



**Wilfred Ngunjiri Nderitu t/a Nderitu & Partners Advocates v  
National Housing Corporation (Commercial Case E091 of 2018)  
[2023] KEHC 24607 (KLR) (Commercial and Tax) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E091 OF 2018**

**MN MWANGI, J**

**JULY 31, 2023**

**BETWEEN**

**WILFRED NGUNJIRI NDERITU T/A NDERITU & PARTNERS  
ADVOCATES ..... PLAINTIFF**

**AND**

**NATIONAL HOUSING CORPORATION ..... DEFENDANT**

**RULING**

1. The application before me is a Notice of Motion dated 3<sup>rd</sup> September, 2019 brought under the provisions of Order 19 Rule 2 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and all other enabling provisions of the law. The plaintiff seeks the following orders -
  - i. That this Honourable Court be pleased to set the date for the attendance and cross-examination of Kennedy Nyariki Nyabare in relation to the averments of his replying affidavit sworn on 4<sup>th</sup> July, 2019 and filed in Court on 5<sup>th</sup> July, 2019; and
  - ii. That the costs of this application be awarded to the plaintiff.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Wilfred Ngunjiri Nderitu (SC), the plaintiff's Counsel. In opposition thereto, the defendant filed a replying affidavit sworn on 3<sup>rd</sup> February, 2020, by Kennedy Nyariki Nyabare, the defendant's Senior Legal Officer.



3. The application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Nderitu & Partners Advocates on 28<sup>th</sup> January, 2020, whereas the defendant's submissions were filed on 4<sup>th</sup> February, 2020 by the law firm of Ngatia & Associates.
4. Mr. Nderitu (SC), for the plaintiff herein, submitted that he filed an amended plaint on 13<sup>th</sup> November, 2018 seeking judgment against the defendant for the principal sum of Kshs. 1,014,414.53, costs of the suit and interest at the rate of 14% per annum. He stated that in response thereto, the defendant filed an amended statement of defence on 29<sup>th</sup> November, 2018. That thereafter, the plaintiff filed an application dated 29<sup>th</sup> May, 2019 seeking to strike out the defendant's amended statement of defence for being a sham and an abuse of the Court process, and for judgment to be entered in favour of the plaintiff for the liquidated sum of Kshs. 1,014,414.53, interest thereon at 14% per annum and costs of the suit. In response to the said application, the defendant filed a replying affidavit sworn on 4<sup>th</sup> July, 2019 by Kennedy Nyariki Nyabare, the Senior Legal Officer of the defendant company.
5. Senior Counsel referred to the provisions of Order 19 Rule 2 Sub-rules 1 & 2 of the Civil Procedure Rules, 2010 and submitted that this Court has the power to order the attendance of a deponent for cross-examination on the averments of his affidavit upon establishment of a proper legal basis as is the case herein. He submitted that Mr. Nyabare's affidavit is full of malicious falsehoods which negatively impact on his credibility as an Advocate and an Officer of this Court and he should be summoned to attend Court for cross-examination on paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 14 & 15 of his affidavit. Mr. Nderitu (SC) relied on the case of *Majanja Luseno & Advocates v Sammy Boit Arap Kogo* [2016] eKLR, where the Court considered the severity of the allegations made in the affidavit and allowed cross-examination of the deponent.
6. He also relied on the case of *Nancy Wanja Gatabaki v Ashford Muriuki Mugwuku t/a Ashford & Company Advocates* [2013] eKLR, where the Court considered the circumstances under which a deponent may be summoned to be cross-examined on the contents of an affidavit and stated that the plaintiff has laid out a proper basis to warrant an order requiring Mr. Nyabare to be cross-examined on the contents of his replying affidavit to the application dated 29<sup>th</sup> May, 2019. He stated that the plaintiff has specified the paragraphs of the said affidavit which give rise to the need for cross-examination. Senior Counsel urged the Court to consider the fact that Mr. Nyabare confirmed that he is a resident of Nairobi, which means that he can be readily produced before this Court for cross-examination purposes.
7. Mr. Ngatia (SC), learned Counsel for the defendant submitted that despite the fact that the plaintiff seeks leave of the Court to cross-examine the deponent of the defendant's affidavit so as to conclusively ascertain the truth of the averments on the replying affidavit, the plaintiff had not filed a further affidavit to counter the factual averments contained in the said affidavit hence the instant application has been made in a factual vacuum and ought to be dismissed. He relied on the case of *Esther Muthoni Passaris v Kultar Singh Hanspal* [2008] eKLR and submitted that there is no inconsistency on the contents of the defendant's affidavit, and in the absence of a further affidavit by the plaintiff, the issues raised by the defendant in its replying affidavit remain uncontroverted. He stated that no reason exists for the Court to allow the cross-examination of Mr. Nyabare.
8. Senior Counsel relied on the case of *Moi University v Vishva Builders Limited* Civil Appeal No. 296 of 2004 (unreported) cited by the Court of Appeal in the case of *Issac Awuondo v Surgipharm Limited & another* [2011] eKLR, and stated that the defendant's amended statement of defence raises triable issues such as the issue of the delivery of the plaintiff's itemized bill of costs dated 22<sup>nd</sup> December, 2010 to the defendant, which requires interrogation during a full trial of the suit. He further stated that the orders sought by the plaintiff will prejudice the defendant's case by giving the plaintiff an



undue advantage and it is in the interest of justice for both parties to tender their evidence and be cross-examined at the hearing of the main suit.

9. In submitting that the orders sought by the plaintiff in the instant application ought not to issue as it will amount to converting the hearing of an interlocutory application into a hearing of the main suit, Mr. Ngatia (SC) relied on the decisions in *APA Insurance Limited v Jennifer Adoyo Oremo* [2016] eKLR and *Nyoro Construction Co. Limited v Prashanth Projects Ltd & another* [2015] eKLR, where it was held that the Court should not make findings or opinions in an interlocutory application that will prejudice the trial. Senior Counsel urged the Court to dismiss the application herein with costs.

### **Analysis And Determination**

10. I have considered the instant application, the grounds on the face of it, the affidavit filed in support thereof and the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiff's deponent should be summoned for cross-examination of some of his averments in the affidavit sworn on 4<sup>th</sup> July, 2019 in response to the plaintiff's application dated 29<sup>th</sup> May, 2019.
11. The plaintiff in his affidavit deposed that in the defendant's affidavit sworn by Kennedy Nyariki Nyabare, the Senior Legal Officer of the defendant company on 4<sup>th</sup> July, 2019 in opposition to the plaintiff's application dated 29<sup>th</sup> May, 2019, insinuated that the plaintiff misled this Court in his affidavit sworn on 29<sup>th</sup> May, 2019, in support of the said application regarding the fact that-
  - i. His law firm delivered to the defendant an itemized bill of costs and letter both dated 22<sup>nd</sup> December, 2010;
  - ii. On 23<sup>rd</sup> December, 2010 the defendant acknowledged receipt of the said letter and itemized bill of costs by signing for them in his delivery book; and
  - iii. The extract of the delivery book annexed to his affidavit was from a delivery book belonging to his law firm.
12. The applicant averred that cross-examination of Mr. Nyabare will enable this Court to establish the veracity of the averments contained in his affidavit in issue.
13. The defendant in its replying affidavit deposed that by an application dated 29<sup>th</sup> May, 2019, the plaintiff sought for orders that the defendant's amended statement of defence filed on 29<sup>th</sup> November, 2018 be struck out on grounds that it does not raise any triable issues. That the plaintiff also sought a prayer for judgment to be entered in his favour against the defendant. The defendant averred that in opposition to the said application, it filed a replying affidavit sworn on 5<sup>th</sup> July, 2019, where it was deposed that the plaintiff's alleged itemized bill of costs dated 22<sup>nd</sup> December, 2010, was not received by the defendant as alleged or at all, since the said bill of costs does not bear its stamp acknowledging its receipt of the same.
14. It was stated by the defendant that there is no evidence that the extract of the delivery book referred to at paragraph 5 of the plaintiff's supporting affidavit is from a delivery book belonging to the firm of Nderitu & Partners Advocates. The defendant contended that the issue of delivery of the said bill of costs requires further interrogation by the Court during a full trial.
15. The defendant stated that the plaintiff now seeks to cross-examine the deponent of its affidavit sworn on 5<sup>th</sup> July, 2019 on its contents, on grounds that the said affidavit is full of malicious falsehoods. It asserted that the plaintiff ought to have filed a supplementary affidavit to adduce evidence in response to the issues raised in the defendant's affidavit sworn on 5<sup>th</sup> July, 2019.



16. The defendant averred that its statement of defence raises triable issues and there is no inconsistency on the contents of its affidavit sworn on 5<sup>th</sup> July, 2019 and for this reason, the instant application only seeks to convert the hearing of an interlocutory application into a trial of the main suit. The defendant further averred that since delivery of the plaintiff's bill of costs dated 22<sup>nd</sup> December, 2010, to the defendant is disputed, at the hearing of the main suit, the plaintiff's witness ought to adduce evidence regarding the said delivery and thereafter be cross-examined on the same.
17. The defendant contended that the best forum for all the parties herein is a trial of the dispute between the parties which would afford all parties an equal forum and the Court an opportunity to make a determination of all the issues raised herein. The defendant asserted that the plaintiff has laid no basis to warrant cross-examination of the deponent of the affidavit sworn on 5<sup>th</sup> July, 2019, at an interlocutory stage.

**Whether the plaintiff's deponent should be summoned for cross-examination of some of his averments in the affidavit sworn on 4<sup>th</sup> July, 2019 in response to the plaintiff's application dated 29<sup>th</sup> May, 2019.**

18. Order 19 Rule 2 of the [Civil Procedure Rules](#) provides for the Court's power to order attendance of deponents in Court, for cross-examination. It states as follows
  - “(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
  2. Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”
19. Any party desiring to cross-examine a deponent of an affidavit must set out the particular paragraphs he wishes to cross-examine the deponent on. The Court then has the discretion to order attendance of a deponent of an affidavit for purposes of cross-examination. Courts must however exercise the said discretion judiciously, and only in cases where the purpose of such cross-examination is to enhance the course of justice. In the case of [R v Kenya Revenue Authority ex-parte Althaus Management and Consultancy Ltd](#) [2015] eKLR, Odunga J., (as he then was) when dealing with an application similar to the present one held that –

“Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words, a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent's affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held



by Ochieng, J. in the case of *Abmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2)* [2006] 2 EA 6.” (emphasis added).

20. In this case, the plaintiff contended that the defendant’s replying affidavit sworn on 4<sup>th</sup> July, 2019 in opposition to the plaintiff’s application dated 29<sup>th</sup> May, 2019, is full of malicious falsehoods which negatively impact on his credibility as an Advocate and an Officer of this Court. The plaintiff stated that for the said reason, the defendant’s deponent ought to be cross-examined so as to substantiate the allegations in the said affidavit. On the other hand, the defendant submitted that the plaintiff has not established the basis for an order for cross-examination and in addition, the orders sought by the plaintiff will prejudice the defendant’s case by giving the plaintiff an undue advantage.
21. The replying affidavit that forms the subject of the instant application was filed in opposition to the plaintiff’s application dated 29<sup>th</sup> May, 2019, seeking to strike out the defendant’s amended statement of defence for allegedly being a sham and an abuse of the Court process. The said application also sought for judgment to be entered in favour of the plaintiff for the liquidated sum of Kshs. 1,014,414.53, interest thereon at 14% per annum and costs of the suit. In the case of *APA Insurance Limited v Jennifer Adoyo Oremo* [2016] eKLR, the Court held as follows-
- “An application to strike out a suit is a summary procedure designed to obviate a full-length hearing when the claim or defence is hopeless. Where it results in the cross-examination of deponents and filing of counter affidavits, it defeats the very purpose of the summary process. In my view, the trial court has sufficient power and authority to ensure that the parties get to the heart of the matter and give necessary directions particularly where it appears in this case that the summary process has morphed into a full-length trial.... The power granted to the court to order cross-examination of a deponent is discretionary but it is an exception in interlocutory matters particularly in a case of striking out a pleading.” (emphasis added).
22. The plaintiff contended that the defendant in its affidavit insinuated that he misled the Court in his affidavit sworn on 29<sup>th</sup> May, 2019, regarding the contested fact that his law firm delivered to the defendant an itemized bill of costs and letter both dated 22<sup>nd</sup> December, 2010, and that on 23<sup>rd</sup> December, 2010, the defendant acknowledged receipt of the said letter and itemized bill of costs by signing for them in the plaintiff’s delivery book, and the extract of the delivery book annexed to its affidavit was from a delivery book belonging to the said law firm.
23. It is my finding that in determining the application dated 29<sup>th</sup> May, 2019, all that this Court has to establish is whether the defendant’s amended statement of defence raises even one bona fide triable issue. It is therefore this Court’s finding that cross-examining the deponent on the veracity of the aforementioned allegations particularized by the plaintiff, shall amount to trial of the main suit in the dispute between the parties herein, in an interlocutory application. On perusal of the record, it is evident that the said Kennedy Nyariki Nyabare who is the deponent of the defendant’s affidavit sworn on 4<sup>th</sup> July, 2019, has been listed as one of the defendant’s witnesses in the main suit. It therefore follows that the plaintiff will have an opportunity to cross-examine him at the hearing of the main suit.
24. The upshot is that the application dated 3<sup>rd</sup> September, 2019 is bereft of merit. It is dismissed with costs to the defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



**NJOKI MWANGI**  
**JUDGE**

