



In re Estate of the Late Lukas Ntalemea Kudate (Succession Cause E008 of 2024) [2025] KEHC 10604 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
SUCCESSION CAUSE E008 OF 2024**

**CM KARIUKI, J
JULY 18, 2025**

BETWEEN

ZAHRA NOOR ISMAEL APPLICANT

AND

NANYINGAE KUDATE & 2 OTHERS RESPONDENT

RULING

1. The crux of the matter lies in the validity of the Affidavit sworn by advocate William Wekesa Lusweti, which has been challenged through an oral PO. The Respondent side contend that the Affidavit, sworn by William Wekesa Lusweti in support of the application dated 27 June 2025, is invalid due to its due to its contents of contentious matter by the counsel acting for the Applicant.
2. They argue that an advocate, is prohibited from swearing an Affidavit on contentious matters or issues. Premised on the basis that an advocate is not mandated to swear an affidavit on contentious matters, learned counsel for the Respondents has submitted that the Affidavit sworn by Mr. William Wekesa Lusweti, advocate, is therefore invalid and ought to be expunged from the record of the Court.
3. On the other hand, the Applicant's side has submitted that the averments contained at the foot of the supporting Affidavit are issues and matters within the knowledge of the deponent. In this regard, it has been contended that where the facts deposed to are within the knowledge of the advocate, the advocate is at liberty to swear an affidavit in a matter wherein the same advocate is acting for a party.
4. Having considered the rival submissions, I am taking the following position. Firstly, it is trite and established that any party/person, whether advocate or otherwise, is at liberty to swear an affidavit for use in a court of Law. Nevertheless, it is pertinent to state and observe that it is incumbent upon the deponent to ensure that the averments being deposed to are within his/her knowledge, save where the Law allows deposition based on belief and information. [See Order 19 Rule 3 of the Civil Procedure Rules, 2010].



5. For ease of appreciation, it suffices to reproduce the provisions of Order 19 Rule 3 of the Civil Procedure Rules 2010. The same are reproduced as hereunder

Matters to which affidavits shall be confined [Order 19, rule 3] (1) Affidavits shall be confined to such facts as the deponent is able of his knowledge to prove: Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof. (2) The costs of every Affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

6. . Secondly, even though an advocate is at liberty to swear an affidavit in a matter wherein the advocate is acting for a party, the advocate must take care and exercise caution. In particular, an advocate is only at liberty to swear an affidavit touching on matters/facts which are within his /her knowledge and not otherwise.
7. . Additionally, there is no gainsaying that where the matter and/or facts are borne out from the record of the Court and the same are not in contest, then an advocate can also depose to an affidavit. Nevertheless, it is instructive to underscore that an advocate cannot swear an affidavit and depose to contentious Evidential matters.
8. . Put differently, it is trite and established that an advocate cannot swear an affidavit and depone to contentious matters. For good measure, where an advocate swears an affidavit and depones to contentious matters, there arises a likelihood of the advocate being invited to step down from the privileged position and thereafter be subjected to cross-examination. Such a scenario would create an absurdity and thus ought to be eschewed at all costs.
9. . To underscore the foregoing position, it suffices to take cognizance of the holding in the case of *Kisya Investment Limited & others v Kenya Finance Corporation Ltd* HCCC No 3504 of 1993 (Unreported), where Ringera J [as then was] stated thus:

“It is not competent for a party's advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions.

10. It is impossible and unseemly for an advocate to discharge his duty to the Court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.
11. The foregoing position of the Law was re-affirmed in the case of *East African Foundry Works (K) Ltd v Kenya Commercial Bank Ltd* (Civil Suit 1077 of 2002) [2002] KEHC 1122 (KLR) (Civ) (22 October 2002) (Ruling), where the Court held; thus, depositions by advocates on contentious matters of fact in suits or applications which canvass before the courts,are for striking out as a matter of good practice in our courts.
12. This Commitment to upholding the law is a serious matter that we do not take lightly. It must not be lost on this Court that the decisions referenced in the preceding paragraphs dealt with the aspect where the Affidavit relates to contentious evidentiary matters. Instructively, no advocate is at liberty to swear an affidavit and depone to contentious matters in a case where the same advocate is retained to act for a party.



13. Pertinently, it is my finding and holding that the Bar and prohibition of advocates swearing affidavits touch on and concern the deposition of contentious evidential matters. For good measure, the bar/prohibition is not absolute and/or infinite. Simply put, there are known exceptions under the Law, and these exceptions suffice.

14. .To buttress the foregoing position, it suffices to cite and reference the decision of the Supreme Court of Kenya in the case of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment).136.

This Court cannot countenance this type of conduct on the part of counsel who are officers of the Court. Though it is elementary learning, it bears repeating that affidavits filed in Court must deal only with facts which a deponent can prove of his knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed to.

15. Having reviewed the jurisprudence obtained in the preceding paragraphs, it is now appropriate to revisit the matter previously discussed and consider whether the supporting Affidavit contains any contentious matters or facts. Suffice it to point out that the record of the Court bears out the issues highlighted and captured in the body of the supporting Affidavit.

16. . Additionally, there is no gainsaying that the matters/issues that the deponent of the supporting Affidavit has adverted to are issues that are within the knowledge of the deponent. Notably, it is the deponent account as to what happened to him leading to the dismissal of the application 13th February 2025.

17. The contents of the supporting Affidavit fall squarely within the purview and knowledge of the deponent. In this regard, I am not persuaded by the arguments advanced by learned counsel for the Respondents.

i. Thus, the PO is rejected, overruled, and dismissed with costs in the main cause.

DATED AND DELIVERED IN NAROK THIS 18TH DAY OF JULY, 2025.

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CHARLES KARIUKI
JUDGE

