



REPUBLIC OF KENYA



Araka v Chief Magistrates' Court at Keroka & another; Nyasani & 4 others (Interested Parties) (Judicial Review E008 of 2024) [2025] KEHC 8649 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
JUDICIAL REVIEW E008 OF 2024**

**WA OKWANY, J
JUNE 19, 2025**

BETWEEN

THOMAS MONG'ARE ARAKA EXPARTE APPLICANT

AND

**THE CHIEF MAGISTRATES' COURT AT KEROKA 1ST RESPONDENT
FOOTBALL KENYA FEDERATION, ELECTORAL BOARD . 2ND RESPONDENT**

AND

VINCENT MEROKA NYASANI INTERESTED PARTY

INNOCENT NYAMBANE MAYAKA INTERESTED PARTY

RICHARD MABUKA OBERO INTERESTED PARTY

JOSEPHAT MOMANYI GICHANA INTERESTED PARTY

YVONNE REMA KERUBO INTERESTED PARTY

RULING

1. The Applicant/2nd Respondent filed the Application dated 19th March 2025 seeking orders that: -
 1. The Replying Affidavit dated 18th February 2025 purportedly sworn by Dr. Hesbon Owila and filed on behalf of the 2nd Respondent be expunged from the court record.
 2. The 2nd Respondent be granted leave to file and serve a fresh Replying Affidavit sworn by Harold Ndege, the CEO/General Secretary of the Football Kenya Federation and its representative to the Electoral Board.
 3. The fresh Replying Affidavit annexed hereto be deemed as duly filed and properly on record upon payment of the requisite court fees.



4. The costs of this Application be in the cause.
2. The Application is supported by the Affidavit of Harold Ndege, the CEO/General Secretary of the Football Kenya Federation. The Applicant's deponent avers that the Replying Affidavit dated 18th February 2025 purportedly sworn by Dr. Hesbon Owila was disowned by the said Dr. Owila who denied swearing or executing it.
3. He also averred that Dr. Owila resigned from his position as chairperson of the Football Federation Electoral Board and that he wished to place a valid and properly sworn Replying Affidavit on record to enable the Court determine the merits of the case.
4. The ex-parte Applicant filed a Replying Affidavit dated 27th March 2025 in response to the Application wherein he averred that parties took directions to canvass the substantive Judicial Review Application by way of written submissions. He states that they later received a letter indicating that Dr. Hesbon Owila was no longer a member of the 2nd Respondent and that his affidavit was therefore defective.
5. The ex-parte Applicant faulted the 2nd Respondent for proposing to introduce a new deponent, one Mr. Harold Ndege, to swear a fresh affidavit when the said Mr. Ndege was not among the people elected by the General Assembly of the Football Kenya Federation Board. He noted that the proposed deponent was merely a member of the General Secretariat, an administrative body of the Football Kenya Federation and therefore precluded from being a member of any other body of Football Kenya Federation in line with Section 63(4) of the Football Kenya Federation Constitution.
6. He further averred that as a representative of the Football Kenya Federation to the Football Kenya Federation Electoral Board, Mr. Ndege has no voting rights and is therefore not be competent to swear an affidavit. He also averred that the matter of forgery of Dr. Owila's signature was reported to the police vide OB No. OB/37/3/2024 and was currently under investigation. He added that the 2nd Respondent's counsel was only seeking to sanitize their mistake yet Article 159 of *the Constitution* was never meant to be a cleanser of all shortfalls, but was meant to cushion innocent and genuine mistakes. It was the ex-parte Applicant's case that allowing the Application would be akin to condoning mischief that is meant to delay the ongoing case.
7. The Application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Application for leave to expunge the Replying Affidavit and replace it with the one dated 19th March 2025 is merited.
8. Order 53 of the *Civil Procedure Rules* 2010 provides as follows in Applications for Judicial Review: –
Order 53 - Applications For Judicial Review

4. Statements and affidavits [Order 53, rule 4]

1. Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.
2. The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits,



he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

3. Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.
9. The instant application is premised on the ground that the Affidavit that was initially filed is irregular since the deponent no longer holds the office of the chairperson of the Football Kenya Federation. The ex-parte Applicant, on his part, contended that the said affidavit is a product of fraud and ought to be struck out, and by extension, the substantive Application be considered as unopposed.
10. Order 19 of the Civil Procedure Rules 2010 addresses the issue of irregularities in affidavits as follows: -
ORDER 19
 7. Irregularity in form of affidavit [Order 19, rule 7] The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.
11. I have perused the contents of the resignation letter written by Dr. Owila and filed in support of the present Application together with the letter dated 25th February 2025 that was addressed to this Court. It was not in dispute that the said Dr. Owila resigned as Chairperson of the Football Kenya Federation Electoral Board and is therefore not qualified to swear an affidavit in relation to this matter. The said deponent also disowned the Affidavit. This means that the purported affidavit is defective as it was not only executed by a different person other than the deponent but was also executed by a person who is no longer in office and therefore not competent to swear an affidavit on behalf of the organization. My finding is that such an affidavit cannot be relied upon by this Cou
12. The question which the court has to grapple with is whether the Applicant has made up a case for the filing of a fresh affidavit. In *Essanji and Another vs. Solanki [1968] EA at page 224* Georges, C.J. (Tanzania) held thus: -

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.”
13. Guided by the decision in the above cited case, I find that in exercising this Court’s inherent jurisdiction, the court’s main concern should be to consider if the orders issued will occasion any prejudice to the parties. From the facts of this case, it is clear that the substantive application is yet to be set down for Ruling. It is therefore my humble view that no prejudice will be occasioned to the ex-parte Applicant if the prayers sought in the instant Application are granted. This court is of the view that it is the 2nd Respondent who will be prejudiced if the orders sought are not granted as such an outcome will have the effect of driving him away from the seat of justice thus condemning him unheard. I am guided by the decision by Ringera J. (as he then was) in the case of Microsoft Corporation vs. Mitsumi Computer Garage Ltd (2001) 2 E.A. 460 at page 467, where the court found that the verifying affidavit filed was defective, but declined to strike out the plaint and held thus: -

“...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out



the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue...The purpose for verifying the contents of the plaint may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on the record.”.

14. For the foregoing reasons, I find the Application dated 19th March 2025 is merited and I therefore allow it in the following terms: -

- i. The Replying Affidavit dated 18th February 2025 purportedly sworn by Dr. Hesbon Owila and filed on behalf of the 2nd Respondent is hereby expunged from the Court record.
- ii. The 2nd Respondent is granted leave to file and serve a fresh Replying Affidavit sworn by Harold Ndege, the CEO/General Secretary of the Football Kenya Federation and its representative to the Electoral Board.
- iii. The fresh Replying Affidavit annexed hereto is deemed as duly filed and property on record upon payment of the requisite court fees.
- iv. The costs of this Application shall be in the cause.

15. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 19TH DAY OF JUNE 2025.

W. A. OKWANY

JUDGE

