REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION - MILIMANI

MISCELLANEOUS APPLCIATION NO. 355OF 2015

MAJANJA LUSENO &ADVOCATES ……. APPLICANT

VERSUS

SAMMY BOIT ARAP KOGO ……RESPONDENT

R U L I N G

Introduction:

1. This matter comes before the Court in circumstances slightly out of the ordinary. The original application arises out of the Bill of Costs filed on 6th August 2015. The Advocates claiming their fees are Messrs Majanja Luseno & Company Advocates and the Client Respondent is one Sammy Boit Arap Kogo. The Bill of Costs is said to be arising from the HCCC No 268 of 2004 between the National Social Security Fund Board of Trustees and Ankhan Holdings Limited and its two directors, one of whom is the named Sammy Boit Arap Kogo (the "Parent File") The Second Defendant in that matter and the Respondent to the Bill of Costs.

2. The Bill of Costs records that the Advocate Client Relationship commenced on 18 June 2008 with Instructions from the Respondent Client and terminated on 26th May 2015 "when the 2nd defendant withdrew instructions". The Bill of Costs seeks payment of KShs11,947,885 for legal services rendered including advise and attendances at Court. The main suit in the Parent File is described by the Bill of Costs as "the suit filed by the plaintiff seeking inter alia KShs70,000,000/= (Seventy Million Shillings) plus interest at 32% from May 1994 until payment in full and final settlement arising from a recission of a contract entered into by the Plaintiff and the defendants for the sale of 6.031 hectares of land which is approximately 15 acres" The Claim including interest is KShs 540,400,000/= (five hundred and forty million, four hundred thousand Shillings) at the date of the suit.

3. In the Bill of Costs the Applicant asks for "Instruction Fees" of KShs 7,883,000/= (Seven Million eight hundred and thirty three thousand shillings). The Bill of Costs goes on to give an itemised breakdown of the legal services rendered between 21 February 2010 and 10th June 2015. These include several attendances at court for hearings. There is an item for the drawing of an application to withdraw from the suit on 18th November 2010. The Bill of Costs creates the impression of an ongoing Advocate Client relationship up to around June 2015 when the Applicant was replaced by different advocates.

4. The Bill of Costs is dated 4th August 2015. It was lodged with the Court on 6th August and the

Notice of Taxation dated 24th September 2015 gives the date for the taxation hearing as 21st October 2015. On 16th October 2015, that is only two days before the Hearing, the Respondent filed a Grounds of Opposition and an Affidavit. On 21st October 2015, the Applicant therefore asked for the matter to go before the Judge who has been hearing the main suit. The Matter therefore came before this Court on 23rd October 2015. On that date the Respondent was not ready to proceed.

5. In principle the Grounds of Opposition state that there was no Client-Advocate relationship between the Applicant and the Respondent. That of itself is not exceptional. The Deputy Registrars deal with issues of the existence and parameters of advocates' instructions day in day out. However, in this case the Respondent goes further and makes allegations of fraud and extortion against the Applicant Advocates. Those are serious allegations and that is what caused the Applicants to request a referral to the Judge.

6. The Grounds of Opposition filed on 16th October 2015 state that the Respondent opposes the Bill of Costs "*on the Grounds that:*

> *1. That the Application is frivolous vexatious and amounts to an abuse of the Courts process*
>
> *2. That he Applicant never offered any legal services to the Respondent herein*
>
> *3. That even if there were any services rendered, the applicant did so without any instructions express or otherwise from the Respondent. As such there was no existence of Advocate-client relationship. (sic)*
>
> *4. That in any event if there were any legal services offered by the applicant, the same were done when the Respondent had expressly stated that the applicant was not to offer any such services.*
>
> *5. That in any case the applicant has sued the wrong party. That any instructions and/or payments in **HCC 268 of 2004** would only be made through the 1st defendant, Ankhan Holdings Limited. The 2nd defendant in that case (the Current Respondent) had only been joined therein due to his role as a director of the 1st defendant.*
>
> *6. That the Respondent herein has no knowledge of the applicant firm. That there has never been any communication whatsoever between the applicant and the Respondent.*
>
> *7. That in HCCC No 268 of 2004, the defendants therein used to instruct their advocates in writing. The applicant herein never received any such instructions.*
>
> *8. That even some of the documents that the applicant purportedly drafted and filed on behalf of the Respondent and which required the Respondent's signatures were filed without his signature, approval knowledge and/or consent.*
>
> *9.The Bill of Costs is so inconsistent and contradictory in that it purports that the instructions were given at a time when the Respondent herein and the defendants in HCCC NO268 had another advocate on record and continued to pay them. Item Number 1 on the Bill of Costs indicates that the applicant received instructions on 18th June 2008. This is false since the Firm of Mohamed Muigai was still acting for the defendants including the respondent herein. Indeed on 24th July 2008, the respondent and the other defendants in HCCC 268 of 2004 paid KShs60,000.00/= to their advocates who were still acting for them. This was acknowledged through receipt Number 4197 and 4198. By Mohamed Muigai & Co advocates. It is preposterous that the Respondent and the other*

defendants would have instructed two advocates simultaneously.

10. That it is on these grounds and other grounds that will be adduced at the hearing that the Respondent prays that the Applicant's Bill of Costs dated 4th August 2015 is struck out as being an abuse of the court process." .

7. In this regard the Grounds of Opposition is seeking an order without making any appropriate application. Although the Defendant has not complied with Order 51 rule 1 rule 5 the Applicant has not asked for those parts of the Affidavit to be struck out but seeks to resolve the issues raised instead. I will deal with the contents of the Replying Affidavit below.

8. On 27 October the Applicant Firm filed a Notice of Intention to Cross Examine the Deponent. That elicited a quick response from Messrs Rachier & Amolo Advocates, who have been on the record for the Defendants in the Main suit/Parent File only since about May/June 2014. The Letter is dated 28th October 2015 and records that those Advocates are astonished by the Notice of Intention to cross-examine. They take the view that the Applicants should file a replying affidavit to the Replying Affidavit. Further there is complaint that the Notice is unprocedureal as there is no substantive response filed and does not particularize which parts of the affidavit it is intended to cross examine upon. They therefore decide that they have no choice but toimpute mischief in the Applicant's conduct. They reiterate that they will object to the Applicant's "misinformed" Application.

The Replying Affidavit

9. The Replying Affidavit is sworn by Mr Sammy Boit Arap Kogo on 16th October 2015. The Deponent has confirmed that he opposes the Bill of Costs. He states he is aware of it and that he understands the contents. At paragraph 3 of the Affidavit he states that "the application" as opposed to the Bill of Costs is (a) misguided (b) thoroughly misinformed and (c) actuated by malice. He states that the applicant firm had no instructions to act and that there was no extant advocate-client relationship. He goes on to allege that the bill of costs is an attempt to unlawfully extort money from the Respondent. That is an allegation of criminal conduct. The Affidavit also asks retorical questions and puts forward legal argument rather than concentrating on bringing out the relevant facts (see paragraphs 6 and 7).

10. The Replying Affidavit makes further allegations including that (d) the applicant sued the wrong party (paragraph 4), (e) that the Respondent gave no instructions to the Advocates. He was merely a Second Defendant in HCCC 268 of 2004. Also that (f) the Instructions came from the First Defendant in the Main Suit namely Ankhan Holdings (paragraphs 4 and 5) (g) that the First Defendant, Ankhan Holdings Ltd had Instructed the firm of Mohammed Muigai & Co Advocates to be the Advocates for both Defendants (in fact there were three Defendants); (h) At no time did the Defendants in the Main Suit appoint the Applicant "in this case or at all" (paragraph 5). (i) The correspondence at SBK 1 shows that Messrs Mohammed Muigai were instructed by Ankhan Holdings Ltd, the First Defendant in the Main Suit. (j) that the Applicants contention that he received instructions to act for the Respondent on 18th June 2008 is factually incorrect and legally impossible. As at 24th June the First Defendant in the main suit was still instructing Mohammed Muigai and relies on the receipts annexed at SBK-2 and SBK-3 dated 24th July 2008. The Deponent also states that, the Second Defendant wrote to the firm of Mohammed Muigai & Co confirming that firm was still representing "them". I assume that is intended to mean all the Defendants. He also says that by a Letter dated 10th July 20078 the First Defendant wrote to the firm of Mohammed Muigai & Co Advocates. The Deponent states that the letter was sent specifically advising that firm not to release the file to the Applicant Messrs Majanja Luseno & Co Advocates. Also exhibited is a second letter dated 10th July 2008 to Messrs Mohammed Muigai Advocates enclosing part payment and stating "we would like you to attend the matter thereto with the best of your principle competence and as per the evidence thereto. Each letter has been signed by a different director and both were received by Messrs Mohammed Muigai

Advocates on the same day (11th July 2008). In relation to the Letter dated 10th July 2008 the First Defendant (not the Respondent) wrote to the firm of Mohammed Muigai & Co Advocates. The Dependent says the letter was sent specifically advising that firm not to release the file to Majanja Luseno Advocates. It does not say why such a Letter would be necessary if Majanja Luseno were strangers to the case. In fact that Letter is said to be responding to a letter by Majanja Luseno Advocates to the Deputy Registrar. A copy of that Letter is not exhibited. However, the correspondence that is exhibited does not present the picture of a very happy relationship. In the Letter dated 16th June 2006 from the First Defendant but signed by the Second Defendant, the closing sentence says "We look forward to ….and better relationship from yourselves.". Then there is a letter dated August 4, 2006 from Mohammed Muigai and Advocates which records that the Court File is no longer available. It says "Kindly request your man who helped you to file the application to assist us" resulting in a heated response dated 29 August 2006.

11. At paragraph 9 the Respondent states that "during the recurrence of the Advocate-Client relationship between the said firm and the Respondent, he paid all the legal fees outstanding. That statement is ambiguous because the previous sentence refers to two different firms of advocates so which is the "said firm"? Further, in relation to payment the covering letter signed by the respondent refers to "further part cheque payment". The cheque is at Exhibit SBK 2 is dated 24 July 2008 as are the receipts. The two week time lag between the payments and the supposed covering letter is not explained.

12. The Applicant's Application to cease acting in the Main Suit is explained by the Repondent saying that the Advocate did not communicate with the Respondent or the other Defendants and made no efforts to do so. He says, the failure to communicate is not an oversight but deliberate because they knew they had not instructions (paragraph 10). Exhibits SBK7, SBK8 and SBK 9 relate to more recent correspondence from Ankhan Holdings (First Defendant). Firstly to Mohammed Muigai Advocates on 4 May 2015 and then to Rachier & Amollo Advocatooes on 8th May. The first letter asks Mohammed Muigai Advocates to forward "our file" to M/s Rachier Amollo Advocates and the Second Letter Instructs Amollo & Rachier Advocates to "demand our file" from Mr Majanja and then alleges Mr Majanja took the file without our instructions and without our knowledge. If that is true, those are serious allegations. The Third Letter from Rachier& Amollo Advocates is addressed to Majanja Luseno & Co Advocates. It appears to be undated. It is marked for the attention of a Mr David Majana andis signed by a Nduru Gichamba. Clearly there are inconsistencies in the three letters as to the expected whereabouts of the file. If indeed the Letters were sent, where are the responses from Mohammed Muigai? The third letter also refers to instructions "to take over the above matter by <u>our mutual client</u>". Those three words are significant according to the Applicant. It is said in submissions that the letter is dated 6th May but that cannot be correct as the Instructions Letter is dated 8th May 2015. In any event, there is a conceptual inconsistency between "they never acted" and "mutual clients". No responses to any letters are exhibited.

<u>Authorities</u>

12. The Respondent has filed a bundle of Authorities on 30th November 2015 comprising:

(1) ***<u>Misc Application No 545 of 2013, Nancy Wanja Gatabaki vs Ashford Muriuki Mugwuku (t/a Ashford & Co Advocates)</u>*** *and*

(2) ***<u>ELC Civil Suit No157 of 2015, Papinder Kaur Atwal v</u>***

<u>Harbans Singh Amrit and Another</u>.

I have considered those authorities carefully. They both reinforce the proposition stated elsewhere that firstly the court has a wide discretion whether or not to order the cross examination of the

deponent of an affidavit. Also that, there has to be a clear and proper basis laid by the applicant before the court can exerrcise that discretion. That discretion should be exercised judiciously and not capriciously. It is not a discretion that should be exercised liberally without a concise review of any factors that make it necessary to have a party cross-examined at the hearing of an interlocutory application as in those case. *There is a danger that if the court were to liberally grant leave to cross-examine deponents of affidavits without serious scrutiny of the basis upon which an application to cross-examine a deponent is founded the courts may find themselves inundated with such applications such that "minitrials" or "trials within a trial" would be the order of the day which would not augur well for the administration of justice. The courts therefore have to tread carefully and allow only those applications that are merited*" (per Mutungi J in ***ELC Civil Suit No 157 of 2015***). In those cases the application was not successful.

13. I have also considered the authority of ***Civil Case No 196 of 2015, The Law Society of Kenya vs Faith Waigwa and 8 Others*** where the appliciation was successful. In that case Hon Sergon J said, *"I have taken time to set out the rival arguments put forward by learned counsels on behalf of their respective clients. The main question this court has been urged to consider is whether or not to grant the applications of the Plaintiff and the Interested Party. The duo have sought for leave to cross- examine named Defendants over the averments they each made in certain paragraphs of their respective affidavits. 9. 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. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness's averments is tested. 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. This may assist the court in making the necessary directions at the pre-trial conferences envisaged under Order 11 of the Civil Procedure Rules. However, 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. The question of delay keeps on popping up in my thinking particularly in respect of this case because we are dealing with an interlocutory application premised under Order 40 of the Civil Procedure Rules. What cuts across in Order 40 is time lines which must be adhered to if a matter has to be fairly tried and concluded."* I set out the quote as it shows that some thought needs to be put into the approach to be adopted.

14. As to procedure; ***Order 19 Rule 1 and2 provide:*** "

"*(1) Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing. On such condictions as the court thinks reasonable; Provided that, where it appears to the court that either party bona fides desires the production of a witness for cross-examination and that such witness can be produced an order shall not be made authorizing the evidence of such witnesses to be given by affidavit.*

(2)(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-examinaton of the deponent. (2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in curt, or the court otherwise directs." The overriding objective set out in ***Section 1A and 1B of the Civil Procedure Act 2010*** provides that the Court should attain the following aims:

a. *the just determination of the proceedings*
b. *the efficient disposal of the business of the court,*

c. *the efficient use of available judicial and administrative resources;*
d. *the timely disposal of proceedings and all other proceedings in the court, at a cost affordable by the respective parties; and*
e. *the use of suitable technology"*

Those are the principles applicable to the issues before the Court.

Submissions

15. The Matter first came before the Court on 23 October 2015. At that time only the Bill of Costs and the Grounds of Objection together with the Replying Affidavit were before the Court. Mr Luseno for the Applicant who had asked for the Hearing before the Judge stated that it was only the issue of the retainer that needed to be resolved. He pointed to the correspondence from the current advocates on record and argued that their reference to "our mutual client" shows that they recognize there was a retainer. He also argued that it is a matter of record that he appeared before the Court to represent the Respondent and was before the Court on several occasions as well as filing documents. He wishes to adduce evidence that was obtained from the Respondent pursuant to the giving of instructions over the period in question. The Court, of its own motion, sought clarification as to whether the Respondent had given up his legal professional privilege or was willing to do so. It is clear that the Respondent has exhibited and referred to communications between himself and his various advocates. That is in the normal course of events protected by privilege. Counsel who attended (Miss Nyika) for the Respondent was unable to answer the question whether he had knowingly and willingly given up his privilege in those documents and any others that may be adduced as she was holding brief for Mr Arua. She said Mr Arua would be available on 29th October 2015. The matter was adjourned to allow the Parties to address that question. The Court made the following order:

> *"1.List for Hearing of the Preliminary Question on whether the Defendants/Respondents are deemed to have given up their privilege upon all communications between 2008 and 2018 with the firm of Majanja, Luseno and Co on 29th October 2015;*
>
> *2. Parties to attend with copies of all the authorities of which the seek to rely.*
>
> *3. Costs Reserved."*

In the meantime the Applicant filed a further application for leave to cross-examine the Respondent.

16. On 29th October 2015 Mr Luseno attended for the Applicant (in effect in person) and Mr Arua was present for the Respondent. He informed the Court that his Client was also in Court. Mr Luseno informed the Court that prior to the hearing the Advocates had a discussion on the question of privilege and the Respondent took the position that "as there is no Advocate-Client relationship there is no privilege and that sorts out that issue". Mr Luseno then went on to request the Court to conduct an inquiry into the Parent File to ascertain what had happened and what documents had been delivered by the Cient and submitted to the Court. Also that the documents filed included a Defence. He argued that the allegation made by the Client is to contest the Advocate-Client relationship.

17. Mr Arusa for the Respondent opposes the Application for cross-examination. In submissions he said he was relying on CPR Order 19, Rules 13, 14 and 15, Order 50 and Order 51. In fact the authorities relied upon deal only with Order 19 Rule 2. Mr Arua says that the matter is fairly simple firstly the Respondent says that he did not instruct the firm of Majanja Luseno and Co. He says he instructed the firm of Mohammed Muigai Advocates with whom he has settled all questions of fees. In relation to the appearanced by Mr Luseno he suggests that was because Mr Luseno was holding brief for a different advocate which is common practice. There is no

evidence from that other firm to confirm or deny that evidence from the Bar. I also note that it is not beyond the realms of possibility for a company and its directors to have separate representation if the situation calls for that and if that is the case, or even to seek a second opinion from different advocates.

18. Mr Arua also argues that the Applicant should put in a replying affidavit to the Respondents Replying Affidavit. He argues that unless that is done the evidence is deemed to be uncontroverted and the Court is obliged to accept it as true. There is nothing in Order 19 that could give rise to such an interpretation. Apart from the point that the submission confuses pleadings and affidavits, what is suggested in that submission and the danger of injustice that such a scenario would result in that provides one of the arguments for allowing the cross-examination being applied for. Counsel also feels that he should have advance notice of the questions the Applicant intents to ask so that the witness can prepare. That is tantamount to asking for time to coach the witness! It is also argued that the Respondent should not be the only one being cross-examined. There are other people who should also be cross-examined. The latter submission fails to take into account that it is only the Respondent who has filed an affidavit challenging the retainer. The Respondent has not made any application for the attendance of any other witness for cross-examination. Mr Arua argues that the "burden of proof is on the Applicant to show that they had full Instructions to represent the Respondent in HCC 268 of 2004". That evidence would have to be put before the taxing registrar if necessary.

19. Mr Luseno also raised the question of whether the proceedings should be held in camera. He thought that was advisable to protect the Client. Mr Arua for the Respondent felt that was an intereference with due process and the proceedings should be held in open Court. Mr Luseno makes the point, that if Mr Arua had instructions that his client had Instructed only Mohammed Muigai Advocates why did he (1) file a notice saying that his firm is replacing Majanga Luseno and Co and further why does the Letter exhibited to the Replying Affidavit refer to "our mutual client". That is a valid point and demonstrates an inconsistency of approach.

20. The undisputed facts in this case are only that the Main Suit was issued in 2004 (***Civil Case No 268 of 2004)*** between the National Social Security Fund Board of Trustees and Ankhan Holdings Ltd and Sammy Boit arap Kogo as well as the other Director of the First Defendant. The firm of Mohammed Muigai Advocates acted at the start. It is not clear whether this was for the First Defendant or all. It is also not clear whether at any stage separate representation was considered. The person with conduct was a Mr David Majanja (as he then was). It seems that Mr Majanja set up a new firm and it is that firm that has raised the Bill of Costs. The Main Suit carried on to being confirmed ready for trial on two occassions the Applicant was involved in that process. Also on two ocassions the Court File went missing and had to be reconstructed. That was also a process in which the Applicant and the Plaintiff's Advocates in the Main Suit were involved.

Reasoning and Decision

21. The Applicant has in fact makes two applications, one for the cross-examination of the Respondent on the question of whether there was a retainer and the second to conduct an inquiry into the matter including consideration of the file to ascertain whether such a retainer existed. That is not an interlocutory issue but goes to the heart of the taxation.

22. As for the second application, a general inquiry, that is not an appropriate function of this Court. It is a matter that is properly within the competence of the Taxing Registrar who can review the file and take cognizance of attendances recorded, documents filed and court fee received as well as the identity of the payer. In any event such an approach would not be the most efficient use of the Judge's time, for the additional reason that the file has gone missing twice and had to be reconstructed, therefore there is no guarantee that the file now before the Court is complete and comprehensive. At this stage, there are no grounds set out as to why the Court should usurp the function of the taxing officer apart from on the issue of the existence of a

retainer. In relation to the first application, that is, to cross examine the Respondent. That application is clear, it is succinct in that the parameters are defined, in other words did a retainer exist or not? To allow such cross-examination would not in my opinion put an onerous burden upon the Respondent.

23. The Constitution of Kenya 2010 enshrines the right to a fair trial. Such an entitlement includes access to the Courts in an efficient and expeditious manner. The approach commended by the Respondent of endless affidavits sworn by a swathe of persons not currently involved in these proceedings does not lend itself to that approach. The Respondent makes serious allegations against the Applicant. In addition, those allegations go beyond the taxation and have an undeniable impact upon the Main Suit. If in fact, the Respondent is right and there was no retainer, then the firm of Majanja Luseno & Co acted without due authority. That means that all documents filed whether witness statements, affidavits, pleadings etc cannot stand within those proceedings. The Plaintiff needs to be informed. It should be mentioned that the Main Suit has been through Order 11 compliance and Case Management under the new Practice Direction. If what the Respondent says is true and he stood by and allowed the Plaintiff to rely on those documents, that too has serious implications on the readiness for trial of the Main Suit as well as the costs of the Main Suit.

24. The Firm of Majanja and Luseno has been on the record, according to the Bill of Costs, since about 2008. They have filed documents and attended hearings. If that was done without authority, there was a duty on the Respondent herein and all three Defendants to bring that to the Plaintiff's attention in the main suit. None of them have done so. Taken together with the repeated disappearance of the file, that conduct gives rise to an unacceptable delay that the Plaintiff will suffer in the Main Suit.

25. Given the age of this matter and the implications upon other Parties, I take the view that far from being a drain on Court time, a cross examination of the Respondent will hasten the process. Nor would it delay the proceedings. Rather it would hasten clarification of a fundamental issue.

26. In addition, given the fundemental implications upon the main suit of the Respondents allegations, the Plaintiff in the main suit needs to be notified of the position that the Respondent now takes. In the event that the Respondent is right, the costs of the main suit to date will need to be considered.

27. The Respondent makes very serious allegations against the Applicant. These could amount to criminal offences and could have serious implications upon the professional standing of the Applicant firm. They include allegations of fraud stretching to misleading the Court and possibly obstructing the administration of justice. A person should not be allowed to make such serious criticism of another without justification. Statements made on oath should be regarded seriously and not be entered into frivilously. I note there are not complaints to the Law Society's regulatory arm. Therefore, the Respondent having made the allegations, should not shy away from the opportunity of substantiating them under cross-examination. Anything less would deny the Applicant fair access to justice. In addition the Affidavit and its Exhibits give rise to some inconsistency in what is being said. For example the exhibited correspondence refers to "part payment" yet it is now said that that payment was made it full. Both versions cannot be true. Cross-examination will allow the Respondent to clarify what he said and what he meant without the need for endless exchange of affidavits and correspondence.

28. For the reasons set out above, the Application for cross-examination of the Respondent is allowed with costs. The Application for this Court to conduct an inquiry is dismissed as being premature as that is the function of the taxing registrar. Should the Applicant take issue with the process there is recourse to the Court on a review etc.

29. The process of cross examination should be conducted with all the relevant evidence being placed before the Court.

ORDER

30. I therefore Order that:

1. The Applicant shall serve the Plaintiff in the Main Suit with a copy of his Application and the Respondent's Replying Affidavit and this Order within 7 days of today
2. The Applicant shall file a serve an affidavit exhibiting all the documents on which they seek to rely to refute the Respondent's claim and prove the existence of a retainer within 14 days of today;
3. The Respondent is hereby given leave to file and serve a further Affidavit in reply if so advised within 7 days of service
4. The Respondent shall attend Court on a date to be fixed for cross-examination limited to the issues raised in his Replying Affidavit;
5. The Plaintiff in the main suit is hereby granted leave to attend that cross-examination as an Interested Party but shall not be entitled to cross-examine the witness.
6. The Respondent shall pay the Applicant's costs to be taxed if not agreed.
7. List for Mention on 15 February 2016 to fix a date for the cross-examination.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED AND DELIVERED AT NAIROBI THIS 18th DAY Of January 2016

In the Presence of:

Joseph Kabugi C/Clerk

Mr Luseno For Plaintiff/Applicant

Mr Arua For Defendant/Respondent