



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

HCCC NO. 434 OF 2014.

NDUNDE INVESTMENTS LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

EUGENE MUTHONI DADET.....DEFENDANT

RULING

1. On 27th November 2019, the defendant herein, **Eugenie Muthoni Dadet**, filed a Notice of Intention to cross examine one **Joseph Mbai Mbugua** on the contents of a replying affidavit he swore and filed on 10th July 2019 in response to the defendant's application dated 18th June 2019 wherein the defendant sought, inter alia, orders for stay of execution and to set aside the judgment entered against it on 13th December 2018.

2. At the hearing of the application, **Mr. Akedi**, learned counsel for the defendant, submitted that Order 19 Rule 2 of the Civil Procedure Rules stipulates that an application to cross examine a deponent can be made either orally in court or by way of a formal application. Counsel further submitted that Article 50(1) of the Constitution allows parties to challenge the evidence placed before the court. Counsel also cited the provisions of Articles 27 and 22(3) (d) of the Constitution to buttress his arguments that the ends of justice will be met if the defendant is granted the opportunity to cross examine the plaintiff's deponent.

3. On his part, **Mr. Gatuhi**, learned counsel for the plaintiff submitted that under Order 19 of the Civil Procedure Rules, a formal application by way of chamber summons to cross examine a deponent should have been filed and that the as the notice to cross examine a deponent does not expressly state the particulars upon which such cross examination would be based.

4. This ruling is therefore on the issue of whether the notice to cross examine filed on 27th November 2019 should be allowed. Order 19 Rule 2 of the Civil Procedure Rules stipulates 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.”

5. The wording of the above provision connotes that the power to order a deponent to appear in court for purposes of cross examination is a discretionary power which must be exercised judiciously and only in the most deserving cases. Contrary to the plaintiff's assertions, Order 19 Rule 2 does not specifically provide that a formal application to cross examine a deponent must be filed before an order to that effect can be made. All that the order states is that the court may order attendance of a deponent for cross examination at the instance of either party.

6. My finding is that affidavit evidence, like oral evidence, is not full proof or beyond challenge and may be interrogated through cross examination in order to test its credibility. I further find that just like in any normal cross examination after presentation of oral evidence, a party seeking to cross examine a deponent must not necessarily indicate up-front or beforehand, the nature of questions he intends to pose to the deponent during cross examination.

7. In **GGR v HPS** [2012] eKLR, the court held;

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the court may order a deponent of an affidavit to attend court to be cross examined. It would appear that where allegations of matters touching on fraud, malafides, authenticity of the facts deponed (sic), bad motive among others are raised, cross examination of the deponent of an affidavit may be ordered. This also extends to where there is a conflict of affidavits on record or order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an affidavit. The court must feel that adequate material has been placed before it that shows that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”

8. Taking a cue from the above cited case, I find that in the present case, apart from filing a notice to cross examine the deponent, the defendant has not placed any other material before this court to show that the intended cross examination would serve the interest of justice.

9. I have also perused the replying affidavit dated 10th May 2019 that is the subject of the Notice of Intention to Cross Examine and I note that it mainly contains denial of the averments made by the defendant in the supporting affidavit sworn on 18th June 2019 and statements of facts regarding the proceedings that have so far been conducted in the matter including advise and information that the deponent received from his advocates on record.

10. My finding is that there are no special circumstances raised in the subject replying affidavit that would warrant the granting of an order to cross examine its deponent. Consequently, I decline to grant the order to cross examine the plaintiff’s deponent. I direct that the application dated 18th June 2019 be heard on its merits. I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 12th day of March 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Gatari for Njagi for plaintiff

Mr. Abok for Mrs Akedi for defendant/Judgment Debtor

Court Assistant – Sylvia