



Lund-Henriksen & another (Suing as Administrators of the Estate of Philp Denis Nagenda Wilson) v Directorate of Criminal Investigations & 3 others; Kabaria & 3 others (Interested Parties) (Environment & Land Petition E065 of 2024) [2025] KEELC 3387 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 3387 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E065 OF 2024**

OA ANGOTE, J

MARCH 27, 2025

BETWEEN

**BIRGITHE LUND-HENRIKSEN 1ST PETITIONER
ELI PAASCHE DREYER 2ND PETITIONER
SUING AS ADMINISTRATORS OF THE ESTATE OF PHILP DENIS NAGENDA
WILSON**

AND

**DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT
INSPECTOR GENERAL OF POLICE 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT**

AND

**ALICE WAIRIMU KABARIA INTERESTED PARTY
JAMES NYIHA WANJOHI INTERESTED PARTY
GRACE WANGUI KOECH INTERESTED PARTY
DAVID BANJI MUBIIKE INTERESTED PARTY**



RULING

INTRODUCTION

1. Vide a Notice of Motion dated 9th August, 2024, brought pursuant to the provisions of Sections 1, 1A of the [Civil Procedure Act](#) and Section 134 of the [Evidence Act](#), Cap 80, the Petitioners/Applicants seek the following reliefs:
 - i. That pending the hearing and determination of this Petition, this Honourable Court do issue an order of injunction restraining the 1st and 2nd Respondents, whether by themselves, agents, servants or any other person under their instructions from investigating, summoning, arresting, charging or preferring charges or otherwise taking any adverse action against the Petitioners or the 2nd, 3rd and 4th Interested Parties in respect of the dispute between Birgithe Lund-Henriksen and Eli Paasche Dreyer, the Petitioners and Alice Wambui Kabaria (1st Interested Party) & Others in Nairobi ELC Case No E320 of 2021 in relation to land parcel 1/414.
 - ii. That pending the hearing and determination of the Petition, this Honourable Court do issue an order of prohibition restraining the 1st and 2nd Respondents from demanding or compelling the production of any correspondence exchanged between the Petitioners and her Advocates, namely, the 2nd, 3rd and 4th Interested Parties relating to Land Parcel No 1/414.
 - iii. That pending the hearing and determination of the Petition or further orders of this Court, a temporary injunction be issued restraining the 1st Interested Party(Alice Wairimu Kabaria), whether by herself, her servants, agents, employees or otherwise howsoever, from entering, remaining upon, occupying, using, developing, constructing on, selling transferring, or in any other way interfering with the suit property known as Land Reference Number 1/414 located along Chania Avenue, Kilimani Nairobi.
 - iv. That pending the hearing and determination of the Petition or further orders of this Court, the 1st Interested Party (Alice Wairimu Kabaria) be ordered to disclose to the Petitioners and to this Honourable Court any, and all ongoing negotiations, agreements or transactions related to the suit property known as Land Reference Number 1/414 located along Chania Avenue, Kilimani, Nairobi which she has illegally entered into.
 - v. That the costs of this Application be borne by the Respondents.
2. The application is premised on the grounds on the face of the Motion and supported by the affidavit of the 1st Petitioner, Birgithe Lund-Henriksen, the widow to, and co-Administrator of the Estate of the late Philip Dennis Nagenda of an even date.
3. She deponed that at the time of his death, the deceased was the lawful and duly registered owner of all that parcel of land known as L.R No 1/414 (hereinafter the suit property) having rightfully purchased the same from Neville Anthony Duorado and Maria Aldonca Duorado on the 29th August, 1986.
4. After the death of her husband, she deponed, she instructed the firm of Messrs Nyiha Mukoma & Company Advocates to Petition for a grant of Letter of Administration in respect of his Estate; that the same was issued to her and her mother on 19th April, 2021 in High Court Succession Cause No E1298 of 2020, which grant was confirmed on 4th February, 2022; that the suit property having been owned by the deceased during his lifetime, now forms part of the Estate and that in a bid to ensure the



property is not wasted, she has continued to pay the caretaker, and paid all outstanding land rates and rents as well as a sundry of expenses related to the property.

5. The 1st Petitioner deposed that on 5th May, 2021, she discovered that the 1st Interested Party was falsely claiming to have purchased the suit property vide a forged conveyance dated the 24th April, 2017 and was in the process of selling and transferring it and that she reported the fraud to the 1st Respondent, sought a restriction on the title from the Chief Lands Registrar, notified the Cabinet Secretary, Ministry of Lands and Physical Planning and published a caveat emptor notice in the Daily Nation Newspaper of 7th May, 2021 and 2nd November, 2021.
6. Pursuant to an order issued by the Magistrates Court on the 17th August, 2021, in MCELC 287 of 2021, she stated, the 1st Interested Party together with officers from Kilimani Police Station invaded the suit property, evicted her employees and tore down the caveat emptor sign; that the aforesaid suit was filed by the 1st Interested Party and involved fabricated Defendants and that she reported the matter to Kilimani Police station and the complaint was booked under OB No 59/23/08/2021.
7. She stated that nonetheless, the court in MCELC 287 of 2021 had issued injunctive and not eviction orders and the eviction of her employees was illegal; that they were later joined in the matter but the 1st Interested Party withdrew the same; that they subsequently instituted ELC E320 of 2021 and that on 18th November, 2021, the court in ELC E320 of 2021 issued orders restraining the 1st Interested Party from dealing with the property.
8. It is the 1st Petitioner's deposition that the 1st Interested Party's evidence of ownership, being the Indenture of Conveyance dated 24th April, 2017, is a forgery, as evinced by the fact that the impugned conveyance indicated the property was acquired for Kshs 80,000,00 whereas the 1st Interested Party claims to have received the same as a gift.
9. Additionally, she deponed, the conveyance did not recite the original conveyance as required in conveyancing law and practice setting out the chronology of the transfer of the suit property.
10. Further, it was deponed, the alleged transfer of the suit property to the 1st Interested Party was registered on 12th October, 2017 and the registration details indicated that the presentation number is 887, volume number N48, the folio as 135 and file number 15262 and that the volume number of the suit property cannot be N48 as the same had already changed to N116 when the reconveyance to the deceased was registered.
11. Also, it was deponed by the 1st Petitioner, the folio entry number indicated in the registration of the impugned conveyance cannot be 135 because the same was closed after the registration of the deceased's mortgage dated 29th August, 1986, hence the reason why a new folio number, that is folio 191, was used when the reconveyance dated 14th August, 2012 was registered and given number 191/12.
12. She stated that despite conclusive evidence establishing the fraudulent nature of the 1st Interested Party's claim, all of which is in the civil case, the 1st Interested Party persists in her unlawful attempts to sell the property; that the 1st Respondent has vide its letter dated 1st August, 2024, inexplicably initiated an investigation against the Petitioners, a clear attempt to manipulate law enforcement agencies to further the 1st Interested Party's unlawful agenda and that the 1st Respondent's demand for privileged information between her and her counsel is an affront to the principles of fair administrative action and undermines the sacrosanct principle of advocate -client relationship.
13. According to Ms. Henriksen, the 1st Respondent's actions circumvent the proper legal channels for obtaining evidence such as search warrants and court orders; that this conduct constitutes a blatant



- abuse of process and that the court is bound to interfere when law enforcement agencies engage in bad faith tactics in breach of their fundamental rights and freedoms.
14. In response to the Motion, the 1st Respondent, through CPL Lucas Juma, a police officer attached to the Directorate of Criminal Investigations-Nairobi Regional Headquarters swore a Replying Affidavit on the 17th September, 2024.
 15. He deponed that he is one of the investigating officers assigned to investigate the subject matter and has due authority of the 1st and 2nd Respondents to swear the affidavit and that the 1st and 2nd Respondents, through the DCI Nairobi Regional Headquarters is conducting an inquiry vide the office inquiry no 19 of 2024 to investigate a complaint made by the 1st Interested Party that part of documents that were filed in Succession Cause No E1298 of 2022 and ELC E320 of 2021 are suspected to be forged or were fraudulently obtained.
 16. He deponed that the 1st and 2nd Respondents, knowing the legal ramifications of falsified or fraudulently obtained information, took notice of the serious nature of the allegations and in exercise of their constitutional mandates immediately commenced investigations; that one of the documents complained about is a copy of the Nairobi County Commissioners letter Ref OP/MCING/GEN./20 dated the 16th October, 2020 which formed part of the documents the Petitioners filed in Succession cause of E1298 of 2020 and that the Nairobi County Commissioner has disowned the letter which was indeed filed in court by the Petitioners.
 17. He states that the Petitioners are in court by dint of the grant of Letters of Administration arising from Succession Cause 1298 of 2020 whereby preliminary findings of the 1st and 2nd Respondents show that a fraudulent document was filed in violation of the law and that the 1st and 2nd Respondents have a duty to bring to the court such grave violations of the law and abuse of court process by thoroughly investigating the matter.
 18. According to CPL Juma, the 1st Respondent, through the serious crimes unit, is also investigating a complaint reported by one of the Petitioners against the 1st Interested Party and that as an administrative measure and to avoid duplicity in investigation, the investigating officers through the Nairobi Regional DCI Co-ordinator sought the authority of the Director of the 1st Respondent to investigate the allegation in which case, permission was granted for an objective investigation.
 19. He avers that the investigation and reports alluded to by the Petitioners are subject to review by the 1st -3rd Respondents through elaborate evidence and are not conclusive; that all persons are equal before the law and the 1st Interested Party who has also been under investigation, cooperated by providing information in her possession in the Petitioners' case against her and that it is unjust for the Petitioners and their Advocates to scandalize the 1st Interested Party's complaint which is merited unless they are scared of the outcome of the investigation.
 20. It was deponed that the request made to the law firm of the 2nd, 3rd and 4th Interested Parties was made in good faith and in the ordinary discharge of their duty; that as the Petitioners reside outside the country, their contacts are only available through the law firms and that it having been noted that most affidavits are sworn by the Petitioners before the 2nd, 3rd and 4th Interested Parties in their capacities as commissioners of oaths and were inconsistent with their travel history, information from the said commissioners is key to the investigation.
 21. It was stated that the Petitioners have deliberately failed to appreciate the constitutional mandate of the 3rd Respondent as the report thereof must be forwarded for directions upon independent review of the evidence gathered and the legality of such investigations; that the 1st and 2nd Respondents are subject



- to the decisions and direction of the 3rd Respondent and that the court should compel the parties to avail themselves before the investigation team.
22. The 4th Respondent filed Grounds of Opposition dated 27th August, 2024 premised on the grounds that:
- i. The Application/Petition is incompetent to the extent that it fails to provide particulars of the threat that or the infringement of the Applicants constitutional rights and freedoms by the 4th Respondent.
 - ii. That pursuant to Article 157 of *the Constitution* of Kenya, 2010, the 4th Respondent has the Constitutional mandate to institute and undertake criminal proceedings and the exercise of this mandate cannot be interfered with unless in exceptional and clearest circumstances where there is an infringement of fundamental freedoms, violation of *the Constitution* and the law or where there is abuse of the legal process.
 - iii. That the 4th Respondent in exercise of his constitutional mandate will decide to charge if at all based on sufficiency of evidence and public interest underlying prosecution of cases.
 - iv. That the Application/Petition is frivolous, vexatious and amounts to an abuse of court process as it seeks to have the Respondents restrained from performing their constitutional mandates.
23. The 1st Interested Party filed a Notice of Preliminary Objection on the 28th October, 2024 premised on the grounds that:
- i. That the Application as drawn and filed is a gross abuse of judicial process and/or court process as the exhibits annexed to the Supporting Affidavit of Birgithe Lund-Henriksen are improperly sealed and therefore violate the express provisions of the Public Notaries Act (Cap 17, Laws of Kenya), *Oaths and Statutory Declarations Act* (Cap 15 Laws of Kenya) and the Oaths and Statutory Declaration Rules.
 - ii. That the Application is founded on an incompetent Petition as the exhibits annexed to the Supporting Affidavit of Birgithe Lund-Henriksen in support of the Petition are improperly sealed and therefore violate the express provisions of the Public Notaries Act (Cap 17, Laws of Kenya), *Oaths and Statutory Declarations Act*(Cap 15 Laws of Kenya) and the Oaths and Statutory Declaration Rules.
 - iii. That Section 4 of the *Oaths and Statutory Declarations Act* as read together with Rule 9 of the Oaths and Statutory Declaration Rules do not envisage a situation such as in the present case where a commissioner for oaths seals exhibits of an Affidavit that the commissioner for oaths has not commissioned and the Application as drawn and filed is therefore incompetent, unmaintainable in law and constitutes a gross abuse of court process.
 - iv. That whereas the seal of the commissioner for oaths indicates that the Affidavits in support of the Application and Petition were sworn on the 6th August, 2024 at Nairobi, the Notary Public indicates that the Affidavit was notarized on the 6th August, 2024 Oslo, Norway which is a legal impossibility thereby rendering the Affidavits as scandalous, frivolous or vexatious calculated to embarrass the fair trial of this matter.
 - v. That the Affidavit in support of the Application and Petition offends the provisions of Section 88 of the *Evidence Act* (Cap 80 Laws of Kenya) as the Affidavit is said to be notarized in Oslo, Norway, a non-commonwealth country but the Affidavit has not been verified or proved in accordance with the provisions of Section 80 of the *Evidence Act*.



- i. That the Application as drawn and filed is incompetent, bad in law and is otherwise scandalous frivolous or vexatious.
24. None of the other Respondents filed responses to the Motion.
25. Vide a Further Affidavit dated 21st February, 2025, Ms Henriksen, the 1st Petitioner, deposed that contrary to the 1st and 2nd Respondents' depositions, the letter from the Nairobi County Commissioner was validly acquired.
26. She noted that the fact of the institution of investigation by the 1st and 2nd Respondents against them, rather than the 1st Interested Party, despite overwhelming evidence of forgery by the 1st Interested Party amounts to complicity and violates her proprietary rights and that the letter of 1st August, 2024 addressed to the 2nd, 3rd and 4th Interested Parties demanding information pertaining to their engagement does not provide any written reasons for requiring the information.
27. In respect to the Preliminary Objection, she noted that the 1st Interested Party seeks to dissuade the court from determining the substantive merits of the suit based on technicalities and the court should disregard the same.

Submissions

28. The Petitioners counsel filed submissions on 24th February, 2025. Counsel submitted that as stated in R vs Attorney General Ex-parte Kipngeno Arap Ngeny, High Court Civil Application No 406 OF 2001 cited in Mwangi vs Director of Public Prosecution & 4 Others; Kinuthia(Interested Party) [2024]KEHC 14446(KLR), criminal prosecutions commenced in the absence of proper factual foundation are suspect for unfair motive or improper conduct and as stated in Republic vs Chief Magistrates Court at Mombasa Ex-parte Ganijee & nor[2002]eKLR, where criminal investigations are used for ulterior motives, the court can intervene and halt them.
29. It was submitted that the court should issue an order of prohibition restraining the 1st and 2nd Respondents from demanding or compelling the production or correspondence between the Petitioners and their counsel as the same overlaps the boundaries of lawful investigations and amounts to attempts to compel production of self-incriminatory evidence. Reliance in this regard was placed on the cases of Re Matter of an Application by Peter Anyang Nyongo: James Omingo Magara and Mweandwiro Mghanga for leave to commence judicial review proceedings for orders of certiorari, prohibition and mandamus vs decision by the Government thro the Ministry of Finance to offer to the public 25% of Safaricom Shsres[2007]KEHC 3700(KLR) and Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd[2002]KECA 8(KLR).
30. According to Counsel, as stated in King Woolen Mills Ltd and Anor vs M/S Kaplan and Stratton Advocates[1993]eKLR, the fiduciary relationship between an Advocate and a client mandates Advocates to treat all information as confidential and that further, under Section 37 of the *Evidence Act*, an individual cannot be compelled to disclose any confidential communication with their Advocate unless they voluntarily offer themselves as witnesses.
31. Counsel submitted that the 1st Interested Party has persisted in her attempts to deal with the suit property despite existing orders dated the 17th November, 2021 necessitating their seeking further temporary injunctive orders;
32. Counsel urged that the court should compel the 1st Interested Party to disclose to the Petitioners any negotiations, agreements or transactions related to the suit property as the same are, as found in ABN Amro Bank N.V vs Kenya Pipeline Company Limited[2019]eKLR necessary for the just



- determination of the matter; that the Preliminary Objection is unmerited and the same is premised on technicalities and that Article 159(2)(d) of *the Constitution* mandates that justice should be administered without undue regard to technicalities.
33. It was submitted that nonetheless, Order 19 Rule 7 of the Civil Procedure Rules provides that the court may receive any affidavit for the purpose of being used in any suit notwithstanding any defect in form and that the costs of the Motion should be borne by the Respondents.
 34. The 4th Respondent filed submissions on the 22nd October, 2024. It was submitted that the court ought not interfere with the constitutional and statutory mandate of the Respondents and that as expressed in *Republic vs Commissioner of Police & Anor vs Ex-parte Michael Monari & Anor*[2012]eKLR and *Philomena Mbete Mwilu vs Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima(Interested Party) International Commission of Jurists Kenya Chapter(Amicus Curiae)*[2019]eKLR, once complaints are made, the police are duty bound to investigate them and cannot be faulted for acting on the complaints. Reliance was also placed on the case of *Josephat Koli Nanok & Another vs Ethics and Anti-corruption Commission*[2018]eKLR.
 35. Counsel stated that the Director of Public Prosecutions is an independent body established under Article 157 of *the Constitution* and does not require the consent of any person or authority for the commencement of criminal proceedings and shall not, in the exercise of its powers be under the direction or control of any authority. In support of this contention, the court was referred to the cases of *Diamond Hasham Lalji & Anor vs A.G & 4 Others*[2018]eKLR, *Republic vs Grace Wangari Bunyi(sued as the Administrator of the Estate of the Late Obadiah Kuira Bunyi) & 7 Others Ex-parte Moses Kirruti & 28 Others*[2019]eKLR and *Eunice Khalwali Miima vs Director of Public Prosecutions & 2 Others*[2017]eKLR.
 36. The 1st Interested Party filed submissions on the 10th March, 2025. Counsel submitted that the preliminary objection meets the threshold set out in the *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributor Ltd*[1969]E.A 696 being founded on pure questions of law touching on the alleged violations of the Public Notaries Act, *Oaths and Statutory Declarations Act* and *Evidence Act*.
 37. In the circumstances, it was submitted, it is impossible for the affidavit to have been simultaneously deposed to in Oslo Norway and commissioned in Nairobi on the same date; that in *Mary Gathoni & Anor vs Frida Ariri Otolu & Another* [2020]eKLR, the court noted that a commissioner and the deponent must be in the same physical location and that similarly, affidavits in non-commonwealth countries must be proved by affidavit or otherwise.
 38. Reliance was also placed on the cases of *Re MWO(Minor)*[2021]eKLR and *Geoffrey Githinji Mwangi & 2 Others vs Jubilee Party & 9 Others*[2017]eKLR and *Rene & Hans Advocates LLP vs Kiwipay(Kenya) Limited & 4 Others*[2023]KEHC 2970(KLR), *Alim Alhamed Ali & Anor vs Emag, HCC No 1806 of 2000(O.S)* and *Peeraj General Trading & Contracting Company Limited, Kenya & Anor vs Mumias Sugar Company Limited*[2016]eKLR.
 39. Counsel submitted that further, the affidavits have not been serialized and sealed and the failure to do so renders them fatally incompetent as held in *Musikari Nazi Kombo vs Moses Masike Wetangula & 2 Others* cited in *Francis A Mbalanya vs Cecilia N Waema*[2017]eKLR and *Suri vs Technoservice Limited & Anor; Nokia Corporation and 2 Others*[2022]KEHC 10141(KLR).
 40. It was stated that the Petitioners have casually treated the objections raised vide the preliminary objection; that as expressed in *Chris Munga N Bichage & 2 Others vs Independent Electoral and Boundaries Commission & 2 Others*[2017]eKLR, no party should be allowed to hide behind *the*



Constitution to run roughshod over known and established laws and rules and that the Motion should be dismissed in its entirety.

Analysis and Determination

41. Upon considering the Motion, the Preliminary Objection, Grounds of Opposition, the various affidavits and submissions, the issues that arise for determination are:

- i. Whether the Motion is competent, and if so,
- ii. Whether the Petitioners/Applicants are entitled to the orders sought herein?

42. Vide the Preliminary Objection and the Grounds of Opposition, the 4th Respondent and 1st Interested Party seek to impugn the present Motion. Beginning with the Preliminary Objection, the law with respect to the same is now well settled. Law JA in *Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors* (1969) EA 696 at 700 stated that:

“...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.”

43. In the same case, Newbold, P further held as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

1. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others* [2014] eKLR re-affirmed the principle as set out in the *Mukhisa Case* (supra) stating 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

45. Vide the objection, the 1st Interested Party contend that the exhibits attached to the affidavits in support of both the Motion and the Petition are improperly sealed in violation of the Public Notaries Act, the *Oaths and Statutory Declarations Act*, and the Oaths and Statutory Declaration Rules having not been sealed by the commissioner for oaths who commissioned the affidavits.



46. Further, whereas the seal of the commissioner for oaths indicates that the affidavits in support of the Motion were sworn on 6th August, 2024 in Nairobi, the Notary Public indicates that the affidavits were notarized on the 6th August, 2024 at Oslo Norway, a legal impossibility. Lastly, it is contended, the affidavits have not been verified in accordance with the provisions of Sections 80 and 88 of the *Evidence Act*.
47. Considering the nature of these objections, the court considers that they are proper questions of law touching on the admissibility and validity of affidavits and annexures in support of the Motion and Petition. Indeed, there is no factual dispute as to the contents of the affidavits and the manner in which they were notarized, making these objections purely legal in nature and suitable for determination as preliminary objections.
48. The affidavits in support of both the Motion and the Petition were sworn by Birgithe Lund-Henderson on the 6th August, 2024 before a Notary Public in Oslo, Norway.
49. Section 88 of the *Evidence Act* provides thus:
- “When any document is produced before any court, purporting to be a document, which by the law in force for the time being in England, would be admissible in proof of any particular in any court of justice in England, without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed
- a) the court shall presume that such seal, stamp or signature is genuine and that the person signing it held, at the time when he signed it the judicial or official character which he claims in such document; and
 - b) the document shall be admissible for the same purpose for which it would be admissible in England.”
50. The affidavits in issue were sworn in Norway, which is not a Commonwealth country. Speaking to the admissibility of documents originating from non-Commonwealth jurisdictions, the court in *Peeraj Genral Trading & Contracting Company Ltd & Another versus Mumias Sugar Company Ltd (2016)eKLR*, stated thus:
- “Indeed, Section 88 of the *Evidence Act*, cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public”



51. Further discussing this, the court in *Lakeview Development Limited vs Belgo Holdings Limited & another* (Environment & Land Case E064 of 2020) [2023] KEELC 19199 (KLR) (27 July 2023) (Ruling) noted:

“...a court of law dealing with an affidavit taken and/or sworn outside the commonwealth is called upon to ascertain whether the signature of the deponent has indeed been authenticated and in this regard, the court is obligated to ascertain the existence of an authentication document; which no doubt must bear the signature and the seal of attestation affixed thereto by the Notary Public....

In respect of the subject affidavit in response to the Interrogatories, there is certainly a document which has been attached thereto and wherein the Notary Public; namely, Yakir Mandel, authenticates that the deponent of the impugned affidavit in response indeed appeared before him and that upon ascertaining the identity of the deponent, same (Notary Public) proceeded to and notarized the affidavit in question.

72. Additionally, the Notary Public proceeds and thereafter makes a further statement wherein same states as hereunder; “In witness whereof, I hereby authenticate the signature of Mr Zeevi Gadi, by my own signature and seal this day; July 12th 2023”
73. Arising from the foregoing, it is my humble finding and holding that the document which has been attached to the affidavit in response to the interrogatories, does not only bear the signature of the Notary Public in authentication, but same also has the seal affixed thereto.
74. To surmise, it is my humble position that the authentication of the signature of the deponent of the affidavit in response to the interrogatories vide the documents attached thereto meets and complies with the prescription of section 88 of the *Evidence Act*, chapter 80 Laws of Kenya.
75. Nevertheless, even assuming that the provisions of Section 88 of the *Evidence Act*, is stringent on the verification being done by way of an affidavit (which with humility is not the case), it is imperative to underscore that the decision in the case of *Pastificio Lucio Garofalo S. PA versus Security & Fire Equipment Company Zazeco (K) Ltd* (2001)eKLR and by extension section 88 of the *Evidence Act*, must now be read in accordance with the provision of *the Constitution* 2010 and in particular, articles 48, 50(1) and (2) and 159 (2) (d) thereof.”
52. Guided by these principles, the court has examined the affidavits in support of the Motion and the Petition and notes that at the foot of the affidavits, the Notary Public, Ingrid Flom, states that that signature belongs to the deponent who has certified the contents before her as required by Norwegian law. The affidavits bear her signature and seal. That being the case, it is the finding of the court that there has been sufficient authentication and the affidavits satisfy the requirements of Sections 88 of the *Evidence Act*.
53. On the issue of the validity of the annexures in support of the affidavits, it is trite in law that where a person seeks to prove a fact by way of affidavit, he is obligated to exhibit any document on his affidavit and the same must be duly commissioned by a commissioner for oaths or notarized as the case may be.



54. Section 4 of the *Oaths and Statutory Declarations Act*, Cap 15 provides as follows:

“A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court.”

55. Rules 9 and 10 of the Oaths and Statutory Declarations Rules on the other hand provide:

“(9) All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.”

(10) The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.”

56. In the present case, the deponent, Ms Henriksen has referred to various annexures in the Supporting Affidavits in support of the Motion and the Petition which are intended to reinforce the factual assertions therein.

57. However, the Supporting Affidavits were sworn and notarized in Norway, yet the annexures were sealed by a commissioner for oaths in Kenya on the same date. This presents a legal inconsistency, as it is impossible for a commissioner in Kenya to lawfully seal annexures that are attached to an affidavit sworn and notarized in a foreign jurisdiction.

58. Indeed, the law does not envisage a scenario where a commissioner, seals exhibits linked to an affidavit that were neither commissioned nor sworn before them. The proper course of action would have been for the notary public in Norway to also seal and authenticate the annexures contemporaneously with the notarizing of the affidavit.

59. Rather than directly address this inconsistency, the Petitioners contend that the defect is a mere technicality that should not be used to invalidate the annexures or undermine their case. They argue that the court should adopt a liberal interpretation that prioritizes substantive justice over strict procedural compliance.

60. The requirement for properly marking, sealing, and attesting to annexures is not a mere formality, but a crucial safeguard that guarantees the authenticity and probative value of documentary evidence.

61. When these safeguards are disregarded, the credibility and admissibility of the affected documents are called into question, ultimately compromising the fairness and predictability of judicial proceedings.

62. Indeed, the court does not consider that the same is in the nature of a defect in form as alluded to in Order 19 Rule 7 of the Civil Procedure Rules, neither is it curable by virtue of Article 159 of *the Constitution*. The court finds comfort in this respect in the exposition by Kiage, JA in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 others* [2013] eKLR thus:

“... I am not in the least persuaded that article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and



timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

63. Having found that the exhibits attached to the affidavit in support of the application of July 13th, 2020 contravene Rules 9 and 10 of the Oaths and Statutory Declarations Rules, the same are hereby expunged from the record.
64. It is noted that, in what appears to have been an attempt to go around the irregularity, the Petitioners filed a Further Affidavit wherein Ms. Henriksen reiterated the averments in her initial Supporting Affidavit, together with the annexures thereto. It is trite that a Further Affidavit is meant to respond to issues raised in the Replying Affidavit. It is not intended to serve as a substitute for the initial Supporting Affidavit, nor can it be used to cure fundamental defects in the original affidavit.
65. Having expunged the annexures to the Supporting Affidavits of 6th August, 2024 from the record, it follows that the aforesaid affidavits are bare and without any evidentiary anchorage. This has fatal consequences for the Motion.
66. Given that the Preliminary Objection has succeeded on this point, it would serve no practical purpose for the court to delve into further determinations on the matter. Consequently, the grounds of opposition are now moot.
67. As to the fate of the Petition, the expulsion of the annexures to the affidavit in support of thereof undoubtedly leaves it in a precarious position, as it now lacks evidentiary support. However, given that the Petition itself has yet to be prosecuted, the court is inclined to allow the Petitioners an opportunity to rectify their pleadings in accordance with the law. The Petitioners may seek to file fresh affidavits and exhibits that comply with the requisite statutory and evidentiary requirements.
68. In light of the foregoing, the court makes the following final determination:
 - i. The Preliminary Objection of 28th October, 2024 partly succeeds to the extent that the Notice of Motion dated 9th August, 2024 be and is hereby struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Olembo for Kanjama for Petitioners

Mr. Allan Kamau for 1st – 3rd Respondents

Mr. Githinji for 1st Interested Party.

Court Assistant: Tracy

