



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Election Petition 261 of 2010

HITEN KUMAR A. RAJA.....PLAINTIFF

V

GREEN SPAN LIMITED.....1ST DEFENDANT

ASHOK RUPSHI SHAH.....2ND DEFENDANT

KIRANKUMAR SHAH..... 3RD DEFENDANT

DEVCHAND BHAI KHIMASIA.....4TH DEFENDANT

KAPLESH SHAH.....5TH DEFENDANT

RULING

The applicant, Apell Kwengu Advocate has brought a Notice of Motion dated 8th January 2013 under Order 19 Rule 2 of the Civil Procedure Rules and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act and Article 157 of the Constitution and all other enabling provisions of the Law and seeks the following substantive orders:-

1) That the Honourable court be pleased to order the cross examination of Hiten Kumar Raja, Bryan Yongo and Ashok Rupshi Shah in respect of their affidavits sworn on 6th December 2012, 2nd November 2012 and 5th November 2012 respectively as well as John Muinde, the Forensic Document Examiner on his forensic document examiners report submitted on 12th November 2012.

2) That costs of the application be provided for.

The application is supported by the affidavit of Mr. Apell Kwengu, advocate sworn on 8th January 2013. Mr. Apell Kwengu has stated that the issues deponed in the affidavits sought to be interrogated are extremely weighty and border on perjury, forgery and defamation. According to Mr. Apell Kwengu, the affidavit of the Plaintiff is highly defamatory, scandalous and constitutes a criminal offence and the court needs to interrogate the issues by way of cross examination and tendering viva voce evidence.

Further, Mr. Apell Kwengu has stated that the court is entitled to compare signatures under section 76 of the Evidence Act and a mere denial of the signatures on the letters of instructions call for cross examination to establish the grave allegations against an officer of the court. According to the applicant, the Plaintiff's character and credibility is questionable since he is alleged to be under investigations for various serious offences and therefore, there is need to cross examine him. The applicant has annexed a

replying affidavit sworn by Setim Kandie, Chief Inspector of police on 1st July 2010 stating that the Plaintiff is suspected to have been involved in the murder of James Kiarie Ng'ang'a on 10.05.10. The applicant has annexed evidence of letters dated 16.08.10 and 30.09.10 written by the Plaintiff and addressed to the Director of Criminal Investigations, and has maintained that the signatures of the Plaintiff in the said letters is the same signature appended in the letters of instructions and affidavits and the applicant has denied the allegations of forgery on his part.

The applicant has questioned the expert's handwriting report and has stated that the report is not binding on the court which has to make its own independent evaluation and finding. According to the applicant, the expert opinion would be more accurate upon cross examination and oral evidence being tendered.

In his submissions dated 28th January 2013, the applicant has argued that there is a clear admission from the deposition of the Plaintiff at paragraph 21 of the Plaintiff's affidavit sworn on 12th October 2012 that the Plaintiff issued instructions to the firm of Kwengu & Company Advocates. It is submitted for the applicant that the court has a duty to analyze, consider and evaluate the evidence while taking note of the demeanour of the witnesses in order to make a finding on credibility especially where there is conflicting evidence and reliance has been placed on the cases of **Dinkerrai Rakishan Pandya -vs- R(1957)EA 337, Glannibanta(2)(1876)1 PO 283, Rosetta Cooper -vs- Gerald Nenill & anor(1961)EA63, N.K Brothers Building Contractors Ltd -vs- Jane Wairimu Kamau(2001)1EA 170.**

Counsel for the applicant has submitted that under section 34(1)(b) and (d) of the Evidence Act, evidence tendered by a witness in a judicial proceeding is admissible in subsequent judicial proceedings for purposes of proving the facts which it relates to if inter alia, the proceedings is between the same parties or their representatives in instances where the adverse party in the first proceedings had an opportunity to cross examine a party on the issue and where the questions in issue were substantially the same in the first and second proceedings. Counsel has stated that in the replying affidavit sworn by the Respondent in BPRT Case No. 736 of 2010, the respondent's allegations that the same is a forgery constitutes perjury and demonstrates the character of the Plaintiff. It is submitted for the applicant that under Section 107(1) of the Evidence Act, the legal burden of proof lies upon the party who invokes the aid of the law. Further, the applicant has submitted that allegations of fraud and/or forgery must be strictly proved more than on a balance of probabilities as stated in **R. G. Patel -vs- Lalji Mukanji (1957)EA 314.**

Counsel for the applicant has argued that a person whose signature is appended to a document can only seek to deny liability on the basis of *non est factum* which must be pleaded unlike in the instant case. Counsel relied on the case of **Issack Wagichiengo -vs- Kathleen Gerald (1988)KLR406.** Lastly, it was submitted for the applicant that the allegations that the affidavit is a forgery is hearsay and inadmissible in evidence and reliance was placed on the case of **Charles Mwithali -vs- Mitubi(1988)KLR286.**

The application is opposed by the Plaintiff who, in his replying affidavit sworn on 6th February 2013 has stated that the affidavit in support of the application sworn on 8th January 2013 is defective. According to the Plaintiff, the deponent has not stated which of the matters deposed in the affidavit are within his personal knowledge and which ones are based on information or belief as well as the source of the information contrary to Order 19 Rule 3(1) of the Civil Procedure Rules which requires affidavits to be confined to such facts as the deponent is able of his own knowledge to prove. Order 19 Rule 3(1) provides as follows:-

“Affidavits shall be confined to such facts as the deponent is able to 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”

The Plaintiff has stated that paragraphs 11,12,13,14,15,16,17,18 and 19 of the said affidavit should be struck out for offending Order 19 Rule 3. Further, that paragraph 20, 21 and 22 are also liable for striking out as they contain matters of law whereas an affidavit should be confined to matters of fact only.

The Plaintiff reiterated the contents of his affidavits sworn on 12th October 2012 and 6th December 2012

that he never instructed the firm of Kwengu & Co. Advocates to act for him in the instant case or in any other case. The Plaintiff averred that this fact has now been established by the report of the forensic expert of the CID Kenya dated 14.11.12 annexed to the affidavit sworn on 6th December 2012. The Plaintiff maintained that the applicant has not satisfied the legal conditions for being allowed to cross examine him. According to the Plaintiff, the affidavit of Ashok Rupshi Shah had not raised any issues for cross examination and further, that Bryan Yongo is a stranger to these proceedings and therefore cannot be called for cross examination.

Counsel for the Plaintiff in his submissions dated 4th April 2013 argued that cross examination of a deponent has to be restricted to the contents of the affidavit and that the Plaintiff's affidavit raises clear cut issues on which no cross examination is necessary. Reliance was placed on the case of **Garvin -vs- Domus Publishing Ltd & anor (1989)2 All ER 345** as well as the case of **Comet Products UK Ltd -vs- Hawkex Plastics Ltd & anor(1971)1All ER 1141**.

Further, it was submitted that the affidavit in support of the application sworn by the applicant on 8th January 2013 is invalid for reasons that the deponent has not disclosed the grounds of belief or sources of his information and counsel relied on the cases of **Bombay Floor Mills -vs- Patel(1962)EA 803**, **Phankey -vs- Worldwide Agencies Ltd XV EACA 1**, **Noor Mohamed Janmohammed -vs- Kassamali Verji 20 EACA 8**, **Standard Goods Corp -vs- Harekh Cand XVII EACA 99**, **Assanand & Sons -vs- EA Music Stores(1959)EA 364** and **Hardial Singh Hunjan & anor -vs- Glad AK Finance Ltd & anor HCCC No. 1595 of 2001**.

Counsel contended that Order 19 Rule 2 of the Civil Procedure Rules does not bestow an automatic right to cross examine a deponent of an affidavit and further, that a proper foundation to justify the grant of such an order has to be laid. For this submission, counsel relied on the case of **Kibaki -vs- Moi & 2 others Election Petition No. 1 of 1998**, **Joyce Muthoni Nottingham & 2 others -vs- Pheroze Nowrojee HCCC No.1305 of 2000** and **Oguk & another -vs- Westmont Power Kenya Ltd & anor (2003)UR 5259**.

While submitting that the Plaintiff had produced a report from a handwriting expert which showed that he did not sign the questioned documents, counsel stated that the applicant was asking the court to act as an expert witness and hold that the Plaintiff signed the questioned document. Reliance was placed on the case of **James Kamara Chiera -vs- Ol Kalou Farmers Sacco Society Ltd & anor (2012) eKLR** where the court stated that a court adjudicating on a dispute cannot convert itself to be an expert witness and cannot determine whether or not the signatures were those of the applicant. It is argued for the Plaintiff that the handwriting expert has not sworn any affidavit and therefore, that he cannot be cross examined under Order 19 rule 3 of the Civil Procedure Rules. Counsel relied on the case of **Astral Aviation Ltd -vs- Rolkan Investments Ltd(2006)eKLR** and **Paul Hudson Kamau -vs- Housing Finance Co. Ltd(2008)eKLR** where the court relied on section 48 of the Evidence Act. The Plaintiff also relied on the case of **Ali Mohamed Sunkar -vs- Diamond Trust Bank Ltd (2011)eKLR** where the court held that the handwriting expert's report could only be challenged by counter expert report.

Counsel for the Plaintiff referred the court to the cases of **Nancy Gakii Bundi -vs- R(2009)eKLR** and **Southern Credit Banking Corporation Ltd -vs- Jonah Stephen Ng'ang'a(2006)eKLR**. Lastly, counsel sought to distinguish the authorities cited by the applicant stating that there were no similarities between the cited cases and the instant case.

The issue for determination in this application is whether the applicant has established a good reason and/or laid a proper basis for the deponents to be cross examined on their affidavits.

I have carefully considered and evaluated the rival positions as articulated in the filed written submissions and I have considered the various authorities I have been referred to by the parties and now turn to consider the application of the law and the facts.

Order 19 Rule 2(1) of the Civil Procedure Rules provides that the court may order the attendance of the deponent for cross examination on his affidavit at the instance of either party Rule 2(1) provides thus:-

“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”

Clearly therefore a right to cross examine a deponent on his affidavit is discretionary and the only qualification is that the discretion ought to be exercised judiciously by the court.

The applicant is seeking to cross examine the Plaintiff on his affidavit sworn on 6th December 2012 where the Plaintiff has deposed that he never instructed the firm of Kwengu & Company advocates to act on his behalf on this matter. In response, the applicant has through his replying affidavits sworn on 8th January 2013 and 2nd November 2012 maintained that the Plaintiff duly instructed the said firm of advocates. The court has stated in the case of **Gandhi -vs- Njagi Nrb HCCC No. 1330 of 2001** that conflict in affidavit evidence can only be resolved by cross examination of the deponents. In this case Hon. Justice Ringera (as he then was) stated where service of summons was contested thus:-

“... The plaintiff maintains there was service. He even, invites the court to compare the defendants alleged signature at the back of the copy of summons returned to court with his undoubted signatures on the affidavits on record and the cheques admittedly issued by him and from its own opinion. The defendant on the other hand denies being served with the summons to enter appearance and deposes the signature at the back of the copy of summons which bears similarity to his true signature is actually not his but a good imitation. This conflict in affidavit evidence could only have been resolved by the cross examination of the deponents. Unfortunately neither party saw it fit to offer their men for cross examination. And none asked to cross examine the other party’s material witness...”

The court has also held in the case of **Geovanni Gneichi - Ruscone -vs- H.P Steyn Nrb HCCC No. 51 of 2005** that:-

"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 touching on matters of fraud, mala fide, authenticity of the facts deposed, bad motive among others are raised, cross examination of a deponent of an affidavit may be ordered."

In my view, the applicant has laid a proper basis and has established sufficient grounds to warrant the court to exercise its discretion to allow the cross examination of the Plaintiff. Mr. Apell Kwengu Advocate alleges he was instructed by the plaintiff to act for him and represent him a fact that the plaintiff vehemently denies. In my view this is an instance where the discretion of the court may be exercised to allow the applicant to cross examine as through the cross examination the disputed and/or matters in conflict may be clarified to the benefit of the court and in the interest of doing justice. No reasons have been advanced as to why the applicant seeks to cross examine Bryan Yongo on his affidavit sworn on 2nd November 2012 which the applicant introduced in court as an annexure in his replying affidavit sworn on 2nd November 2012. No sufficient basis has been laid as regards the affidavit sworn by Ashok Rupshi Shah on 5th November 2012 and his cross examination is in my view unnecessary.

In the absence of a counter expert report to challenge the handwriting report prepared by John Muinde, the applicant cannot challenge the said report by way of cross examining John Muinde as was held in **Ali Mohamed Sunkar -vs- Diamond Trust Bank Ltd (2011) eKLR**. Cross examining John Muinde may therefore not serve any purpose. See **Hudson Enterprises Ltd -vs- Kenya Cold Storage (foods) Ltd & others (2006) eKLR**

On the Plaintiff's objections to the supporting affidavit to the application before court for not distinguishing matters deposed on knowledge and those on information or belief, the Court of Appeal in **Pattni v. Ali and Others [2005] 1 EA 339** has held that there is no obligation on the deponent of an affidavit to distinguish what he swears to on knowledge, and what on information and belief as the court would itself examine the affidavit and determine from a clear reading of it which averments emanate from what source. The court would in the premises allow the impugned paragraphs of the applicant's affidavit

to stand and declines to strike the same out.

The upshot is that the applicant's application dated 8th January, 2013 is allowed to the extent that the applicant is allowed to cross examine Hiten Kumar Raja on the contents of his affidavit sworn on 6th December, 2012. The court therefore directs that Hiten Kumar Raja shall be required to avail himself to be cross examined when the plaintiff's application dated 12th October, 2012 is fixed for hearing.

The costs for this application are ordered to be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants