



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1607 of 1999

SYLVANUS LUSI AMITO T/A SAVORSEN SAFARIS.... PLAINTIFF

V E R S U S

MPATA INSTEMENTS LIMITED..... DEFENDANT

J U D G M E N T

Before me is a Chamber Summons dated 25/2/2008 filed by M/s Lubulellah & Associates advocates for **MPATA INVESTMENTS LTD.** The application was brought under Section 3A and 63 (e) of the Civil Procedure Act, Order XVIII Rules 1, 2 and 8 of the Civil Procedure Rules, and all other enabling provisions of the law. It seeks for two orders, that is-

Ø *That SYLVANUS LUSI OMITO the plaintiff herein and the deponent of the replying affidavit sworn on 19th February, 2008 be produced in court for cross examination at the hearing of the defendant's Notice of Motion dated 28th June, 2008.*

Ø *That the costs of this application be granted to the applicant.*

There are three grounds of the application on the face of the Chamber Summons, that-

1. *The plaintiff herein has deponed to some facts which are not clearly true or within the Plaintiff's knowledge.*
2. *The Plaintiff is not in a position to give this Honourable court the true position as to why there was a delay in opening a Joint escrow account and it is important that the truth be known.*
3. *No prejudice will be caused to the plaintiff if such orders are granted.*

The application is supported by the affidavit of **ANTHONY MILIMU LUBULELLAH** advocate for the defendant/judgment debtor (*the applicant herein*)

The Notice of Motion under reference is dated 20th February, 2008 filed by M/s Kopere & Company advocates and seeks for orders that –

1. *The Judgment and decree of court given on 15/03/2006 by the Hon. Mr. Justice B.P. Kubo be reviewed and a further order at page 7 between 1 and 2 “That the defendant's counter-claim be and is hereby dismissed with costs save to the extent of the sum of U.S. Dollars 1,740 allowed and discounted from the plaintiffs claim.”*

2. *The costs of this application be in the cause*

Grounds of objection to the Chamber Summons (*erroneously described as Notice of Motion*), dated 13th March, 2008 filed by Kopere & Company advocates for the plaintiff. Parties counsel also filed written submissions.

At the hearing of the application, Mr. Lubulellah for the applicant submitted that order 18 of the Civil Procedure Rules dealt with affidavits. Counsel submitted that the plaintiff had sworn to things which were done by his advocate, including matters of consent recorded in court, including the number of days it took Mr. Lubulellah's office to respond to Kopere's office. The plaintiff also deponed to the fact that Mr. Kopere was out of office. The matters deponed upon were hearsay. Counsel argued that though the court could admit hearsay evidence. However, for a person who relied on hearsay evidence alone, his averments must be verified for them to be believed.

On the grounds of objection, counsel argued that there was no evidence that Lubulellah & Company advocates had not shown *bona fide* desire for cross-examination. Counsel contended that the one who alleged lack of *bona fides* should prove it. Counsel contended that the truth could only come out if the deponent of the affidavit of the plaintiff was cross-examined. Counsel argued that the Civil Procedure Code did not require that the applicant for cross-examination of a deponent of an affidavit should show the paragraphs in question.

Counsel argued that the contention in the ground of opposition that relevant documents were exhibited but could be explained by Counsel, itself justified the need to cross-examine the deponent. On the ground that the one who calls for cross-examination should meet the costs of attendance, counsel submitted that each party meet their costs, and ultimately it would be the court's discretion to award costs.

On the case of *EAST AFRICAN FOUNDRY WORKS (K) LTD -Vs- KENYA COMMERCIAL BANK LTD [2002] IKLR 443*, Counsel submitted that he had personal knowledge of the matters on which he deponed the affidavit. Counsel stated that, where a paragraph of an affidavit where someone did not have personal knowledge could be struck out. Counsel also argued that as the plaintiff had filed an application dated 20/2/2003 to review the judgment, they cannot claim to have been kept away from enjoying it. Since the plaintiff consented to stay of execution pending appeal, they would not suffer prejudice.

Counsel submitted that the joint account was opened a few days later than ordered by court, but that was because Mr. Kopere had been out of office. Therefore the plaintiff could not say that the applicant did not comply with the consent order. That was why, it was necessary to cross-examine the deponent of the affidavit. Counsel emphasized that courts had discretion to order cross-examination of deponent of an affidavit.

Mr. Kopere for the plaintiff opposed the application. He submitted that the application sought one order – to cross-examine the plaintiff (*deponent*) of the affidavit. The grounds were three. Firstly, that the applicant deponed to facts which were not true. His response was that it was for the court to determine truth. Secondly, that the deponent swore to facts not within his knowledge. His response was that a deponent was allowed under the rule to give sources of the information, and that was done. Counsel emphasized that instructions to an advocate were from clients, and a client was the principal. Therefore letters were from source instructions of the client. In any case advocates should not swear on contentious issues as was held in the case of *AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES -VS- NATIONAL BANK OF KENYA – MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 532 OF 2004*. Rule 9 of the Advocates (*Practice*) Rules also restricted advocates from swearing affidavits.

Counsel submitted that the third ground was that no prejudice would result to the plaintiff. The applicant however did not state what paragraph of the affidavit was for cross-examination. Counsel submitted that the applicant had not given any basis for cross-examination under Order 18 of the Civil Procedure Rules. Counsel submitted that the plaintiff will suffer prejudice, at least the expense of coming

to Kenya for the cross-examination.

Counsel emphasized that what was in dispute requiring cross-examination had not been disclosed, therefore there was no justification for granting the request for cross-examination.

On the application dated 20/2/2008 for review of judgment, counsel argued that they wanted the court to clarify an error on the face of the record. Counsel emphasized that the consent recorded was in the form of a contract, and therefore was binding on the parties. Counsel emphasized that the applicants had not shown any justification for the cross-examination of the plaintiff. He urged me to dismiss the application.

In response Mr. Lubulellah submitted that the plaintiff was a resident of Nairobi and London. Counsel emphasized that they were not applying for extension of time. Counsel also submitted that in his application for review of judgment, the plaintiff was asking far reaching orders, as the counter-claim was not in fact dismissed. Counsel stated that the present application was not frivolous.

I have considered the application, documents filed and written and verbal arguments of counsel for the parties.

This is an application to cross-examine a deponent of an affidavit in an application that has been filed herein. That deponent is the plaintiff in the main case. The legal provisions regarding the powers of court to order cross-examination are contained in Order XIII rule 2 of the Civil Procedure Rules, which provides-

“2(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.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the court otherwise directs.”

From the above provisions of the law, the court has wide discretion to order the attendance of a deponent of an affidavit for cross-examination. I have considered the reasons given for the request to cross-examine the Plaintiff. I find no basis for allowing the cross-examination. Since the application is ordinarily under the Civil Procedure Rules an application grounded on affidavits, the applicant was required to show sufficient reasons for the cross-examination. In my view, there is nothing, that is lacking in the affidavit that would require cross-examination to clarify. The application has also not indicated which paragraph of the application is for intended cross-examination. I will not allow an application for cross-examination of a deponent of an affidavit for a party to fish for evidence. The applicant can dispute the contents of the replying affidavit in a further affidavit, if he so wishes. He can also seek expungement of any paragraph that offends the legal requirements.

Considering all the circumstances and facts before me, I find no justification to grant the application for cross-examination of the deponent of the affidavit.

Consequently, I find no merits in the application and dismiss the same. The applicant will pay the plaintiff the costs of the application.

Dated and delivered at Nairobi this 22nd day of May, 2008.

GEORGE DULU

JUDGE.

In the presence of-

Mr. Lubulellah for applicant/defendant

Mr. Kopere for respondent/plaintiff

Mwangi Court clerk.