



**Sabatia Investment Limited v Hari Gakinya & Company Advocates (Civil
Case 6 of 2019) [2025] KEHC 8442 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 6 OF 2019
PN GICHOHI, J
JUNE 16, 2025**

BETWEEN

SABATIA INVESTMENT LIMITED PLAINTIFF

AND

HARI GAKINYA & COMPANY ADVOCATES DEFENDANT

RULING

1. What prompted this ruling is that when the matter came for hearing on 26th May 2025, Mr. Ogola advocate for the Plaintiff sought to have the two Affidavits sworn by Gideon Toroitich on 13th February, 2019 and 22nd March, 2019 produced as evidence by Kenneth Limo Toroitich Ogola , who had taken the witness box to testify. The ground was that the deponent has since died.
2. Mr. Gakinya, Advocate objected to production and admissibility of the same as evidence. He argued that since Gideon Toroitich cannot be called as a witness and subjected to cross-examination on the contents of the two Affidavits and the documents attached thereto, then reliance on the same will be prejudicial to the Defendant. He submitted that as long as prejudice exists, this Court has a duty to defend the party who stands to be prejudiced by admission of those Affidavits. He relied on Section 33 of the *Evidence Act*.
3. In response, Mr. Ogola submitted that the objection had come too late in the day when the evidence had been adduced and reliance placed on the said affidavits and exhibits. His position is that the most Mr. Gakinya should have done is to seek review of the proceedings.
4. He argued that such statements were admissible under Section 33 of the *Evidence Act*. He submitted that it is not in dispute that Gideon Toroitich is deceased. He argued that the said Statement was made in the course of the deponent's normal daily transactions as permitted by law. He therefore termed the objection baseless and sought its dismissal.



5. The law governing the admissibility of statements and affidavits of a deceased person is primarily found in Section 33 of the [Evidence Act](#) (Cap 80, Laws of Kenya). This section provides that:-

“when Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases:-

- (a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;
- (b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;
- (c) against the interest of maker when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;
- (d) an opinion as to public right or custom when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen;
- (e) relating to existence of relationship when the statement relates to the existence of any relationship by blood, marriage, or adoption between persons at whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised;
- (f) relating to family affairs when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised;



- (g) relating to a transaction creating or asserting, etc., a custom when the statement is contained in any deed or other document which relates to any such transaction as is mentioned in section 13(a);
 - (h) made by several persons and expressing feelings when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.”
6. Essentially, section 33 of the *Evidence Act* addresses the admissibility of statements made by individuals who cannot be called as witnesses and such witnesses includes deceased persons.
 7. For a deceased person's statements to be admissible under Section 33, specific conditions must be met. These include; dying declarations, statements made in the ordinary course of business, statements against the maker's interest, opinions on public rights or customs, statements concerning the existence of a relationship, or those found in a Will or Deed relating to family affairs.
 8. Affidavits, as sworn written statements of admissible facts, fall directly within the scope of Section 33 of the *Evidence Act*. For such an affidavit to be admissible, three key conditions must be met: the deponent must be deceased; the affidavit's content must fit into one of the specific categories outlined in Section 33 (e.g., statements made in the ordinary course of business, dying declarations, etc.); and the facts stated in the affidavit must themselves be admissible as evidence, meaning they would have been admissible had the deponent been alive and testifying.
 9. In this case, the first affidavit under objection, sworn on 13th February, 2019, contained key documents like a company resolution to sue, a copy of the court's decree and certificate of costs, correspondence between the advocates, and demand letter.
 10. The second Affidavit which is dated 22nd March, 2019 has an attachment in form of a letter instructing the Respondent, who were their former advocates, to stop acting for them, along with an application to set aside court orders.
 11. It is a fact that due to Mr. Gideon Toroitich's demise during the pendency of this case and before he could testify, he is not available for cross examination on the contents therein.
 12. Section 33(b) of the *Evidence Act* permits admitting statements made in the ordinary course of business when the maker is deceased or cannot be found. In this instance, Mr. Toroitich, as a director of the Applicant company, swore the two affidavits during his lifetime within the context of a commercial dispute with its former advocates.
 13. These affidavits detail the company's financial dealings, including monetary transactions, legal representation, and funds held in trust and their contents, which refer to alleged withheld payments, decrees, trust obligations, and losses, clearly reflect routine business operations and professional correspondence.
 14. Additionally, all documents relied upon in the objected affidavits, except for the company resolution to institute the suit, have been reproduced in the supplementary affidavit by Kenneth Toroitich, the Applicant's current Director, sworn on 16th June, 2023.
 15. Further, some documents including the court decree are attached to the Respondent's Replying Affidavit sworn on 12th March, 2019. Further, the two Affidavits contain business-related content and provide a history of HCC 31 of 2017 until its determination and the issuance of decrees and certificates of costs, along with subsequent demand letters.



16. In the circumstances, the two Affidavits are admissible in evidence under Section 33 of the *Evidence Act* and no prejudice will be visited on the Defendant if the Affidavits sworn by Gideon Toroitich are produced in evidence. In the upshot:-

1. The Objection is overruled.
2. Costs of the objection are in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Oriri holding brief for Mr. Ogola for the Plaintiff

N/A for Defendant

