



Mwangi v Wambui & another; Chege Wainaina & Co Advocates (Garnishee) (Commercial Case 185 of 2009) [2023] KEHC 1891 (KLR) (Commercial and Tax) (22 February 2023) (Directions)

Neutral citation: [2023] KEHC 1891 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 185 OF 2009
DO CHEPKWONY, J
FEBRUARY 22, 2023

BETWEEN

LUCY WAIRIMU MWANGI PLAINTIFF

AND

MONICA JACKLINE WAMBUI 1ST DEFENDANT

PAULINE MUKUHI NGANGA 2ND DEFENDANT

AND

CHEGE WAINAINA & CO ADVOCATES GARNISHEE

DIRECTIONS

1. This matter came up on February 20, 2023 for parties to confirm whether parties had complied with directions issued on December 22, 2022. While Mr Nyboma, counsel for the plaintiff confirmed that they had not complied and sought for more latitude to file their written submission, M/s Wambui, learned counsel for the 1st and 2nd defendants applied for cross-examination of Mr Chege Wainaina, the deponent to an affidavit dated December 8, 2022. According to the said learned counsel, Mr Chege had been adversely mentioned in the affidavit dated January 5, 2023 on allegations of fraud and in the counsel's view, it would be in the interest of justice that the prayer for cross-examination be allowed. Mr Nyboma, counsel for the plaintiff opposed the application citing that the same was an attempt to relitigate on issues which had already been addressed and determined by the court.
2. In considering the order sought by the defendants, I am guided by the provisions of order 19 rule 2 of the *Civil Procedure Rules*, which in my understanding allows for cross-examination of a deponent of an affidavit on the matters deposed therein. However, there should be special circumstances before ordering for cross-examination of a deponent of an affidavit and the party seeking such cross-



examination ought to place before court, adequate material that demonstrate that the same would be in the interest of justice and that it would assist in arriving at the truth or that it would be just and fair to order for cross-examination of such deponent.

3. While laying emphasis that it is within the discretion of court to grant or refuse cross-examination of a deponent to an affidavit, the court in the case of *GGR -vs- HPS*[2012]eKLR, listed some of the factors or instances, which would compel such cross-examination. This includes where there is conflict in itself, where there are allegations on matters touching on fraud, *malafides*, and authenticity of the facts deposed or bad motives.
4. Bearing the above legal perspective in mind, I have considered Mr Chege's affidavit dated December 8, 2022 as well as M/s Monica Jackline Wambui's affidavit dated January 5, 2023. In the affidavit dated December 8, 2022, Mr Chege states that the Garnishee holds monies in the accounts of judgment debtors and the same is subject in the present garnishee proceedings. On the other hand, M/s Monica Jackline has deposed in the affidavit dated January 5, 2023 that Mr Chege and the plaintiff/applicant colluded to deprive her of the house subject to these proceedings and in the most recent case, they had attempted to forge receipts for payment of stamp duty on the property.
5. In my respectful view, this court delivered judgment on May 18, 2020 with respect to claims made by the parties herein. Whether Mr Chege and the plaintiff acted in collusion in this matter was an issue to be considered in the said judgment. This court is therefore functus officio with respect to disputes elucidated in the main and cross suits and any cross-examination intended to add on the merit and case made in the main suit or that cross suit would not aid the court in determining the issue at hand, which is whether the garnishee order absolute should issue in this matter. Whether there was fraud in the dealings of either party in the dispute culminating to the instant suit is not an issue that can aid in the pending garnishee proceedings.
6. Nonetheless, the court can only allow cross-examination of Mr Chege with respect to the affidavit dated December 8, 2022, if it is shown that the affidavit has inconsistencies on its face or facts thereon or where the affidavit fast-tracks fraud, *malafides* or bad motives. None of these grounds have been shown to exist in the affidavit dated December 8, 2022 rather the allegations made stem from the claims made in the cross suit and the history leading to the dispute between the parties.
7. In that respect, I am not persuaded that the defendants have established a special case with proper legal foundation to justify the application for cross-examination.
8. That being the case, parties are advised to fast-track the dispensation of the garnishee application dated September 19, 2022 and the notice of preliminary objection filed in response thereof. Consequently, the following orders do issue:-
 - a. The plaintiff be at liberty to file a response to the preliminary objection within seven (7) days from the date hereof.
 - b. Each party is granted fourteen (14) days to file written submissions with respect to the preliminary objection and the application dated September 19, 2022, with the plaintiff going first.
 - c. Highlighting of submissions on April 18, 2023.

It is so ordered.

DIRECTIONS DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2023.



D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Nyboma holding brief for Mr Ojiambo for Plaintiff/Applicant

Mr. Olukaka holding brief for M/S Wambui Kibicho counsel for Defendants

Mr. Kairaria counsel for Garnishee

