



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 196 OF 2015**

**THE LAW SOCIETY OF KENYA.....APPELLANT**

**VERSUS**

**FAITH WAIGWA.....1<sup>ST</sup> DEFENDANT**

**WAMBUGU GITONGA.....2<sup>ND</sup> DEFENDANT**

**ALEX GATUNDU.....3<sup>RD</sup> DEFENDANT**

**KIMANI WAWERU.....4<sup>TH</sup> DEFENDANT**

**JACQUELINE MANANI.....5<sup>TH</sup> DEFENDANT**

**EDWIN SIFUNA.....6<sup>TH</sup> DEFENDANT**

**ALUSO INGATI.....7<sup>TH</sup> DEFENDANT**

**KINYANJUI THEURI.....8<sup>TH</sup> DEFENDANT**

**CHARLES KANJAMA .....INTERESTED PARTY**

**RULING**

1. On 1<sup>st</sup> July 2015, this court delivered its ruling in which it allowed the Defendant's application to have Mr. Apollo Mboya, the Plaintiff's secretary/C.E.O to take the witness stand to be cross-examined on portions of the affidavit he swore in support of the motion dated 28<sup>th</sup> May 2015. Immediately after the delivery, of the aforesaid ruling, Mr. Ongoya, learned advocate for the Plaintiff, applied to this court for leave to cross-examine Faith Waigwa, Alex Gatundu, Edwin Sifuna and Aluso Ingati, the 1<sup>st</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively over certain averments they made in their affidavits they swore in response to the averments made by Apollo Mboya. Mr. Ongoya, made specific reference to the particular paragraphs of these affidavits basically to test the veracity of those averments. Mr. Kanjama was of the view that given the opportunity to cross-examine those deponents he will be able to have the questions relating to the procurement of signatures and issuance of charters clarified and settled.

2. The Defendants vehemently opposed those applications. Mr. Masika, learned advocate who appeared

together with Miss Njuguna as holding brief for Mr. Okero for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants urged this court not to grant the orders because the Plaintiff will have an opportunity to clarify those issues while re-examining Mr. Apollo Mboya. Mr. Masika pointed out that there is no use to put his clients on the witness stand over averments they made in response to averments made in affidavits filed in support of the Plaintiffs application dated 28<sup>th</sup> May 2015. Mr. Masika was critical of Mr. Kanjama's role in these proceedings. He pointed out that Mr. Kanjama had initially taken a neutral ground but has now taken sides. The learned advocate argued that should Mr. Kanjama's application be allowed, this court will determine matters or issues reserved for the substantive hearing of this suit. Mr. Masika specifically identified questions relating to the manner the Annual General Meeting held on 20<sup>th</sup> March 2015 was conducted to be an issue reserved for the substantive hearing and not in an interlocutory application. Mr. Masika was of the view that at some stage Mr. Kanjama may be required to be cross-examined on new issues he introduced particularly the question on the outfit known as Okoa L.S.K.

3. Mr. Mureithi, learned advocate for the 3<sup>rd</sup> and 5<sup>th</sup> Defendants too urged this court to dismiss the applications of the Plaintiff and the Interested Party. The learned advocate pointed out that if his clients are placed in the witness box for cross-examination, it will be tantamount to asking them to explain why they averred that Mr. Apollo Mboya had made false averments. Mr. Mureithi also argued that all the documents which are alleged to have been executed, withheld, falsified and or altered are in the custody of the Plaintiff's C.E.O. The learned advocate further pointed out that if the question relating to the validity of the Annual General Meeting held on 20<sup>th</sup> March 2015 was to be determined at this stage then the court will have done a mini-trial in an interlocutory application. Mr. Mureithi accused Mr. Kanjama of engaging himself in a fishing expedition through the application for cross-examination.

4. Mr. Anzala, learned advocate for the 4<sup>th</sup> and 7<sup>th</sup> Defendants too oppose the application by the Plaintiff and the Interested Party. He was of the view that the applications were made as an afterthought after the Defendants successfully sought for a similar application. According to the learned advocate, these applications have no basis in law and if allowed, will drive these proceedings to a mini-trial.

5. Mr. Sifuna, the 6<sup>th</sup> Defendant, too opposed the application claiming the Plaintiff's application is properly answered vide the material placed in the court record. He argued that the issues relating to the Annual General Meeting cannot be determined vide an interlocutory application.

6. In response to the Defendants arguments, Mr. Kanjama stated that the Defendants should be cross-examined over contradictory averments to determine the veracity of those averments. He also argued that the court will be able to gauge the extent to which the cross-examination will take. He further pointed out that the outcome of the cross-examination will enable this court determine whether or not the principles of granting temporary orders of injunction have been established or not. He denied the averment that his application is an afterthought.

7. Mr. Ongoya, on the other hand pointed out that this court concluded in its ruling of 1.7.2015, that the cross-examination of Mr. Apollo Mboya will enable this court reach a conclusive decision on contentious and contradictory averments made before this court. It is Mr. Ongoya's opinion that the Plaintiff's application will go a long way to assist this court achieve this objective. The learned advocate accused the Defendants of creating an artificial difference between the Annual General Meeting and a Special General Meeting with the aim of defeating the Plaintiff's application whereas there is a specific prayer for injunction against the holding of a Special General Meeting in the plaint. Mr. Ongoya also pointed out that the Defendants in their respective affidavits all deponed that they had full knowledge of the facts in question and yet they have now indicated that they do not know all the information. The learned advocate further argued that unless the Plaintiff's application is allowed, this court risks to get a one sided story.

8. 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.

10. A critical examination of the rival submissions presented to this court reveals the fact that both sides are keen in having this dispute heard and determined expeditiously. Both sides have questioned the reliability of the averments made by the opposite party. Both sides have now come before this court to seek for leave to cross-examine those parties who have sworn affidavits in support or against the motion dated 28<sup>th</sup> May 2015 to establish the veracity of those averments. The Plaintiff and the interested party have been accused of making their requests as an afterthought, because they only made their applications after the Defendants were given similar orders to summon the Plaintiff's secretary/C.E.O to attend court to be cross-examined in respect of specified paragraphs in his affidavits. A careful perusal of the court record will show that both the Plaintiff and the Interested Party had at the outset clearly expressed their intention of praying at some stage for similar reliefs as those sought by the Defendants. In my humble view, the duo's applications therefore cannot be said to be an afterthought.

11. Under Order 19 rule 2(1) of the Civil Procedure rules this court is given a wide discretion to order attendance of a deponent for cross-examination on the application of either party. In my view, such an application must be made in good faith and not on the spur of the moment or just because the other side has successfully done so. In the dispute before this court, I am convinced the applicants i.e. the Plaintiff and the Interested Party acted in good faith in urging for the application.

The applications have specified the paragraphs of the deponents' affidavit they intend to interrogate by cross-examination.

12. I have taken time to critically examine the relevant Paragraphs of the affidavits sworn by different deponents who have now been cited to be summoned for cross-examination. It is clear to me that those affidavits raised contentious issues. The aforesaid affidavits at times take totally different directions. At some point they appear to contradict each other. In the circumstances of this motion there is need to settle those questions by interrogating by way of cross-examination of the contentious and contradictory positions that have emerged.

13. This court has been urged to decline the applications on the basis that the cross-examination and re-examination of Apollo Mboya alone will settle or give answers to all the questions intended to be squeezed out by cross-examination of the specified Defendants. With respect, I do not think that is correct. There are specific questions directed to or at each Defendant in respect of specific averments and in respect of certain paragraphs of the affidavits they each swore. I am convinced that if the order sought is given, the question in controversy will be answered, clarified, elaborated and settled. I find the application made by the Plaintiff and the Interested Party to be well founded hence I allow them as prayed. For the avoidance of doubt, I grant the following orders:

**1. Faith Waigwa, Alex Gatundu, Edwin Sifuna and Aluso Ingati are hereby summoned to**

appear before this court on a date to be fixed to be cross-examined by the Plaintiff's advocate and to be re-examined by their respective advocates over their responses to paragraphs 21 and 22 of Apollo Mboya's affidavit sworn on 28.05.2015 and their responses to paragraphs 7.4 and 7.5 of Apollo Mboya's supplementary affidavit sworn on 15.06.2015.

2. Apollo Mboya, Faith Waigwa, Alex Gatundu, Edwin Sifuna and Aluso Ingati are hereby summoned to

3. attend court on a date to be specified to be cross-examined by the Interested Part as follows:

1. *Faith Waigwa on her supplementary affidavit dated 16/6/2015 paras 6, 9..2, 9.2.2, 11.3, 11.4 & 12.*
2. *Apollo Mboya on his supplementary affidavit dated 18/6/2015 paras 7.2, 7.4, 7.5 & 14.*
3. *Alex Gatunde on his supplementary affidavit dated 18/6/2015 paras 5, 6, 11, 12, 15 & 17.*
4. *Faith Waigwa on her supporting affidavit dated 8/6/2015 paras 6, 8, 10, 16, 17, 20, 21 & 22.*
5. *Faith Waigwa on her affidavit in reply dated /6/2015 as to statements in paragraphs 15, 16, 17, 18, 19, 20 & 21.7 to 21.11.*
6. *Aluso Ingati on her replying affidavit dated 5/6/2015 paras 5, 8, 10, 16, 18, 19, 20, 22, 23 & 23.*
7. *Edwin Sifuna on his replying affidavit dated 5/6/2015 paras 5, 8, 10, 16, 18, 19, 20, 22, 23 & 23*
8. *Alex Gatundu on the replying affidavit by 3<sup>rd</sup> and 8<sup>th</sup> Defendants paras 9, 18, 22, 24, 25, 27, 28 and 32.*
9. *Apollo Mboya on his supporting affidavit dated 28/5/2015 paras 12, 13, 14, 15 & 19.*

14. Having granted the orders sought, this court makes the following observations and directions. First from the sheer number of deponents summoned to be cross-examined, it would appear, a considerable amount of time will be spent dealing with an interlocutory application. To address this challenge, this court hereby makes an order directing the cross-examiners and re-examiners to each take a maximum of 10 minutes.

15. Secondly, the issues sought to be interrogated by cross-examination appear to be substantive and are likely to give the way forward on the hearing and determination of the substantive suit. I think it is time learned counsels and their clients chose to comply with the provisions of Order 11 of the Civil Procedure Rules and thereafter a pre-trial conference can be undertaken to instead have the substantive suit heard and determined expeditiously.

16. Thirdly, this court wishes to inform the parties that should it become apparent that the conclusion of the dispute may delay, this court will exercise its inherent power to have the hearing and determination of the suit expedited as suggested herein above.

Dated and delivered in open court this 27<sup>th</sup> day of July 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant