



**Kalandini Holdings Limited v Kiberu (Environment & Land Case  
E428 of 2022) [2023] KEELC 22538 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22538 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E428 OF 2022  
AA OMOLLO, J  
DECEMBER 7, 2023**

**BETWEEN**

**KALANDINI HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**NAFTALI KIBERU ..... DEFENDANT**

**RULING**

1. The plaintiff filed a notice to cross-examine dated February 14, 2023 seeking leave to cross-examine S. Onunga Makori Advocate on his replying affidavit sworn on the January 11, 2023. The parties presented their submissions to the Court orally on July 26, 2023.
2. Ms. Kethi Kilonzo learned counsel for the plaintiff submitted that they purposed to cross-examine Mr. Makori Advocate on the averments in particular, paragraphs 5.2 and 5.8 of the replying affidavit and the exhibits annexed at pages 7, 11 and 34. Counsel submitted that the affidavit is sworn on facts not received from the client and on the face of the documents, there is conflict on the interest sold. That this necessitates the need for cross-examination to clarify the issues.
3. The plaintiff relied on the bundle of authorities filed on March 22, 2023 and in particular the case of *Law Society of Kenya (LSK) v Faith Waigwa & 8 others* [2015]eKLR at paragraph 9 thus;

“Let me once more restate the rationale of cross-examination of witnesses. 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. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. 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.”



4. In opposing the notice, Mr. Makori learned Counsel for the defendant and who is to be cross-examined submitted that since this court was moved by way of notice, there is no demonstration of special circumstance. That this makes it difficult for the court to determine whether it is founded on whimsical or caprice motives. Mr. Makori stated that grounds submitted on were not set out in the notice.
5. Counsel submitted further that in the Ndunde case, the court was clear that special circumstances must be shown. He referred to the case of *Hudson Enterprises Ltd v Kenya Odd Storage (foods) Ltd & 14 others* [2006] eKLR which took the position that proper basis and special circumstances must be proven. That in the present case, the issue of due diligence and bonafide purchaser can be dealt with at the main trial. He concluded that even if he presents himself for cross-examination, he will repeat what is already stated in the replying affidavit. He cited the case of *Vitabiolus Ltd & another v Ripples Pharmaceuticals Ltd* [2016] eKLR.
6. The Respondent also argued that for the exercise of discretion on leave to cross-examine, the Applicant ought to make a formal application under order 19 rule 2(1) of the *Civil Procedure Rules*. In this instant, since the court was not formally moved, the notice should be disallowed.
7. I have considered the submissions rendered and the Replying Affidavit in question. Order 19 rule 9 of the *Civil Procedure Rules* provides that applications under this order may be by Chamber Summons or orally in court. Consequently, it was not mandatory for the plaintiff to formal application.
8. The plaintiff has mentioned the paragraphs 5.2 and 5/7 which they seek the cross-examination. Upon perusal of the said paragraphs, it is indeed true that the depositions are made in the personal knowledge of the counsel sought to cross-examined. They refer to instruction counsel undertook on behalf of their client which in my view are self-explanatory on the face of the Replying Affidavit.
9. The documents referred to at pages 7 (official search), page 11 and 34 which are copies of the sale agreement and which documents the plaintiff will have an opportunity to ascertain and verify their contents during the main hearing of this case. For the grant of interlocutory applications, courts are not required to examine the authority or otherwise of documents relied upon by the parties. In the *LSK vs Faith Waigwa supra*, the Court went further to state that; “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.”
10. Besides stating that the averments made were not on instructions from the Respondent, the Applicant has not elaborated how the averments prejudice their application. It is trite law that a party ought to demonstrate a prima facie case even instances where the application is not opposed. The issues raised for the cross-examination is to clarify in my view should be dealt with at the hearing of the main suit. Without prejudice to the foregoing, the question ought to have been raised by the Applicant is to cross-examine the Counsel during the hearing of the main case but not at this interlocutory stage.
11. I am therefore not persuaded that this case present special circumstances to warrant the cross-examination of Mr. Makori on his replying affidavit. In the result, the notice to cross-examine is declined.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF DECEMBER, 2023**

**A. OMOLLO**

**JUDGE**



**Sent to advocates on record via email at NAIROBI this 7th Day of December, 2023**

**DEPUTY REGISTRAR, ELC**

**NAIROBI**

