



**Mohamed v Beja & 5 others (Environment & Land Petition  
59 of 2011) [2023] KEELC 20958 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20958 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 59 OF 2011  
NA MATHEKA, J  
OCTOBER 24, 2023**

**BETWEEN**

**ABDULLAH MANGI MOHAMED ..... PLAINTIFF**

**AND**

**LAZARUS BEJA ..... 1<sup>ST</sup> DEFENDANT**

**DOMINIC LIVU IVULI ..... 2<sup>ND</sup> DEFENDANT**

**OMAR ABUBAKAR ZUBEDI ..... 3<sup>RD</sup> DEFENDANT**

**SMIN SHALA OUDE ..... 4<sup>TH</sup> DEFENDANT**

**THE SENIOR REGISTRAR OF TITLES MOMBASA ..... 5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated February 27, 2023 and seeks the following orders;
  1. That this Application be certified as urgent and service thereof be dispensed with in the first instance.
  2. That this Honourable Court be pleased to issue Orders allowing the 3<sup>rd</sup> Defendant to proceed by way of Affidavit evidence and the 3<sup>rd</sup> Defendant be granted leave to file a Sworn Witness Statement in place of the Witness Statement dated April 15, 2019.
  3. That the costs of this application be in the cause.
2. It is premised on the supporting affidavit of Omar Abubakar Zubedi the 3<sup>rd</sup> Defendant herein and the following grounds that the 3<sup>rd</sup> Defendant filed the Witness Statement dated April 15, 2019 and is fully aware of the facts pertaining to this suit. That the 3<sup>rd</sup> Defendant filed the documents as contained



in the List of Documents dated March 23, 2015. That the Plaintiff testified on September 27, 2022 and proceeded to close his case and the matter was set down for hearing of the Defendant's case on November 21, 2022. That when the matter came up for hearing of the Defendant's case on 21<sup>st</sup> November 2022, the 3<sup>rd</sup> Defendant was not able to attend Court on medical grounds and as he was out of the Country for purposes of seeking medical attention. That the Honourable Court adjourned the matter and slated the same for hearing on January 19, 2023 but the 3<sup>rd</sup> Defendant was not able to attend Court on the said date as he was still out of the country seeking further treatment. ■ ■ That the matter is now slated to come up for hearing of the Defence case on March 1, 2023 and the 3<sup>rd</sup> Defendant will still not be in a position to attend Court as he will be undergoing further treatment out of the Country. That the 3<sup>rd</sup> Defendant does not wish to occasion further adjournments in this matter and hereby applies to proceed with the hearing by way of affidavit evidence. That no prejudice will be visited on the other parties as the affidavit the 3<sup>rd</sup> Defendant wishes to rely on is with respect to documents already filed in Court and served on the other parties. That the 3<sup>rd</sup> Defendant has not raised any new facts or evidence that will prejudice the Plaintiff who has already testified and closed his case. That the 3<sup>rd</sup> Defendant's Application is aimed at furthering the Honourable Court's objective under section 1 (A) of the Civil Procedure Act with respect to aiding the Court to expeditiously determine proceedings. That unless the Application is allowed, the 3<sup>rd</sup> Defendant's constitutional right to be heard will be curtailed as he is unable to attend Court owing to the intense medical treatment out of the Country. That the Honourable Court is fully vested with the jurisdiction to invoke the provisions of order 19(1) of the Civil Procedure Rules and allow the 3<sup>rd</sup> Defendant to adduce his evidence by way of affidavit evidence so is to avoid any further adjournments in this matter.

3. The Plaintiff submitted that it is common practice that where allegations of fraud, misrepresentation, authenticity of any title are raised, the Court ought to order the deponent of the affidavit be cross-examined. Further, the order sought by the applicants is not an automatic right. The power to allow the orders sought is discretionary which must be exercised judiciously. The materials relied upon by the applicant in the instant suit is capable of irreparably injuring the Plaintiff if the Applicant is allowed to proceed and not be cross examined. The Applicant has not placed any document before this Honourable Court to suggest that he cannot remember the process that led to having a claim over the suit property. This being an era of technology and the Courts being online. They submit that during the 3<sup>rd</sup> defendant's case, the defendant be allowed to access court through the online system. This will give the parties a proper time to examine the 3<sup>rd</sup> Defendant.
4. This court has considered the application and the submissions therein. order 19 rule 2(1) of the Civil Procedure Rules recognizes that;
  - (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. Thus, this being a discretionary power, it is to be exercised judiciously and therefore some good reason ought to be shown to warrant the invocation of the power. In connection with this provision, it was observed in GGR v HPS (2012) eKLR that;

" 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, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the 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 show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”

6. Courts have in the past sought to interpret the provisions of Order 19 Rule 2(1). In the case of *Kibaki v Moi & another* ( Election Petition No.1 of 1998), the High Court in dismissing an application for cross-examination of a deponent held thus;

In the exercise of its ordinary jurisdiction, the High Court is vested with the discretionary power to allow the cross-examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed, cross-examination will not be ordered.”

7. Azangalala, J (as he then was) in *Hudson Enterprises Ltd v Kenya Cold Storage (Foods) & 14 others* (2006) eKLR observed that;

Under this provision (order XVIII rule 2 (1), the right to cross-examine a deponent on his affidavit is discretionary. Like all judicial discretions it has to be exercised judiciously and not whimsically or capriciously. In the case at hand the circumstances are such that I had to decline the application. All the complaints made by the Plaintiff can be established by means other than cross-examination of Wilfred Nyasimi Oroko.”

8. In the instant case the Applicant stated that the 3<sup>rd</sup> Defendant will still not be in a position to attend Court as he will be undergoing further treatment out of the Country. That the 3<sup>rd</sup> Defendant does not wish to occasion further adjournments in this matter and hereby applies to proceed with the hearing by way of affidavit evidence. However, the Plaintiff submitted that they would also wish to examine the Defendant on the veracity of the documents he filed in Court and rely upon. The Plaintiff believes those documents were acquired fraudulently and the same fraudulent title transferred to the 4<sup>th</sup> Defendant knowingly so as to defeat the Plaintiffs claim and escape liability. That if they were to proceed by way of affidavit evidence as recorded in the order of October 27, 2009, this may not resolve the issues. I find that fraud is a serious allegation and it would be prudent for the Plaintiff to be allowed to cross examine the 3<sup>rd</sup> Defendant to clarify any issues that they may have stemming from the affidavit. Indeed, in this era of technology this would not delay the matter as the case can be conducted through virtual hearings. I therefore find that this application is not merited and I dismiss it with costs.

9. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER 2023.**

**N.A. MATHEKA**

**JUDGE**

