Kigumba & another v Marete & 3 others (Enviromental and Land Originating Summons E030 of 2025) [2026] KEELC 348 (KLR) (26 January 2026) (Ruling)

Neutral citation: [2026] KEELC 348 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E030 OF 2025

JO MBOYA, J

JANUARY 26, 2026

BETWEEN

KANYUA RUNDANGU KIGUMBA ..... 1ST APPLICANT

SILAS NJERU RUKANGU ..... 2ND APPLICANT

AND

SILAS KINOTI MARETE ..... 1ST RESPONDENT

PHINEAS MUTHOMI MARETE ..... 2ND RESPONDENT

EDWARD MUTWIRI MARETE ..... 3RD RESPONDENT

MOSES MARETE GITOBU ..... 4TH RESPONDENT

RULING

1. Before me is the Preliminary Objection dated 12/01/2026, by and on behalf of the 1st , 2nd , 3rd and 4th Defendants [sic] respondents; wherein the said Respondents have highlighted various grounds. The grounds underpinning the Preliminary Objection are as hereunder:

    i. That the Origination Summons is incompetent, fatally defective and bad in law, the same having been accompanied by a purported supporting affidavit whose annexed exhibits are unsealed and/or not securely sealed by a Commissioner for oaths, contrary to the mandatory provisions of Rule 9 the Oaths and statutory declaration rules.

    ii. That rule 9 of the oaths and statutory declarations rules imposes a mandatory obligation upon a commissioner for oaths to securely seal and mark all exhibits referred to in an affidavit, and failure to comply with the said rule renders the exhibits invalid and no evidential value.

iii. That exhibits which are not sealed by a commissioner for oaths do not form part of a valid affidavit in law, and are therefore a nullity incapable of being relied upon by the this Honourable court.

iv. That the affidavit in support of the origination summons is rendered fatally defective by reason of the unsealed exhibits, the said exhibits constituting the primary evidential foundation of the claim, thereby leaving the originating summons unsupported by admissible evidence.

v. That proceedings commenced by way of originating summons are evidence – driven and must be supported by valid affidavit with properly commissioned exhibits, and where such affidavit is defective the entire suit is incompetent.

vi. That the defect complained of is not mere procedural technicality, but goes to the root of the proceedings and cannot be cured under Article 159(2) (d) of *the Constitution* of Kenya, 2010, Zaheer Jhanda & another versus Independent Electoral & Boundaries Commission & 3 others [2018] KECA (KLR].

vii. That this Preliminary Objection raise pure points of law, discernible from the face of the pleadings and affidavit on record, requiring no ascertainment of contested fact and being capable of disposing of the entire suit in limine.

2. The Preliminary Objection came up for hearing on 26/01/2026, whereupon the court issued directions pertaining to and concerning the hearing thereof. In particular, the court directed that the preliminary objection be canvassed by way of oral submissions.

3. Learned counsel for the named Respondents adopted the grounds at the foot of the Preliminary Objection and thereafter highlighted four [4] key issues. The issues highlighted by learned counsel are namely: the annextures attached to the supporting affidavit are invalid and contravene the provisions of Regulation 9 of the Oaths and Statutory Declaration; the paragraphs of the affidavit exhibiting the annextures are incompetent/deficient; the failure to comply with rule 9 of the oaths and statutory rules is fundamental and goes to the root of the annextures; and the court ought not to sanitize breach of mandatory rules of procedure.

4. Regarding issue number one, learned counsel for the named Defendants have submitted that the annextures which have been exhibited by the Plaintiff to the affidavit in support of the originating summons have not been serialized and securely sealed under the seal of the commissioner of oaths. In this regard, it has been submitted that the impugned annextures are therefore irregular, invalid and illegal.

5. Secondly, it has been submitted that the provisions of rule 9 of the oaths and statutory declaration deployed the usage of the word 'shall' and thus the rule is peremptory and mandatory. To this end, it has been contended that a violation of the said rule is fundamental and goes to the root of the matter. Moreover, it has been submitted that the breach/violation of the said rule is not curable by invoking the provision of Article 159 [2] [b] of *the Constitution* of Kenya.

6. The next issue that has been urged is to the effect is that the paragraph of the supporting affidavit which have annexed the impugned annextures ought to be struck out and expunged from the record. In particular, it has been submitted that the paragraphs of the supporting affidavit cannot remain standing yet the annextures attached thereto are irregular and invalid.

7. Finally, learned counsel for the named Defendants has submitted that the preliminary objection before the court raises and canvased a pure point of law and that same [Preliminary Objection] if allowed, would dispose of the entire suit.

8. In support of the foregoing submissions, learned counsel for the named Defendants have cited and referenced various decisions, inter allia: Kenya Commercial Bank Limited versus Lapaz Holdings Limited [2024] eKLR : Francis Mbalanya versus Cecilia Wahema [2016] eKLR; Nyakundi and 2 others versus National Social Security Fund [2024] eKLR and Zaheer Jhanda versus IEBC and others [2018] eKLR, respectively.

9. Flowing from the foregoing, learned counsel for the named Defendants has therefore invited the court to find and hold that the Preliminary Objection is meritorious. In this regard, the court has been implored to uphold the preliminary objection; strike out the impugned annextures; expunge the offensive paragraphs of the supporting affidavit and to strike out the originating summons.

10. Learned counsel for the Plaintiff has opposed the preliminary objection and same has contended that a preliminary objection by and of itself should be one that is intended to terminate the entire proceedings in limine. However, in respect of the instant case it has been submitted that the preliminary objection canvassed by the named Defendants is not capable of terminating the entire proceedings. On the contrary, it has been submitted that the preliminary objection is merely directed to the annextures, which even if, same were struck out, the originating summons would still remain in situ.

11. Secondly, learned counsel for the Plaintiff has submitted that the annexutres which have been referenced at the foot of the supporting affidavit have been duly serialized and securely sealed by the seal of the commissioner. In this regard, learned counsel has posited that the impugned annextures comply with and adhere to the provisions of rule 9 of the oaths and statutory declaration regulations.

12. Thirdly, learned counsel for the Plaintiff has submitted that the issue which has been raised and canvassed by the counsel for the named Defendants is procedural in nature and thus same is curable by the provisions of Article 159[2] [d] of *the Constitution* 2010. In particular, it has been contended that the court should endeavor to hear and determine the subject dispute on the basis of substance and merits, as opposed to procedural technicality.

13. Finally, learned counsel for the Plaintiff has submitted that striking out pleadings is a draconian and drastic measure and hence same should only be deployed in clearest of cases. Moreover, the court has been invited to lean on the side of substance, by preserving the suit. In this regard, the court has invited to find and hold that the preliminary objection is not only misconceived, but legally untenable.

14. The counsel for the named Defendants offered a short rejoinder. Counsel submitted that the Plaintiff herein is misleading the court that the annextures have been duly serialized and securely sealed by the commissioner of oaths, yet what has been done is certification. It has been contended that there is a difference between serialization and sealing in terms of rule 9 of the oaths and statutory rules and certification. To this end, counsel invited the court to find that the annextures are invalid.

15. Secondly, learned counsel for the named Defendants has submitted that the rules of procedure were meant to regulate the conduct of business of the court; and thus same ought not to be disregarded with abandon. In the circumstances, it has been contended that the court should not shut its eyes to the breach of the rules, which rules, it has been contended are mandatory and peremptory.

16. In answer to a question from the court, as concerns the holding of the Court of appeal in the case of Oginga versus Moko [2024] KECA, [the December Ruling] where the court of appeal found and held that breach of rule 9 of the oaths and statutory declaration rules was not per se fundamental, learned counsel invited the court to be guided by the holding in the earlier case of Zaheer Jhanda versus IEBC and others [2018] eKLR where it was found that the breach of the said rules goes to the root of the annextures.

17. Having reviewed the notice of preliminary objection and upon consideration of the oral submissions canvassed by/on behalf of the parties, I come to the conclusion that the determination of the objection turns on three [3] key issues: Whether the impugned annextures comply with the Provisions of Rule 9 of the Oaths and Statutory Declaration Rules or otherwise; Whether the non-compliance with Rule 9 [supra] by and of itself is fatal and irredeemable or otherwise; whether the court should strike out the annextures, the offending paragraphs and the entire originating summons or otherwise.

18. Before venturing to address the thematic issues, which have been isolated in the preceding paragraph, it is important to recall and reiterate that what is before me is a dispute touching on and concerning ownership of and title to land. By virtue of being a dispute that touches on land, it behooves the court to endeavor to hear and determine such disputes on merit as opposed to resorting to procedural technicalities. Additionally, it is incumbent upon the court to distinguish between breach of procedural rules, which are merely procedural vis a viz those that are fundamental.

19. Moreover, I am reminded of the holding of court of appeal in the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] KECA 706 (KLR)where the court of appeal [per Ouko JA – as he then was] stated as hereunder:

> In Kenya the attachment to land is passionate, emotional and almost fanatical. Nations, neighbours, siblings, spouses and even strangers fight over land. In some instances, the disputes degenerate into bloodshed and death. This Court in Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others Civil Appeal No. 84 of 2013, explained why land is such an important asset thus;
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> > "Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities."

20. With the foregoing context in mind, I am now well appraised to revert back to the issues for consideration and to determine same, bearing in mind that what is before me is land dispute; and thus sensitive in nature.

21. Back to issue number one. Learned counsel for the named Defendants has submitted that the various annextures that have been attached or annexed to the supporting affidavit have not been serialized and securely sealed in accordance with the provisions of Rule 9 of the Oaths and Statutory Declarations Rules. In This regard, the court has been implored to expunge the annextures.

22. The provisions of rule 9 [supra] provide as hereunder:

> " All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification."

23. The text of the rule provides that all annextures [exhibits] attached to an affidavit must be serialized and securely sealed with the seal of the commissioner of oaths. Notably, the annexture must bear the seal of the commissioner who administered the oath to the affidavit in question.

24. I have looked at the annextures which have been exhibited/attached to the affidavit in support of the originating summons and I beg to state that the annextures have neither been serialized in the manner stipulated nor have same been securely sealed and the seal of the commissioner. On the contrary, what has been done to the annextures amounts to certification to the effect that the documents are true copies of [sic] originals.

25. I must point out that there is a distinction between serialization and sealing of the annextures in terms of rule 9 [supra] on one hand and certification. To my mind, the latter only applies where the documents in question is secondary copy [photocopy] and which requires to be certified as true copy of the original [primary copy].

26. From the foregoing, I encounter no difficulty in returning a finding that the impugned annextures do not comply with and or adhere to the dictates of rule 9 of the oaths and statutory rules. Thus far, I agree with the submission[s] of the Learned Counsel for the named Defendants.

27. Turning to the second issue, namely; whether the failure to comply with the provisions of rule 9 [supra] are fundamental and thus ought to invalidate the annextures or otherwise. I beg to state that the court of appeal addressed the import and implications of rule 9 [supra] in the case of Zaheer Jhanda versus IEBC and others [2018] eKLR. For good measure, the court stated as hereunder:

> '.....although the plaintiff's advocate submitted that the failure to seal and mark the annextures is a defect in form that should be ignored by the court, the law has declared in mandatory terms that annextures must be sealed and numbered. That is the only way they can be allowed on record. It is therefore not true, as submitted by the Plaintiff's counsel, that the failure to seal and number the annextures is a procedural technicality that can be saved by the provisions of Article (159) (2) (d) of *the Constitution* and sections 1A and 1B of the *Civil Procedure Act*...."

We are in agreement with the above sentiments. Rule 9 of the *Oaths and Statutory Declarations Act*, is intended to prevent various kinds of mischief and to ensure that a deponent owns and secures all the exhibits annexed to his affidavit. The rule further aims to prevent litigant from sneaking into the record documents that were not part of the affidavit, thus prejudicing their opponents. We therefore cannot fault the learned judge for expunging the annextures to the affidavit of PWII that were not marked as required by law.'

28. The ratio [holding] of the Court of Appeal in the decision [supra] is succinct. Simply put, the court underscored that the provisions of rule 9 of the oath and statutory declaration rule are couched in mandatory terms and thus same are peremptory in nature and hence a failure to comply therewith renders the impugned annexures invalid.

29. The issue as pertains to implication of rule 9 [supra] was revisited by the Court of Appeal in the case of Oginga v Moko [2024] KECA 1830 (KLR) where the court stated as hereunder:

> Similarly, it is true, as the Solomon Omwega Omache Case held, that the proper procedure in which annextures become part of an affidavit is for them to be identified in the affidavit; intituled; attached with the correct intitulement; and have each annexture separately stamped by a Commissioner of Oaths. However, it is not true that the venial failure to studiously follow each of this formalistic failures would automatically render the annextures inadmissible in evidence. The test is substantive: can it be said that the failure in process was prejudicial to the other side? Was it otherwise so bad that it would make a mockery of procedural due process? And, finally, does the failure betray a lack of good faith or an animus to steal a match on the other side? We think on consideration of each of these factors, the technical deficiencies of the supporting affidavit are to be forgiven under Article 159(1)(d) of *the Constitution*.

30. My understanding of the holding in the latter case, is to the effect that the failure to comply with the provisions of rule 9 of the oath and statutory declaration rules, does not automatically [ipso facto]

invalidate the annexture and render same inadmissible. Pertinently, what the court was saying is to the effect that the court still retains a discretion to consider whether the failure is such that the adverse party will be prejudiced or otherwise.

31. The ratio at the foot of the latter decision drives me to the conclusion that the mere failure to comply with the provisions of rule 9 of the oaths and statutory rules is not fundamental. On the contrary, such a violation can still be cured by invoking and deploying the provisions of article 159 [2] [d] of *the constitution* 2010.

32. I beg to state that though the annextures do not fully comply with the provisions of rule 9 of the oaths and statutory declaration rules, that alone does not mean that the impugned annextures ought to be expunged and the offending party, namely; the Plaintiff to be driven away from the seat of justice.

32. On the other hand, I beg to state that there are instances where the court can still address and adjudicate upon the dispute beforehand despite the infractions by a party. In the case of Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] KESC 2 (KLR) the Supreme Court of Kenya [the apex Court] stated as hereunder:

> 65. "This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.
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> 66. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of article 159 (2) (d) of *the Constitution*, which proclaims that, "... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.
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> 67. As an instance, there are times when the disregard of rule 33 of the SUPREME COURT RULES clearly undermines the Court's ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the court was not without all the requisite documentation, for undertaking a consideration of the matter.
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> 68. We are therefore not inclined to invalidate the appeal on ground only that it does not stand on all fours with rule 33 of this Court's Rules. An invalidation, indeed, would deprive the court of an opportunity to pronounce itself on substantial questions of law raised by the submissions of counsel for all the parties."

33. Flowing from the foregoing analyses, I come to the conclusion that the failure to comply with rule 9 of the oath and statutory rules does not automatically invalidate the impugned annextures. On the contrary, a court of law is still seized of discretion to consider the matter and to make a decision that serves the interest of justice, taking into account the provisions of 159 [2] [d] of *the Constitution*; and by extension the Interests of Justice.

34. In the premises, I am not prepared to expunge the impugned annextures. To this end, I find and hold that the preliminary objection is not merited.

35. Next is the issue as to whether the offending paragraphs of the supporting affidavit ought to be struck out and expunged from the record. I beg to state, that other than the submission touching on the annextures, which aspect I have already dealt with, there was no irregularity or illegality that was pointed out as pertains to the affidavit. Moreover, I have reviewed the affidavit under reference and the contents thereof, and I can confirm that same accords with the provisions of order 19 of the Civil Procedure Rules 2010.

36. Regarding the originating summons, it suffices to posit that no arguments were made as pertains to its competence or otherwise. Nevertheless, there is no gainsaying that the originating summons ex facie complies with the provisions of Order 37 Rule 7 of the Civil Procedure Rules 2010.

37. Finally, there is the question as to whether the striking out of the annextures, would by itself warrant the striking out the paragraphs of the affidavit exhibiting same. To my mind, even if the annextures had been struck out [which I have declined to do] the paragraphs exhibiting the annextures would still remain in situ.

38. Moreover, I am alive to the fact that striking out of a pleading, including an affidavit, where necessary, is a drastic and draconian measure. Such an endeavor ought to be resorted to in the clearest of cases. In addition, it is a jurisdiction that must be exercised sparingly and with necessary circumspection, insofar as striking out of pleading has the potential of driving away a litigant from the seat of justice. [See the holding in DT Dobie & Company (Kenya) Limited v Muchina & another [1980] KECA 3 (KLR)]

39. In view of the foregoing, I wish to state that the preliminary objection taken by and on behalf of the named Defendants is not meritorious. Furthermore, it is important to note that the originating summons beforehand would have been subjected to the directions in terms of Order 37 Rules 16, 17 and 19 of the Civil Procedure Rules, 2010. To this end, the parties would still be called upon to file List of Witnesses; Witness Statements; and List and Bundle of Document[s].

40. In the premises, what comes out and into the fore is to the effect that the preliminary objection by the Defendants has/ had no utilitarian value. The objection itself stood muted by the provisions of Order 37 Rules 17 and 19 of the Civil Procedure Rules, whose contents are explicit.

41. In a nutshell, the issues that were raised and canvassed by learned for the defendants, are issues that could very well be subsumed during the directions. To this end, I reiterate that the preliminary objection was not well taken.

42. On the issue of costs; it is important to underscore that costs follow the event. However, the court is bestowed with discretion while considering whether to award such costs and in what proportion. Furthermore, where the court is inclined to depart from the general rule then the court must provide good grounds for doing so. In this case, even though the preliminary objection has been declined, it suffices to highlight that the Plaintiff was also perfunctory in the manner same prepared and compiled the documentations.

43. In the circumstances, an award of costs in favour of the Plaintiff would be tantamount to countenancing negligent; and slovenly conduct. Consequently, and taking into account the provisions of section 27 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, I am inclined to decree that each party bear own costs of the preliminary objection. [See also the holding of the Supreme Court in case of Jasbir Singh Rai and 3 others Versus Tarlochan Singh Rai and 4 others [2013]eKLR].

Conclusion.

44. In the course of deliberating on the various thematic issues, I have come to the conclusion that even though the impugned annextures did not comply with the provisions of rule 9 of the oaths and statutory declaration rules, that alone [per se] does not invalidate the annextures.

45. Additionally, I have found and held that the court still has a discretion, so as to avert travesty to justice, including driving away a Litigant from the seat of Justice merely because her/ his Counsel failed to wholly internalize the tenor of some Rule.

Final Orders.

46. In the upshot, the final orders that commend themselves to the court are as hereunder:

    i. The preliminary objection dated 12th January, 2026 be and is hereby dismissed.

    ii. Each party shall bear own costs of the preliminary objection.

47. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF JANUARY 2026

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Court Assistant Hussein

Mr. Benson Kinyua for the 1st, 2nd 3rd and 4th Defendants.

Miss Otieno A for the Plaintiffs.