



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 2 OF 2014

WENDANO MATUU COMPANY LIMITED.....1ST PLAINTIFF

STEPHEN NDAMBUKI MULI.....2ND PLAINTIFF

ONESMUS MUISYO KAMATU.....3RD PLAINTIFF

VERSUS

JOSHUA KIMEU KIOKO.....1ST DEFENDANT

JAMES KIOKO KIVUKO.....2ND DEFENDANT

JOHN BOSCO NDIINGA.....3RD DEFENDANT

SAMUEL MWANZA NZIOKA.....4TH DEFENDANT

JUVENALIS MUSYOKI KAVITA.....5TH DEFENDANT

MANGU NGOLO.....6TH DEFENDANT

ROSE NDANU MUTUA.....7TH DEFENDANT

PHILLIP MUNYAKA.....1ST INTERESTED PARTY

PRISCA WAMBUA & ANTONY MASENO T/A

WAMBUA & MASENO ADVOCATES.....2ND INTERESTED PARTY

CANON ALUMINIUM

FABRICATORS LIMITED.....3RD INTERESTED PARTY

RULING

The Application

Directions were given herein on 30th October 2017 that the Notice of Motion dated 24th June 2014 filed by the Plaintiffs herein shall proceed to hearing by way of cross-examination and re-examination of Stephen Ndambuki Muli on the affidavits he filed in Court in relation to the said Notice of Motion, and the parties shall after the said examination be given directions by the Court as to the filing of submissions.

The cross examination and reexamination of the said Stephen Ndambuki Muli duly took place on 21st November 2017, whereupon, Mr. Gitonga, the learned counsel for the Plaintiffs, made an oral application that he be allowed to cross examine the 1st Defendant herein, Joshua Kimeu Kioko on his affidavits. The grounds for the application are that the law on procedure allows deponents of affidavits to be cross-

examined on any affidavit in any proceedings.

Mrs. Nzei, the learned counsel for the Defendants, opposed the application on the ground that the Notice of Motion before the Court for hearing is an application for contempt of Court which must be proved beyond reasonable doubt, which does not allow for the Respondent to be put on his defence. Further that the 1st Defendant will be prejudiced as the Plaintiffs will be looking for materials to back up their allegations in the cross-examination.

The Determination

I have carefully considered the arguments by the parties. The issue that is before the Court for determination is whether the 1st Defendant should be cross-examined on the affidavits he filed in court in relation to the Notice of Motion dated 24th June 2014 . An affidavit is a statement in writing made on oath or affirmation. Affidavits constitute important evidence in interlocutory applications and miscellaneous proceedings. Although hearings by affidavit are not specifically provided for under the applicable law to contempt of court proceedings, the Court has discretion to direct that such an application is heard by way of affidavit evidence. The Court of Appeal in **Juan Torres & another v Michael Njai** [2017] e KLR held as follows in this regard:

“Section 5 of the Judicature Act gave the High Court and Court of Appeal power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. That section has now been repealed by Section 38 of the Contempt of Court, Act No. 46 of 2016 which commenced on 13th January 2017. However, to our knowledge, the rules under the Act have not been made by the Chief Justice as stipulated. In any case, it is the English Rules which applied at the time the questioned order was made. Although the offence of contempt of court is tried summarily, that does not take away the contemnor’s right to a fair trial and section 7(3) of Kenyan Act is explicit on this (see also Maharaj v Attorney-General for Trinidad and Tobago [1977] 1 All ER 411).....”

[8] The learned counsel for the respondent has helpfully cited an article by I. H. Jacob on ‘THE INHERENT JURISDICTION OF THE COURT’ – published in the CURRENT LEGAL PROBLEMS, 1970, Vol. 23 where the author says at page 23:

“what then is the meaning of summary process? It means the exercise of power of the court to punish or to terminate proceedings without a trial, i.e. without hearing the evidence of witnesses examined orally and in open court. It does not mean that the court can be capricious, arbitrary or irregular or can proceed against the offender or the party affected without his having due opportunity of being heard; but summary process does mean that the court adopts a method of procedure which is different from the ordinary normal trial procedure.”

The author continues at pages 29 and 30:

“The extent to which summary process differs from ordinary trial process may not appear, in most cases, to be as great today as when the usual mode of trial was by jury. With virtual elimination of jury trial in civil cases the contrast between the decision of a single judge given at the end of an ordinary trial by summary process has become somewhat masked and may not be all that striking. For when exercising its inherent jurisdiction by summary process, the court will, if necessary, determine all disputed questions of fact or law and for this purpose affidavit evidence will be admitted, and the court may if necessary hear full argument at an extended hearing.”

[9] We would respectfully adopt the above passages as a correct exposition of procedural law in contempt of court proceedings.”

Specifically on the issue of cross-examination of the deponents of affidavits in contempt of court proceedings , the Court of Appeal noted that the same is intended to establish the correct facts for the final determination of the disputed facts by the court, and added as follows:

“...We hold therefore, that, like in ordinary civil cases where cross-examination of deponent’s of affidavits is allowed, a court which has taken cognizance of contempt of court proceedings, has a discretion in appropriate cases to allow cross-examination of a deponent of an affidavit in contempt of court proceedings. Contrary to the contention of the appellants’ counsel, that does not amount to shifting of burden of proof. Cross examination is intended to help the court to reach a just decision....”

Lastly, the Court of Appeal set the criteria for determining whether or not cross-examination is necessary as follows:

[13] Furthermore, it is clear from the authorities cited by both parties that the order for cross-examination is a discretionary order which should be exercised judiciously. A proper basis must be laid to satisfy the court that it is necessary or desirable in the interest of justice to allow cross-examination whether the order for cross-examination should or should not be made depends on judicial evaluation of the circumstances of each case.”

I am guided by the Court of Appeal’s decision, and while I note that the Plaintiff’s counsel did not give specific reasons why he seeks cross-examination of the 1st Defendant, the interests of fair trial demand that as the Defendants were given the opportunity to cross-examine the Plaintiff’s witness on his affidavits, the Plaintiffs should also be accorded a similar opportunity. Section 7 (3) of the Contempt of Court provides as follows in this regard:

(3) Notwithstanding subsection (1), any proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution.

Accordingly, the orders that commend themselves to me arising from the foregoing, are that the Plaintiffs' oral application is allowed, and the 1st Defendant shall present himself to Court on a date to be set by the Court for cross-examination, which cross-examination shall be limited to the affidavits the 1st Defendant swore and filed in Court in response to the Plaintiffs' Notice of Motion dated 24th June 2014.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 18th day of December, 2017.

P. NYAMWEYA

JUDGE