



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

HCC NO. 467 OF 2015

KENYA DEPOSIT INSURANCE CORPORATION.....PLAINTIFF

VERSUS

HASSAN AHMED ABDUL HAFEDI ZUBEIDI.....1ST DEFENDANT

AFRICA ENERGY LIMITED.....2ND DEFENDANT

SULEIMAN ENTERPRISES COMPANY.....3RD DEFENDANT

KAMP GENERAL ENGINEERING CO.....4TH DEFENDANT

KEMU SALT PARKERS PRODUCTION CO.....5TH DEFENDANT

MAESTRO PROPERTIES COMPANY.....6TH DEFENDANT

RULING

1.The Plaintiff/Applicant filed this Chamber Summons Application dated 23rd June 2016, seeking for orders that Mr. Hassan Ahmed Abdul Hafedi Zubeidi, 1st Defendant/ Respondent, be ordered to appear in Court for cross examination on the contents of his Affidavit he swore dated 12th April 2016. The costs of the Application be provided for.

2. The Application is brought under Order 19 Rule 2 of the Civil

Procedure Rules, Section 1A, 3 and 3A of the Civil Procedure Act. It is based on the grounds on the face of it and an Affidavit sworn by Mohammed Adan Boru.

3.The background facts as stated by the Plaintiff/Applicant are

that, upon the inspection of Dubai Bank Kenya Ltd (hereinafter “the Bank”) by the Central Bank of Kenya between the 3rd and 14th August 2015, the Bank was placed under Receivership on 14th August 2015. This was pursuant to the Provisions of Section 43 and 53(1) of the Kenya Deposit Insurance Act, 2012. The Plaintiff/Applicant was then appointed as a Receiver thereof and Mr. Hassan Zubedi, the then Chairman of the Bank was accordingly informed of the appointment of the Plaintiff as the Receiver.

4. The Plaintiff then prepared a Status Report dated 24th August, 2015, in respect to the Bank as at 14th

August 2015 and presented it to the Central Bank of Kenya, recommending the Liquidation of the Bank as the most viable option. On the same date, the Central Bank of Kenya, pursuant to Sections 53(2) and 54(1)(a) of the Act appointed the Plaintiff as the Liquidator of the Bank.

5. The Applicant avers that at all the material times, the 1st Defendant, Mr. Zubedi has maintained that he was the Non-Executive Chairman of the Bank. He held both Executive and Non-Executive responsibilities. Thus, he had absolute control of the management and affairs of the Bank. He also held shares in/or was a Director or had absolute control over the affairs of the 2nd to 6th Defendants companies. These companies were recipients of substantial unsecured funds from the bank and/or the bank held unsecured securities in respect of the said defendants for credit running into hundreds of millions of shillings. That the titles recovered from the bank premises and which form the subject matter of this suit were meant and constitute security for various unauthorized and illegal advances made to the bank Board Members, members of their families, or their companies. The Plaintiff is entitled to recover the said properties and to deal with them in such manner as may be expedient to safeguard the interest of depositors and creditors of the Bank.

6. That the 1st Defendant is seeking for the release of titles confiscated yet he has not disclosed to the Court when he acquired these properties, which the Plaintiff has established that they belong to the Bank. The dispute over who owns these properties can only be resolved through cross-examination of the 1st Defendant. Thus the Court has to first establish the propriety of the transactions leading to the acquisition of the properties and unless he is cross examined as sought, the material non-disclosure in his affidavit will rob the Honourable Court of an opportunity to wholesomely verify the allegations contained therein. The Court has inherent jurisdiction to order for cross-examination where it has been established that there is need to cross-examine a deponent on the contents of an affidavit. That in addition, the 1st Defendant's Application dated 12th April 2016, is seeking for final orders and if granted the matter will be fully determined.

7. The 1st Defendant opposed the Application by filing a Replying Affidavit sworn, dated and filed on 15th July 2016. He deposed that, the prayer seeking to have him cross-examined on the Affidavit he has sworn dated 12th April 2016 is without merit or basis, as the same is purely intended to delay the hearing and determination of the Application dated 12th April 2016, in which the 1st Defendant seeks *Inter alia* for the release of his possessions illegally detained by the Plaintiff. That, the Applicant herein is merely repeating and re-litigating issues and allegations that are raised in the Applications pending before the Court. He further relied on the Supporting Affidavit filed in support of his Application dated 12th April 2016, and further Affidavit dated 16th October 2015, and 18th November 2015 respectively to oppose the Application.

8. The 1st Defendant further argued that, the Applicant has failed to give any particulars of the facts allegedly concealed. To the Contrary, it is the Applicant who has deliberately withheld material facts from the Court by failing to explain and inform the Court of the extent of seizure. That, the orders sought for in the Application dated 12th April 2016, does not warrant his cross-examination on facts unequivocally set out in his various Affidavits. That his right to property is guaranteed under Article 40 of the Constitution of Kenya, and he is under no legal obligation to demonstrate to the Applicant how he acquired it. The onus to prove otherwise lies with the Applicant. Thus the Applicant is simply on a fishing expedition and wants to use the Court to achieve such ends. Therefore, the Applicant has failed to lay a proper legal basis for his cross-examination. Similarly, the Applicant has failed to identify any of the paragraphs that they wish to cross-examine him on, and/or, the area of conflict or the contested facts. To indulge in cross-examination of the 1st Defendant on the entire Affidavit will amount to a mini-trial and will defeat the purpose of Section 1A (2) of the Civil Procedure Act, (Cap 21) Laws of Kenya.

9. The 4th Defendant opposed the Application by filing a Replying Affidavit, dated 16th July 2016 sworn by Kirpal Singh. He relied on the grounds that, the Application is pre-mature and seeks to examine a key witness in a case at an early stage. The cross examination of the witness will water down the hearing.

That, the 1st Defendant is not and has not been a Director of the 4th Defendant Company. The 4th Defendants Company's account at the **Bank Account No. 81070288** was solely operated by Amarijeet Singh and the deponent and at no time was the **Title LR No.18141 N/Quoko/Athi River** charged to the Bank, and neither did the 4th Defendant Company benefit from the colossal loan amount in excess of Kshs.150,000,000 as alleged.

10. I have considered the various arguments advanced by the Parties and the submissions they have filed. I find various issues arise for consideration namely;

(i) Whether the Plaintiff/Applicant has laid a legal basis for grant of the order sought for Cross-examination of the 1st Defendant.

(ii) Whether the Plaintiff/Applicant has identified the specific paragraphs in the impugned Affidavit on which it intends to Cross examine the 1st Defendant/ Respondent.

(iii) Whether this Application is pre-mature and seeks to cross-examine a key witness at an early stage.

(iv) Whether, the Application will be rendered nugatory if the prayers sought are not granted and the 1st Defendant's Application dated 12th April 2016 is heard and determined.

11. Apparently, these issues are inter-related. Therefore, I shall consider them alongside each other. Be it as it may, I find that Order 19 Rule 2 of Civil Procedure Rules, states that:

“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. Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs”

12. These Provisions allow a party to apply to Court to cross-examine a deponent of an Affidavit on the content thereof. In the Judgement in **SMT.Sudha and another vs. Manmohan and others (1996 Rajasthan 59)** the Court held as follows,

“The order for attendance of deponent of the affidavit for cross-examination is absolute discretion of the Courts. It is true that absolute discretion means not arbitrary but judicious discretion having justice oriented approach in summoning the deponent of an affidavit for cross-examination. Order for attendance of the deponent for cross-examination would not be ordinarily be made unless the court is satisfied and convinced that application for summoning the deponent for cross-examination is necessary in the interest of justice. Unless both the conditions co-exist the Courts have no jurisdiction to summon a deponent for cross-examination”.

13. Similar principles were held in the case of **Kibaki Vs Moi (2008) eKLR** and in the case of **Ontario Vs Rothmans Inc. 2011 NSC 2504, (can LII)**, Justice Paul Perell analyzed in depth the proper bounds of cross-examination on affidavits. He undertook a lengthy and detailed analysis of the nature of cross-examination on an affidavit, in which he compared and contrasted it with examinations for discovery and cross-examination at trial. The distinction between discovery and cross-examination is that the scope discovery is not limited, and may go beyond the pleadings to even hearsay evidence or that party's position on question of law. He noted that the cross examination of a deponent on an affidavit is;

- ***Narrower than examination for discovery.***
- ***Cross examination is not a substitute for examination for discovery or production of documents available under the Civil Procedure Rules.***
- ***The Applicant may not go beyond the scope of the cross examination for the Application.***
- ***Question for cross examination must be a fair question.***

- *The scope of cross examination in respect to credibility must not go to impeach the character of the deponent.*
- *The questions must be relevant to the issues on the particular Application, matters raised in the Affidavit, and credibility and reliability of the deponent's evidence.*

14. In the case of *LSK Vs Faith Waigwa & 8 others 2015 eKLR* the Court observed that cross-examination is:

- *Mechanism to bring out desirable facts to modify/clarify/establish cross-examiner's case.*
- *Impeach the credit worthiness of a witness.*
- *To give the Court an early opportunity to get glimpse of what is to expect during the substantive hearing.*

15. I have considered the specific wording of the prayer for cross examination herein. It reads as follows;

“That Mr. Hassan Ahmed Abdul Hafedi Zubedi, the 1st Defendant herein appears in Court for Cross-examination on the contents of his Affidavit dated 12th April 2016”.

16. It's therefore clear that the Applicant intends to cross examine the deponent on the entire Affidavit. I have looked at the said Affidavit. It is a 51 Paragraphs Affidavit, and supported by annexures' running into 95 pages. If the Applicant is allowed to cross examine the deponent on the entire Affidavit how long will the cross-examination last? Reliance was placed on the case of *Nicholas Kiptoo Arap Salat Vs IEBC & 7 others*. However, the learned Judge in that case stated that, there must be sufficient grounds for making an order for cross-examination, and that, reference should be made to the materials contained in the Affidavit that the Applicant intends to Cross examine the deponent on.

17. The 1st Defendant submitted that, the Applicant has not specified the paragraphs that it intends to cross-examine him on. He relied on the case of *Malindi Succession cause no. 89 of 2010*. The Courts have held that the Applicant as herein, has to identify the paragraphs of the Affidavit they intent to cross examine the Deponent on. In the *Matter of the Estate of Annelies Ann Graff and Nancy Wanja Gatabakii Vs Ashford Muriuki Mugwuku*, the Learned Judge observed that, the Application for cross-examination did not specify: ***“the portion of the two Affidavits of the Respondent she needed to cross-examine him upon and why it is necessary to cross examine”***. He went on to conclude the general cross examination of the deponent would unduly prolong the matter. Am inclined to agree with the sentiments of the Court above that, if the Courts allows the Applicant to cross examine the Deponent on the expansive affidavit herein, it may unduly prolong the trial.

18. I shall now address the concerns raised by the Applicant that the orders sought for in the Application dated 12th April 2016, are final in nature. I have read through the said Application, the orders sought for therein, the grounds and Affidavit in support. I realize that, indeed under prayer 5 of the Application thereof, the Applicant is seeking for unconditional release to him of all the documents seized by the Applicant as set out under Prayer 2, 3, and 4 of the Application. I have gone through the pleadings in particular the Complaint filed herein by the Applicant on 25th September 2015, and the accompanying Notice of Motion Application of the same date. I realize that the title documents mentioned in the Complaint and the Notice of Motion Application form part of the documents that, the 1st Defendant seeks to be released to him. He makes reference to ***“various original title documents”*** which he seeks to be released to him.

19. The questions that arise are: If the Court were to hear the 1st Defendant's Application dated 12th April 2016, before the main suit, will it prejudice the Applicant's case or will it assist the Court to deal with any urgent matters. If the Court on the other hand declines to order for cross examination of the 1st Defendant, will it prejudice the Applicant's case?.

20. In answer to these questions, I note that, the Applicant filed a Complaint and Notice of Motion herein on 25th September 2015. The same has not been heard. Subsequently the Applicant seized items herein on or about mid-September 2015. The 1st Defendant seeks for release of the same. The Applicant herein lays

claim over the same. From the averments in the Affidavits in support of the Applications of 25th September 2015 and 12th April 2016, and the grounds thereto, it is clear to me that, the cross examination of the deponent as prayed for herein will not resolve the key issues herein. Similarly, to allow the cross examination of the 1st Defendant on the entire affidavit may prejudice the hearing of his Application dated 12th April 2016. The same may amount to assisting the Plaintiff prosecute it's case. The issues to be resolved include but are not limited to ownership of the seized documents. To resolve these issues, it is in the interest of justice for the Parties to file their respective responses and/or submissions on the two pending Applications. The Court will then hear them together, or hear the Application dated 12th April 2016, and upon hearing the same, and thereafter determine whether the cross examination of the 1st Defendant will be necessary. In the meantime to preserve the respective rights of the Parties and the subject matter of the suit, I direct that there should be no disposal of any properties in the custody of either the Plaintiff or the 1st Defendant, until the hearing and determination of the two pending Applications and/or the main suit. In that regard, the Application is not allowed as prayed. The costs shall abide the outcome of the suit.

21.Orders Accordingly.

Dated, Signed and Delivered on this 28th day of March 2017 at Nairobi.

G. L. NZIOKA

JUDGE

IN OPEN COURT IN THE PRESENCE OF:

Mr. Obuya for Mr. Ochieng Oduor for the Plaintiff/Applicant

Ms. Hannan for Mr. Muchoki for 1st Defendant/Applicant

Ms Hannan for Mr. Waithuta for 2nd and 3rd Defendant

Ms. Hannan for Mr. Githui for 4th Defendant

Teresia Court Assistant

G. L. NZIOKA

JUDGE