Declarations Act* provides that the commissioner for oaths shall state in the jurat or attestation at what place and on what date the oath or affirmation is taken or made; that the deponent of the supporting affidavit was not in Kenya at the time of the deposition and yet the affidavit states that he was in Nairobi. They submit that the advocate who drafted the said affidavit affixed the 1st defendant's signature and indicated that the same was sworn in Nairobi. That when they wrote to the commissioning advocate, one Bernard Kibet Sang, to inquire as to whether he commissioned the affidavit the response came from the advocates for the 1st and 2nd defendants; that they are therefore guilty of professional misconduct and ought to exercise disciplinary measures against



them for gross misconduct, including denying them audience; that the supporting affidavit ought to be struck out.

Determination

16. The objection to the applicant's affidavit amounts to a preliminary objection that may if granted have the consequence of undermining the application to the extent of it being struck out. Many cases may proceed without objections to affidavits, not because they are perfect, but because parties have riveted their attention on the core of the disputes before them. However, when objections arise the court is bound to entertain them and determine them in accordance with the law.
17. The affidavit is attacked on two main fronts: first, that the deponent lacks authority from the company to swear it and secondly, that it misleads the court by stating that it was sworn in Kenya while the deponent was not in Kenya as at the date of its swearing.
18. In dealing with the first issue, it is notable that the position that obtained in years past regarding the filing of authority by a company has now changed. In Malindi ELC Appeal No E001 of 2024 *Cliffion Bay Limited v Dama Nguwa Chivatsi (Suing as the administrator of the estate of Jefwa Kalama Lewa-Deceased) and others* in which case counsel argued that a deponent did not furnish the court with a resolution authorizing him to swear the supporting affidavit on behalf of the appellant company and as such his affidavit was said to be of no probative value, this court relied on the case of *Arthi Highway Developers Limited v West End Butchery Limited & others*, Nairobi Civil Appeal No 246 of 2013 (2015) eKLR. In the Arthi case, the court held as follows:
 44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor* (1970) 1 EA 147. The court in that case held: -

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”
 45. To their credit, the appellant's Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000.
19. The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*: SCCA No.1 of 1998. The latter case restated the law as follows: -

.... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf and in the names of the company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that company.”

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR.”



20. The case of Bugerere (supra) dealt with the issue of filing of a suit by a company which is in itself a matter of great consequence. The present case relates to the defence of a suit filed against a company, in which an application has been made and a supporting affidavit attached thereto. It is that supporting affidavit that is under challenge for the reason of the deponent's apparent want of authority from the company to swear it.
21. I must state that Exhibit "PT-1" in the applicant's supporting affidavit shows that the deponent is a director of the 2nd defendant; so does Exhibit "ELD 10" submitted before this court by the plaintiffs themselves. I therefore find that there is no controversy as to whether or not the deponent is a director of the 2nd defendant. By extrapolation, if as held in Arthi (supra) that a board resolution is not a requisite for an advocate to file suit on a company's behalf and a director can instruct him to undertake that task, there is no good ground upon which this court can hold that a director has no mandate to authorize an advocate to perform a lesser task of swearing an affidavit in support of an application such as the present unless the contrary is shown.
22. No evidence has been presented by the plaintiffs to the effect that there is any objection from the rest of the directors or shareholders to the swearing of the affidavit.
23. For the foregoing reasons this court hereby dismisses allegation that the 2nd defendant has not granted authority granted to the 1st defendant to swear the affidavit dated 23/5/2024.
24. Now I proceed to the second issue which I find more delicate, as to whether the affidavit is defective and, if so, whether it ought to be struck out.
25. As stated earlier, the basis of the plaintiffs' objection is that it stated that the affidavit was sworn at Nairobi while the 1st defendant was out of the country on the day when it was said to have been sworn. I have perused the affidavit evidence of the plaintiffs regarding whether or not the 1st defendant was in Kenya and I find that the allegation that he was not in Kenya on the date of swearing of the affidavit is not challenged. I also find that it has been admitted by the advocates for the 1st and 2nd defendant that the 1st defendant was abroad on the date of the purported swearing. Whereas I find no evidence to support the plaintiff's advocate's assertion that the defendant's advocate simply affixed the 1st defendant's signature on the affidavit draft and took it to the commissioner for oaths, the court needs address in depth the impact of the admission that the 1st defendant never physically appeared before the commissioner for oaths during the commissioning of the affidavit.
26. It is the 1st and 2nd defendant's argument that the plaintiffs' objection is a mere technicality on which the affidavit ought not be struck out. Lacking any direct authority for the proposition that the deponent does not have to appear in person before the commissioner they have advanced the argument that the deponent can appear virtually, and also affix a signature to the affidavit virtually. They aver that that is what happened in respect of the present affidavit and that the 1st defendant has not complained of a false affidavit. That is quite an alluring argument. In this digital era many things can be done virtually. Even the requirement of court attendance can be fulfilled virtually. However, the contents of an affidavit are statements under oath which may lead to offence of perjury if care is not taken; it is not surprising that affidavits are usually required to be commissioned when a deponent is present and is satisfied that the contents are correct. The Commissioner too needs know if the deponent understands what he is swearing to. The need for personal appearance during commissioning of an affidavit has been emphasized by the plaintiffs who cite the provisions of Section 5 of the [Oaths and Statutory Declarations Act](#) which states as follows:
 5. Particulars to be stated in jurat or attestation clause



Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

27. It may be argued that the above law was enacted before the world was compelled recently by the covid 19 pandemic to adopt electronic media for the performance of most tasks, including attending meetings. I think the distinction that must be made is that meetings have organizers and platforms on which they are held and only the concerned attendees are allowed in. This court would also like to believe that organizers of online meetings have means of safeguarding their meetings from intruders and since the attendance is live, such unwarranted gatecrashing can be detected and addressed in real time. The same applies for online court sessions which in a way are highly organized and solemn meetings convened by constitutionally or statutorily empowered institutions, governed by strict rules as to conduct and content, for the trial and determination of disputes between citizens. In contrast to this, the swearing of an affidavit is neither an adjunct of nor a main live court session in which all the parties and court can witness the deponent acknowledge that the statements in the affidavit are true as well as see him affix his signature on the depositions. It is a session that would, if at all it takes place, be privy to a commissioner and the deponent as they are the only actors named in the document.
28. An admission has been made by the advocates for the 1st and 2nd defendant that “it is common and normal practice, custom and usage for parties to execute documents before their advocates and given that the said advocates can not commission their own documents they present to colleague advocates for commissioning.” However, whether it has been the normal practice or custom, this does not absolve the deponent from appearing before the commissioner for oaths, and this court does not sanction anything that is contrary to the law.
29. The defendant’s advocates seem to accuse, without evidence whatsoever, the plaintiff’s advocates for raising the objection while even they, being accusers, know very well that they are guilty of the same thing from time to time. In effect they are saying: why are you accusing us of what you also do on a regular basis? It is like the classical allegory of one removing a speck from his compatriot’s eye while he has not removed the log from his own.
30. This court agrees that in legal practice as in other sectors, shortcuts may have been adopted apparently to make work easier, but that does not give them the stamp of propriety. It is noted that in respect of swearing of affidavits certain fundamental issues spring from the commissioning of an affidavit whose deponent does not appear before the commissioner for oaths. First, the deponent may not have confirmed to the commissioner that he approves of and owns up to all the statements made in the document. If at any point after the purported commissioning the deponents who never appeared before commissioners ever disputed the veracity of the statements in affidavits filed in legal proceedings or the signatures thereon and the court upholds their objections thereto, there may be a lot of backpedalling that may occasion, contrary to public policy, the deleterious effect of bloating the backlog of cases before court. Secondly, in view of the provisions of section 5 of the [Oaths and Statutory Declarations Act](#), the commissioner in affixing his stamp in the absence of a deponent while stating at the place and on what date the oath or affidavit is taken or made would be in effect uttering a falsehood.
31. It is the case as per the above discourse that absence of a deponent at the commissioning table is serious. The second issue that arises is whether in this digital age the commissioning can be done online. In the present case the 1st and 2nd defendants’ counsel would have the court believe that first had the draft affidavit executed, then they took it to their neighbour one Commissioner Bernard Kibet Sang who engaged in an online interaction with the deponent and commissioned the affidavit.



32. It is not stated if Commissioner Kibet knew the deponent prior to the alleged interaction, whether deponent's advocates were present during the online interaction and whether they identified the deponent to Mr Kibet, whether the statements of the draft affidavit were read to the deponent and if he confirmed he understood the same, or even which online platform was used yet statements in an affidavit are evidence and submissions of counsel are mere statements from the bar.
33. The question that arises is if the commissioning of the affidavit took place online, why were all the answers to the immediately preceding questions not contained in the affidavit now objected to in which case the affidavit would be testifying as to its own propriety and attract no objection such as that now raised?
34. Whether or not it is an established custom or practice to execute the affidavits and pass them on to the nearest commissioner for oaths to commission in the absence of a deponent, if this court were to put stock into mere submissions by counsel for the 1st and 2nd defendant from the bar and without counsel's own affidavit, that would be admitting hearsay evidence into the proceedings which this court is disinclined to do. Submissions are not evidence and many a case have held as such, including the notorious *Daniel Toroitich Arap Moi v Mwangi Stephen Muriitibi & another* [2014] eKLR where it was held as follows:

We have already found that the 1st respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

35. Further drawing from the law of evidence, there is a clear omission by either the commissioner or the deponent of the impugned affidavit to present a certificate to prove the online activity. If the affidavit was transmitted to the deponent online, executed and returned and downloaded then commissioned, in this court's view the certificate under section 106 of the *Evidence Act*. Section 106 provides as follows:

106B. Admissibility of electronic records.

- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—



- (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
- (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

36. There is no doubt that the electronic signature and the contents of the affidavit of the deponent are pieces of information for the purposes of section 106B (1) that had been stored electronically. Also, the court would have to be satisfied that there was a live online appearance of the deponent before a commissioner for oaths for it to accept the execution of the affidavit was by that deponent. Section 106B (4) and (5) provide as follows:

- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

37. In *Samwel Kazungu Kambi v Nelly Ilongo & 2 others* [2017] eKLR it was held as follows:



21. Sub-section (4) of section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.
 22. The source of the photocopies of the photographs annexed to the affidavit sworn by the petitioner in support of the petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.
 23. The conditions set down in Section 106B were not met by the petitioner. He could not therefore be allowed to produce the photographs.”
38. In conclusion, in this court’s view, an affidavit procured in the manner alluded to by the counsel for 1st and 2nd defendants would only qualify as a proper affidavit provided it is accompanied by the appropriate certificate under section 106 B. It is the opinion of this court that lack of a certificate or certificates under Section 106 B with respect to the process followed in procuring the present affidavit or the procurement of the attendance of the deponent at the commissioning table is fatal and the said affidavit must be struck out. The consequence is that I therefore strike out the supporting affidavit of Pasquale Tirito dated 23/5/2024. As the application, also dated 23/5/2024, can not stand without any supporting affidavit, the same is hereby struck out with costs.
39. However, noting the centrality of the issue of arbitration in the application and in the determination of the suit, the applicant is however granted leave to file a fresh application in the proper manner and supported by a proper affidavit within 21 (twenty-one) days from the date hereof. This matter shall be mentioned on 27/2/2025 for issuance of further directions.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

