



**Clearwater Industries Limited v First Community Bank Limited; Rural Power Solutions Limited (Third party) (Commercial Case 199 of 2017) [2022] KEHC 13383 (KLR) (Commercial and Tax) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13383 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 199 OF 2017  
WA OKWANY, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**CLEARWATER INDUSTRIES LIMITED ..... PLAINTIFF**

**AND**

**FIRST COMMUNITY BANK LIMITED ..... DEFENDANT**

**AND**

**RURAL POWER SOLUTIONS LIMITED ..... THIRD PARTY**

**RULING**

1. This ruling is in respect to the objection raised by Mr Owino, learned counsel for the plaintiff, during the hearing on July 6, 2022. Counsel objected to the cross examination of the plaintiff by the third party on the basis that the plaintiff did not have a claim against the said third party. According to Mr Owino, the plaintiff did not file any response to the third party's case.
2. In a rejoinder, Mr Nyanyuki for the third party argued that the issue in question touched on the third party's bank account from which the plaintiff sought payments. He contended that it was therefore necessary to determine the person with the mandate to operate the said account. He further argued that it is necessary to give the third party an opportunity to clarify, from the plaintiff, its basis of seeking to recover money from its account. Counsel cited the provisions of order 1 rule 22 of the [Civil Procedure Rules](#) (CPR) which provides that: -

22. If a third party enters an appearance pursuant to the third party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question



to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

3. The issue before court is whether the third party should be allowed to cross examine the plaintiff's witness. In *Law Society of Kenya v Faith Waigwa & 8 others* [2015] eKLR the court gave the rationale of cross-examination of witnesses as follows: -

“First, it is a mechanism which is used to bring out desirable facts to modify or clarify or to establish the cross-examiner's case. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness's averments is tested. Thirdly, the exercise of cross-examination in some cases gives the court an early chance to get the glimpse of what to expect during the substantive hearing. This may assist the court in making the necessary directions at the pre-trial conferences envisaged under order 11 of the Civil Procedure Rules. However, the process of cross-examination should not be used to convert the hearing of an interlocutory application into a mini or full trial of the suit. It is a difficult balancing act which the court has to live with for a long time. It is also a process which is sparingly used because it may lead to a considerable delay in concluding an otherwise straightforward dispute. ....

4. I have perused the record, and I note that the plaintiff's claim against the defendant is with respect to the monies held in account number 0xxxxxx3 domiciled at the defendant's bank. The plaintiff claims that it opened the said joint account together with third party in anticipation of a joint venture. The plaintiff accused the defendant's staff for stealing money held in the said account.
5. My finding is that the issues raised by parties herein arise from the same transaction. The right to cross examine a witness forms part and parcel of the right to fair hearing as envisioned under article 50 of the *Constitution*. This court is of the view that it is through cross examination of the plaintiff that the court will get a clearer view of the facts of the case thus aiding in the fair determination of the matter.
6. In sum I find that the objection raised by the plaintiff is not merited and I therefore dismiss it and order that the matter proceeds for cross examination of the plaintiff by the third party.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Mr. Osodo for Owino for Plaintiff.

Mr. Mbabu for Defendant

Mr. Nyanyuki for Third Party.

Court Assistant- Sylvia

