



**Simandi Investments Limited v Macharia & 2 others (Environment and Land
Case Civil Suit 1035 of 2016) [2025] KEELC 3935 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1035 OF 2016**

OA ANGOTE, J

MAY 22, 2025

BETWEEN

SIMANDI INVESTMENTS LIMITED PLAINTIFF

AND

ROSALINE NJERI MACHARIA 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY (KENHA) 3RD DEFENDANT

RULING

1. Before this Court is the Plaintiff's Notice of Objection dated 2nd May, 2025 brought pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Cap 21. The Objection seeks to have expunged the following documents:
 - i. The 1st Defendants' witness affidavit of Gordon Okumu Wayumba sworn on the 14th November, 2016.
 - ii. The 1st Defendant's witness affidavit of Meshack Okumu sworn on the 15th November, 2016.
2. The Objection is premised on the grounds that the affidavits fall short of Order 19 Rules 1 and 2 of the Civil Procedure Rules.
3. The parties made oral submissions in relation to the Objection. Learned Counsel for the Plaintiff submitted that he objects to the production of the witness affidavits by Gordon Okumu and Meshack Okumu and that the same should be expunged.
4. In opposing the application, learned Counsel for the 1st Defendant, submitted that the affidavits in question were filed as far back as November 2016 and were in response to a deed plan produced by the Plaintiff, the contents of which were disputed by Mr. Gordon Wayumba and Mr. Okumu.



5. Counsel argued that these individuals are crucial witnesses whose evidence will be necessary for the just determination of the issues before the court, and that they will be called to testify.
6. Counsel for the 1st Defendant further submitted that the impugned affidavits have already been admitted, and Rulings made by this court based on them and that the 1st Defendant filed a bundle of documents in support of her case, and no objection thereto was raised by the Plaintiff in respect to the Affidavits.
7. According to counsel, the Plaintiff's objection to the affidavits is an attempt to exclude material evidence and that at the appropriate stage during the hearing, the 1st Defendant will demonstrate why the Plaintiff is now opposed to the inclusion of the affidavits.
8. In a rejoinder, the Plaintiff's counsel submitted that affidavits are strictly reserved for use in interlocutory applications and not for the substantive hearing of a suit and that if the 1st Defendant intended to rely on the evidence contained in the affidavits, they ought to have filed witness statements in compliance with the rules governing trial proceedings.
9. Counsel emphasized that substantive provisions of the law of evidence cannot be overridden. He contended that affidavits would only be proper if the court had granted express leave for their use at trial, which, in this case, it had not and that the provisions of Order 19 Rules 1 and 2 of the Civil Procedure Rules clearly delineate the circumstances under which affidavits may be filed and relied upon.
10. Having considered the Objection and the submissions thereto, the sole issue for determination is whether the affidavits of Gordon Okumu Wayumba and Meshack Okumu sworn on the 14th and 15th November, 2016 respectively should be expunged from the record.
11. Vide its Objection, the Plaintiff seeks to have the affidavits by Mr Gordon Okumu Wayumba and Meshack Okumu expunged from the record. It is contended that because the 1st Defendant intends to call the two as witnesses, they should have filed witness statements.
12. The affidavits, it is contended, are strictly for use in interlocutory applications unless leave is otherwise granted for their use during trial, which leave was never granted in the circumstances.
13. The trial process in civil matters is primarily governed by the Civil Procedure Rules, 2010, which provides the procedural framework for the conduct of litigation from the filing of pleadings to the delivery of judgment and execution.
14. The Civil Procedure Rules sets out the documents that are required when instituting and defending suits. Order 3 Rule 2 provides that witness statements are among the documents required to be filed alongside the Plaint. Conversely, if the Defendant intends to call witnesses, their witness statements must be filed alongside documents and the Defence (see Order 7 Rule 5). The exceptions herein are with respect to expert witnesses, who are required to file expert reports.
15. As regards the use of affidavits, the same is provided for under Order 19, Rules 1 and 2 of the Civil Procedure Rules provides as follows:

“Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable: Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that



such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.”

2. (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”

16. It is clear from the foregoing that the general rule in civil proceedings is that the evidence of a witness at the hearing is to be adduced through witness statements. Affidavits are not the standard mode of presenting evidence during trial. Rather, their use is limited and governed by Order 19 Rules 1 and 2, which allow the court, for sufficient reason, to permit facts to be proved by affidavit.

17. In the circumstances herein, it is not in dispute that the 1st Defendant intends to call the deponents of the impugned affidavits, as witnesses during the hearing of the suit. They are witnesses numbers 2 and 3 respectively on the 1st Defendant’s list of witnesses dated 16th November, 2024.

18. This triggers the proviso under Order 19 Rule 1 of the Civil Procedure Rules, which prohibits the admission of affidavit evidence where the deponent is available. Further, it is apparent that no application was been made for the giving of evidence by way of affidavit as anticipated by Order 19 Rule 2.

19. With respect to the 1st Defendant’s contention that the affidavits form part of the record, and no objection was raised at the time they were filed, it is noted that these affidavits were filed in 2016 and are part of the 1st Defendant’s bundle of documents of 6th April, 2021. However, the mere filing of the affidavits does not render them admissible. That is the position as explained by the Court of Appeal in *Kenneth Nyaga Mwige vs Austin Kiguta & 2 others* [2015] KECA 334 (KLR):

“ How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof...”

20. Ultimately, the court agrees with the Plaintiff that the 1st Defendant should have filed witness statements of Professor Wayumba and Mr. Okumu as demanded under the Civil Procedure Rules.

21. That said, Sections 1A and 1B of the *Civil Procedure Act*, and Section 3 of the *Environment and Land Court Act* mandate this court to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.

22. These provisions reflect the spirit of Article 159(2)(d) of *the Constitution*, which directs courts to administer justice without undue regard to procedural technicalities, while ensuring fairness and adherence to the rule of law. In line with these principles, courts are empowered to manage proceedings in a manner that promotes the delivery of substantive justice, without sacrificing procedural integrity.

23. In the present case, the court takes cognizance of the fact that the affidavits in question were filed in 2016 and have consistently formed part of the 1st Defendant’s intended evidence. The contents of those affidavits have long been within the knowledge of the Plaintiff, mitigating any potential prejudice.



24. While the court finds it necessary and appropriate to expunge the impugned affidavits from the record, owing to their non-compliance with the Civil Procedure Rules and the absence of any lawful basis for their admission at trial, it is equally mindful of its duty to facilitate the just and proportionate resolution of disputes as aforesaid.
25. Consequently, the court hereby grants the 1st Defendant leave to rectify the procedural lapse by filing and serving duly signed witness statements of Gordon Okumu Wayumba and Meshack Okumu.
26. In the end, the court makes the following determination:
 - i. To the extent that the affidavits of Gordon Okumu Wayumba sworn on the 14th November, 2016 and Meshack Okumu sworn on the 15th November, 2016 form part of the 1st Defendant's trial bundle, they are hereby expunged from the record.
 - ii. The 1st Defendant shall within 21 days hereof file and serve witness statements of Gordon Okumu Wayumba and Meshack Okumu.
 - iii. The costs of the objection to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF MAY, 2025.

O. A. ANGOTE

JUDGE

