



**Akinyi v Africa Plantation Capital Limited (Cause 582 of 2017)
[2022] KEELRC 4078 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4078 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 582 OF 2017
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

LYDIA AKINYI CLAIMANT

AND

AFRICA PLANTATION CAPITAL LIMITED RESPONDENT

RULING

1. The verifying affidavit filed with the statement of claim by the claimant, on March 27, 2017, was attested by commissioner for oaths, Shikwe Bernard Otundo, on March 23, 2017.
2. The respondent filed an application dated November 5, 2019, asking the court to strike out the statement of claim and verifying affidavit, on the ground that at the time of attestation, commissioner for oaths, Shikwe Bernard Otundo, was not qualified to practise law.
3. This was confirmed through the advocate's profile, and letter issued by the Law Society of Kenya dated May 5, 2017, addressed to the respondent's advocates.
4. The claim answers that she was never informed Otundo was not qualified to practice law, at the time of attestation. The default cannot be visited upon the claimant. It was for the Commissioner to disclose to the claimant's advocate, that he was not qualified. The claimant was a complete stranger to commissioning of her verifying affidavit. The claimant takes the position that default is a technicality which should not affect her claim.
5. Parties agreed to have the application considered and determined on the strength of their affidavits and Submissions. They confirmed filing and service of Submissions at the last appearance in court on 6th July 2022.



The Court Finds:

6. The court does not accept the submission by the claimant, that she was a stranger to the attestation of her own Affidavit.
7. When her affidavit was sworn, she was legally required to appear before the Commissioner for Oaths, and confirm the contents of her verifying affidavit.
8. An affidavit involves recording of evidence. Evidence is given in the presence of the giver, whether before the court or the commissioner for oaths. The *Oaths and Statutory Declarations Act*, Cap 15 the Laws of Kenya, requires persons taking oath, to appear before the giver. This why the Affidavit, indicates 'Before Me.'
9. The act, *Cap 15* the Laws of Kenya, requires that a commissioner for oaths is a practising advocate.
10. The Law Society confirmed to the respondent's advocate, that Otundo was not qualified to practise law, and therefore was not qualified to commission the claimant's verifying affidavit, at the time the affidavit was allegedly sworn.
11. Rule 4 [2] of the *Employment and Labour Relations Court [Procedure] Rules*, 2016, states that a statement of claim shall be accompanied by an affidavit verifying the facts relied on.
12. There is no such an affidavit verifying the facts relied on. The claimant instead states she is a stranger to the alleged attestation of her affidavit. A verifying affidavit is a written statement, confirmed by oath, for use as evidence in court. To refer to what was filed by the claimant as a verifying affidavit, is a misnomer. It is an unsworn statement, which at best, is to be equated with a Witness Statement. The default is not a technicality, but breach of a fundamental requirement under the procedural law governing the proceedings of this court. Without a valid verifying affidavit, there is no valid Statement of claim before the court. The facts have not been verified.
13. The court agrees with the respondent that the claim is not validly filed.
14. It is ordered that the statement of claim is struck out with no order on the costs.

DATED SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH DAY OF SEPTEMBER 2022

James Rika

Judge

