



Obiero t/a C Obiero & Associates Advocates v Nyageh (Civil Miscellaneous Application E296 of 2024) [2025] KEHC 8834 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL MISCELLANEOUS APPLICATION E296 OF 2024**

A MABEYA, J

JUNE 20, 2025

BETWEEN

**CLIFFOR OTIENO OBIERO T/A C OBIERO & ASSOCIATES
ADVOCATES APPLICANT**

AND

JOYCE VIHENDA NYAGEH RESPONDENT

RULING

1. By a Motion on Notice dated 27/2/2025, the applicant/advocate sought that the Certificate of taxation dated 18/2/2025 be converted into a judgment and decree together with interest at Court rate. The Motion was brought under section 51(2) of the *Advocates Act*.
2. The grounds were set out in the body of the Motion and Supporting affidavit of Clifford Otieno Obiero sworn on 27/2/2025. These were that the applicant filed its advocate-client bill of costs dated 5/9/2024 for determination of its fees. The same was taxed on 17/2/2025 at Kshs.244,992/=. A Certificate of Costs to that effect was issued on 18/2/2025.
3. It was contended that the said Certificate of Costs had not been challenged or set aside. The applicant therefore sought judgment as prayed.
4. The application was opposed vide an affidavit of the respondent sworn on 3/4/2025. She deposed that the Motion was supported by a defective affidavit. That the supporting affidavit was sworn at Kisumu but before a Commissioner for Oaths at Nairobi. That she was advised by her advocate that that was in breach of section 5 of the *Oaths and Statutory Declarations Act*.
5. That the applicant had represented her in Kisumu CMCC No. 338 of 2022 but without her consent, settled the claim out of court at Kshs.553,000/- which was lower than the amount of the claim. That the applicant forged her signature in the Discharge Voucher issued by First Assurance.



6. That upon receipt of the settlement amount, the applicant disappeared until 21/6/2023. That he wrongly exercised the right of lien and withheld Kshs.416,724/-. That even after the decree herein is converted into a decree, the applicant must account for the said sum of Kshs.416,724/- appropriated. The respondent produced the undated Discharge Voucher and a letter dated 22/6/2023 in support of her contestations.
7. The parties appeared and orally argued the application. Mr. Obiero submitted that a Commissioner for Oaths in Kenya has national jurisdiction and that there was nothing wrong with a Commissioner based in Nairobi commissioning the documents in Kisumu. The contention that money had been paid was res-judicata as the bills were nevertheless taxed.
8. Mr. Alego for the respondent submitted that under section 5 of the *Oaths and Statutory Declarations Act*, a Jurat must state the place of the commission. That the Commissioner in this case was in Nairobi purporting to commission documents in Kisumu. That that was irregular. The case of *Mary Gathoni vs Frida Arithi* [2020] eKLR was relied in support of that proposition.
9. It was further submitted that the applicant could not exercise a lien before taxation. The case of *KCB vs Rachier* [2024] eKLR was relied on in support of that submission. That if judgment is entered, the sum held as lien be released to the respondent together with Kshs.108,000/-.
10. I have considered the parties' contestations. This is an application to convert a Certificate of Costs into a judgment and decree.
11. Such applications are guided by the direction given in section 51(2) of the *Advocates Act*. The same provides: -

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
12. The requirement under that section is that there be a Certificate of Costs which has neither been varied or set aside. Once that requirement is met, an advocate is entitled to a judgment sought in terms of a Certificate of Costs.
13. In the present case however, the application has been opposed on two fronts; that the affidavit in support of the application is defective as it is in breach of section 5 of the *Oaths and Statutory Declarations Act*, and secondly, that the applicant had retained a sum of Kshs.415,724/- in alleged exercise of a lien.
14. I have seen the supporting affidavit of Clifford Otieno Obiero sworn on 27/2/2025. The same discloses that it was sworn at Kisumu. The only quarrel with the jurat is that the commissioning stamp has an address for Nairobi. Section 5 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya, provides: -

“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.”
15. The aforementioned section is couched in mandatory terms. An affidavit is a sworn statement of fact voluntarily made by a deponent under an oath or affirmation administered by a person authorized to



do so by law. The document is witnessed to authenticate the averments therein and the deponent's signature by a taker of oaths, such as a Notary Public or Commissioner of Oaths.

16. In this regard, where there is an irregularity in the commissioning of an affidavit such as in instances whereby the jurat shows that the affidavit is signed in one place and commissioned in another, the likelihood that the affidavit was made in the absence of the Commissioner is to be inferred, unless the Commissioner states otherwise on oath. In such cases, it is likely that the stamp is just affixed without the affidavit being sworn before the Commissioner. That makes such an affidavit to be irregular and unacceptable.
17. In *Regina Muniyiva Ndunge v Kenya Commercial Bank Limited* (2005) eKLR, the court addressed itself to compliance with section 5 of the *Oaths and Statutory Declarations Act* in the following terms: -

“The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the *Oaths and Statutory Declarations Act* provides that:

‘ ... The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbutia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed.’

18. In *CMC Motors Group Limited v Bengeria arap Korir trading as Marben School & Another* (2013) eKLR, the court, while striking out an affidavit on similar grounds, stated: -

“The merit as I find it in respect of Waudo's affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black's Law Dictionary defines an oath as follows –

‘Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one's statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.’

‘ ... Bearing that definition the question that needs to be answered is whether Waudo took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of Section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.’

19. Can safety be found in Article 159 (2) (d) of *the Constitution*? I do not think so. This is because such defects affect the veracity and probative value of the averments, made in the affidavit thereby affecting the very substance of the affidavit.
20. Accordingly, I hold and find that section 5 of the Oaths & Statutory Declaration Act is meant to ensure and maintain the integrity of affidavits and cannot be departed from.



21. This being the case, I strike out the affidavit and that leaves the Motion without any evidence and cannot stand. All in all, the application is struck out with costs.

It is so ordered and file closed.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE

