



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiplagat v Options Education Agency Limited (Constitutional Petition  
14 of 2023) [2025] KEHC 13865 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13865 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CONSTITUTIONAL PETITION 14 OF 2023**

**E OMINDE, J  
OCTOBER 2, 2025**

**BETWEEN**

**NOAH KIPTOO KIPLAGAT ..... APPLICANT**

**AND**

**OPTIONS EDUCATION AGENCY LIMITED ..... RESPONDENT**

**RULING**

1. By way of Notice of motion dated 20<sup>th</sup> November 2024, the Applicant seeks the following orders;
  1. That this Honourable Court be pleased to strike out and expunge from the court records replying affidavit of Rosemary Ndugiri Wainaina and Hellen Nyawira Njuguna filed in court on the 28<sup>th</sup> October 2024 and the annexures thereto for being in contravention of section 4(1) &7 of the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya and section 347 of the Penal Code.
  2. That the cost of this application be provided for.
2. The application is expressed to be brought under Rules 19 & 3 of *the Constitution* of Kenya (Protection of Rights & Fundamental Freedom) Practice & Procedure Rules 2013, Section 1 A, 1 B, & 3A of the *Civil Procedure Act* & Order 51 Rule I of the Civil Procedure Rules & all enabling Provision of Law.
3. The application is premised on the grounds on the face of it and the averments of the Applicant in his affidavit in support of the application.
4. In his affidavit he deponed that his advocate read and explained the contents of the replying affidavits of Rosemary Ndugiri Wainaina and Hellen Nyawira Njuguna dated 28<sup>th</sup> October 2024 and filed in court on the same day. Further, that he is personally known to the two deponents of the replying affidavits and that they currently reside and works for gain as a in Adelaide Australia. He annexed and marked as NKK1 an extract of his passport indicating his exit and entry.



5. He stated that Rosemary Ndugiri Wainaina resides and works for gain in Adelaide Australia as a nurse and was not in Nairobi, Kenya on the 28<sup>th</sup> October 2024. Additionally, that Hellen Nyawira Njuguna works and runs the operations of Options Education Agency (the respondent principal) in Adelaide Australia and was similarly not in Nairobi Kenya on the 28<sup>th</sup> October 2024. The deponent averred that the two replying affidavits were declared and sworn in Nairobi Kenya and the deponents were/are in Adelaide Australia. He annexed and marked as NKK2 (a-b) an extract of the jurat of the said replying affidavits.
6. The deponent stated that affidavits must be drawn in the presence of an advocate who is competent and authorized to administer oath. That affidavits must be signed by a deponent in the presence of an advocate competent and authorized to administer oath. He stated that the affidavits are complete forgeries as the deponents never appeared before the said advocate who prepared and commissioned the said replying affidavits. He additionally stated that a commissioner for oaths in Kenya is only authorized to administer oaths or take any affidavits for any matter in Kenyan courts only within Kenya.
7. The deponent averred that his advocate on record informs him that the two replying affidavits and annexures offend the provisions of Section 347 of the Penal Code and ought to be struck out and expunged from the court record. Further, that they offend Sections 7 of the Oaths and Statutory Declaration Act which makes it an offence to willfully and knowingly make a false declaration. Urging that the replying affidavits are incurably defective, incompetent, and amount to gross abuse of the court process, he prayed that the application be allowed.
8. In response, the respondent filed a grounds of opposition dated 18<sup>th</sup> March 2025. The Respondent opposes the Application on the following grounds;
  1. That the Application is misconceived, frivolous, vexatious, and an abuse of the court process.
  2. That the Application is based on unsubstantiated allegations of forgery and fraud which the Applicant has failed to prove beyond mere assertions.
  3. That the Applicant has erroneously conflated the physical presence of a deponent before a Commissioner for Oaths with the technical requirements for valid affidavits under Kenyan law.
  4. That the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya does not categorically prohibit the commissioning of affidavits where deponents are outside Kenya, particularly where modern technological means have been employed to verify identities.
  5. That the Applicant has not adduced any credible evidence to demonstrate that the signatures on the impugned affidavits are indeed forgeries, as alleged.
  6. That the Commissioner for Oaths who administered the oath on the impugned affidavit duly registered and authorized to practice in Kenya, and the variation in signatures, if any, does not automatically invalidate the commissioned documents.
  7. That the Applicant's claim that the deponents were physically in Australia on the date of commissioning is not substantiated by any immigration records or other reliable documentary evidence.
  8. That the Applicant has not demonstrated that the alleged technical defects, if any, have occasioned a miscarriage of justice that would warrant the drastic remedy of striking out the entire affidavits.



9. That the Respondent would suffer substantial prejudice if the Replying Affidavits were to be struck out, as they contain material information crucial to the just determination of the main petition.
10. That this Honourable Court has inherent jurisdiction under Section 3 A of the *Civil Procedure Act* to ensure that the ends of justice are met by allowing the impugned affidavits to remain on record.
11. That the circumstances of this case warrant the application of Article 159(2) (d) of *the Constitution* which requires that justice be administered without undue regard to procedural technicalities.
12. That the Petitioner/Applicant's Supporting Affidavit largely contains legal arguments and conclusions, which ought to have been properly addressed in written submissions rather than in an affidavit.
13. That the Petitioner/Applicant has made scandalous allegations against the advocates who commissioned the affidavits without making them parties to these proceedings, thereby denying them the right to be heard.
14. That in the alternative and without prejudice to the foregoing, the Respondent is ready and willing to regularize any procedural shortcomings in the Replying Affidavits, should this Honourable Court deem it fit and necessary.
15. That the Petitioner's Application dated 20/11/2024 is without merit and should be dismissed with costs.
16. The parties filed submissions on the application.

### **Applicants' Submissions**

9. On whether the replying affidavits should be expunged, Counsel urged that they are complete forgeries, nullities and are not Affidavits in Law for having been made in blatant disregard of Section 4 & 5 Oaths and Statutory Declaration Act and Section 347 of the Penal Code. He cited the case of *Caltex Oil (Kenya) Limited v New Stadium Service Station and Another* (2002) eKLR in this regard and cited Section 4(1) *Oaths and Statutory Declarations Act*. He additionally cited the case of *Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another Nairobi* (Milimani HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460 on jurisdiction of a Commissioner of Oaths.
10. Counsel submitted that it is undisputed and uncontroverted that the impugned Affidavits on record were purportedly sworn and declared in Nairobi Kenya on 28/10/24, while the deponents were in Australia. He pointed out that the Respondent's counsel, has stated, on record before this Court that the deponents were in Australia, specifically on 29/10/24, and on 20/3/25. Further, that he has been using the same as a scapegoat for his constant failure to comply with the court directions. Counsel urged that the deponent's signatures were therefore forged, and the Commissioner's for Oaths stamp just affixed, hence such an Affidavit is irregular, unacceptable, fatally defective and is amenable to striking out.
11. Counsel pointed out that it is imperative to note that the replying Affidavits were filed on 29/10/24 after this Honourable Court's direction that the Replying Affidavits be filed before close of business 29/10/24. That this was after counsel on record had categorically stated and informed the court that the deponents/his clients, were in Australia. He further stated that it is practically impossible and



interestingly strange that they managed to appear before the Commissioner of Oaths and swear the affidavits.

12. Counsel cited Section 5 of the [Oaths and Statutory Declarations Act](#) urging that requires the physical presence of a deponent before a Commissioner for Oaths, who in turn shall execute the Oath in presence of the said Commissioner for Oaths. The deponent and the Commissioner for Oaths must be both present at the same place at the same time, and as correctly put by Justice Jesse Njagi in the case of David Wamatsi Omusotsi vs The Returning Officer Mumias East Constituency & 2 others (2017) eKLR. Counsel reiterated that it is on record that the Deponents were in Australia at the time of making the impugned Affidavits and confirmed by Respondent counsel, thus, the impugned Affidavits are in contravention of Section 5 of the [Oaths and Statutory Declarations Act](#) for not truly stating the true place where the Affidavits/Oaths were taken and by falsely stating where it was not taken. He urged the court to strike it out for being defective and placed reliance on the case of Laikipia University College v Kibia (Suing as the Legal Representative of the Estate of Peter Maina Mwaura - Deceased) (Civil Appeal E0022 of 2023) [2023] KEHC 26705 in this regard.
13. Counsel submitted that the averments by the Respondent that Affidavits can be commissioned by employing modern technologies of verifying their identities is a misapprehension of the Law, as the Law as of now requires that a person should be physically present in Kenya and appear in person before a Commissioner for Oaths. Further, that the deponents have not offered any cogent evidence to demonstrate that the signatures on the impugned Affidavits are theirs, and that they indeed appeared before the said Commissioner for Oaths on 28/10/24 when the Affidavits/Oaths were taken and commissioned.
14. Counsel cited the case of Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR and urged that the burden of proof shifted to the deponents to prove that they indeed were in Kenya on the date of commissioning the impugned affidavits or that the impugned affidavits are compliant with the Law. Further, that the signatures on the Affidavits are theirs, upon the Petitioner asserting that the Affidavits are forgeries, the deponents were in Australia and producing evidence of his presence in Australia and raising the issues of non-compliance with mandatory provisions of Law. The deponents have failed to do so.
15. Counsel urged that the Petitioner has demonstrated the point of law in the preliminary objection to warrant the striking out of the impugned Affidavits on record for having been made in blatant disregard of Section 4 & 5 Oaths and Statutory Declaration Act and Section 347 of the Penal Code and the same ought to be struck out and/or expunged from the court record as they are designed to deny and to obscure justice.
16. Counsel submitted further, that the circumstances of this case do not warrant the application of Article 159 (2) (d) of [the Constitution](#) & Section 3A of the [Civil Procedure Act](#) which embodies the oxygen principle as prayed by the respondent in paragraphs 10 & 11 of the Grounds of Opposition, and primarily where non-compliance of mandatory provision of Law and criminality has been raised and exhibited, as aptly put in the case Malewa Ranching Company Limited v Joseph Nyutu Ng'ang'a & 146 others [2022] eKLR. He also cited the case of Nicholas Kiptoo Arab Kenga Salat vs IEBC and 6 Others (2013) eKLR on the applicability of Article 159 of [the Constitution](#). Additionally, he submitted that the issues raised are of non-compliance with mandatory provisions of the law and cannot be termed as technicalities, placing reliance on the case of Caltex Oil (Kenya) Ltd vs New Stadium Service Station Ltd & Another (2002) eKLR.
17. On whether the Respondent should be allowed to regularize and/or file compliant affidavits, counsel submitted that Affidavits and its annexures are proscribed documents, and the extent of the illegalities,



to wit, forgery of signatures on the impugned affidavits, amounts to serious criminal offences under Section 347 of the Penal Code, and as such, it too grave to be rectified, and the Court cannot exercise discretion under Article 159(2)(d) of *the Constitution* as put in the case of Wilson Mwang'ombe Mwajumwa Independent Electoral and Boundaries Commission & 2 others [2017] eKLR.

18. He urged the court to allow the application as prayed.

### **Respondents' submissions**

19. Learned counsel for the respondent submitted that it is trite law that allegations of fraud and forgery must be specifically pleaded and strictly proved to the required standard. That the burden of proof lies with the party alleging fraud or forgery, and the standard of proof required is higher than the ordinary balance of probabilities, though not as high as the criminal standard of beyond reasonable doubt. He cited the case of Kinyanjui Kamau v George Kamau [2015] eKLR, and Arthi Highway Developers Limited v West End Butchery Limited & 8 others [2015] eKLR in this regard. Counsel submitted that in the present case, the Petitioner has made blanket allegations of forgery and fraud without providing specific details or adducing credible evidence to support these allegations.
20. That the Petitioner has not provided any forensic analysis of the signatures alleged to be forgery nor has he adduced any immigration records or other reliable documentary evidence to prove that deponents were indeed physically in Australia on dates the affidavits were commissioned. Counsel urged that the mere assertion that the signatures on the impugned affidavits differ from the deponents known signatures is insufficient to establish forgery. He cited the case of Kipkoech Arap Baliach v Kipkoske Arap Rotich & Another [1991] KLR and Caroline Wanjiku Ngugi v Republic (2015) eKLR in this regard.
21. Counsel submitted that the Petitioner has also miserably failed to demonstrate how the Commissioner for Oaths who commissioned the affidavits would have been complicit in the alleged forgery and fraud. The Commissioner for Oaths is an officer of the Court who performs a quasi-judicial function, and there is a presumption of regularity in the performance of official acts by public officers. He cited the case of Republic v Chief Land Registrar & another Ex-Parte Nathan Karanja Gachoka [2016] eKLR in this regard. Counsel reiterated that the Petitioner has failed to establish a prima facie case of forgery and fraud in relation to the commissioning of the impugned affidavits.
22. Counsel urged that the Application is premised on the contention that the physical presence of a deponent before a Commissioner for Oaths is an absolute requirement under Kenyan Law. He urged that this contention is an oversimplification of the legal position and fail to take into account the evolving nature of law in response to technological advancements. He urged that the *Oaths and Statutory Declarations Act* does not explicitly require the physical presence of a deponent before a Commissioner for Oaths.
23. He cited Section 4 of the Act and submitted that while traditional practice has been for deponents to appear physically before Commissioners for Oaths, this practice evolved in era before advent of modern communication technologies. With the advancement of technology, particularly video conferencing and digital signature verification tools, it is now possible to verify a deponent's identity and administer an oath remotely with the same level of certainty as in-person verification.
24. Counsel stated that the Judiciary of Kenya has also increasingly recognized the need to adapt legal procedures to accommodate technological advancements. This is evident in the enactment of the Information and Communications Act, the Kenya Information and Communications (Electronic Certification and Domain Name Administration) Regulations, 2020, and the development of e-filing systems for court documents.



25. Counsel stated that Article 159(2) (d) of *the Constitution* enjoins courts to administer justice without undue regard to procedural technicalities. He cited the cases of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2015] eKLR in this regard. Counsel urged that the COVID-19 pandemic further accelerated the adoption of remote and digital processes in legal proceedings and the Judiciary of Kenya, in response to the pandemic, issued practice directions allowing for remote court proceedings and electronic filing of documents.
26. Counsel urged that in jurisdictions with similar legal systems to Kenya, courts have increasingly recognized the validity of affidavits commissioned remotely. In the Canadian case of *Tanguay v. Brousey* 2020 ONSC 4658, the Ontario Superior Court of Justice held that an affidavit could be sworn remotely via video conference. Counsel also cited the cases of *Panchal Trading (K) Limited v. NT Metals Corporation* [2021] KEHC 12901 (KLR), *Qad Software South Africa (Pty) Limited v. Rift Valley Railways Investments (Pty) Limited* [2013] eKLR and the case of *Saggu v Roadmaster Cycles (U) Ltd* (2002) 1 EA 258.
27. Counsel urged that striking out of pleadings or affidavits is a draconian remedy that should only be invoked in the clearest of cases and further, that courts are generally reluctant to strike out pleadings unless they are so fundamentally defective that they are incapable of being cured through amendment or other less drastic means. He cited the case of *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 in this regard and urged that the alleged irregularities — even if proved — do not render the affidavits fatally defective. At best, they are curable through corrective steps, and certainly not grounds for the drastic remedy of striking out, which would prejudice the Respondent's right to be heard.
28. Counsel stated that while there may not be any explicit statutory provisions in Kenya authorizing remote commissioning of affidavits, the absence of such provisions should not be interpreted as a prohibition, especially in light of the constitutional mandate to administer justice without undue regard to procedural technicalities. Further, that procedural rules are intended to aid in the fair determination of disputes and not to be wielded as weapons to defeat legitimate claims or defenses. In the present case, the Petitioner has not demonstrated what prejudice he stands to suffer if the impugned affidavits are considered on their merits. He stated that the purpose of affidavits is to place relevant facts before the court and the affidavits in question provide the Respondent's version of events to shut them out on alleged procedural defects without proof of fraud would deny the Respondent the right to be heard, contrary to the principles of natural justice.
29. Counsel urged that Order 19 Rule 7 of the Civil Procedure Rules, 2010 stipulates that an affidavit cannot be struck out merely on technicalities. He cited the case of *Tanga Investments (K) Limited v NF Metals Corporation* [2021] eKLR and urged that in determining whether to strike out a pleading due to procedural irregularities, the Court should consider whether the irregularities have occasioned a miscarriage of justice or prejudiced the other party in a manner that cannot be remedied by alternative measures.
30. He additionally cited the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR and urged that the Petitioner has not demonstrated how any of the alleged procedural irregularities in the commissioning of the affidavits have occasioned a miscarriage of justice or prejudiced him in a manner that cannot be remedied by alternative measures. Further, that if this Court were to find that there were procedural irregularities in the commissioning of the affidavits, it could order that the deponents re-swear the affidavits before a Commissioner for Oaths in Kenya, rather than striking them out entirely. This would be a proportionate response that addresses



any of the procedural concerns while ensuring that the substantive issues in the case are determined on their merits.

31. Citing Article 159 of *the Constitution*, counsel urged the court to dismiss the application. He cited the case of Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR and Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR and urged the court to dismiss the application with costs.

### **Analysis & Determination**

32. Having addressed my mind to the pleadings and the submissions, it is my considered opinion that the sole issue for determination is;

Whether the impugned Replying Affidavits are fatally defective for the reasons given and ought therefore to be expunged from the court record

33. On the allegations of fraud made by the Applicant and the provisions of Section 347 of the Penal Code which it has been alleged that the said affidavits contravene as a consequence as hereunder reproduced provides as follows;

Any person makes a false document who—

- (a) makes a document purporting to be what in fact it is not; or
- (b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; or
- (c) introduces into a document without authority whilst it is being drawn up matter which if it had been authorized would have altered the effect of the document; or
- (d) signs a document—
  - (i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing; or
  - (ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing; or
  - (iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person; or
  - (iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be;
- (e) fraudulently—
  - (i) makes or transmits any electronic record or part of an electronic record;
  - (ii) affixes any digital signature on any electronic record; or



- (iii) makes any mark denoting the authenticity of a digital signature, with the intention of causing it to be believed that such record, or part of document, electronic record or digital signature was made, signed, executed, transmitted or affixed by or by the authority of a person by whom or whose authority he knows that it was not made, signed, executed or affixed;
- (f) without lawful authority or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with a digital signature either by himself or by any other person, whether such person is living or dead at the time of such alter;
- (g) fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of deception practiced upon him, does not know the contents of the document or electronic record or the nature of the alteration.

34. Further the law regarding the person upon whom the burden of proving the existence of any fact which he asserts is as provided under Section 107, 108 and 109 of the [Evidence Act](#) as follows: -

107. Burden of Proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

35. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

36. It should be noted that because Section 347 of the Penal Code cited by the Applicant creates a criminal offence, any allegations premised upon the said Section requires proof beyond reasonable doubt. The question that needs to be answered therefore is whether the applicant has proved the allegations that he has levelled against the Respondent’s replying affidavits to the set threshold. That said in considering



the facts deposed in support of the said allegations, what is clearly apparent is that they remain as mere allegations. It is the Applicant's allegation and the onus is on him to prove that which he alleges by way of cogent evidence. He cannot hinge his argument on the assertion that the Counsel for the Respondent had stated that the deponents of the said affidavits live in Australia and so the court should hold that this is the correct position.

37. Having grounded his submissions on Section 347, he ought therefore to have availed cogent documentary and forensic evidence to prove beyond any reasonable doubt that the deponents were not in Kenya when they are said to have signed the affidavits; and that this being the case, the impugned signatures cannot have been appended by them to the said affidavits before a Commissioner of Oaths resident in Kenya as has been averred; and further that the said signatures are not the deponent's known signatures and are therefore a forgery.
38. It should be further noted that the burden of proof does not at all shift to the Respondent as submitted by the Applicant except in circumstances where the evidence availed by Applicant is support of the fact that he asserts is so cogent that if not rebutted by the person against whom the fact is alleged would be presumed to be true. In this case, as I have already stated, no evidence at all or even any evidence sufficient to warrant any such rebuttal was proffered.
39. This position on when the burden shifts has been very clearly elucidated in Halsbury's Laws of England, 4<sup>th</sup> edition, Volume 17 at paras 13 and 14 which states;

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

40. In light of my above conclusions, is my finding that the allegations of forgery and fraud are merely broad allegations that have failed to establish any case in relation to the commissioning of the impugned affidavits.
41. On the issue that the impugned affidavits offend the mandatory provisions of the of the [Oaths and Statutory Declarations Act](#) Section 4 of the said Act provides thus;
  - (1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act



or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

- (2) A commissioner for oaths shall, in the exercise of any of the powers mentioned in subsection (1), be entitled to charge and be paid such fees as may be authorized by any rules of court for the time being.
42. In noting that save for Subsection 2, the provisions of Section 4 are not at all couched in mandatory terms. But even supposing that were to be the case, Section 72 of the *Interpretation and General Provisions Act*, Chapter 2 of the Laws of Kenya whose provision is couched in mandatory terms states as follows on issues pertaining to the form of documents:

Save as is otherwise expressly provided, whenever a form is prescribed by a written law on instatement or document which purports to be in that form shall not be void by reason of a deviation there from which does not affect the substance of the instrument or document or which is not calculated to mislead.”

43. Further to the above, in dealing with a similar issue in the case of *Mghendi v Sports Disputes Tribunal; Oriku & 15 others (Interested Parties) (Judicial Review E001 of 2024) [2024] KEHC 3220 (KLR) (4 April 2024) (Ruling)*, Justice Olga Sewe held thus;

- (18) However, in this instance, the affiant is purported to have made the deposition virtually before a Commissioner of Oaths who was then based in Nairobi. Whether this is permissible must be considered within the backdrop of recent technological advances and the uptake of technology in the administration of justice since the advent of the global Covid 19 pandemic. Accordingly, Section 27 of the *High Court (Organization and Administration) Act*, 2015, explicitly provides for automation of court records and business processes as well as the promotion of the use of ICT.
- (19) To that end, the Practice Directions to Standardize Practice and Procedures in the High Court, Gazette Notice No. 189 of 2022, set out the practice and procedures for virtual proceedings in paragraphs 28 to 32. It is therefore now common place for witnesses to testify virtually; entailing the administration of oath virtually. Additionally, we now have procedural rules governing service of court process via email embedded in Order 5 Rules 22B and 22C of the Civil Procedure Rules.
- (20) In the circumstances, the question to pose is whether the fact that the affidavit was deposed to virtually is fatal to the application. In this regard, it is instructive to bear in mind that in certain instances, of which this is one, the use of the word “shall” is merely directory and not necessarily mandatory.
- .....
- (23) It is in the light of the foregoing that I take the view that the mere fact that the 2<sup>nd</sup> respondent’s Supporting Affidavit was sworn virtually does not necessarily render it defective; there being no proof that the document was calculated to mislead.



44. In associating myself fully with the holding of Sewe J and above and in light of the legal provisions that I have herein cited and more particularly the provisions of Section 72 of the Interpretation's Act herein cited, having found that the Applicant has failed to prove the acts of forgery and fraud alleged, I am satisfied that the fact that the impugned affidavits were commissioned virtually does not render them defective, does not affect the substance of the document there is also no proof that the said documents were calculated to deceive.
45. In light of the above, I find that the Application by the Applicant lacks merit and the same is accordingly dismissed in its entirety with costs to the Respondents.

**READ DATED AND SIGNED AT ITEN ON 2<sup>ND</sup> OCTOBER 2025**

**E. OMINDE**

**JUDGE**

