

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

CIVIL APPEAL NO. E385 OF 2025

PHILOMENA
CHENANGAI.....1ST
APPELLANT
AL HUSNAIN MOTORS
LTD.....2ND APPELLANT

VERSUS

GRACE NEKESA OJIAMBO & KADZO MWASAMBU POLE
(Suing as Legal Representatives of the Estate of
CORNELIUS MLANDA MWASAMBU -
DECEASED).....RESPONDENTS

(Being an appeal from the ruling of Hon. delivered on
28th February 2025 in MCCC No. E290 of 2022)

JUDGMENT

Background

1. The original Plaintiff, **Cornelius Mlanda Mwasambu**, died on **25th December 2021**.
2. A Plaint dated 21st January 2022 was subsequently filed together with a verifying affidavit bearing the same date.
3. The Appellants raised a Preliminary Objection dated 11th December 2024, contending that the suit contravened Section 5 of the Oaths and Statutory Declarations Act (Cap 15) and Order 3 of the Civil Procedure Rules as the verifying affidavit was executed after the death of the

Plaintiff. The Appellants argued that the suit was therefore incompetent and an abuse of the court process.

4. The trial court found the verifying affidavit defective, struck it out, but declined to strike out the suit and instead allowed substitution and filing of a compliant affidavit.

The Appeal

5. Aggrieved by the said decision, the Appellants lodged the present appeal which was canvassed by way of written submissions.

The Appellants' Submissions

6. The Appellants submitted that the Respondents' suit is incurably defective on account of the verifying affidavit having been executed after the Plaintiff's death.
7. They argued that the verifying affidavit contravened Section 5 of the Oaths and Statutory Declarations Act, which requires that an affidavit must indicate when and where it was sworn and Order 3 Rule 2 of the Civil Procedure Rules, which makes the filing of a verifying affidavit mandatory.
8. It was further submitted that an affidavit cannot be sworn on behalf of a deceased person, and that any such document is a nullity.
9. The Appellants relied on the decisions in ***Nahashon Owuya Amanga vs. Board of Management Rift Valley Institute of Science & Technology [2019] eKLR*** and ***Stephen M. Mogaka vs. IEBC & 2 Others [2017] eKLR*** for the for the proposition that

commissioning of affidavits must strictly comply with the law.

10. The Appellants urged the Court to find that the defect goes to the root of the suit and is not curable.

Respondents' Submissions

11. The Respondents submitted that the deceased had signed the verifying affidavit before his demise but inadvertently failed to date it.
12. They contended that the omission was procedural and curable, and that striking out the suit would defeat substantive justice.
13. Reliance was placed on ***Philip Keipto Chemwolo & Another vs. Augustine Kubende [1986] eKLR*** and ***Kenya Commercial Bank Ltd vs. Ann Kajuju Charles [2009] eKLR*** for the argument that procedural lapses should not defeat a litigant's claim.
14. The Respondents also invoked Article 159(2)(d) of the Constitution, and Sections 1A and 1B of the Civil Procedure Act, urging the Court to uphold substantive justice.
15. I find that the main issues for determination are: -
 - a) Whether the verifying affidavit contravened Section 5 of the Oaths and Statutory Declarations Act and Order 3 Rule 2 of the Civil Procedure Rules;***
 - b) Whether the defect, if any, rendered the suit incompetent ab initio;***

- c) Whether the cause of action survived the deceased Plaintiff;**
- d) Whether the learned trial magistrate erred in dismissing the Preliminary Objection and allowing amendment/substitution.**

Analysis and Determination

16. On validity of the verifying affidavit, Section 5 of the Oaths and Statutory Declarations Act (the Act) requires every commissioner for oaths shall state truly in the jurat at what place and on what date the oath or affidavit is taken or made.
17. It is therefore a mandatory requirement that an affidavit must disclose the place and date of swearing. In the instant case, the verifying affidavit was dated 21st January 2022, a date subsequent to the Plaintiff's death that was reported to have occurred on 25th December 2021.
18. I find that the Respondents' explanation that the affidavit had been signed earlier but dated later does not cure the defect, as the law requires that the oath be taken before a commissioner on the date indicated.
19. I therefore find that the verifying affidavit was defective for want of compliance with Section 5 of the Act. The question which arises is whether the defect is fatal thereby rendering the entire suit incompetent.
20. In ***Josephat Kipchirchir Sigilai vs. Gotab Sanik Enterprises Ltd & 4 Others [2007] eKLR***, the Court of Appeal held that the absence or defect of a verifying

affidavit does not automatically invalidate a plaint and may be cured.

21. Further, in ***Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696***, the Court emphasized that striking out is a draconian remedy that should be exercised sparingly.
22. Indeed, the main purpose of a verifying affidavit is to confirm the correctness of pleadings. It is my considered view that a defect in the verifying affidavit does not necessarily extinguish the cause of action.
23. In the present case, the defect relates to the form and timing of attestation, not the substance of the claim and I am therefore persuaded that the defect, though serious, is not fatal and is amenable to cure particularly where the cause of action survives the deceased and no prejudice is occasioned to the opposing party.
24. Turning to the issue of survival of the cause of action, Order 24 Rule 3 of the Civil Procedure Rules provides for substitution where a party dies and the cause of action survives.
25. The claim herein arises from a personal injury cause of action, which survives for the benefit of the estate.
- 26.** I therefore find that the cause of action survived the deceased Plaintiff, and substitution was properly invoked.
27. The trial court struck out the defective verifying affidavit, allowed filing of a compliant affidavit and permitted substitution of the deceased Plaintiff. I find that these orders were consistent with the overriding objective under

Sections 1A and 1B of the Civil Procedure Act and the constitutional imperative under Article 159(2)(d) of the Constitution which requires the delivery of substantive justice without undue regard to procedural technicalities.

28. I must hasten to add that parties and counsel must nonetheless strive to comply strictly with statutory requirements governing affidavits. Proper commissioning of affidavits is not a mere technicality but an essential safeguard of the integrity of judicial proceedings.

29. In ***Philip Keipto Chemwolo vs. Augustine Kubende [1986] eKLR***, the Court held that mistakes of advocates should not necessarily shut out a litigant from the seat of justice. I therefore find no misdirection or error in principle on the part of the learned magistrate.

30. In the end, I find that the appeal is devoid of merit and I accordingly make the following orders:

- a) The appeal is dismissed in its entirety;***
- b) The ruling of the Chief Magistrate delivered on 28th February 2025 is hereby upheld;***
- c) The Respondents shall proceed with the suit upon filing a compliant verifying affidavit;***
- d) Costs of the appeal shall be in the cause.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY 2026.

HON W. A. OKWANY
JUDGE

In the presence of
Ms Njoki for Appellant
Ms Sagwa for Respondent
Abdirzak - Court Assistant

ORIGINAL