

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. 39 OF 2007

ANNA MARIE CASSIEDE.....1ST PLAINTIFF
BRUNO CASSIEDE.....2ND PLAINTIFF

-VERSUS-

PETER KIMANI KAIRU T/A KIMANI KAIRU
& COMPANY ADVOCATES.....DEFENDANT

AND BY WAY OF COUNTERCLAIM

PETER KIMANI KAIRU T/A KIMANI KAIRU
& COMPANY ADVOCATES.....COUNTER CLAIMANT

-VERSUS-

ANNA MARIE CASSIEDE.....1ST DEFENDANT TO COUNTER CLAIM
BRUNO CASSIEDE.....2ND DEFENDANT TO COUNTER CLAIM

RULING

1. The plaintiffs filed a Notice of Motion application dated 17th September 2024 pursuant to the provisions of Section 3A of the Civil Procedure Act, Order 2 Rules 15(1)(b) to (d) of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. They pray for orders for the Court to strike out and expunge from the record the supporting affidavit sworn by the defendant on 17th June 2021 before one Muriithi Dennis, allegedly an Advocate, Commissioner for Oaths, and Notary Public, and the defendant's witness statement dated 17th June 2021 made before the same person. The plaintiffs also seek an order that

upon being granted the foregoing orders, the defendant's Notice of Motion dated 17th June 2021 be struck out and expunged from the record.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Aldrin Ojiambo, an Advocate of the High Court of Kenya and learned Counsel for the plaintiffs. Mr. Ojiambo averred that the defendant filed a Notice of Motion application dated 17th June 2021, supported by an affidavit purportedly sworn before one Muriithi Dennis, who is allegedly an Advocate, Commissioner for Oaths and Notary Public. Mr. Ojiambo stated that the defendant also filed a witness statement dated 17th June 2021 made before the same person. Mr. Ojiambo deposed that upon inquiry, he discovered that there was no Advocate by the name Muriithi Dennis known to the Law Society of Kenya. He stated that in order to make a verification, they wrote to the Law Society of Kenya on 8th July 2024 seeking confirmation of whether such a person was an Advocate authorized to practice as at 2021.
3. He deposed that in response, the Law Society of Kenya confirmed that the only similar name on the roll of advocates was Rimita Dennis Muriithi, who was admitted to the Bar on 5th August 2022, a year after the impugned documents had been commissioned and filed. He further stated that a subsequent letter from the Law Society of Kenya dated 6th August 2024 further confirmed that no Advocate by the name Dennis Muriithi had been admitted to the Bar as at 2021. Mr. Ojiambo asserted that Dennis Muriithi was not qualified to act as a Commissioner for Oaths or Notary Public; thus the defendant's supporting affidavit was not sworn before a duly authorized Commissioner for Oaths, rendering it invalid and incapable of being considered as an affidavit in law. He

averred that the witness statement also made before the said individual offends the law and should be struck out.

4. In opposition to the application, the defendant filed a replying affidavit sworn on 4th December 2024 by Mr. Peter Kimani Kairu, the defendant herein. Mr. Kairu averred that after his Advocates prepared the impugned documents, he was directed to a neighbouring law firm, M/s Aoko & Githara Advocates, whose offices were at the same premises as his Advocates' chambers at the time, where he was attended to by a gentleman who commissioned and witnessed his documents. He maintained that he neither knew the said person beforehand, nor had he any reason to doubt his authority to act as a Commissioner for Oaths. The defendant averred that he was an innocent client and that any irregularity on the part of the purported Commissioner should not be visited upon him.
5. Mr. Kairu asserted that the affidavit and witness statement contain true and relevant facts which the Court should consider. He stated that the alleged defect in commissioning did not vitiate the Notice of Motion dated 17th June 2021, which was properly drawn, contained valid prayers, and was made on sound legal grounds. He urged this Court not to punish him for the failures of the person who commissioned his affidavit, and asserted that the overriding objective of the Court is to do substantive justice rather than to lock out a party for a procedural irregularity beyond his control. Mr. Kairu urged this Court to allow the application dated 17th June 2021 to be heard and determined on its merits. He expressed willingness to cure any defect in his earlier affidavit by swearing a supplementary one in its place.
6. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 3rd December 2024 by the law firm of

Acorn Law Advocates LLP, while the defendant's submissions were filed by the law firm of Kithinji Marete & Company Advocates on 1st April 2025.

7. Mr. Ojiambo, learned Counsel for the plaintiff submitted that the commissioning of affidavits in Kenya is governed by the Oaths and Statutory Declarations Act, specifically, Sections 2 & 3, which outline the process and qualifications for appointment as a Commissioner for Oaths. He relied on the case of **Walubengo v Independent Electoral and Boundaries Commission & 2 others** (Election Petition 2 of 2022) [2022] KEHC 16090 (KLR), and asserted that only practising Advocates duly appointed by the Chief Justice and gazetted may act as Commissioners for Oaths. Counsel argued that since Muriithi Dennis was not admitted to the Roll of Advocates as at 2021, he was neither an Advocate nor qualified to act as a Commissioner for Oaths or Notary Public, and any documents purportedly commissioned by him were invalid in law and should be struck out from the Court record.
8. Mr. Ojiambo stated that since the defendant's supporting affidavit and witness statement both dated 17th June 2021 were not sworn before a duly authorized Commissioner for Oaths as required under Section 4 of the Oaths and Statutory Declarations Act, they do not amount to affidavits known in law. He cited the case of **Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others** [2017] KEMC 45 (KLR), and asserted that since affidavits constitute evidence in support of an application, the absence of lawful commissioning renders such documents legally incompetent. He referred to the Court of Appeal case of **Flystar Limited v Delphis Bank Limited** [2015] KECA 747 (KLR), and submitted that since Muriithi Dennis, who purported to commission the defendant's affidavit and witness statement, was

not a qualified Commissioner for Oaths, the said documents are fatally defective, offend the law, and undermine the integrity of the judicial process.

9. Mr. Ojiambo cited the case of **University of Nairobi v George Mabele Sifuna** [2021] KEELRC 279 (KLR), and submitted that it is trite that an application must be founded on supporting evidence through a properly commissioned affidavit, thus where such an affidavit is void, the entire application collapses as it has no legal foundation. He further submitted that an application without a valid supporting affidavit is not a mere technical defect curable by the Court, but a fatal flaw warranting the striking out of the entire application. He stated that since the defendant's affidavit in support of the application dated 17th June 2021 is fatally defective for want of commissioning by a duly authorized Commissioner for Oaths, and that the defendant's application dated 17th June 2021 is incompetent in law, they should both be struck out.
10. Mr. Marete, learned Counsel for the defendant submitted that the defendant innocently had his documents commissioned at the offices of Aoko and Githara Advocates, genuinely believing that the person who commissioned them was duly qualified. He relied on the Supreme Court case of **National Bank of Kenya Limited v Anaj Warehousing Limited** [2015] KESC 4 (KLR), and asserted that he should not be penalized for relying on such representation. Counsel argued that the fault, if any, lies with the purported Commissioner and not with the defendant as a litigant acting in good faith.
11. Mr. Marete stated that the application dated 17th June 2021 is distinct and separate from the supporting affidavit, and that since the said application is founded on Order 26 Rules 1, 5 & 6 of the Civil Procedure Rules, 2010, this Court can still determine it on its merits even in the absence of the impugned affidavit since the alleged defect in commissioning does not render the

application incompetent. Counsel urged this Court to refrain from invoking the draconian power of striking out pleadings, as this would unjustly deprive the defendant of his right to be heard and would elevate procedural technicalities over substantive justice.

ANALYSIS AND DETERMINATION.

12. I have considered the instant application, the grounds on the face of it, and the affidavit filed in support thereof, the replying affidavit by the defendant and the written submissions by Counsel for the parties, the issue that arises for determination is whether the application herein is merited.
13. It is not disputed that Muriithi Dennis, who purported to commission the impugned supporting affidavit and witness the defendant's witness statement, was neither an Advocate, Commissioner for Oaths, nor Notary Public at the material time. Consequently, the affidavit in support of the defendant's application dated 17th June 2021 was not duly commissioned before an authorized Commissioner for Oaths. The plaintiffs therefore contended that the said affidavit is invalid, defective, and incapable of being recognized as an affidavit in law. The defendant however urged this Court to allow his application to be heard and determined on its merits and expressed willingness to cure any defect by swearing a supplementary affidavit.
14. The law governing the commissioning of affidavits is set out in the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya. Section 2 defines a Commissioner for Oaths as a person appointed by the Chief Justice and gazetted to administer oaths and take affidavits. Section 4 thereof provides that every Commissioner shall state truly in the jurat at what place and on what date the oath or affidavit is taken. It follows therefore, that the authority to commission affidavits is a statutory function reserved for duly appointed

Commissioners for Oaths. In **Muktar Bishar Sheikh v Independent Electoral & Boundaries Commission & 2 others** (supra), the Court in striking out affidavits relied on the Black's Law dictionary definition of an affidavit as follows -

...Black's Law Dictionary defines an affidavit as a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths such as a Notary Public. An affidavit therefore must be voluntary, written and commissioned. If any of these three ingredients is missing, then that document is not an affidavit. In this case the purported supporting affidavit is not commissioned. That document cannot be called an affidavit as known in law. It is incompetent...

15. An affidavit is not a mere statement but evidence tendered under oath, the validity of which depends upon its being sworn before a person authorized by law to administer oaths. The Court of Appeal in the case of **Flystar Limited v Delphis Bank Limited** (supra) affirmed the High Court's decision that -

The learned Judge determined that the verifying affidavit was:

“no affidavit at all. It is null and void as having been commissioned by a person not authorised by the Law to do so.” (Kenya Commercial Bank Ltd and another v Kenya Hotels Ltd, No. Nai 40 of 2004 (UR 24/2004)).

16. Whereas this Court appreciates the defendant's plea that he acted in good faith and was an innocent litigant, the law does not permit the Court to recognize or act upon an affidavit that does not meet the statutory threshold. Further, the defendant's argument that its application dated 17th June 2021 can stand

independent of the affidavit cannot find favour with this Court since an application brought under Order 26 of the Civil Procedure Rules, 2010, must be grounded upon evidence, which is ordinarily furnished through affidavits. In the absence of a valid affidavit, the application is unsupported and cannot be sustained, as it has no legs to stand out.

17. I am of the considered view that an affidavit sworn before an unauthorized person is null *ab initio*, and such an affidavit cannot be salvaged by Article 159(2)(d) of the Constitution. In the absence of lawful commissioning, there is no valid oath in the eyes of the law. Accordingly, the defendant's application dated 17th June 2021, which is not supported by a valid affidavit, is defective as it lacks evidentiary foundation.
18. In view of the foregoing, I find that the affidavit in support of the defendant's application dated 17th June 2021 purportedly commissioned by Muriithi Dennis is invalid in law for having been commissioned by a person not duly appointed as a Commissioner for Oaths. Consequently, it is hereby struck out and expunged from the Court record.
19. Having found that the supporting affidavit was null *ab initio*, it follows then that the defendant's Notice of Motion dated 17th June 2021 is incompetent for want of a valid evidentiary foundation.
20. The upshot of the foregoing is that the instant application is merited. It is hereby allowed in the following terms –

- i) The supporting affidavit sworn by the defendant on 17th June 2021 before one Muriithi Dennis, allegedly an Advocate, Commissioner for Oaths, and Notary Public is hereby struck out and expunged from the Court record;**

- ii) The defendant's Notice of Motion dated 17th June 2021 is hereby struck out and expunged from the Court record; and**
- iii) Costs of the instant application shall be borne by the defendant.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 24th day of October 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Nyboma holding brief for Mr. Ojiambo for the plaintiff/applicant

Ms Muriithi holding brief for Mr. Marete for the defendant/respondent

Ms B. Wokabi – Court Assistant.