



**Flexilease Limited v Mwangi & another; Kotecha (Intended Defendant) (Environment and Land Case E499 of 2024) [2025] KEELC 5569 (KLR) (21 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5569 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E499 OF 2024**

**MN KULLOW, J  
JULY 21, 2025**

**BETWEEN**

**FLEXILEASE LIMITED ..... PLAINTIFF**

**AND**

**MARTIN NGIGE MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**ALPHA GRAIN MILLERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**SHASHIKANT SAMJI KOTECHA ..... INTENDED DEFENDANT**

**RULING**

1. What is before me is the application dated 25<sup>th</sup> March, 2025, brought under a certificate of urgency pursuant to Order 19 Rule 9, Order 51 Rule 4 of the [Civil Procedure Rules, 2010](#), seeking, among others, spent, the following substantive orders:
  - a. That the Supporting Affidavit sworn by Mr. Shashikant Samji Kotecha on 18th January, 2025 in support of the Intended 3rd Defendant's Notice of Motion dated 21st January, 2025 be declared fatally defective and incurable.
  - b. That the said affidavit be expunged from the court record.
  - c. That, consequently, the entire application dated 21st January, 2025 be struck out with costs.
2. The 1<sup>st</sup> Defendant/Applicant argues that the affidavit was sworn before the application it supports, which in their view, renders it fatally defective and warrants the dismissal of the substantive application for joinder.
3. The Application is opposed contending that the discrepancy in dates is a mere procedural irregularity that does not render the affidavit defective, and thus the substantive application remains competent.



## Issues for Determination

4. From the foregoing the court is called upon to determine:

Whether the supporting affidavit sworn on 18<sup>th</sup> January, 2025, in support of the application dated 21<sup>st</sup> January, 2025, renders the application incurably defective and liable to be struck out.

## Analysis and Determination

5. The core of the 1<sup>st</sup> Defendant's objection is that the affidavit predates the application it supports. They argue this temporal sequence is procedurally flawed and undermines the validity of the substantive application.

6. This Court is, however, guided by both statutory provisions and judicial precedent which squarely address this issue.

7. The law governing affidavits is the *Oaths and Statutory Declarations Act*. Section 5 provides:

“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.”

8. In addressing the purpose of and Affidavit the court in: *Shah & another v Kenya Deposit Insurance Corporation & another* (Constitutional Petition E203 of 2021) [2023] KEHC 485 (KLR) (Constitutional and Human Rights) (27 January 2023) (Ruling) stated at paragraph 33:

“The question on the table is whether the fact that the affidavit is dated before the Petition in support of which it was filed, renders the Petition fatally defective. To answer this question posed, it is necessary to consider the purpose of an affidavit. Every affidavit sworn presents facts which are within the knowledge of the deponent and those that are not, the source thereof must be indicated. It is for this reason that every affidavit must be expressed in the first person whether singular or plural.”

9. The guiding principle is further reinforced by Order 19 Rule 7 of the *Civil Procedure Rules* which provides:

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect of misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”

10. Moreover, Article 159(2)(d) of the *Constitution* of Kenya directs courts to administer justice without undue regard to procedural technicalities.

This Court is enjoined to do substantive justice to all parties and a party ought not be driven from the seat of justice on a mere technicality as a date. In this regard, I adopt the following sentiments expressed by Kimondo, J. in the case of *Bakex Millers Limited v Esgee Industries Limited* [2014] eKLR: “Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Fletcher Moulton L.J. in *Dyson Vs. Attorney General* [1911] 1 KB 410 at 418 when he delivered himself thus;



“To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad”

11. Similarly, In *Kabansora Flour Mills Ltd v. Jambo Biscuits Ltd* [2004] eKLR, the court rejected a similar objection to an affidavit sworn before the corresponding application. It held:

“..... I believe that the attempt to strike out an affidavit whose date is prior to the application is no more than a feeble attempt at attacking the said affidavit. But if I should be wrong on that score, and if indeed the affidavit were to be deemed defective, .....”

12. Importantly, it has not been stated that the deponents of the said affidavit deponed to facts that were not within their personal knowledge. It has also not been demonstrated that the affidavit being dated before the application has caused any prejudice to the 1<sup>st</sup> Defendant or affected the fairness of proceedings.
13. This Court finds that the date discrepancy, though noted, does not occasion a miscarriage of justice or rise to the level of fatality. The application remains capable of being fairly and effectively adjudicated on its merits.
14. The affidavit dated 18<sup>th</sup> January, 2025 was sworn before a Notary Public in the United Kingdom. It complies with Section 5 of the *Act*, which governs the commissioning of affidavits. The supporting affidavit introduces facts in support of an application filed three days later. No prejudice has been demonstrated, nor has the authenticity or veracity of the contents been challenged.

## **Conclusion**

15. The objection by the 1<sup>st</sup> Defendant is a technical one, and while it raises a valid procedural point, it does not justify the drastic remedy of striking out the affidavit or the substantive application. Courts have moved away from technical formalism, especially where no prejudice is suffered and the rules permit curative discretion.
16. Accordingly, I find that the application dated 25<sup>th</sup> March, 2025 lacks merit and is hereby dismissed. Costs shall be in the cause.

It is so ordered!

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JULY, 2025.**

**MOHAMMED N. KULLOW**

**JUDGE**

Ruling delivered in the presence of: -

Ms. Amwama for the Plaintiff

Mr. Buluma for the Defendants

Philomena W. Court Assistant

