REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 543 OF 2007

HOUSING COMPANY OF EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....1ST DEFENDANT

KISIMA MANAGEMENT LIMITED …….....…. 2ND DEFENDANT

R U L I N G

1. During the course of the hearing of the first Defendant's case, upon the completion of the Plaintiff's counsel's cross examination of DW 1 **Caroline Rakama**, Mr. Omwanza, learned counsel for the second Defendant rose to his feet to cross examine the witness. Mr. Regeru, learned counsel for the Plaintiff posed the question to the Court as to whether there could be any cross examination of the first Defendant's witness by a co-defendant where there was no notice of an adverse claim against that co-defendant. The first and second Defendants herein were on the same side and, in the opinion of the Plaintiff's counsel, DW 1 could not be cross examined by Mr. Omwanza as there was no joinder of issues. In the absence of a pleading that joined issues, whether against a co-defendant or otherwise, there could be no cross-examination undertaken. Mr. Regeru pointed the Court towards the provisions of **Order 1 rule 24**, of the *Civil Procedure Rules, 2010*.

2. In Mr. Omwanza's view the entry point of the second Defendant into this suit was by consent of both the Plaintiff and the first Defendant. In the pre-trial questionnaire, there was no issue raised by the Plaintiff in this regard and it wasn't objected to. The second Defendant had filed its own statement of issues and one of the issues raised therein was whether the first Defendant had any interest in the suit property, saying that an agreement for sale had been completed and the money paid. Counsel was of the view that the Plaintiff's prayer for specific performance was impossible as it was targeted towards the first Defendant, which now did not have the documents or any proprietary interest in the suit property. Counsel held no store as regards **Order 1 rule 24** as such did not apply to cross-examination. Such provisions were in the Evidence Act. Mr. Kajwang shared Mr. Omwanza's viewpoint that there was nothing in **Order 1 rule 24** which barred the cross examination of his witness. The operative words in that rule were that: "the Defendant may". There was consequently no mandatory requirement and counsel asked the Court to disallow the objection and allow the matter to proceed.

3. In his reply, Mr. Regeru maintained that the Court had to go back to first principles. The right to cross examine, even under the *Evidence Act*, arises only where there has been a joinder of issues as between the

co-parties. Such issues have to be directly opposed and contesting. The co-parties then become adversaries and only then are they each entitled to contest and examine each other's witnesses. Counsel maintained that in this case, there were no contesting issues as between the two Defendants. They were reading from the same page and fighting on the same side. There were no contestable issues between them to be tried by cross-examination. In the case before Court, there was the Plaintiff on the one side and the two Defendants on the other. They shared common issues and the pre-trial questionnaire was of no relevance in determining such issues. Once the second Defendant had been enjoined in this suit, **Order 1 rule 24** kicked in and, if there had been any issue with the co-defendant, then it should have been raised. Mr. Regeru emphasised that the second Defendant's pleadings did not detail any issues as between the Defendants. The second Defendant was perfectly at liberty to examine its own witnesses but not to cross-examine the other Defendant's.

4. I have carefully perused **Order 1 rule 24**, of the *Civil Procedure Rules, 2010*. Such covers a situation where a defendant desires to claim against another person who is already a party to the suit. If the defendant wishes to make such a claim then, it may without leave, issue and serve on the other person a notice making such claim or specifying such question or issue. I have perused the Defence of the second Defendant dated 8th February 2008. It is correct, as Mr. Regeru says, that there is no issue raised therein as between the first and second Defendants. Such issues seem to have been raised in the second Defendant's list of issues for determination dated 16th September 2013. For example issue No. 2 reads:

"As at the 16th of October 2007, did the 1st Defendant have the legal capacity to enter into a Sale Agreement for the suit premises with the 2nd Defendant?"

There are other issues as between the first and second Defendants detailed in that list. However, neither the Plaintiff nor the first Defendant would seem to have challenged those issues in any way as not being pertinent to this case. In any event, that is for the Court to decide when arriving at its determination of this matter. What is apparent is that issues have been raised between the first and second Defendants and as regards the submissions of Mr. Regeru, if he is correct in the same, then the second Defendant's counsel should have the right to put such issues in cross-examination of DW 1.

5. The right to the taking of evidence does not, in my view, arise necessarily from the provisions of the *Civil Procedure Rules*. **Order 18 rule 3** thereof provides:

"The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge."

Where I believe that the issue of examination of witnesses in this suit has become confused is largely as a result of the provisions of **section 145** of the *Evidence Act (Cap 80, Laws of Kenya)*. Such reads:

> **"145. (1) The examination of the witness by the party who calls him shall be called his examination-in-chief.**
>
> **(2) The examination of a witness by the <u>adverse</u> party shall be called his cross-examination.**
>
> **(3) Where a witnesses being cross-examined and is then examined by the party who called him, such examination shall be called his re-examination."** (Emphasis mine).

Section 145 is immediately followed in this vein by **section 146 (1)** which reads:

"Witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross examined, then, if the party call them so desires, re-examined."

6. What those two sections rather simply deal with are situations as between one party and the other, the latter being called "the adverse party". What it does not take into account is the position where there are multiple parties to a suit. This Court has no doubt however, that where a co-Defendant wishes to examine

a witness, he should be entitled to do so, such matter being anticipated in **section 164** of the *Evidence Act* which reads:

"When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of the opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies."

7. This Court received some assistance from the Court of Appeal decision in the case of **Bhandari & Anor v S. R. Gautama (1964) EA 606** where the learned President of the Court **Sir S. Quashie-Idun** adopted and quoted at page 609 as follows:

"In Halsbury's Laws (3rd Edn.) Vol. 15, the following passage appears at p.443, para. 800, viz.:

'Any party is entitled to cross-examine any other party who gives evidence or his witnesses; and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.

A witness, once sworn, is liable to be cross-examined, even though he has not given evidence or been asked any question in chief, unless he has been called by mistake and not examined in consequence of the mistake being discovered.'

> **At p. 444 of the same volume the following passage appears at para. 801, viz.:**
>
> **'Cross-examination is directed to (1) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross-examiner's version thereof; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he (witness) is able to depose'**
>
> **The denial of the right of the appellants' counsel to cross-examine the plaintiff on vital issues before the court, in my view, renders the trial unsatisfactory…."**

8. In my view, the above passage clearly details that a Court has a complete discretion as to whether to allow examination or cross-examination of a witness whether by plaintiff, defendant, co-defendant or any other party to a suit. As a result, I overrule Mr. Regeru's objection in that regard and will allow Mr. Omwanza to examine DW 1 as he should think fit.

DATED and delivered at Nairobi this 27th day of June, 2014.

J. B. HAVELOCK

JUDGE