



REPUBLIC OF KENYA



KENYA LAW
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**Musau & 2 others v Kiamba (Environment and Land Appeal
E014 of 2024) [2025] KEELC 3525 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E014 OF 2024**

EO OBAGA, J

MAY 5, 2025

BETWEEN

CHARLES MUTHAMA MUSAU 1ST APPELLANT

KIVUVA NGOMO 2ND APPELLANT

ALOISE MUTIE KATHIME 3RD APPELLANT

AND

DANIEL MBITHI KIAMBA RESPONDENT

RULING

1. This is a ruling in respect of a preliminary objection by the Respondent dated 29th October, 2014 on the following grounds:
 1. That under Rule 9 of the Advocates practice Rules advocates are not permitted to swear affidavits in contentious matters.
 2. That advocates are not permitted to swear affidavits on behalf of their clients when their clients are readily available to do so.
 3. That the supporting affidavit sworn by Cecilia K. Mwangangi, Advocate is sworn on contentious issues.
2. The Respondent had sued the Appellants in Tawa CMC ELC No. E002 of 2023. A judgment was delivered in favour of the Respondent on 29th August, 2024. The Appellants were aggrieved with the judgment and they preferred an appeal to this court.
3. The Appellants contemporaneously filed an application seeking stay of execution pending appeal. The supporting affidavit to the application for stay was sworn by the 3rd Appellant. The Respondent filed a replying affidavit to the Appellants' application in which he brought to the attention of the court



that the 1st Appellant had passed on and that he was therefore incapable of giving instructions to the Appellants' lawyer to file the appeal and the application.

4. The Appellants' advocate swore a replying affidavit in which she deponed that the fact of the death of the 1st Appellant was not known to her and that it had been brought to her attention after the filing of the appeal and the application. The appeal by the 1st Appellant was withdrawn on 21st November, 2024.
5. The court gave directions that the preliminary objection be disposed of by way of written submissions. The Respondent filed his submissions dated 25th November, 2024. The 2nd and 3rd Appellants filed their submissions dated 28th November, 2024.
6. I have considered the submissions by the Respondent and those of the 2nd and 3rd Appellants. The only issue for determination is whether the Appellants' advocate deponed to matters which are contentious which will cause the affidavit to be struck out.
7. The law on affidavits touching on contentious matters is found in Hulsbury's Laws of England 3rd Edition paragraph 84 which states as follows:

“Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated. For the purpose of this rule, those applications only are considered interlocutory which do not decide rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for purpose of obtaining some direction of the court as to the conduct of the cause.”

8. Order 19 Rule (3) of the Civil Procedure Rules states as follows:

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

9. Further the advocate (practice) Rules 1966 states as follows:

“No advocates (practice) Rule, 1966 states that in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if while appearing in any witness to give evidence whether verily or by declaration of affidavit, he shall not continue to appear provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears”.

10. It is in light of the above provisions that I will decide whether the advocate for the Appellants ought to have deponed to the averments in her further affidavit. According to the Respondent's submissions, the paragraphs in contention are paragraphs 7,8,9,10,11,12,13,14 and 15 of the advocates' affidavit.
11. The Appellants' advocate seems to be conceding without clearly stating so that the bulky of the supplementary affidavit deposes to matters within her own knowledge having acted for the Appellants in the lower court.



12. The advocate also seems to be contending in the submissions that the 1st Appellant had died and was therefore nowhere to swear the supplementary affidavit. She further invokes Article 159 (d) of the Constitution that this court should not be tied down to matters of technicality.
13. I have looked at paragraph 7 to 15 of the Supplementary Affidavit sworn by the Appellants' advocate. All the averments in those paragraphs touch on contentious issues which were the subject of litigation in the lower court and are now alive in the appeal before this court. The averments in the said Supplementary Affidavit contradict the submissions whereby the advocate is trying to justify why she swore the affidavit. She claims that the 1st Appellant had died and that is why she had to swear the supplementary affidavit. This is in direct contradiction with her supplementary affidavit in which she states that she was not aware of the death of the 1st Appellant.
14. There is no explanation given why the 3rd Appellant who swore the supporting affidavit could not swear the supplementary affidavit as well. Article 159 (d) of the Constitution cannot cure the mistake. I therefore uphold the preliminary objection and proceed to expunge paragraphs 7 to 15 of the supplementary affidavit sworn on 24th October, 2024. The costs of this preliminary objection shall abide the outcome of the pending application.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF MAY, 2025.

IN THE PRESENCE OF:

Mr. Njugunga for Mr. Mulu for Respondent.

Mr. Kenyatta for Appellant.

Court assistant – Steve Musyoki

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