



**Nickson v Makhanu & 3 others (Environment & Land Case  
E001 of 2024) [2024] KEELC 5689 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5689 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE E001 OF 2024**

**FO NYAGAKA, J**

**JULY 25, 2024**

**BETWEEN**

**AMUHAYA SAGINI NICKSON ..... PLAINTIFF**

**AND**

**SAMMY COLLINS MAKHANU ..... 1<sup>ST</sup> DEFENDANT**

**TITUS BARAZA MAKHANU ..... 2<sup>ND</sup> DEFENDANT**

**EDWIN MULONGO MAKHANU ..... 3<sup>RD</sup> DEFENDANT**

**CALEB SIMIYU MAKHANU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The background of this Preliminary Objection has been given in a Ruling delivered in regard to the Preliminary Objection dated 12/04/2024. Briefly, the plaintiff sued the Defendants on 03/01/2024. The Plaint was accompanied by Notice of Motion dated 03/01/2024. It was supported by an Affidavit sworn by the plaintiff on the same date.
2. Upon service of the Application the Respondents filed Replying Affidavits to which the Applicant, with leave of the Court filed a Supplementary Affidavit sworn on 16/04/2024. To the Supplementary Affidavit were annexures which were impugned though the Preliminary Objection as will be highlighted hereunder.
3. The content of the Objection was to the effect that:

That the Plaintiff's Supplementary Affidavit dated 16<sup>th</sup> April 2024 is fatally incompetent and fatally defective for want of compliance with Section 5 of the [Oaths and Statutory Declarations Act](#), Chapter 15 of the Laws of Kenya and Rule 7 of the Oaths and Statutory Declarations Rules.



That the handwritten agreements dated 29/12/2010, 01/02/2011, 03/03/2011, 05/04/2011, 04/05/2011, and 30/06/2020 annexed to the Supplementary Affidavit are fatally incompetent and incurably defective for want of compliance with Rule 9 of the Oaths and Statutory Declarations Rules.

That the photograph of the Memorandum of Agreement dated 15/06/2006 (Exhibit “RTY 1”, Handwritten agreements dated 29/12/2010, 01/02/2011, 03/03/2011, 05/04/2011, 04/05/2011, and 30/06/2020, Sale Agreement dated 23<sup>rd</sup> September 2023 (RTY 2), Pages 2, 3 and 4 of the Proposed Plot(s) Layout (RTY 3), “RTY 5” and RTY 5 (sic) annexed to the Supplementary Affidavit be struck out from the court record for want of compliance with Section 106B of the Evidence Act, Chapter 80 of Laws of Kenya.

4. Similar to the previous Preliminary Objection, the other ground of the Objection was meaningless because it was futuristic and not specific.
5. The Objection was disposed of by way of written submissions. The 2<sup>nd</sup> Defendant submitted that the closer look at the Plaintiff’s signature on his Supplementary Affidavit dated 16/04/2024, confirms that it is either scanned or a photocopy of his original signature and it is faint and not so clear, leaving doubt as to why it is faint and not clear hence it was not made before the Commissioner. This was in violation of Section 5 and Rule 7 of the Oaths and Statutory Declarations Act and Oaths and Statutory Declaration Rules respectively. Therefore, the Affidavit was fatally defective and should be struck out from the court records. He relied on the case of Regina Muniyva Ndunge v Kenya Commercial Bank Limited [2005] eKLR.
6. Regarding the handwritten Agreements dated 29/12/2010, 01/02/2011, 03/03/2011, 05/04/2011, 04/05/2011 and 03/06/2020 annexed to the Plaintiff’s Supplementary Affidavit he submitted that, as Exhibits, they were not securely sealed under the seal of the Commissioner and marked with serial letters contrary to Rule 9 of the Oaths and Statutory Declarations Rules. They were thus incurably defective and improperly and should be expunged. He relied on the case of Chris Munga N. Bichage & 2 others v Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR.
7. About what he termed as Photographs of documents marked as “Exhibit “RTY 1”, “RTY 2”, “RTY 3”, “RTY 5” and “RTY 5” annexed to the Plaintiff’s Supplementary Affidavit, he submitted that they did not comply with Section 106B of the Evidence Act since they were “Screen Shots” taken by a phone thus making them photographs and generated as print outs by use of a printer. He submitted that this meant they were electronically generated documents/records and therefore ought to have been accompanied by a Certificate of electronic evidence to accompany in line with Section 106B (4) of the Evidence Act. Thus, without it they ought to be expunged from the record. He relied on the cases of Republic v Barisa Wayu Mataguda [2011] eKLR; Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2018] eKLR; and Bhavna Patel Mandaliya v Chetan Aroon Solanki [2021] eKLR.
8. Lastly, he submitted that the Preliminary Objection met the threshold of one as defined by the decision of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 and the Supreme Court decision of Aviation and Allied Workers Union Kenya versus Kenya Airways Ltd & 3 others Application No. 50 of 2014, [2015] eKLR.
9. He prayed that the Preliminary Objection be allowed as presented.
10. On his part the Plaintiff submitted that the Preliminary Objection raised did not meet the threshold of one. He relied on the case of Mukisa Biscuits (supra). He submitted that the defects if any could be cured by Article 159(2)(d) and 22(3) (b) and (d) of the Constitution and Sections 1A of the Civil Procedure Act. He relied on the case of Saggi v. Roadmaster Cycle Ltd [2002] 1 EA 258. Lastly, he



stated that the issues raised would call for evidence to be adduced to prove them. He relied on the cases of *George Oraro v Baker Eston Mbaja HCCC No. 85 of 1992* and *Mehuba Gelan Kellil & 2 Others v Abdulkadir Abdilhim and others [2015] eKLR*.

### **Issue, Analysis And Determination**

11. As usual it is important to begin with an understanding of the meaning of a Preliminary Objection. A Preliminary Objection was defined by the seminal case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*, wherein Sir Charles Newbold defined it as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

12. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR*, the same Court held that:

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

13. Also, in *Susan Wairimu Ndiangui v Pauline W. Thuo & Another[2005] eKLR*, Musinga J as he then was held as follows:-

“a Preliminary Objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

14. It is clear that a Preliminary Objection arises on a point of law only. As stated in the previous Ruling, if it would require the Court to venture into deducing the issues from other information than is borne by the pleadings impugned then that does not fall under the definition of a Preliminary Objection.

15. I have considered the meaning above and carefully analyzed pleadings impugned and the submissions by both parties. I will infuse the submissions in the analysis that follows.

16. In the instant Objection the first point of argument is that the Plaintiff's Supplementary Affidavit sworn 16/04/2024 is fatally incompetent and fatally defective because it does not comply with Section 5 of the [\*Oaths and Statutory Declarations Act\*](#) and Rule 7 of the Oaths and Statutory Declarations Rules.

17. The law regarding commissioning of documents is Section 5 of the [\*Oaths and Statutory Declarations Act\*](#) and Rule 7 of the Oaths and Statutory Declarations Rules.



18. Section 5 provides that, “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”. Rule 7 provides that “A Commissioner for Oaths before administering an oath must satisfy himself that the person named as the deponent and the person before him are the same, and that such person is outwardly in a fit state to understand what he is doing”.
19. The reason the 2<sup>nd</sup> Defendant makes the argument on this limb is that the signature of the Deponent is faint as compared to that of the Commissioner and appears to have been either scanned or a photocopy of his original signature. What is clear from the above argument is that the Defendant wants this Court to make a determination on guesswork. This is absolutely sad for learned counsel to raise an objection which he himself is not sure of and ask the court to proceed on a trajectory of guesswork.
20. Section 107 of the *Evidence Act* provides that he who alleges proves. And in civil matters the standard of proof is not as high as that in criminal cases where one is required to do so beyond reasonable doubt. In civil matters is proof on a balance of probabilities: that it was most likely that it happened. Herein the proposition by the 2<sup>nd</sup> Defendant does not even begin to rise to any balance at all. It is at zero. Guesswork is not proof. It does not matter whether one has a close look or a cursory one on the document. As long as the party stated that it was either a scanned or photocopy of the signature that of itself made his argument a non-starter. To argue that of a signature is faint makes it not original is the highest stretch of imagination I have come across in life. The 2<sup>nd</sup> Defendant seems to imagine that all human beings must press their writing so much to a paper as to leave deep’ ink on them.
21. Be that as it may, this Court took the liberty to peruse the original of the documents as scanned and mailed to the court, which documents were finally printed. It found out that the signatures of both the Commissioner and that of the Deponent were of the same print save that the deponent’s was slightly faint compared to that of the Commissioner. What evidence, other than conjecture, was therefore available to found the argument by the 2<sup>nd</sup> Defendant that the deponent did not appear before the Commissioner? None. I would dismiss that limb of the objection.
22. The second limb of the Objection is that the handwritten agreements dated 29/12/2010, 01/02/2011, 03/03/2011, 05/04/2011, 04/05/2011, and 30/06/2020 annexed to the Supplementary Affidavit are fatally incompetent and incurably defective for want of compliance with Rule 9 of the Oaths and Statutory Declarations Rules. The law on serializing of Exhibits before a Commissioner for Oaths is Rule the 2<sup>nd</sup> Defendant cited. It provides that “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. In the instant matter the 2<sup>nd</sup> Defendant argues that the annexures to the Supplementary Affidavit were not serialized by the Commissioner for Oaths as required by law.
24. I have carefully perused the annexures referred to in the argument. My finding is that they are securely serialized by the Commissioner who has even appended his signature at every one of the parts where he has affixed his stamp which serialization runs as RTY1 at page 7, RTY 2 at page 12, RTY 3 at page 13, RTY 4 at page 16, RTY 5 at page 18, RTY 6 at page 19. There is no denial that by the Commissioner that he did not serialize the documents as are. Thus, the argument by the 2<sup>nd</sup> Defendant is baseless and an abuse of the process of the Court and I dismiss it.
25. The last limb is that the documents listed in the objection as the Memorandum of Agreement dated 15/06/2006 (Exhibit “RTY 1”, Handwritten agreements dated 29/12/2010, 01/02/2011, 03/03/2011, 05/04/2011, 04/05/2011 and 30/06/2020, Sale Agreement dated 23/09/2023 (RTY 2), Pages 2, 3 and 4 of the Proposed Plot(s) Layout (RTY 3), “RTY 5” and RTY 5 (sic) annexed to the



Supplementary Affidavit are photographs and they do not comply with Section 106B of the Evidence Act and should be struck out of the court record.

26. The limb is basically on the a “Admissibility of electronic records” as provided for under Section 106B of the Act. Specifically, Subsection 1 stipulates that:

“(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.”

27. Subsection 4 which is relevant for the Objection raised herein is to the effect that:

“In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

28. The question this Court has to settle first is whether or not the documents sought to be struck out are photographs or electronic records which would qualify the application of Section 106B of the Act. The 2<sup>nd</sup> Defendant argues that the documents were “Screenshots” hence electronic records which are printed through a printer. With all due respect, I did not find any evidence that the documents were screenshots. Where the party got the information from is a mystery. Moreover, the real documents have not been availed before the Court as to demonstrate that indeed they are screenshots. May be this party has special ‘machine’ eyes that detect that the documents which are in pdf format before the Court are screenshots.

29. For one to determine that the documents are screenshots, unless it is expressly admitted, requires production of evidence to that effect. None has been given. And even if it was to be given, then it would put the argument beyond a Preliminary objection incapable of falling within the definition of the Mukisa Biscuits case (*supra*). Thus, I find the argument nothing but a figment of imagination which is far-fetched and only brought forward to waste the court’s time and split hairs for nothing. I dismiss it.



30. The totality of my finding is that the so-called Preliminary Objection was not one properly so called. It was an argument designed to waste the Courts time by abusing its process. I dismiss it with costs to the Plaintiff.

31. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY VIA THE TEAMS PLATFORM THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

**HON. DR.IUR F.NYAGAKA,  
JUDGE, ELC KITALE**

**In the presence of:**

- 1. R. Aswani for the Plaintiff**
- 2. Letaya for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants**
- 3. 2<sup>nd</sup> Defendant in person**

