

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC NO 18 OF 2022 (O.S)

MAURICE OJIAMBO ABILA
APPLICANT

= VERSUS =

EDDY OLOO
RESPONDENT

R U L I N G

1. This suit has been heard almost to conclusion although **EDDY OLOO** (the Defendant) was yet to close his case when the trial hit a turbulence on 18th March 2025 after **MR OKEYO** counsel for **MAURICE OJIAMBO ABILA** (the Plaintiff) raised an objection seeking that this Court strikes out the replying affidavits of the Defendant and **ANTHONY OCHIENG OGOLLA (DW3)** as well as **WILSON OGOLLA (DW1)**, the Defendant's witnesses, for failure to comply with the provisions of **Section 5** of the **Oaths and Statutory Declarations Act**. The Court directed that the oral application by **MR OKEYO** be canvassed before the trial could continue. That oral application is the subject of this ruling and the

substance of the suit is therefore not necessary for purposes of this ruling.

2. In his oral application, **MR OKEYO** asked this Court to expunge from the record the replying affidavits filed in response to the Plaintiff's Originating Summons and they be struck out for failure to comply with the provisions of **Section 5** of the **Oaths and Statutory Declarations Act** which requires that a deponent of an affidavit must personally appear before a Commissioner for Oaths when swearing and affidavit. That the Defendant and his witnesses say they signed their replying affidavits in Busia and they were commissioned by an advocate called **PETER MUGALO** at Kakamega. Counsel then cited the cases of **MARY GATHONI & ANOTHER -V- FRIDA ARIRI OTOLO & ANOTHER 2020 eKLR** and **REGINA MUNYIVA NDUNGE -V- KCB 2005** for the proposition that where an affidavit is defective, the Court has no option but to have it struck out.
3. Mr **OURU** for the Defendant replied that to strike out a pleading should be the last resort of a Court. He urged the Court to invoke the provisions of **Article 159(2) (d)** of the

Constitution and ignore technicalities. He added further that whereas **MR OKEYO** was laying much emphasis on the replying affidavits not having been properly commissioned, a Commissioner of Oaths need not be in one office.

4. After addressing the Court orally, the parties were granted time to file their submissions which they did.
5. I have considered the oral and written submission by both **MR OKEYO** and **MR OURU** on whether or not the replying affidavits by the Defendant and his witnesses should be struck out for offending the provisions of **Section 5** of the **Oaths and Statutory Declarations Act**. That provision reads:

5: “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.”

Section 8 of the same **Act** provides that:

8: “A magistrate or Commissioner for Oath may take the declaration of any person voluntarily

making and subscribing it before him in the form in the schedule.”

Counsel for the Plaintiff made the following written submission in support of his oral application:

“By an oral application in Court on 18th March 2025, the Plaintiff/Applicant applied that the replying affidavit of Eddy Oloo dated 4th September 2022 and the affidavit evidence of Wilson Ogola and Anthony Ochieng Ocholla dated 10th September 2022 be struck out and/or expunged from the record for failure to comply with mandatory provisions of Section 5 and Section 8 of the Oaths and Statutory Declarations Act. The basis of our application stemmed from the cross-examination in Court where the witnesses denied knowledge of the Commissioner for Oaths in question and also denied swearing the affidavits in Kakamega where they are stated to have been sworn.

The affidavits before Court are sworn at Kakamega before one PETER W. MUGALO of P/105/4314/00. A look at the Advocates Search Engine indicates that the said Advocate practices at Kakai Mugalo & Co Advocate a firm based at Corner House Kimathi Street in Nairobi. In their cross-examination in Court, Eddy Oloo (PW2) (sic) stated that he signed the replying affidavit at Busia Villa Hotel and not in Kakamega as indicated in the jurat section of the affidavit. The witness equally denies ever meeting one PETER W. MUGALO who signed the document. DW3 (sic) on the other hand testified that he signed his affidavit at Korinda Junction and not in Kakamega as indicated in his evidence affidavit. He also denied knowledge of PETER W. MUGALO, the Commissioner for Oaths before whom the document is said to have been sworn.”

Counsel then concludes his submissions in the penultimate paragraph by stating thus:

“We urge your Lordship to find and hold that the 3 affidavits before Court are in contravention of the mandatory provisions of Section 5 read together with Section 8 of the Oath and Statutory Declarations Act and proceed to have the same expunged from the record in line with the Supreme Court’s decision in Civil Application NO 26 of 2018 - Gedion Sitelu Konchellah -v- Julius Lekakeny Ole Sunkuli & 2 others 2018 eKLR.”

On the flip side, **MR OURU** counsel for the Defendant stated as follows in paragraphs 4 and 5 of his submissions:

4: “In particular, counsel stated that the jurat Section of the respective affidavits offends the provisions of section 5 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya, in that while it is stating that the said affidavits were sworn in Kakamega, the 2 witnesses (the Respondent and DW3) stated that they signed the same within Busia Township.

5: Your Lordship gave parties an opportunity to orally highlight the application and later on retire to canvass the same further through written submissions. While Mr Okeyo counsel for the Applicant largely but preliminarily relied on the ruling in *Mary Gathoni & another -v- Frida Ariri Otolu & another*, Civil Appeal No 66 of 2019 2020 eKLR (W. Musyoka J) and urged your Lordship to allow the application, Mr Ouru counsel for the Respondent preliminarily relied on the provisions of Articles 50(1) of the Constitution of Kenya 2010 as read with 159(2) (a) (d) and (e) and further invited the Court, on a without prejudice basis, to take judicial notice of the fact that Commissioners for Oaths, being Advocates of the High Court of Kenya are mobile and can therefore administer Oaths anywhere within the borders of the Republic of Kenya.”

Counsel for the Defendant then goes further in paragraph 7 of his submissions to state that the Plaintiff is taking advantage of the jurat sections of the replying affidavits which do not occasion any prejudice to the Plaintiff being mere deviation in form and procedures as was held in the case of **NICHOLAS KIPTOO** Arap **KORIR SALAT -V- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & OTHERS 2013 eKLR**. Counsel urged the Court not to allow the Plaintiff to employ tactics to deprive the Defendant of his property.

6. It is clear from the record that both the Defendant (who testified as **DW2** (not **PW2**) as submitted by **MR OKEYO**) and **ANTHONY OCHIENG OCHOLLA** who testified as **DW3** (not **PW3** as submitted by **MR OKEYO**) were cross-examined as to where they signed their respective replying affidavits. The Defendant (**DW2**) said the following when cross-examined by **MR OKEYO** on 18th March 2023:

“I know an advocate called PETER MUGALO. I met him in a hotel in Busia. It was called BUSIA VILLA HOTEL where I signed the replying affidavit in

BUSIA. It was Commissioned in KAKAMEGA. I agree that BUSIA and KAKAMEGA are far apart.”

On his part, when **ANTHONY OCHIENG OCHOLLA (DW3)** was also cross-examined by **MR OKEYO** on the same day, he said:

“I signed the affidavit in the office of the advocate in BUSIA. He has a branch in KORINDA. I do not know an advocate called PETER MUGALO of KAKAMEGA. I signed my affidavit in BUSIA not in KAKAMEGA.”

That issue was not raised by **MR OKEYO** when he cross-examined the Defendant **WILSON OGOLLA OLENDU (DW1)**. However, what is clear from the replying affidavits of the Defendant and his two witnesses is that they were all commissioned at **KAKAMEGA** by an advocate practicing under the name and Style of **PETER W. MUGALO**. **MR OKEYO** has submitted, and it has not been rebutted, that a look at the Advocates Search Engine indicates that Advocate **PETER W. MUGALO** practices at **KAKAI MUGALO & CO ADVOCATES** a firm based at **CORNER HOUSE KIMATHI IN NAIROBI**. That

must be taken as the official communication confirming where the said counsel practices from. And although **MR OURU** submitted, and rightly so, that an Advocate can administer Oaths anywhere, he did not rebut the assertion by **MR OKEYO** that **MR PETER W. MUGALO's** office is infact situated at **CORNER HOUSE KIMATHI** and neither did he provide any information that **MR PETER W. MUGALO** has another office at **KORINDA** and also at **VILLA HOTEL** in **BUSIA**. Indeed, nothing would have been easier than calling the said Advocate to refute **MR OKEYO'S** assertion which looks credible in the circumstances.

7. An oath is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as:

“a solemn promise, often invoking a devine witness, regarding one’s future action or behaviour. A sworn declaration, such as the promise to tell the truth, in a Court of law.”

All the replying affidavits by the Defendant and his witnesses **WILSON OGOLLA OLENDU (DW1)** and **ANTHONY OCHIENG OGOLLA (DW3)** show that they were

commissioned before Advocate **PETER W. MUGALO** at **KAKAMEGA**. However, when he was re-examined by **MR OKEYO**, as I have already stated above, the Defendant said he met the Advocate at **VILLA HOTEL** in **BUSIA** while his witness **ANTHONY OCHIENG OCHOLLA (DW3)** not only said that he did not know **PETER W. MUGALO** but also added that he signed his replying affidavit in **BUSIA**. In the absence of any evidence showing that Advocate **PETER W. MUGALO** has any office in **BUSIA** or **KAKAMEGA** and also in light of the un-rebutted evidence that the said **ADVOCATES** office is situated in **NAIROBI**, this Court must find, which I hereby do, that the affidavits of the Defendant and his witnesses are defective. The replying affidavit by the Defendants witnesses could not have been sworn in **KAKAMEGA** yet the said witnesses claim to have met the Advocate in **BUSIA**. The said Advocates also has no office in **KAKAMEGA** as shown on the replying affidavits. It is not controverted that his office is in **NAIROBI**. It follows that the replying affidavits by the Defendant and his witnesses **WILSON OGOLLA OLENDU (DW1)** and **ANTHONY OCHIENG OGOLLA (DW3)** contravene the provisions of

Sections 5 and 8 of the Oaths and Statutory Declarations Act and are therefore defective. Faced with a similar situation in the case of **GIDEON SITELU KONCHELLAH -V- JULIUS LEKAKENY OLE SUNKULI & 2 OTHERS CIVIL APPLICATION NO 26 of 2018 [2018 KESC 58 KRL]** the **SUPREME COURT** addressed itself as follows at paragraphs 8 of it's ruling thus:

“We have no hesitation in finding that the purported Replying affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matters before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”

The defects alluded to by **SUPREME COURT** are of course different from those obtaining in this case. However, there is no gainsaying that the replying affidavits by the Defendant and his witnesses are defective and are not affidavits within the law. They must be struck out and expunged from the record.

8. Counsel for the Defendant has asked me, instead, to be guided by the decision in the Ugandan Court of Appeal in the case of **SAGGU -V- ROADMASTER CYCLES (U) LTD 2002 I E.A. 258** where **MPAGI - BAHIGEINE J** held that:

“It is trite that the defect in the jurat or any irregularity in the form of the affidavit cannot be allowed to vitiate an affidavit in view of Article 126(e) of the 1995 Constitution which stipulates that substantive justice shall be administered without undue regard to technicalities. I should perhaps mention that the jurat is the short statement at the foot of the affidavit indicating when, where and before whom it was sworn. It would follow that the learned judge had the power

to order that the undated affidavit be dated in Court and that the affidavit be sworn before putting it on record. He was also correct to penalize the offending party in costs.”

I do not see the Ugandan case of **SAGGU -V- ROADMASTER CYCLES LTD** (supra) aiding the Defendant in this case at all. Firstly, this Court must find, which I hereby do, that the decision of a five Bench Court of the **SUPREME COURT OF KENYA** must take precedence over a three-Judge Bench of the Court of Appeal in Uganda all things being equal.

9. Secondly, and most importantly, the circumstances in the case of **SAGGU -V- ROADMASTERS CYCLES (U) LTD** (supra) are markedly different from those in the case before me. In that case, a preliminary objection had been raised that an affidavit was not dated. That defect was discovered at the preliminary stages when the jurisdiction of the Court to determine the dispute was being canvassed. The Court went on to state, citing **IBRAHIM -V- SHEIKH BROS INVESTMENT LTD 1973 E.A 118** at page 120 where it was held that the Court could always allow a party to re-swear and date an affidavit as this

would not go to the jurisdiction of the Court. The Court, in **SAGGU -V- ROADMASTER CYCLES (U) LTD** (supra) also went on to state that:

“Section 8 of the Oaths Act (chapter 52) which renders it mandatory to date the affidavit before tendering it in a Court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors or omissions regarding the date, place and the commissioner, cannot vitiate an application.”

In this case, this Court is not dealing with Preliminary Objection. This is a case where the Defendant and his witnesses have already testified and been cross and re-examined at length over the contents of their affidavits. It is not a case of simply dating and indicating where the three affidavits were sworn and before who. Rather, it is a case where it has clearly emerged from the examination of the Defendant and his witnesses that they could not even have appeared before the Advocate who allegedly commissioned

those affidavits. In brief, the veracity of those affidavits has already been tested and found wanting. The remedy of dating and stating where and by whom the defective affidavits were sworn, even if it was an option, it is no longer available to the Defendant and his witnesses.

10. The up-shot of all the above is that this Court must up-hold the Plaintiff's application and strike out the replying affidavits of the Defendant dated 4th September 2022 and his two witnesses namely **WILSON OGOLLA OLENDU (DW1)** and **ANTHONY OCHIENG OGOLLA (DW3)** both dated 10th September 2022. The same are expunged from the record. There shall be no orders as to costs.

BOAZ N. OLAO

JUDGE

18TH NOVEMBER 2025

**Ruling dated, signed and delivered on this 18th day of
November 2025 by way of electronic mail.**

BOAZ N. OLAO

JUDGE

18TH NOVEMBER 2025

ORIGINAL