



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 393 OF 2014

REPUBLICAPPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EX PARTE

ALTHAUS MANAGEMENT & CONSULTANCY LIMITED

RULING

1. The *ex parte* applicant herein vide a Notice of Intention to Cross Examine dated 22nd May, 2015 sought that one **Lawrence Njogu** the deponent of an affidavit sworn herein on 24th April, 2015 be availed for cross-examination on the said affidavit. The grounds upon which the Notice was filed were:

- 1) **The affidavit offends the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules.**
- 2) **The deponent of the affidavits has falsely alluded to and made references to refusal by the Applicant to pay the tax allegedly due. It is therefore necessary that the deponent of the affidavit to cross examined on the *bona fides* of his averments.**
- 3) **The deponent of the affidavit has attributed ill faith and tax avoidance on the part of the Applicant. Such claims cannot be proven by affidavit but must be subjected to cross-examination.**
- 4) **The affidavit sworn by Mr. Lawrence Njogu consists of matters of pure hearsay.**
- 5) **The Affidavits contain allegations that ate oppressive to the Applicant. It is therefore necessary that the deponent be summoned to attend court.**
- 6) **Several paragraphs of the affidavits are not based on the deponent's own knowledge.**
- 7) **The affidavit is scandalous and vexations. It is important that the deponent of the affidavit be cross-examined on the contents of his affidavit so that a foundation for the highly provocative allegations to tax avoidance can be laid or discounted.**
- 8) **The deponent of the affidavit has allowed himself to be used as a purveyor of falsehoods**

and defamatory innuendo. He ought to avail himself for cross-examination to enable the court ascertain whether he is guilty of perjury.

2. According to **Miss Odari**, learned counsel for the applicant, the notice was based on the ground that the subject affidavit contravened the provisions of Order 19 Rule 3(1) of the **Civil Procedure Rules** by failing to confine itself to facts. It was contended that the said affidavit deposed to factual issues without disclosing whether the same were from the deponent's own knowledge or not. In support of this submission reference was made to **Simon Kitavo Nduto & Another vs. Owenga Anjere Civil Appeal No. 170 of 1995.**

3. It was further submitted that at various paragraphs of the affidavit, the deponent made false allegations of facts bordering on perjury and by these allegations serious questions were raised regarding tax compliance of the applicant such as the alleged trend of tax avoidance without any material. In the learned counsel's view, these were serious allegations going to the core hence the necessity of cross-examination on the accuracy to determine the main issue in dispute.

4. According to learned counsel, order 19 generally applies to all affidavits including judicial review. Learned counsel discounted the position taken by the respondent that any new issue can be dealt with by further affidavit contending that what was in issue was not a matter of new issues but whether there was perjury and failure to disclose sources of information.

6. In opposition to the application, the respondent filed the following grounds of opposition:

1) That Order 53 Rule 4 of the Civil Procedure Rules provides that any new matters arising out of affidavits of any party ought to be addressed by way of a further affidavit.

2) That the Applicant has accordingly filed a further affidavit dated 15/6/2015 which responds to all issues raised by the Respondent's replying affidavit.

3) That the Respondent's replying affidavit has not contravened the provisions of Order 19 of the Civil Procedure Rules.

4) That the Respondent's replying affidavit is founded on the tax demands dated 24/5/2010, 4/10/2011 and 6/6/2014 which intimate the Applicant has taxes owing to the Respondent.

5) That the application by the Applicant does not give particulars of scandalous and vexatious statements made by the deponent of the affidavit.

6) That the application by the Applicant does not give particulars of the falsehoods and defamatory innuendo made by the deponent of the affidavit.

7) That the application is without merit and parties should be allowed to proceed on the affidavits filed in this matter.

6. In support of the grounds, **Mr Nyagah** learned counsel for the respondent submitted that all the paragraphs which the applicant was contesting were adequately responded to in the further affidavit hence there was no need to avail the deponent for cross-examination. It was added that the replying affidavit was founded on tax demands in which demands the respondent indicated that the applicant owed taxes to the Respondent and that there was nothing in the affidavit which was unknown to the applicant hence the allegations of non-payment of the taxes was factual and hence what can be questioned is the evidence and not the deponent thereof.

7. According to learned counsel, the dispute was handled by several officers, the deponent being the last one and the documents were contained in the file which was available to the deponent. It was contended that the applicant had not shown how the said affidavit offended Order 19 and that in any case tax avoidance was not a crime and therefore cannot be termed vexatious and scandalous.

8. It was contended that judicial review is neither civil nor criminal and in judicial review the Court does not deal with disputed facts. Since there was no contention that the applicant had been prevented from presenting its case, the Court was urged to dismiss the application for cross-examination.

9. In her rejoinder, **Miss Odari** reiterated that there is no distinction between other matters and applications brought under Order 53. In her view, where there are diametrically opposed averments, cross-examination ought to be ordered.

10. I have considered the issues raised herein. The first issue for determination is whether Order 19 of the **Civil Procedure Rules** applies to applications under Order 53 thereof. Section 3 of the **Civil Procedure Act** on the other hand provides:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

11. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the **Civil Procedure Act** are inapplicable. It must be remembered that apart from Order 53 of the **Civil Procedure Rules**, the provisions of the **Civil Procedure Act** and the Rules made thereunder do not apply to judicial review proceedings. Accordingly Order 19 does not apply to these type of proceedings. It ought to be remembered that the preamble to the **Civil Procedure Act** provides that it is “*An Act of Parliament to make provision for procedure in civil courts*”. In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the **Civil Procedure Act** and Rules do not apply unless expressly provided by such an Act and the provisions of the **Civil Procedure Act** and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486**, the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil nor criminal jurisdiction in the strict sense of the word.

12. However, the East African Court of Appeal in **Life Insurance Corporation of India vs. Panesar [1967] EA 614 (Sir Charles Newbold, P)** dealing with the application of the Order to matters falling outside the **Civil Procedure Act** pronounced itself as hereunder:

“Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. That the provisions of the Evidence Act do not apply to affidavits or to arbitration proceedings does not therefore mean that there exist no rules as to what may be set out in the affidavits, other than rule 3 of Order 18, or as to what evidence may be led before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before...I would accept it...the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provisions of Order 18 rule 3(1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that rule 3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise rule 3 would be a classic example of straining at a gnat but swallowing the camel. Even in relation to rule 3 the court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact...It is clear that the court, even where there is a specific statutory exception to the hearsay rule in evidence tendered by affidavit, will not accept the affidavit as probative of the fact sought to be proved unless there is set out

precisely which are the facts based on information and the source of that information. To suggest that the court would have adopted that position if no rules of evidence applied to what could be set out in affidavits is manifestly absurd. Whereas it is true that the Evidence Act does not apply to affidavits tendered to the court, it is also true that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected. It is important to observe that unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence. Unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence instead of oral evidence is destroyed at a blow.”

13. It is therefore my view that the principles under Order 19 of the *Civil Procedure Rules* apply to affidavits filed in applications under Order 53 of the *Civil Procedure Rules* as well.

14. Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the *Civil Procedure Rules*. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent’s affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held by **Ochieng, J.** in the case of **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 2 EA 6.**

15. In fact in **Lawson And Anor vs. Odhams Press Ltd. and Anor. (1948) 2 All ER 717,** it was held that Cross-examination on an affidavit in support of interlocutory application is to be allowed only in special circumstances.

16. I also agree that the decision in **G G R vs. H-P S [2012] eKLR** states the general rule with respect to cross-examination. According to the learned Judge:

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”

17. The foregoing statement is the general position with respect to cross examination particularly in purely civil matters. However as I will show in this ruling, different considerations apply when the same discretion is being exercised in judicial review proceedings. The exercise of that discretionary power in such cases is placed on a higher pedestal than in ordinary civil cases. Such discretion, as was appreciated by **Korir, J** in **R. vs. Constituency Development Fund Board & Another ex parte Robert Itaramwa ochale & 5 Others [2012] eKLR,** though can be exercised under the inherent power of the Court, ought to be invoked sparingly taking into account the fact that allowing cross examination would lead to unnecessary delays in determining judicial review matters and hence the logic behind its policy that such proceedings be fast and quick fix to challenges encountered by citizens in their interaction with the

administration defeated.

18. Although the matter before me is not an interlocutory application, this rule is even more stringent in judicial review applications and the rationale for this is to be found in the holding in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** where the Court held:

“Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.”

19. The first ground for seeking the cross-examination of the deponent is that the said affidavit contravenes the provisions of Order 19 of the ***Civil Procedure Rules***. In my view, if that position is correct, it does not warrant the cross-examination of the deponent of the affidavit. The law as I understand it is that the sources of information and grounds of belief are primarily essential for the purpose of veracity and consequently a failure by the deponent to disclose with particularity the sources of the information he has deposed to, has the effect of weakening the probative value of the information, and may even render it worthless. In **A N Phakey vs. World-Wide Agencies Ltd (1948) 15 EACA 1**, it was held that an affidavit drawn on information and belief is worthless without disclosing the source and ought not to be received in evidence. Similarly, the decision in **Simon Kitavo Nduto & Another vs. Owenga Anjere** (supra) is to the effect that affidavits made on information should not be acted upon by the Court unless the source thereof is specified. The Court further held that an affidavit being evidence cannot be equated with a document which can be amended under the provisions of the ***Civil Procedure Rules*** hence a wrong statement of fact made in an affidavit makes that statement worthless and may in certain circumstances amount to perjury. However, the Court was of the view that the rule does not apply to mere statements of law. According to the decision in **East African Packaging Industries Limited vs. Zoeb Alibhai Civil Appeal No. 124 of 1996**, cross-examination is permissible where the deponent discloses that he obtained information from sales staff and customers hence sufficiently complying with the requirement of the rule. In this case, it is contended that the affidavit does not comply with the rules. If that be the position, the defect would render the affidavit worthless and I do not think any benefit would be derived by subjecting the deponent thereof to cross-examination. It therefore follows that where there is an alternative remedy available to remedy the defect in an affidavit, such defect cannot in my view amount to exceptional circumstances in order to warrant the deponent thereof being cross-examined thereon.

20. The other ground was that the facts in this matter reveal that the parties' cases are diametrically opposed hence the need for cross-examination. However, judicial review, it must always be remembered deals substantially with the process rather than the merits of the case. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison** (supra) judicial review process ought not to be invoked in cases where *viva vice* evidence would be necessary. Judicial review applications only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It deals with the legality or fairness of the decision or proceedings in question hence where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

21. It follows that if it is true that the cases of the parties herein are diametrically opposed, the procedure adopted by the applicant in resolving the dispute would not be the proper course. However, that is a determination which cannot be made at this stage.

22. What is clear however is that that ground is not a basis for ordering the deponent of the affidavit in question to be cross-examined.

23. Having considered the issues raised herein, it is my view and I so hold that no basis has been laid before me to warrant this Court directing that **Lawrence Njogu** the deponent of an affidavit sworn herein on 24th April, 2015 be availed for cross-examination on the said affidavit and I decline to make such directions. The costs of the subject notice are awarded to the Respondent in any event.

Given at Nairobi this 24th September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Waziri for Miss Odari for the Applicant

Mr. Nyaga for the Respondent

Cc Patricia