**Kanyua v Nganga**

**Division:** High Court of Kenya at Nairobi

**Date of ruling:** 1 March 2004

**Case Number:** 2038/96

**Before:** Ochieng AJ

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Affidavit – Affidavit not sworn – Whether unsworn affidavit curable.*

*[2] Pleadings – Form of – Originating summons supported by an unsworn affidavit – Amended*

*originating summons supported by sworn affidavit – Whether amended originating summons cure*

*original originating summons.*

**Editor’s Summary**

The applicant instituted suit in the High Court by way of originating summons. The respondent filed a replying affidavit saying he was not the registered owner of the suit premises. The applicant applied to join the registered owner as the second respondent. The amended originating summons was supported by the affidavit of the applicant. At the hearing the first respondent raised a preliminary objection saying the originating summons was a nullity because the applicant’s supporting affidavit had not been sworn. The applicant argued that because the amended originating summons was supported by a sworn affidavit, the original originating summons was not defective.

**Held** – The filing of an amended originating summons would not cure original originating summons where the originating summons was supported by a defective affidavit. An originating summons not supported by an affidavit is incurably defective; *Gawo v Nairobi City Council* [2001] 1 EA 69 applied. An affidavit which is not sworn is fatally defective and cannot support an originating summons.

The originating summons was struck out.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Igweta v M’ethaa and another* [2001] LLR 3502 (CAK)

***United Kingdom***

*Gawo v Nairobi City Council* [2001] 1 EA 69 – **AP**