



**Nickson v Collins & 3 others (Environment & Land Case
1 of 2024) [2024] KEELC 690 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 690 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 1 OF 2024
FO NYAGAKA, J
FEBRUARY 16, 2024**

BETWEEN

AMUKHAYA SAGINI NICKSON PLAINTIFF

AND

SAMMY COLLINS 1ST DEFENDANT

TITUS BARAZA 2ND DEFENDANT

EDWIN M MAKHANU 3RD DEFENDANT

CALEB SIMIYU MAKHANU 4TH DEFENDANT

RULING

1. Before me is an application dated 26/01/2024. It was brought by the 3rd and 4th Defendants under Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 5 Rule 16, Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. It sought the following prayers:-
 1. ...spent
 2. That this Honourable Court be pleased to set aside and/or discharge the ex-parte proceedings dated 24th January, 2024 and in its place an order of status quo be issued pending the hearing and determination of the suit herein.
 3. ...spent
 4. That an order be issued from this Honourable Court directing that the purported service of the Plaintiff's Application, Summons and Plaint on 5th and 19th January, 2024 was defective and improper, thus the Plaintiff be ordered to serve the said Court documents properly upon the Defendants.



5. That the Defendant and/or the Estate of the late Hellen Inzayi Mulongo be granted leave to file their Response and Defence and oppose the said Application and Complaint within a period deemed fit by this Honourable Court.
6. That the costs of this Application be borne by the Plaintiff.
2. The Application was based on a number of grounds. These were that the Process Server lied on oath that on 05/01/2024 and 19/01/2024 he served the Application, Summons to Enter Appearance and Complaint dated 03/01/2024 because the 1st, 2nd and 4th Defendants left their home in Botwo village for Nairobi on 04/01/2024 for resumption of their work while the 3rd Defendant had left on 15/12/2023 to Machakos and all had never returned home since; that due to the falsehoods and lies of the Process Server the Court had been misled to issue a restraining order against the Estate of the late Hellen Inzayi Mulongo on account of alleged failure of the latter to appear after alleged service; that Mr. Benjamin Serem the village elder denied totally the allegations of the process server that on 19/01/2023 he pointed out to the process server the Defendants for service and was willing to be examined on the alleged fact; the Plaintiff had hitherto never gained actual possession of the parcel of land being Trans Nzoia/Botwo/521 since he allegedly bought it from Henry Mulongo in September, 2023; that land parcel No. Trans Nzoia/Botwo/521 created from a subdivision of parcel No. Trans-Nzoia/Botwo/53 was bought jointly by Hellen Inzayi Mulongo and Henry Mulongo Makhanu but at the time of applying for issuance of the title Henry Mulongo Makhanu clandestinely, fraudulently, unjustifiably and without lawful cause excluded the former's name from the title deed so that at the opportune time he would sell it as he wished; that the process of applying for letters of Administration was commenced and on-going and when that was to be completed the administrators would move the appropriate court for the late Hellen's life interest of the Estate in relation to parcel No. 53 out of which No. 521 was created since the deceased contributed to the acquisition of the property hence Henry had no capacity to sell the parcel without involving her estate; it was imperative that the orders sought be granted because the Plaintiff's claim of ownership of parcel No. 521 and possession of parcel No. 54 which belongs to Titus Barasa Makhanu who bought it from Nichodemus Wepukhulu Wafufula the previous owner who had purchased it from Henry Mulongo Makhanu; and that justice and fairness demanded that the application be granted.
3. The Application was Supported by the Affidavit of on Caleb Simiyu Makhanu who stated that he had been authorized by Edwin Mulongo to swear the Affidavit on his behalf too. He annexed the copy of the written authority as CSM 1. He deponed further that on 24/01/2024 his Advocates received information from another Advocate by name Wanyama Dennis Mutaki who practices in Kitale and represents him in a criminal matters that on that date in the morning the said D. M. Wanyama, while attending the virtual Court session heard the name Makhanu being mentioned in Kitale ELCLC No. E001 of 2024 and out of curiosity established that adverse orders had been issued for non-attendance of the Defendants then. That on 05/01/2024 the deponents' advocates called the Registry over the instant matter and indeed established that the matter came up for hearing on 24/01/2024 and orders issued as were on the material date (this Court needs not repeat them). He annexed a copy of the order as CSM 2. That it was on that date that his Advocates called him and his brothers Edwin and Sammy Kollins to inquire whether they had ever been served and to their surprise no service had ever been done.
4. That the Advocates perused the Court file and noted the contents of the Affidavit of Service by one George Mumali the process server and noted that he misled the Court outrightly by deponing the contents on the act of service which he reproduced in eight (8) short paragraphs numbered (a) - (h), which content I will summarize below when I will analyze the issues herein. He attached and marked as CSM a copy of the Affidavit of Service in issue.



5. He stated that the depositions of the process server were lies and designed at “stealing the match” in favour of the four Applicants because the 2nd Defendant was an Advocate of the High Court of Kenya practicing as such in Nairobi while the 1st Defendant was an Assistant Commissioner then stationed in Kasarani Sub-County Nairobi while the 3rd Defendant was a high school teacher at Muumbuni High School in Machakos and the deponent was a teacher at Lang’ata High School in Nairobi. That except the 4th who had left their home in Botwo Village on 15/12/2023 all the Defendants left on 04/01/2023 and the four had not gone back home since they left.
6. He deponed further that on 25/01/2024 he called on mobile the village elder one Benjamin Serem who was named in the Affidavit sworn by the process server as the person who pointed out the defendants to the process server and he confirmed that he never pointed out anyone to the process server as alleged, and that the said Serem was willing to testify as such. That in light of the above the allegations of the process server as to service were blatant lies made with the sole purpose of misleading the Court to grant order herein ex parte without giving the defendants an opportunity to be heard.
7. Further, he deponed that between September and October, 2023 they (not specified) received information from their brother one Fred Wafula Makhanu that their father had sold their family land parcel number Trans Nzoia/Botwo/53 (previously known as Botwo Farm Plot No. 42) to the Plaintiff and he (father) relocated to Bukura Trading Centre in Kakamega where he was living with his new wife one Hellen Nasambu Waswa whose copy of identity card details he gave in the Affidavit. That the sale was contrary to the life interest and stake of the Estate of their late mother Hellen Inzayi Mulongo as no letters of administration to her estate had been taken out to determine her stake yet their mother contributed directly and indirectly to the acquisition of the land but their father fraudulently, clandestinely, unjustifiably and without lawful cause excluded her name from the registration on the title copies of the agreements dated 06/04/1985 and 04/04/1989.
8. Further, that the Plaintiff began claiming the land while he was well aware that on 25/02/2009 Titus Makhanu, the 2nd Defendant, bought land parcel No. Trans Nzoia/Botwo/54 from one Nicodemus Wepukhulu Wafutula at a sum of Kshs. 1,000,000/= and the said Wepukhulu had bought the same previously from Henry Mulongo Makhanu at a sum of Kshs. 280,000/= on 08/11/2009.
9. That in light of the foregoing the Court ought to set aside the orders granted on 24/01/2024.
10. The Application was opposed through the Affidavit of learned counsel for the Plaintiff/Respondent. Learned counsel actually waded into the controversy of service by swearing an Affidavit on 30/01/2024. He deponed in paragraph 1 that on 05/01/2024 the 1st, 2nd and 3rd Defendants, except the 4th, were present when service was effected and the 1st Defendant acknowledged service by signing and he did so on behalf of the rest. He deponed that the application was a deliberate move to hoodwink and deny the Court the presence of the 1st Defendant. He attached the copy of directions which were issued on 03/01/2024 by my brother judge during the vacation.
11. He deponed further that it was interesting that the 4th Defendant would be unaware, through his brothers, of the existence of the matter herein yet it arose from a transaction they were jointly involved in. That on 18/01/2024 when the matter was mentioned virtually, he saw the 2nd Defendant who is an Advocate of the High Court logged in though out the proceedings and he must have noted the matter on the Cause List and his presence therefore confirms that the other Defendants had been aware of the matter, although he never said anything even when his name was adversely mentioned. He swore that he was willing to call the process server and the village elder to be in court to vouch for their averments. He summed it that the Applicant’s affidavit was frivolous, vexatious and filed in bad faith.



12. When the Application came for further directions, the Court ordered the Defendants and the Process Server to attend Court and be cross-examined as to the alleged service of 19/01/2024. This was because the request was made by the Defendants after vehemently denying having ever been served and alleging that the Process Server had lied to the Court. Thus, on 31/01/2024 all the Defendants and the Process Server, together with the Village elder attended Court for examination but the Court discharged the said Mr. Benjamin Serem after hearing the oral examination and cross-examination the other individuals summoned to appear.
13. Before the Plaintiff/Respondent would file a Replying Affidavit, all the Defendants and the Process Server were examined and cross-examined. During the examination, the 1st Defendant testified on oath that he worked as Senior Assistance Commissioner and was stationed in Kasarani Nairobi. He testified that on 19/01/2024 at about 10:17 am he was at work in Nairobi. He gave his mobile number and stated that he usually carried it along with him. On cross-examination he stated that although he did not have any proof that he was at work, pictorials of his workstation on that material date would show that he was on duty. He stated that he did not carry his attendance record but his Safaricom line records would place him in Nairobi at work. Moreover, his wife would attest to that fact because she slept with him in Nairobi that date. In re-examination he stated that he reported on 04/01/2024 and never came back home.
14. The 2nd Defendant testified that he was an Advocate of the High Court of Kenya practicing as such in the firm name and style of Titus Makhanu and Associates whose offices were in Nairobi at View Park Towers building. He stated on oath that on 19/01/2024 at 10:17 AM he was in his office which was situate on the 19th floor. Further that he had Closed Circuit Television (CCTV) footages to show that on the material date he was in the office as stated. That on the said date at about lunch time he left the office to go to Two Rivers Mall in Ruaraka. At about 2:14 PM he was at Shell Petrol Station off Waiyaki Way where he fueled his car for Kshs. 5,000/= and paid for it through his M-Pesa whose message feedback he received on his phone. He produced a print-out of the message and a receipt to that effect.
15. Upon cross-examination he repeated that at the material time he fueled his car at Shell Petrol Station off Waiyaki Way which is situate opposite Safaricom House. He admitted that the receipt did not indicate the registration number of the car he drove but the M-Pesa message he had on his phone clearly showed that he fueled the car. He showed the learned counsel for the Respondent the text message in his phone about the transaction.
16. On further examination he stated that he fueled from the said petrol station and he printed the M-Pesa message he had given to the Court.
17. The 3rd Defendant testified that he was a teacher by profession and was at the time teaching in Mumbuni High School in Machakos County. He stated that on the material date at 10:17 am he was at school, having reported on duty at 07:30 hours. He left the school at 5.00 PM. He gave his mobile number as evidence for checking records. He produced a letter dated 23/01/2024 on the letterhead of the school. It was issued by the School Deputy Principal one Nicholas Masuki. The letter gave the Teachers Service Commission (TSC) number, national Identity Card number and name of the 3rd Defendant and indicated that on the Friday 19/01/2024 he reported to work at 7:30 AM, remained at school throughout the day and left school at 5:00 PM. Further that he did not seek permission to be out of station on the said date. The witness also produced a print-out of the M-Pesa message on his phone to show that on the material date he fueled his car at 10:03 PM at Machakos Total Petrol Station but he did not have a receipt to evidence the payment.



18. On cross-examination he stated that the School had a duty roster but he did not carry any with him to Court. He stated that the Deputy Principal confirmed in the letter he issued that from the duty roster he was on duty throughout the day.
19. The 4th Defendant testified he too was a high school teacher and was stationed at Langata Boys High School in Langata in Nairobi. Further that on 19/01/2024 he was on duty. That at the material time he was supervising examinations which began at 11 AM and ended at 1 PM. He showed learned counsel and court a soft copy of the examination time-table from his mobile phone whose number he gave. He also produced a letter dated 30/01/2024 issued by the school Principal one Wycliffe Obingo. It too was on the School letterhead and stamped and signed by the said Principal. It gave the witness' name, national identity card and TSC number. It also indicated that on 19/01/2024 the said witness (teacher) was in school from 08:00 am to 5:00 pm.
20. On cross-examination the 4th Defendant indicated that he had a soft copy of his letter of employment, which he produced and showed both learned counsel for the Respondent and the Court. He stated that he hailed from Botwo Village and knew the village elder whose name he gave as Benjamin Serem. He stated he had never had a grudge against him. Further cross-examination revealed that schools re-opened on 08/01/2024 and he reported to school the following day because the school he taught was a boarding one. He gave his School Principal's name as Mr. Wycliffe Obingo.
21. The Court summoned the Process Server one George Mumali who testified that not only was he a process server but a Certified Mediator. He stated that on the material date at about 10:17 am he went in the company of the Village elder, Benjamin Serem, to the homestead of the father to the Defendants. At the homestead he met one Sammy Collins, whom he had known through earlier service, in the company of his brother Paul Mahanu. He explained to him his mission. Further that Mr. Collins informed him that the other Defendants "were just around". That Collins received the Court process documents, being the Application, hearing Notice and the accompanying documents and stated further that the Defendants were aware of the matter. He accepted service in the presence of the village elder. He again changed his side of the version of events to state that when he arrived at the homestead Mr. Collins was at the farm.
22. He admitted that his assertion in the Affidavit of Service that he met all the Defendants was wrong. That he only met Collins.
23. On cross-examination he identified Sammy Collins in the Court room. He admitted that the Court relied on the Affidavit he swore on 23/01/2024. He confirmed he did not meet all the four Defendants. He stated that it was an error that he indicated that he met all of them. He alleged it was a typing error. He admitted further that he was supposed to serve all the Defendants individually but Sammy received the service on their behalf.
24. Further he stated he was not a liar and that he had corrected himself in the testimony. He admitted he was aware of the offence of perjury and knew that if he lied his licence would be taken away. On further cross-examination by the 2nd Defendant he re-stated that he did not serve him with any papers on the material date and even the earlier one. He repeated that it was an error he made when he swore that he had served the 2nd Defendant but that he had corrected himself. He admitted that the information he gave in the two Affidavits of Service he swore was not the truth. But he insisted that he met the 2nd Defendant on 19/01/2024.
25. Upon the close of the examination and cross-examination of the Defendants and the Process Server, the Court gave the Respondent leave to file a Response to the Application before the inter partes hearing. The Plaintiff filed a Replying Affidavit sworn on 08/02/2024. In it he deponed two main facts, being



that, the Application the Court was to determine in the instant Ruling was the one dated 26/01/2024 and in so doing the issue was in regard to the service alleged to have been done on 05/01/2024 and 19/01/2024: it was not a determination of the Application dated 03/01/2024. He then deponed that the issue of service had been comprehensively dealt with when the Defendants and Process Server were examined on 31/01/2024 hence he trusted that the Court had sufficient facts to use to determine the application. He discounted the Affidavit sworn by Caleb Makhanu on 26/01/2024 and stated that it pointed more to the Application dated 03/01/2024 than the instant one. Further that he was inly an innocent purchaser for value without notice of the family disagreement and the issue of the father and late mother of the Defendants was unknown to him.

26. The parties did not submit on the Application as each indicated that the material before the Court was sufficient for it to determine the Application.

Analysis and Determination

27. I have considered the Application, the law and facts herein. As a preliminary point this Court points out that it is improper and irregular for learned counsel to depone to or swear on matters that are contested before a court of law unless he is willing to step aside and be called as a witness. Rule 9 of the Advocate (Practice) Rules, 1966 as contained in the *Advocates Act*, Chapter 16 of the Laws of Kenya prohibits this kind of conduct where an advocate acts in a matter he can be called as a witness.
28. Moreover, courts have emphasized this important principle previously. In *Amina Adam & 3 Others v Rosamma Alexander & 2 Others*[1993] ECLR, the learned judge stated:

“Affidavits must deal only with facts which the deponents can prove of their own knowledge... One does not deny the right of an advocate to swear an affidavit. It is a right which, however, must be exercised circumspectly and in carefully chosen situations. If not done with caution an advocate may find himself engaging in an unhandsome conduct or unwittingly misleading the Court on account of excessive partisanship and unquestioning belief of his client or other informants. His vision may be so clouded by his supportive inclination towards his clients that he falls in the danger of divulging confidential matters given him by his client, without the latter’s authorization. He risks a grave dereliction of his duty to the Court. He risks a conflict of interests. He may be embarrassed in the execution of his instructions, presentation of fair judgment, fulfillment of his duty to the Court, and carrying the responsibility of truth as a deponing witness. In contentious matters such as the instant case, it is irregular for an advocate to appear in the dual capacity of counsel and giving evidence as a witness whether viva voce or by affidavit. An advocate is an officer of the Court”.

29. In *Regina Waithira Mwangi Gitau v Boniface Nthenge* [2015] eCLR the Honorable judge observed:

“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In *Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd* 1998 e CLR and *Kisya Investments Ltd & Others vs Kenya Finance Corporation Ltd*, it was held that

“.....it is not competent for a party’s advocate to depose to evidentiary fact at any stage of the suit”.



In addition, Rule 9 of the Advocates Practice Rules prohibit advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.”

30. In *Habiba Ali Mursai & 4 others v Mariam Noor Abdi* [2021] eKLR, the learned judge held:-

- “25. I must also add my voice to the same trite, if not, hackneyed legal position, which frowns upon advocates abusing their privileged positions, by venturing into and swearing affidavits pertaining to contentious Evidential facts and/or issues, in matters where same have been retained as advocates.
26. Certainly, where an advocate swears an Affidavit relating to contentious evidential facts or issues, such an Advocate runs the risk of being invited into the witness box and thereafter be subjected to cross-examination. For coherence, such an invite, shall, if it does occur, expose the concerned advocate to the vagaries of litigation, including but not limited to cross-examination.
27. In my humble view, this trend ought to be eschewed altogether and if not, Counsel must delineate the true scope and boundaries, for which same are permitted to swear Affidavits, in respect of and/or pertaining to matters where the Counsel is engaged as an advocate for either of the parties.”

31. Learned counsel herein is lucky that the issue of the service of 05/01/2024 was not in contention in the instant Application. This Court wonders what he would have said if he were to be called upon to defend the position he has taken that the 1st, 2nd and 3rd Defendants were served and present when the 1st Defendant allegedly received the court process on behalf of the other Defendants when there is no authority whatsoever that he was the agent of the others as required under Order 5 Rule 8(1) or the controversy that emerged both by Affidavit of 26/01/2024 and oral testimony on 31/01/2024 that indeed the 2nd Defendant was at work in Nairobi at View Park Towers and the 3rd Defendant in Mumbuni High School compound on the material date. Additionally, the Court wonders what learned counsel would say of the service of the material date when the process server deponed that on 05/01/2024 he received “directions dated 04/01/2024...together with application under certificate of urgency, supporting affidavit, annexures thereto... together with summons to enter appearance, Plaintiff, Verifying Affidavit...” and served them when it is clear from the Court record that summons to enter appearance have never been extracted and signed herein. It should be abundantly clear to learned counsel that depositions on matters of controversy between their clients is a no-go zone for them unless it clearly touches on issues that the (learned counsel) have personally engaged in and their evidence on it is required.

32. As to the online presence of the 2nd Defendant on 18/01/2024 and his alleged failure to say anything in response, this Court is appalled that learned counsel for the Respondent would notice that the party was online and not notify the Court of the same while he handled the matter. It is akin to sharp practice. Learned counsel should have had the courtesy to introduce the parties who, according to him, were online in the matter for purposes of the Court indicating the coram as it was. This Court is unable to be prepared to agree with him.

33. I now proceed to use the simplest format of determining the Application herein. It is by identifying the Issue(s), the law (Rule), Applying the law to the facts and drawing a Conclusion thereon (IRAC).



34. The Issue in the instant Application is that the Applicants contend that they were not served with the Application, and indeed any documents relating to the suit herein before the Plaintiff moved the Court to grant the orders which it did on 24/01/2024.
35. The law on service of documents, be it Summons to Enter Appearance or Applications is broadly Order 5 of the Civil Procedure Rules, 2010. Specifically, Order 5 Rule 6 provides that:
- “Service of the summons shall be made by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.”
36. Order 5 Rule 7 which is relevant to the alleged service in instant suit then provides for service of documents on several Defendants.
- “Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.”
37. Further, Order 5 Rule 8(1) is to the effect that that:
- “Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”
38. The three provisions cited above clearly indicate that service ought to be effected on the person of each of the individuals required to be served unless the said person has a duly authorized agent to accept service. Where that is not done, the service is defective. Worse is where service is not done at all. In such circumstances the person who moves the Court to obtain orders or proceedings in his favour in absence of the fulfillment of the requirement of service is one who steals a march on the other thereby denying that other the one of his fundamental rights - the right to be heard - or in order words contravening the rule of natural justice that a party ought to be given an opportunity to be heard. If it ever were to happen, the Court must frown very strongly about such abhorrent conduct and even reprimand the perpetrator and sanction the conduct.
39. Applying the law to the instant facts or case, it is clear that the Application dated 26/01/2024 is grounded on an allegation that the Respondent relied on an Affidavit of Service sworn by one George Mumali which contained falsehoods or lies about the service of 19/01/2024. It was not in relation to the service alleged to have been done on 05/01/2024. On the one of 05/01/2024, the Court ruled on 18/01/2024 that it was defective and or unsatisfactory and directed that the same be effected once more hence the one of 19/01/2024.
40. In regard, specifically to the latter service whose feedback to the Court was given via the Affidavit of Service sworn on 23/01/2024, at paragraph 3 of the Affidavit the deponent stated that on the material date at about 10:17 am he visited the homestead of the father to the Defendants, in the company of the Village Elder one Benjamin Serem, and met all the four Defendants and served them. He stated that the village elder was the one who pointed out each of them to him.
41. To clearly demonstrate that he served each Defendant, the process server deponed at paragraph 4 as follows, “...all the Respondents were specifically pointed out to me by Mr. Benjamin Serem, ... where the Respondents ordinarily reside.” He went on to state at paragraph 5 as follows, “the village elder was introduced to me by the Applicant before service of the court process upon the Respondents, and which Respondents i.e. the 1st, 2nd and 3rd I had personally served with similar Court processes on 05/01/2024... save the 4th Respondent.”



42. The Defendants denied the alleged and challenged him to prove the same. The Affidavit sworn by Caleb Simiyu Makhanu on 26/01/2024 was to the effect that the 1st, 2nd and 4th Defendants left their rural home on 04/01/2024 to Nairobi where they worked and never came back until after the alleged service and directions of the Court that they attend Court in person while the 3rd Defendant left the home for the work place in Muumbuni in Machakos on 15/12/2024. In essence they all wanted the Court to believe that they were not at home at the time of the alleged service. To buttress their claims, the 1st Defendant testified that he was on duty in Nairobi from 04/01/2024 to the time the Court summoned him. He stated that his wife would confirm that fact because she slept with him in Nairobi that material night. Further that pictorial evidence would show that indeed he was on duty and that Safaricom line record.
43. When the Defendants and the process server testified as to their whereabouts on 19/01/2024 each of them repeated their presence at their places of work. The 1st Plaintiff repeated that he was on duty at Kasarani that morning, and that although he did not come to court with a duty roster his phone location and pictorials at the work place would show that indeed he was on duty on the material date. He also emphasized that the previous night he has slept with his wife in their residence in Nairobi and she would confirm that. As for the 2nd Defendant he stated that he was in his office at View Park Towers and that the office CCTV would show that indeed he was in the office at the material time. That he left for Two Rivers Mall that day about lunch hour and that in the afternoon at about 2: 14 PM, on his way to the said Mall he stopped at Shell Petrol Station off Wayaki way and fueled his car for Kshs. 5,000/=. He produced in evidence an M-Pesa transaction whose print-out he made.
44. As for the 3rd Defendant he stated that he was at School in Mumbuni High School on the material date from 07:30 AM to 5:00 PM. He produced a letter dated 30/01/2024 written by the Deputy Principal of the School to show that he was in school all through the working hours on the material date. As for the 4th Defendant, he too stated that he was in Langata High School on the material date and even supervised examinations from 11 AM to 1 PM. He produced a letter dated 30/01/2024 from the School Principal to show that he was present in school from 08:00 hours to 5:00 PM.
45. As for the process server, he stated that on the material date he visited Botwo village and went to the home of the Defendants and met the 1st Defendant whom he served, at first the process server stated on oath that he met him in the home. Later he stated that he met him in the farm and that upon serving him he, the 1st Defendant, informed him that the other Defendants were just around and that he would give them the papers. He admitted that he never met the 2nd - 4th Defendants. He admitted that it was an error when he swore that he served them in person. He stated that it was an error when he stated so on oath.
46. I have carefully analyzed the evidence as to service and the oral testimonies of the Defendants and the process server. It is clear that from the evidence of the process server himself, now on oath through the testimony he gave in Court on 31/01/2024 the 2nd, 3rd and 4th Defendants were never served with the documents on 19/01/2024.
47. The only one whose alleged service upon him the Court now wishes to dwell on in this analysis is the 1st Defendant. According to the 1st Defendant he was at his work place in Kasarani on the material date. This evidence is corroborated by the deposition of the 4th Defendant in his Affidavit sworn on 26/01/2024 together with that of the 3rd Defendant who by extension confirms the contents of the Affidavit through the written authority he gave to the 4th Defendant to depone the Affidavit.
48. On his part the process server testified that he served him at the Botwo home. But his oral testimony contradicted as to where exactly between the homestead and the farm he met the said Defendant. This



being a material contradiction which when juxtaposed with the elaborate lies that the process server made initially that he served all the Defendants who were pointed out to him by the village elder, together with his further admission that even the Affidavit of Service that he swore on 16/01/2024 was incorrect in terms of the service of the process on all the four defendants makes this Court to draw an inevitable conclusion that the process server never served any documents at all on all the four Defendants. What he did, if indeed he was with the Plaintiff, was to collude with the said Plaintiff and make up or conjure a story as to service with the clear aim of misleading the Court to grant orders ex parte. This, I agree with the 4th Defendant, was aimed at stealing a match on the Defendants.

49. I wish to point out here that to lie on oath is an offence punishable under the laws of Kenya. This Court takes great exception to the conduct of the process server who swore the false the Affidavits of Service herein while knowing that it was wrong. I am alive to the fact that the said process server swore another Affidavit on 30/01/2024 which he titled Further Affidavit, by which he sought to correct the oath of 16/01/2024 to the effect that when he indicated in the affidavit sworn earlier that the 1st, 2nd and 3rd Defendants declined to sign when he served them, it was incorrect and that the true position was that they were all present but instructed the 1st Defendant to accept service on their behalf.
50. This Court does not buy the explanation being given at all by the process server on that aspect. In regard to service in this matter, the said process server has proved to be no more than a liar whose word cannot be taken at all. In any event, before me in the instant application was not the service alleged to be evidenced by the Affidavit sworn on 16/01/2024 but of the one purportedly supported by the one sworn on 19/01/2024.
51. While in relation to the latter service the process server tried to explain to the Court on oath that it was an error, this Court disagrees with him and finds that it was a deliberate extensive white lie that he made on oath. Had it been that he stated on one sentence, for instance, that "... the village elder pointed out the defendants to me..." That would have convinced that Court that indeed it was a typing error to indicate service to be on the Defendants by error of inclusion of an "s" at the end of the term. But where he deposed in one paragraph that he "...met all the Respondents..." and in another that "... all the Respondents were specifically pointed out to me..." and in another that "the village elder was introduced to me by the Applicant before service of the court process upon the Respondents i.e. the 1st, 2nd and 3rd I had personally served..." and in another still that "...I confirm I have served all the Respondents above..." these cannot be blamed on a typographical error. They cannot be a simple error that may be made even by a drunkard person who suffers from incapacity of mind due the influence of the substance of alcohol. These are depositions by a person who is clear on what he is doing when he is making them: intent to mislead the recipient and user of the oath or deposition - the Court.
52. One has to be held to account for his words and actions. That is when our society shall be emancipated from the pain of coning we experience right left and centre these days. In particular Section 114 of the Penal Code provides for the punishment of the offence of false swearing. Similarly, Section 11 of the [*Oaths and Statutory Declarations Act*](#) is clear on the punishment for the issue of false declarations.
53. I find the Application merited. But before I give my final orders on it, I must turn to the pleadings of the Applicant herein, that is to say, the manner in which the Applicants crafted their prayers. If this Court were to strictly adhere to the Biblical principle of "No one fools God. What a person sows, he will reap..." (Galatians 6: 7), although I have found the application merited I would not have granted it for reason of the way the prayers were drawn.
54. It is extremely important and a hallowed path of the practice of law that parties pay attention to their pleadings: how parties draft pleadings may make or break a case however good it is. Pleadings are the silent communication between the party filing them, the Court and the adverse party. Poorly drafted



ones will blur the issues and reliefs sought and even bring down the entire claim. Again, each part of the pleading should not be drafted and therefore expected to be read in isolation of the other. The pleadings of one claim or defence are an inseverable whole.

55. Having said that, I now turn to why the prayers sought herein were poorly drafted and learned counsel ought to have done better, especially having taught in law school(s) before. He prayed for the setting aside and/or discharge the ex-parte proceedings dated 24/01/2024 and the grant, in its place of an order of status quo which should abide the hearing and determination of this suit. With such a prayer, if granted, it would mean that once this Court sets aside the impugned orders and orders the status quo it shall have effectively determined the Application dated 03/01/2024 yet this is the Application the Applicants claim and this Court has found was not served on them. That would be an absurdity. It would be akin to “stealing a match” as they argued for their part but now on the Applicant.
56. Again, the prayer that this Court issues an order directing that the service of the Plaintiff’s Application, Summons and Plaint on 5th and 19/01/2024 was defective and improper and that the Plaintiff be ordered to serve the said Court documents properly upon the Defendants wholly contradicts prayer 2 which I have dissected above. This Court wonders the basis of it ordering the service of the Application on the Defendants when it, if it grants prayer 2 as it is crafted, would have ordered status quo to be maintained to the determination of the suit.
57. Also, the observation above is the same in relation to prayer 5 which is to the effect that this Court orders the Defendant and/or the Estate of the late Hellen Inzayi Mulongo be granted leave to file their Response and Defence and oppose the Application dated 03/01/2024 within a period it would deem fit. This prayer does not make sense at all when read with prayer 2 above as draft.
58. The upshot is that the Application is merited and I allow it with costs to the two (2) Applicants but on the following terms:
 - a. That the orders given on 24/01/2024 are hereby set aside, the Plaintiff is ordered to serve the Application afresh, but on the 2nd Defendant in person and learned counsel for the 1st, 3rd and 4th Defendants within the next five (5) days.
 - b. The Respondents shall pay the expenses of travelling, accommodation and attendance of the four (4) Defendants on 31/01/2024 upon proof thereof, but in any event not later than seven (7) days from the determination of the application dated 03/01/2024, in default the costs be taxed and execution to issue forthwith.
 - c. This Court notes that this suit was filed on 03/01/2024 and the Plaintiff did not extract summons as required by law hence he is ordered to extract summons to enter appearance and serve the parties within the next thirty days at most, in default the provisions of Order 5 regarding issuance and service of summons to enter appearance shall kick in.
 - d. The Respondents shall upon service of the Application dated 03/01/2024 file responses thereto within seven (7) days of service.
 - e. The Applicant shall file and serve submissions within seven (7) days of service the last Response by the Defendants or within seven (7) days of the lapse of the period of seven days from when he served the last Defendant, whichever is earlier.
 - f. The Respondents to file their submissions within seven (7) days of service of the Applicant’s or the lapse of the period from when they served their response, whichever is earlier.
 - g. Each parties’ submissions not to exceed three pages of New Times Roman Font 12, 1.5 spacing.



- h. The Application dated 03/01/2024 to be heard virtually on this matter shall be heard on subject to the directions given on 20/03/2024 regarding.
- i. The status quo as was ordered on 31/01/2024 be and is hereby to be maintained until the determination of the Application dated 03/01/2024.

59. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 16TH DAY OF FEBRUARY,2024.

HON. DR. IUR FRED NYAGAKA

JUDGE

