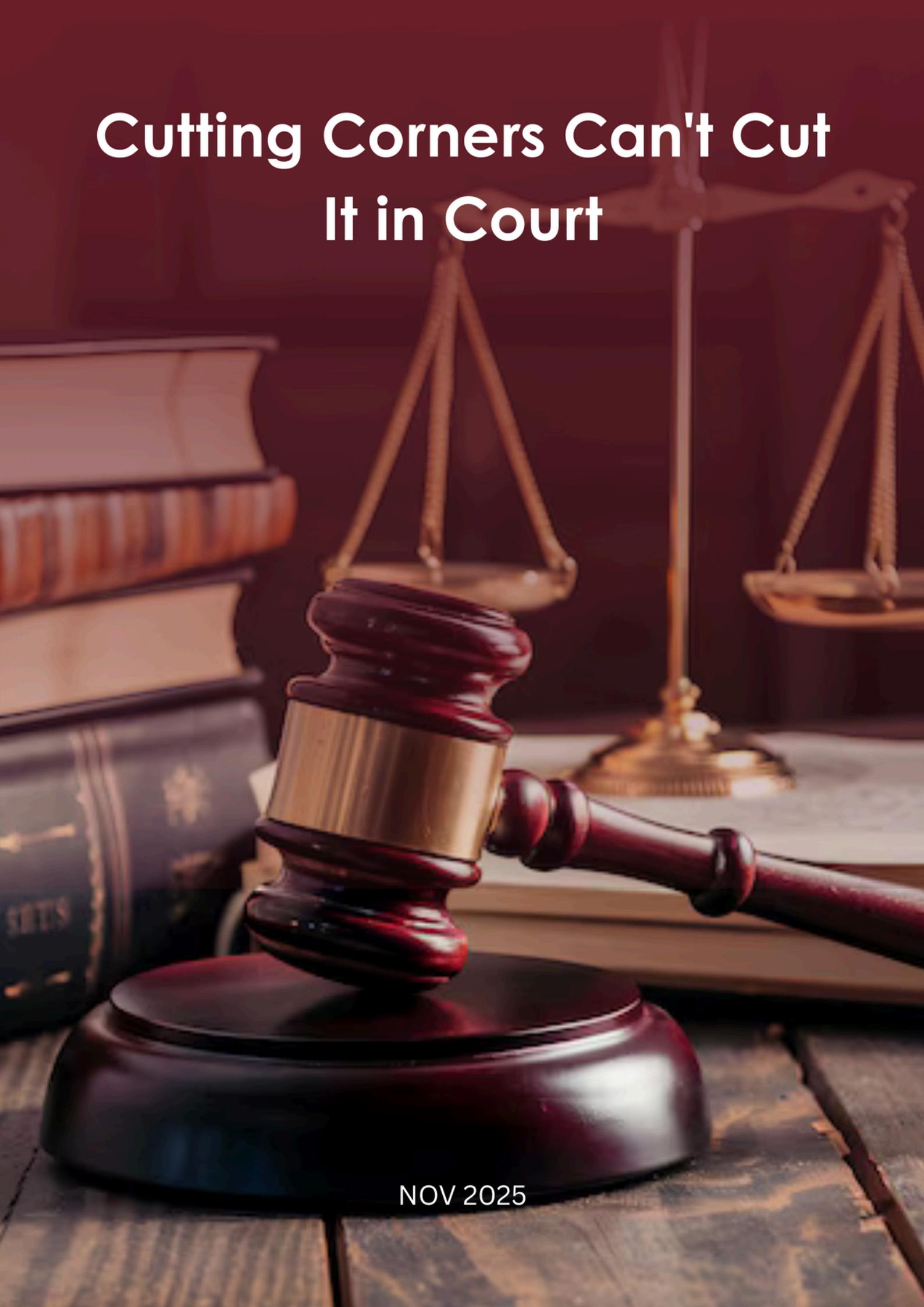


Cutting Corners Can't Cut It in Court

A wooden gavel and a brass scale on a wooden desk with books in the background.

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"This court agrees that in legal practice as in other sectors, shortcuts may have been adopted apparently to make work easier, but that does not give them the stamp of propriety"

~Honourable Mugambi Njoroge
Judge of the Environment and Land Court

The Environment and Land Court at Malindi (the Court) has established precedent that when an affidavit is sworn and signed by a deponent and commissioned electronically, it must be accompanied by a certificate of electronic evidence to be admissible in court as provided for under the Evidence Act.

In the case of Dardanelli and 6 others v Tiiito and 3 others [2025] KEELC 392 (KLR), the Defendants filed an application seeking stay of proceedings for the matter to be referred to arbitration. Ordinarily, their application was supported by an affidavit whose deponent was not in Nairobi, Kenya at the time of swearing, yet, the affidavit stated that it was sworn at Nairobi. The Plaintiffs thus took issue with regards to the authenticity and admissibility of the affidavit, culminating in this precedent.

The Court astutely rebuked the defence of common practice that was raised by the Defendants. The Court further stated that the common practice of advocates to commission affidavits in the absence of and without witnessing the deponent signing the said affidavit, is nullity. That, this practice while usual, does not conform to the law.

From the determination of the Court, the essence of Section 5 of the Oaths and Statutory Declarations Act, Cap. 15 (the Act), is to ensure authenticity and good order of the suit. This is to prevent perjury and by extent, prevent unnecessary delays in the court process from such discovery.

Moreover, the Court adorned the lens of the digital transformation and subsequent evolution in various legal practices. It further noted that parties have and will continue to execute legal documents electronically, just as we now have virtual court sessions, both for the sake of convenience. In essence, considering the probative value of an affidavit, the Court posited that an affidavit sworn and commissioned electronically, like any other electronic evidence, must be accompanied by a Certificate of Electronic Evidence, guided by section 106B of the Evidence Act, Cap. 80.

This is now a crucial requirement for advocates in similar context. We predict that courts shall continue to offer guidance on the admissibility of affidavits when the Commissioner for Oaths and the deponent are in different locations. We, however, question whether a Certificate of Cutting Corners Can't Cut It in Court Electronic Evidence shall indeed address the mischief of fraudulent signing that was initially addressed by Section 5 of the Act. Previously, the deponent would have the affidavit commissioned or notarized strictly in the presence of the Commissioner for Oaths or the Notary Public, then have the original document couriered for the sake of filing or other transaction. Perhaps, in the fast evolving legal landscape spurred on by digital transformation, the solution to creative fraudulent tactics is to revert to what some term as the "good old ways".

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