



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 1521 OF 2000

KENYA ELECTRICITY GENERATING LIMITED T/A KENGEN.....1ST PLAINTIFF

MAJOR J.K. RUGUT.....2ND PLAINTIFF

-VERSUS-

KINGSWAY MOTORS (K) LTD.....1ST DEFENDANT

MANISH SHAH.....2ND DEFENDANT

AND

KINGSWAY TYRES LIMITED.....OBJECTOR

RULING

1. The Application before the Court is the Plaintiffs' **Notice of Motion** dated **15th April 2015** and filed on **20th April 2015**. It is expressed to be brought under the provisions of **Order 19 Rule 2 (1)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**.

2. The Plaintiffs sought for the following orders:-

1. **THAT this Honourable Court be pleased to order the attendance of the Objector's deponent, Issa Premji, for cross-examination.**
2. **THAT this Honourable Court be pleased to make such further orders to meet the end of justice.**
3. **THAT the Objector bears the costs of this application.**

3. The application is based on the grounds set out therein and is supported by the Affidavit sworn on **15th April, 2015** by **DONALD B. KIPKORIR**, an Advocate of the High Court of Kenya.

4. The Plaintiffs aver that the Objector filed a Notice of Objection and the Objection application dated **14th March, 2014**. In support of the aforesaid application, **ISSA PREMJI**, swore an affidavit on behalf

of the Objector. It is the Plaintiff's contention that the 1st Defendant, Kingsway Motors (K) Ltd had, until the time of Judgment, its registered offices at the Objector's physical address. It is also the Plaintiff's contention that the Objector, Kingsway Tyres Ltd, continues to carry on business at the registered offices of the 1st Defendant. It is therefore their case that they will be prejudiced if the orders sought for herein are not granted.

5. The Objector did not put in a response to the application. However, at the hearing of the application, Counsel for the Objector opposed the application on its behalf. The hearing of the application proceeded on 5th October, 2015 whereby Ms. Omollo appeared for the Plaintiffs while Mr. Mc Ronald appeared for the Objector.

6. Counsel for the Plaintiffs reiterated the facts in the application and submitted that since the Objector continued to carry on business at the registered office of the 1st Defendant, it was only through cross-examination of the Objector/Deponent that the truth would come out to enable the Court to arrive at a just decision. It was further Counsel's submission that it was only through cross-examination that the Court would get to know the truth about the relationship between the Objector and the Defendants.

7. In response, Counsel for the Objector took issue with the Supporting Affidavit and argued that an advocate could not competently depose to matters of fact on behalf of a client as has been done herein by Mr. Kipkorir, more so when the Advocate had not disclosed the source of those facts. It was the submission of Counsel for the Objector that the execution was levied against the property of the Objector instead of the 1st Defendant. He referred the Court to the Certificate of Incorporation and Memorandum of Association annexed to the Objector's application in supporting his argument that the Objector is a distinct entity that is quite separate from the 1st Defendant. It was further the submission of Counsel that the orders sought for by the Plaintiffs were discretionary orders and it was therefore required of them to prove that the facts they alleged were relevant.

8. This Court has perused the affidavit sworn by the Plaintiffs' Advocate. The said affidavit, which is fairly short, lays down the grounds/facts for seeking cross examination of the Deponent to the affidavit in support of the Objection application, **Issa Premji**.

9. In the case of *Pattni Vs Ali & 2 Others [2005] 1 KLR 269* the Court of Appeal made it clear that there is no rule prohibiting Advocates from deposing to matters of facts on behalf of their clients so long as they disclose the source(s) of such information. At page 279, the court stated as follows:-

"...advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so....It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is, however, no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information." (Emphasis supplied)

10. The facts at paragraphs 3 and 4 of the affidavit sworn by the Plaintiff's advocate are in contention. The Objector's case in their objection application was that the proclamation and attachment was done at their business premises on University Way which are not the 1st Defendant's premises. The Plaintiffs' advocate on the other hand averred in his affidavit that the Objector carried on business at the registered offices of the 1st Defendant without disclosing the source of his information or facts. It is not discernible on the face of the affidavit, how he came to that conclusion. Under **Order 19 Rule 3(1)** of the **Civil Procedure Rules** it is provided that:-

"affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove; provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

11. The allegation as to whether or not the Objector carries on business at the premises of the 1st Defendant is an evidentiary matter which, having been placed in contest, requires proof. The Advocate failed to depose to personal knowledge of the matter or disclose the source of his information in respect of the information. Since it is the general rule that Advocates should not depone to contentious matters in a case they are involved in as they otherwise run the risk of being called as witnesses, it is plain that paragraphs 3 and 4 of Mr. Kipkorir's affidavit cannot stand. In the case of *East African Foundry Works (K) Limited Vs Kenya Commercial Bank Limited [2002] 1 KLR 443* the deprecated the practice of advocates making depositions on contentious matters of fact in suits or applications which they canvass before the courts and proceeded to strike out certain paragraphs in such an affidavit. Court observed thus:

"The unseemly prospect of counsel being called upon to be cross-examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice..."

In the premises, for the reason that the aforesaid paragraphs of Mr. Kipkorir's affidavit offend **Order 19 Rule 3(1)** of the **Civil Procedure Rules** and the same are hereby struck out as a matter of good practice.

12. Turning now to the issue of cross-examination, the power to order attendance of a deponent for cross-examination is donated by **Order 19 Rule 2 (1)** of the **Civil Procedure Rules** which states as follows:-

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-examination of the deponent.** (Emphasis supplied)

13. From the provision above, it is clear that the power to order a deponent to be cross-examined is discretionary. The Courts have in a number of decisions held that the party applying for cross-examination has to lay out a basis for the same. In the case of *Kibaki Vs Moi & Another (Election Petition No.1 of 1998) UR*, for instance, the High Court in dismissing an application for cross-examination of a deponent held thus:

"In the exercise of its ordinary jurisdiction, the High Court is vested with the discretionary power to allow the cross-examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed, cross-examination will not be ordered."

14. In *Hudson Enterprises Ltd. Vs. Kenya Cold Storage (foods) Ltd. & 14 others [2006] eKLR, Azangalala, J* (as he then was) had similar views when he held that;

"the right to cross examine a deponent on his affidavit is discretionary. Like all judicial discretions it has to be exercised judicially and not whimsically or capriciously. In the case at hand the circumstances are such that I had to decline the application. All the complaints made by the plaintiff can be established by means other than cross examination."

15. In the current application, it appears the basis for the Plaintiff's application for cross-examination of the deponent was set out at paragraphs 3 and 4 of Mr. Kipkorir's affidavit, which have now been struck out. This was to the effect that until the date of judgment, the 1st Defendant had its registered offices at the Objector's business premises. In addition, the Advocate averred that the Objector continued to carry on business at the registered premises of the 1st Defendant. The said paragraphs having been struck out, it is plain that the Plaintiffs have not laid any basis for cross-examination.

16. It is noteworthy too that the Plaintiffs did not file a Replying affidavit to the Objector's application. Therefore, the Court is in no position to tell with exactitude what facts in Mr. Premji's affidavit are disputed. Moreover, the Plaintiffs did not specify which paragraphs of the affidavit they intended to cross-examine the deponent on. The issue of whether or not the 1st Defendant and the Objector operate from the same business premises is evidentiary. The Objector averred that the business premises where the

attachment took place were its premises and the same did not belong to the 1st Defendant. Accordingly, it was imperative for the Plaintiffs to not only offer a rebuttal to the same, but to also provide evidence to the effect that the Objector indeed carries on business at the premises of the 1st Defendant as was alleged, which has not been done.

173. For the foregoing reasons, the court finds that the Plaintiffs/Applicants' application dated 15th April, 2015 is lacking in merit and is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2015

OLGA SEWE

JUDGE