



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 501 OF 2016**

**REUBEN KITONYI NGILA.....APPLICANT**

**VS**

**THE GOVERNOR OF CENTRAL BANK OF KENYA.....RESPONDENT**

**RULING**

1. On 14<sup>th</sup> September 2017 the exparte applicant Mr Reuben Ngila Kitonyi filed a notice to cross examine Mr Kennedy Kaunda Abuga the deponent of the replying affidavit sworn in response to the exparte applicant's substantive motion. This notice was further to two earlier notices to cross examine the said deponent. They are dated and filed on 5<sup>th</sup> may, 2017 and 27th September, 2017 respectively.
2. According to the notice to cross examine dated 14<sup>th</sup> September 2017 and which was directed at Mr Ben Makasi Simiyu advocate for the respondent, the exparte applicant wished that the advocate for the respondent should not be present when the said deponent is being cross examined based on the authority of **Pote v Jarvel [1991] SC WV**.
3. According to Mr Ngila, counsels are not expected to misadvise their clients and that there were two issues which were conflicting which can be clarified by examination and cross examination ie that HC Miscellaneous Application No. JR 390/2015 in which the respondent stated that the reason for dismissal of the applicant and the issues in the criminal, case No. 2881/1996 were different, and that now in the instant case they were saying the contrary. Further, that it is criminal to mislead the court by making wrong statements contrary to Section 113 of the Penal Code Cap 63 Laws of Kenya.
4. On 4<sup>th</sup> October 2017 the exparte applicant was allowed to make an oral application for leave to cross examine Mr Kennedy Kaunda Abuga on his replying affidavit filed in court on 8<sup>th</sup> February 2017. The applicant stated that it was necessary to call Mr Kaunda for cross examination because there are issues to be clarified like whether what happened in criminal case No.2881/96 was an employment matter and why it was not possible for the respondents to produce witnesses to give evidence and why investigations report (sic) and show cause letter have not been produced. The applicant relied on Order 53 Rule 3(4) of the Civil Procedure Rules which he asserted, makes it a mandatory requirement for cross examination of a deponent of an affidavit sworn in judicial review proceedings.
5. The request to cross examine the deponent Mr Kennedy Kaunda Abuga was opposed by the respondent's counsel Mr Simiyu who submitted that the application lacked merit, an afterthought and calculated to delay the matter herein.

6. It was contended that the subject replying affidavit was filed on 8<sup>th</sup> February 2017 after which the court directed parties to proceed by way of written submissions which were filed and that the applicant filed close to ten submissions on record under different headings hence it is only fair and just that the matter herein proceeds to hearing and judgment be written based on the submissions already filed after highlighting as earlier directed by the court.

7. It was submitted that the application to cross examine the deponent should have been filed or made immediately after the affidavit in question was filed and not so late in the day as is the case here.

8. Counsel urged that the Sections 1A and 1B of the Civil Procedure Act obliges this court to expedite cases justly and effectively and that to allow this application by the respondent at this stage is to violate the overriding objectives of the law.

9. It was submitted by Mr Simiyu that the route taken by the ex parte applicant is a dangerous one as it urges the court to descend into the arena of the merits of the case and not the process. Reliance was placed on the case of **Albert Kigera Karume & Others vs George Ngugi Waireri & Others HCC 125/2015**.

10. It was also submitted that the application for cross examination of the deponent is spent. That the applicant seeks to be furnished with disciplinary proceedings which took place about 20 years ago and which have been availed to court as part of the replying affidavit hence there is no need for cross examination. Counsel urged the court to dismiss the application.

11. In a rejoinder, Mr Kitonyi denied that he had brought the issue of cross examination late since he raised it in his submissions filed way back in April 2017. That there are lots of untruths in Mr Abuga's affidavit while his counsel is protecting the deponent. He stated that he was not given an opportunity to appear before the disciplinary committee hence the proceedings annexed to Mr Kaunda's replying affidavit are not the ones that the ex parte applicant wanted hence Mr Kaunda should appear in court to clarify the issues in his sworn affidavit.

### **DETERMINATION**

12. I have considered the foregoing. The right to challenge and adduce evidence is espoused in Article 50(2) (k) of the Constitution of Kenya, 2010. In addition, Section 163 (1) of the Evidence Act Cap 80 Laws of Kenya stipulates that:

***“ The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls him-***

**a.**

**b.**

***c. By proof of former statements, whether written or oral, inconsistent with any party of his evidence which is liable to be contradicted.***

13. However, Section 146(2) of the Evidence Act is also clear that cross examination must relate to relevant facts, and need not be considered to the facts to which the witness testified in his examination in chief.

14. Order 19 Rule 2 (1) and (2) of the Civil Procedure Rules stipulates that upon any application, evidence may be given by affidavit, but the court ay, at the instance of either party, order the attendance for cross-examination of the deponents. Such attendance shall be in court unless the deponent is exempted from personal appearance in court or the court otherwise directs.

15. Cross examination of a witness or a party to proceedings is a mechanism used to bring out desirable facts to modify or clarify or to establish the cross examiner's case. It is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief.
16. Cross examination is also intended to impeach the credit worthiness of a witness. It is in cross examination that a witness or deponent may be asked questions to expose omissions, contradictions, omissions, and improbabilities.
17. In the process, the veracity of witness averments is tested. In other instances the court may allow cross examination to get a glimpse of what to expect during the substantive hearing. Thus, cross examination may also assist the court give the necessary directions in the case.
18. The power to permit cross examination of a deponent on his affidavit lies with the court and is a discretionary power, having regard to a party's right to challenge evidence as stipulated in Article 50(2)(k) of the Constitution.
19. However, cross examination should not be used as a tool to delay the disposal of a matter which may otherwise be straight forward.
20. The respondent in this case the Governor of Central Bank of Kenya opposes the request by the applicant to cross examine the deponent of the affidavit opposing the applicant's substantive motion terming it an afterthought and intended to delay the expeditious disposal of this matter.
21. This court is given wide latitude under Order 19 Rule 2 of the Civil Procedure Rules to order the attendance of a deponent for cross examination on the application of either party. However, such application must be made in good faith and not at the spur of the moment.
22. In this case, the applicant has set out the issues which he wishes clarified by way of cross examination of the deponent of the replying affidavit, Mr Kennedy Kaunda Abuga of Central Bank of Kenya, before highlighting of the written submissions.
23. The ex parte applicant is acting pro se and despite this court urging him to seek for legal aid from the National Legal Aid Service, he was reluctant to do so and has continued acting in person which it is his right to do so, by choice. This court is aware that cases are never conducted on the basis of cross examination alone but are conducted on the pleadings and the evidence tendered. Cross examination is only but a tool for testing the truthfulness or credibility of the deponent hence there is no case that can be made out by a party through cross examination however thorough that cross examination may be.
24. Cross examination is only intended to test the veracity of the witness testimony on his affidavit taken on oath. (see **Joachim Ndaire Macharia vs Mary Wangare Ndaire & Another Nyeri HCCA 63/2016**.)
25. The value of the material elicited in cross examination, if any, can only be considered by the court deciding the case at which point the court may well disregard the same. (see **Nuh Nassir Abdi V Ali Wario & 2 Others [2013] e KLR**.)
26. In **Oriental Five & General Assurance Ltd vs Govinder & Others CA 39/1968 [1969] EA 116**, the Court of Appeal stated:

*“ Cross examination may sometimes let in evidence which could not be admissible in examination in chief, but since the cross examination took place after objection had been taken to the admission of the evidence and moreover, was only directed to the right of the witness to refresh his memory from a written record, not to the substance of the evidence. In any case, the evidence was clearly inadmissible against the third respondent. There is no authority for saying that the opportunity, not exercised, to cross examine can make admissible and the court has no hesitation in rejecting that proposition.”*

27. The purpose of allowing cross examination sometimes places parties on equal footing particularly where the party seeking to cross examine has had either himself or his witness cross examined.

28. In this case, the court is aware that matters raised in these proceedings are age-old and it is possible that, as submitted by Mr Simiyu for the respondent, records have been disturbed and or memory of Mr Ngila who is self-represented is not clear. Cross examination of the deponent on his affidavit may assist him to refresh his memory.

29. This court is in control of these proceedings and is alive of Section 1A and 1B of the Civil Procedure Act on the overriding objectives of the law as well as Article 159(2) (d) of the Constitution of ensuring justice is done to the parties without delay. However, expedition j should not be sacrificed at the altar of substantive justice.

30. This court is called upon to do justice to all parties irrespective of their status. All the parties hereto have filed their respective documents and submissions as directed by the court and albeit counsel for the respondent is apprehensive that there may be delay or that the application for cross examination is brought as an afterthought, or that the applicant has filed more than ten documents in the different names, it ought to be appreciated that the court is only bound to consider documents which are filed or placed on record regularly or with leave of court or as pleadings or responses filed within the stipulated timelines and not every other document sneaked into the court file after the court has given appropriate directions.

31. In addition, the submissions filed by the applicant in April 2017 clearly shows that the applicant had from onset albeit unprocedurally, sought to cross examine Mr Kennedy Abuga on the replying affidavit. The applicant also filed notices to cross examine the same deponent in May and July this year, an indication that he had been waiting for the opportunity when the court would hear him out on this aspect.

32. Being a lay person, the court can appreciate the manner in which that request was initially made and that is why the court did not wish to have this matter prolonged further, by directing that the application for cross examination of the deponent be made orally.

33. The **Albert Kigera** (supra) case relied on by the respondent's counsel was decided on the basis of an application by a party to cross examine his own witness which the court disallowed on the grounds inter alia, that it had not been demonstrated that the witness sought to be cross examined had adduced evidence or sworn an affidavit whose contents were adverse to the interests of the applicant.

34. That case can therefore be distinguished from this case which concerns an application to cross examine an adverse party's witness. This court is entitled to endeavour to do substantial justice to all parties without allowing unnecessary clogs and fetters to be placed along the path of justice and in its quest for truth, and just and fair determination of the substantive notice of motion being prosecuted by a prose litigant, I would allow cross examination of the deponent of the replying affidavit Mr Kennedy Kaunda Abuga to be conducted simultaneous with the main hearing of the substantive notice of motion on a date to be fixed on priority basis.

35. As the right to challenge evidence or depositions of an adverse party is guaranteed in the Constitution, and as it has not been shown that cross examination of the deponent will occasion any prejudice to the respondent or that the deponent is exempted from court appearance or cannot be found without undue delay, or that the application is made in bad faith, I exercise the discretion given to this court by Order 19 Rule 2 of the Civil Procedure Rules and grant to the applicant leave to cross examine Mr Kennedy Kaunda Abuga on his replying affidavit filed in court on 8<sup>th</sup> February 2017.

36. The cross examination thereof shall take place simultaneous with the hearing of the substantive notice of motion subject of these proceedings and counsel for the respondent is entitled to be present and reexamine the witness on a priority date to be agreed upon by both parties hereto on which date Mr Kennedy Kaunda Abuga of Central Bank of Kenya is hereby ordered to appear in court without fail

for cross examination by the ex parte applicant herein.

37. I do not find the authority cited by Mr Ngila relevant in this jurisdiction as the Constitution is clear on the right to a fair hearing and to adduce and challenge evidence. In addition, there is nothing in Order 53 Rule 4 of the Civil Procedure rules that commands for cross examination of a deponent of an affidavit.

38. Each party to bear their own costs of this application. I so order.

Dated, signed and delivered in open court this 16<sup>th</sup> day of October 2017.

**R. E. ABURILI**

**JUDGE**