

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCEP MISCELLANOUS NO. E005 OF 2024

BONIFACE **MAKAU**
MWANDI**PLAINTIFF**
-VERSUS-
JULIUS **SONGE**
MUTISO
.....**DEFENDANT**

RULING

1. The Plaintiff filed the present suit vide the plaint dated 18th December, 2024 seeking the following orders against the Defendant:-
 - a) A declaration that the Defendant’s action of blocking the access road is breach of constitutional right and that the same is injurious to public good.
 - b) An order compelling the Defendant to unblock the blockage caused by seasonal stream flowing from Kinyae dam to Kivenzi/Boniface dam.
 - c) That the Area Chief Thavu Sub-County Kathonzweni to oversee compliance of the orders issued herein.
 - d) General, aggravated and exemplary damages in favour of the Plaintiff herein.
 - e) Costs of the suit and interest thereon at court rates.
 - f) Any other relief the court may deem fit and fair to grant.
2. Subsequent to the filing of the suit, the Defendant filed a notice of preliminary objection dated 14th August, 2025 which is based on the following grounds: -
 - 1) **THAT the suit as filed is fatally defective for want of originating process in compliance with Section 19 of the Civil Procedure Act Cap**

21, Order 3 Rule 1 and Order 4 Rule 3 of the Civil Procedure Rules, 2010.

2) THAT equally, the verifying affidavit dated 18th February, 2025 is incurably incompetent for being in acute violation of Section 4 (1) of the Oaths and Statutory Declarations Act.

3) THAT the verifying affidavit being fatally defective renders the Plaintiff incompetent and the entire suit is liable to be struck out.

4) THAT the suit as filed is therefore a nullity in law, incurably defective and unsustainable.

3. The preliminary objection was canvassed by way of written submissions.

4. In the Defendant's submissions dated 3rd November 2025, Counsel contended that the Plaintiff instituted the instant suit through the law firm of Dola Magani & Co. Advocates vide the Plaintiff and verifying affidavit sworn on 18th December 2024. That the verifying affidavit was drawn and commissioned by the same law firm.

5. Counsel identified two issues for determination namely: -

a) whether the Plaintiff and the verifying affidavit thereto is incurably incompetent for being in acute violation of Section 4(1) of the Oaths and Statutory Declarations Act; and

Who should bear the costs of this application.

6. Citing the provisions of Section 4(1) of the Oaths and Statutory Declarations Act, Counsel contended that it is an express and mandatory provision of law that an advocate appearing for a party shall not commission the party's affidavit. Reliance was placed on the case of **James Francis Kariuki & Another -vs- United Insurance Co. Ltd Civil Appeal No. 1450 of 2000** to buttress the submission that the suit herein is incurably defective as the

verifying affidavit was drawn and commissioned by the same advocate who appears for the Plaintiff. Counsel urged the court to dismiss the application with costs.

7. As at the time of writing this ruling, the Plaintiff's submissions were not on the record in non-compliance with the directions issued on 15th October, 2025.
8. The sole issue for determination is whether the suit offends the provisions of Section 4 (1) of the Oaths and Statutory Declarations Act.
9. Section 4 (1) of the Oaths and Statutory Declarations Act outlines as follows: -

'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.'

10. An avid perusal of the verifying affidavit sworn by Boniface Mwandu on 18th December, 2024 reveals that it was drawn by Dola, Magani & Co. Advocates and commissioned by Dola Indidis practicing under the same law firm. That being the case, the Plaintiff's advocate violated the proviso to Section 4(1) of the Oaths and Statutory Declarations Act since he holds an interest in the proceedings on behalf of his client.

11. In the case of Caltex Oil (Kenya) Limited v New Stadium Services Station Limited & Another [2002] eKLR, Justice Onyango Otieno (as he then was) aptly held as follows: -

“I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand by what I did say in the case of James Francis Kariuki & Another Vs. United Insurance Co. Ltd HCCC No. 1450 of 2000 that such an affidavit sworn in violation of section 4 (1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.”

12. Similarly, in the case of Lesrima Simeon Saimanga v Independent and Electoral Boundaries Commission, Returning Officer-Samburu County & Lenolkulal Moses Kasainie [2017] KEHC 2196 (KLR), Lady Justice R.P.V Wendoh observed as follows: -

“Also see Rajput v Barclays Bank of Kenya Ltd & 3 others (2004) KLR where J. Emukule held that failure to comply with Section 4 & 5 of Cap 15 Laws of Kenya is a matter of substance and not form and is not curable. In Ismael Suleiman & others v IEBC E.P. 3/2013 Makau J. struck out a petition where supporting affidavits were not commissioned as required under Cap 15...

In my view however, the above rule cannot act as a cure for the affidavits commissioned contrary to Section 4 of Cap 15 which is a statutory provision while Order 19 is subsidiary legislation. In my considered view,

since the affidavits are commissioned in contravention of Section 4 of Cap 15 they do not amount to affidavits known in law.”

13. More recently in the present case, I took the following position which I still hold, when striking out the Notice of Motion dated 18th December, 2024: -

“Section 4(1) of the Oaths and Statutory Declarations Act is a statutory requirement. It cannot be taken as a mere technicality or a mistake of counsel which can be executed under Article 159 of the Constitution. Dola Indidis is the lawyer who drafted the pleadings in this case. He is also the one who commissioned the affidavit in support of the Notice of Motion. It is therefore clear that the case of Kaiser Investments Limited (Supra) cannot assist the Respondent. The application by the Respondent offended the proviso to Section 4(1) of the Oaths and Statutory Declaration Act. I therefore find that the supporting affidavit to the Notice of Motion is incompetent and is hereby struck out.”

14. As a consequence of violation of the mandatory provisions of Section 4 (1) of the Oaths and Statutory Declarations Act, I hereby find the verifying affidavit sworn by the Plaintiff on 18th December, 2024 incompetent and proceed to strike it out.

15. On that score, the Plaintiff has no foundation since it is not accompanied by a valid verifying affidavit pursuant to Order 4 Rule 1(2) of the Civil Procedure Rules. In accordance with Order 4 Rule 1(6) of the Civil Procedure Rules, I hereby proceed to strike out the Plaintiff dated 18th December, 2024 with costs to the Defendant.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 30TH DAY OF APRIL, 2026.**

IN THE PRESENCE OF:

Mr. Wanyama for Respondent.

Court assistant – Nyaanga and Musyoki

ORIGINAL