



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL SUIT NO 58 OF 2014 (O.S.)**  
**IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT**

**AKN.....APPLICANT/PLAINTIFF**

**VERSUS**

**JMN.....DEFENDANT/RESPONDENT**

**RULING**

1. At the conclusion of the testimony of the last witness called by the respondent to the application dated 3rd September 2014 on 19<sup>th</sup> May 2016, counsel for the applicant indicated that she had served notice for cross-examination of two persons whose affidavits had been placed on record by the respondent. In response to that counsel for respondent stated that the respondent was dropping the affidavits of persons that they had not called as witnesses. To that counsel for the applicant stated that she had no objection, save that the affidavits of the persons who were not called as witnesses ought not to be disregarded.
2. Counsel for the applicant then proceeded to indicate that she was ready to avail a witness on 20<sup>th</sup> May 2016, a person whose affidavit had been filed to support the applicant's case, but who could not be availed to testify at the time the applicant was presenting her case. In response to that, counsel for the respondent indicated that the respondent was no longer interested in cross-examining the said witness.
3. At that counsel for the applicant invited the court to give directions of what befalls the affidavit of a deponent who is not availed for cross-examination. In her view, where a deponent of an affidavit fails to attend court for cross-examination for no fault of her own there ought to be no prejudice to their affidavit and the same should be considered at the time of the determination of the matter. She was, however, of the view that affidavits of deponents who should have been availed for examination but were not so availed ought to be disregarded. She stated that the affidavits of deponents who were not available at the time that they were required but their attendance was subsequently not called for ought to be considered.
4. On his part, counsel for the respondent submitted that where a court establishes an order for cross-

examination of deponents of affidavits and a deponent does not appear for cross-examination, then his affidavit cannot be used because the right to challenge the contents of an affidavit is key. He further submitted that where a party elects to cross-examine particular witnesses and indicates who should be called, then such affidavits should be on record where the deponents are available. Similarly, affidavits in respect of deponents that the parties have indicated need not be called for cross-examination ought to remain on record. However, affidavits of deponents who were notified to come for cross-examination but chose to stay away ought to be disregarded. He concluded that where parties agree on a specific approach to a matter at directions then that position should hold and bind counsel unless altered by the court.

5. Counsel for the respondent cited the decision of Gikonyo J. in *Bungoma High Court Election Petition Number 2 of 2013 Moses Wanjala Lukoye vs. Bernard Alfred Wekesa Sambu and others*, where it was held that the affidavit evidence of a witness who has not been called for cross-examination is worthless and remains on record as a dead appendage of the record of the trial, except where the parties by consent accept not to cross-examine the witnesses and to have the evidence admitted as presented in the affidavits.
6. An interlocutory application ought to be determined purely on the basis of the affidavits filed in support thereof or opposition thereto, together with the annexures thereto. Where it is directed that an interlocutory application be disposed of by way of cross-examination of the deponents of the affidavits filed in support and opposition thereto, it follows that the determination of the application would be founded on the oral evidence elicited from the examination of the deponents of the affidavits on record. Where a deponent to any affidavit is not called to the stand, then their affidavit would not be exposed to testing and the same should not be taken into account. Parties may agree to dispense with the cross-examination of certain deponents, in which case the affidavits of such persons ought to be admitted as evidence by consent. Where there is no such consent such affidavits, whose deponents are not cross-examined, would count for nothing. In short, directions that an interlocutory application be disposed of by oral evidence founded on the affidavits on record converts the hearing, which ought to be by affidavit evidence, to be a trial founded on oral evidence. The affidavits on record would only count if the deponents are called and cross-examined, or their attendance is dispensed with and the parties consent to admitting the affidavits without calling the makers.
7. Directions on the disposal of the application dated 3<sup>rd</sup> September 2014 were given on 28<sup>th</sup> October 2014. The said application was on that date fixed for hearing on a particular day, and it was directed that the deponents of the various affidavits filed in the matter be available for cross-examination.
8. The oral hearing of the application commenced on 5<sup>th</sup> March 2015. At the close of the hearing on 9<sup>th</sup> September 2015, counsel for the applicant indicated that the applicant had three witnesses remaining, one of whom was available only on 30<sup>th</sup> October 2015. The court directed the applicant to avail all her witnesses on 25<sup>th</sup> September 2015, failing which the respondent would be at liberty to open his case.
9. On 25<sup>th</sup> September 2015, the applicant did not present her witnesses as scheduled. She closed her case with respect to two of the witnesses but pleaded that the other witness would only be available on 30<sup>th</sup> October 2015. In the end, the court allowed the respondent to open his case, but left room for the applicant's remaining witness, Christine Muthama, to testify on 30<sup>th</sup> October 2015, erroneously indicated in the record of 25<sup>th</sup> September 2015 as 30<sup>th</sup> September 2015. At the end of the day's proceedings on 25<sup>th</sup> September 2015 the matter was stood over to 30<sup>th</sup> October 2015, a date that had been given to the parties way back on 10<sup>th</sup> July 2015.
10. When the hearing resumed on 30<sup>th</sup> October 2015 the respondent continued to present his case. 30<sup>th</sup> October 2015 was the day that counsel for the applicant had indicated that Christine Muthama would be available for cross-examination. The said witness was not available on that day, contrary

to what had been directed earlier on 25<sup>th</sup> September 2015, and counsel for the applicant did not address the court on the matter of the said witness.

11. The court record is plainly clear that the hearing and determination of the application in question was to be founded on the cross-examination of the deponents of the affidavits on record. The applicant called all the persons whose testimony she wanted the court to rely on. She dropped two of her witnesses. The affidavits sworn by the said witnesses shall be deemed to have been abandoned. She was given opportunity to call one witness on 30<sup>th</sup> October 2015, in the middle of the respondent's testimony, she did not avail herself of the opportunity on 30<sup>th</sup> October 2015 as indicated above. That is the witness that she was applying to avail on 20<sup>th</sup> May 2016. The affidavit of that witness should therefore equally be deemed to have been abandoned.
12. My conclusion above is fortified by the decision of Gikonyo J. in *Bungoma High Court Election Petition Number 2 of 2013 Moses Wanjala Lukoye vs. Bernard Alfred Wekesa Sambu and others*, with which I respectfully concur.
13. Following the above, the application on record shall be determined wholly on the basis of the evidence recorded from the deponents of affidavits on record who were presented in court and cross-examined. The affidavits on record of all the persons who were not presented by both sides as witnesses shall be disregarded.
14. Having disposed of the matter of the affidavits and witnesses, I am left to give directions on the filing of written submissions. Directions thereon shall be given on a date to be given at the delivery of this ruling.
15. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>TH</sup> DAY OF MAY, 2016.**

**W MUSYOKA**

**JUDGE**