



**Mwandi v Songe (Environment and Land Miscellaneous Case
E005 of 2025) [2025] KEELC 5145 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND MISCELLANEOUS CASE E005 OF 2025**

EO OBAGA, J

JULY 10, 2025

BETWEEN

BONFACE MAKAU MWANDI APPLICANT

AND

JULIUS MUTISO SONGE RESPONDENT

RULING

1. This is a ruling in respect of a Preliminary Objection dated 25th February, 2025 in which the Defendant/ Respondent raises the following grounds:
 1. The application is fatally defective for want of originating process in compliance with Section 19 of the *Civil Procedure Act* Cap 21, Order 3 Rule 1 and Order 4 Rule 3 of the *Civil Procedure Rules 2010*.
 2. The Notice of Motion application is neither recognized in law as an originating process nor a pleading.
 3. The Application is incurably incompetent for being in acute violation of Section 4 (1) of the *Oaths and Statutory Declaration Act*.
 4. The Application is frivolous, badly drafted and amounts to an abuse of the process of court and should be dismissed in limine with costs to the Respondent.
2. The Plaintiff/Respondent had filed a suit against the Respondent in which he sought a number of reliefs. He contemporaneously filed a Notice of Motion of even date in which he sought similar orders as those sought in the plaint. Directions regarding the disposal of the Notice of Motion were given but before the same could be complied with, the Respondent filed the Preliminary Objection which is the subject of this ruling.



3. The parties were directed to dispose of the preliminary objection through written submissions. The Applicant filed his submissions dated 22nd April, 2025. The Respondent filed his submissions dated 5th May, 2025.
4. The only ground in the Preliminary Objection which will be addressed in this ruling is ground 3. It would appear that the Applicant’s counsel was not aware that there was a suit which was filed together with the application under attack. The confusion was brought by the manner the court file was opened under miscellaneous application. The suit was properly headed only that it was indicated that it was meant to be filed in the Chief Magistrate’s Court.
5. I have considered the Preliminary Objection, the submissions filed as well as the authorities cited. The only issue for determination is whether the application offends the provisions of Section 4(1) of the *Oaths and statutory Declaration Act*.
6. Section 4(1) of the *Oaths and Statutory Declaration Act* provides as follows:

“ A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested”.
7. It is clear from the pleadings including the Notice of Motion that the same were drawn by Dola Indidis of the firm of Dola Magani & Co. Advocates. The affidavit in support of the Notice of Motion was commissioned by Dola Indidis who drew the pleadings.
8. In the case of *James Francis Kariuki & Another –vs- United Insurance Co. Ltd* Civil Appeal No. 1450 of 2000 Justice Onyango Otieno (as he then was) held as follows:

“That the verifying affidavit sworn by the Plaintiff is incurably defective as the Commissioner for Oaths while exercising the powers given, offended the mandatory proviso of Section 4(1) of the *Oaths and Statutory Declarations Act*.

The simple facts this case are that the Plaintiffs are, according to thee Plaintiff represented by Njenga Mwaura and Company, Advocates. Mr. Njenga Mwaura is a partner in the firm of Njenga Mwaura and Company Advocates who are the advocates representing the Plaintiffs. The verifying affidavit has been sworn before Njenga Mwaura and Commissioner for Oaths.

It will be clear from the above that Mr. Njenga Mwaura, being an advocate in the firm that is acting for the Plaintiff should not have allowed the verifying affidavit to be sworn before him as in any event, is an interested party”.
9. In the case of *Caltex Oi (Kenya) Limited –vs- New Stadium Services Station Limited & Another* (2002) eKLR Justice Onyango Otieno (as he then was) held as follows:

“I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand



by what I did say in the case of *James Francis Kariuki & ANother –vs- United Insurance Co. Ltd* HCCC No. 1450 of 2000 that such an affidavit sworn in violation of Section 4(1) of the *Oaths and Statutory Declarations Act* for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title”.

10. The Respondent relied on the case of *Kaiser Investments Limited –vs- Hua Run Company Limited & 3 others* (2021) eKLR where it was held as follows:

“In my view, the proviso to Section 4(1) of the Oaths and Statutory Declaration Act can be the subject of different interpretation. Where a firm of advocates has several lawyers and only one of them is appearing in a matter, a party who swears an affidavit before different advocates within the same firm may justify such an action. All what is contained in such affidavits is averments known to the deponent and striking out the affidavit might be another draconian exercise. Advocates are given the Commissioner of Oaths right as individuals and not as a ground in one firm. The Commissioner for Oaths takes the personal responsibility of ensuring that the deponent is telling the truth as per the affidavit. That responsibility is not a joint or communal duty of a firm of advocates. It can be argued that good practice would entail having affidavits drawn by firm on record in a matter sworn before a different firm of advocates. In my view, failure to do so does not mean that the averments are totally false or defective”.

11. Section 4(1) of the *Oaths and Statutory Declarations Act* is a statutory requirement. It cannot be taken as a mere technicality or a mistake of counsel which can be executed under Article 159 of the *Constitution*. Dola Indidis is the lawyer who drafted the pleadings in this case. He is also the one who commissioned the affidavit in support of the Notice of Motion. It is therefore clear that the case of *Kaiser Investments Limited* (Supra) cannot assist the Respondent.
12. The application by the Respondent offended the proviso to Section 4(1) of the *Oaths and Statutory Declaration Act*. I therefore find that the supporting affidavit to the Notice of Motion is incompetent and is hereby struck out. This being the case, the Notice of Motion remains bare and in capable of granting any orders. I therefore proceed to strike out the Notice of Motion dated 18th December, 2024 with costs to the Defendant/Respondent.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 10TH DAY OF JULY, 2025.

In the presence of:

Mr. Kipkorir for Respondent/Applicant.

Applicant Boniface Makau Mwandu in person – present.

Court assistant – Steve Musyoki

