



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1 of 2007**

JAMES KAMANGU NDIMU.....PLAINTIFF

VERSUS

MARGARET WANJIRU NDIMU alias

MARGARET WANJIRU KARIUKI.....1ST DEFENDANT

SAMUEL MATJEKE.....2ND DEFENDANT

RULING

On 31st January 2007 JAMES KAMANGU NDIMU through his counsel C.N. Kihara & Company advocates filed proceedings by way of plaint dated 30th January 2007. The defendants were named as MARGARET WANJIRU NDIMU alias MARGARET WANJIRU KARIUKI and SAMUEL MATJEKE. Orders were sought in the plaint for –

- a) A declaration that there exists a marriage by presumption of law between the plaintiff and the 1st defendant, and that the plaintiff is entitled to enjoyment of conjugal rights.
- b) An injunction order to restrain the 1st defendant from entering or celebrating a marriage under the Marriage Act, and other law applicable in Kenya, pending dissolution of the marriage between the plaintiff and the 1st defendant.
- c) A declaration that the plaintiff is the biological father of the children known as STEVEN NDIMU and EVAN KARIUKI
- d) Damages for defamation
- e) Costs
- f) Interests on (f) and (g) above
- g) Such further orders with and/or directions as the Honourable court shall consider appropriate given the circumstances of this suit.

On the same 31st January 2007, JAMES KAMANGU NDIMU

(hereafter the plaintiff) filed a Chamber Summons also dated 30th January 2007 through his counsel C.N. Kihara & Company advocates. MARGARET WANJIRU NDIMU alias MARGARET WANJIRU KARIUKI and SAMUEL MATJEKE were named as 1st and 2nd defendants respectively. The Chamber Summons was filed under certificate of urgency.

The said Chamber Summons Application was purportedly brought under section 3A The Inherent Powers of the Court, Section 3(1) and (2) of the Judicature Act, Order XXXIX Rules 2, 2A(1) (2) 3 and 9 Civil Procedure Act and Rules Section 20 of the Matrimonial Causes Act, Rules 40(i); (2) of the Matrimonial Causes Rules, Section 2, 4(i), (2) (3) 6(i) and 22(2) and (3) of the Children Act 2001 and any other enabling provisions of the law. The application sought for the following orders –

1. This application be certified as urgent and be heard exparte in the first instance or be fixed for hearing early.
2. An order be issued restraining the defendants, or any marriage officer or such authorized person from celebrating a marriage or any lawful civil union that makes the 1st defendant and 2nd defendant to be lawfully held as wife and husband to each other respectively pending the full hearing of this suit or any further orders from this Honourable court.

3. The plaintiff do give an undertaking in damages to the defendants should they suffer during the pendency of any interim, and or ex-parte orders issued hereof at the plaintiffs behest.

4. The costs of the application be provided for.

This application was supported by an affidavit sworn by the plaintiff on 30th January 2007.

When the application was brought before me on 31st January 2007 Mr. L.W. Kamau and Mr. Kithi appeared for the applicant. Though, at that time, the application had apparently not been served, Mr. Fred Ojiambo, Mr. Mugo and Mr. Kitheka were present for the respondents. I certified that application as urgent and ordered that it be served immediately. I fixed the inter-partes hearing of the application for 7th February 2007.

Consequent upon my above orders, Ms. Mugo Kamau & Company advocates filed a notice of appointment of advocates on the 31st January 2007 to act for both defendants. On 5th February 2007, the firm of Asiema & Company advocates filed a Notice of Change of advocates and came on record for the 2nd defendant in the place of Mugo Kamau & Company advocates

On the same 5th February 2007, Ms. Mugo & Company advocates filed a notice of preliminary objection to the application and the entire suit on behalf of the 1st defendant. They also, on the same date, on behalf of the 1st defendant filed grounds of opposition to the application and the entire suit. They also on the same date, on behalf of the 1st defendant, filed a notice to cross-examine the deponent of the affidavit sworn on 30th January 2007 in support of the application (who was the plaintiff herein). Ms. Asiema & Company advocate for the 2nd defendant, also on the same 5th February 2007, filed a notice of preliminary objection, grounds of opposition, and a notice to cross-examine the deponent of the affidavit in support of the application, similar to those filed on behalf of the 1st defendant. Thereafter, on 6/2/2007 C.N. Kihara & Company advocates for the plaintiff filed preliminary objections to the Notice to Cross-examine the plaintiff on the contents of the affidavit in support of the application.

When the application came up on 7th February 2007 Mr. C.N. Kihara, Mr. Lawrence Waweru, Mr. Martin Momanyi and Mr. George Kithi appeared for the plaintiff. Mr. J. Kitheka held brief for Mr. Ongoya Asiema for the 2nd defendant, while Mr. Mugo Kamau and Mr. Fred Ojiambo appeared for the 1st defendant. Mr. Ojiambo was to lead counsel for the 1st and 2nd defendants, and he made submissions on behalf of both defendants.

In his submissions Mr. Ojiambo acknowledged that each of two defendants had filed a notice of preliminary objection, grounds of opposition and a notice to seek to cross-examine the plaintiff with respect to the contents of the plaintiff's affidavit sworn on 30/1/2007.

He submitted that the defendants had filed grounds of opposition to the application because they were bound to file the same under Order 50 of the Civil Procedure Rules. With regard to the notice of preliminary objection the defendants filed the same as a matter of good practice though the law did not require or bind a party to give or file such a notice. He was however currently only applying on behalf of the defendants, to cross-examine the plaintiff on the contents of his affidavit sworn on 30/1/2007.

On the notice to cross examine the plaintiff, he submitted that the defendants filed the notice under Order 18 rule 2 of Civil Procedure Rules. He submitted that the said rule 2 was justified or introduced by rule 1. Rule 2 conferred on a court power to allow the cross-examination of a deponent of an affidavit. He asserted that rule 3 was also relevant.

He submitted that in an application such as the chamber Summons before the court, evidence was usually by way of affidavits. However, it was for the court to allow accepting affidavit evidence. His contention was that allowing affidavit evidence was an exception to the general rule, that evidence should be tendered by way of viva voce evidence. Therefore he asked the court to uphold the general rule in proceedings by allowing the cross-examination of the plaintiff. He wanted to adduce facts which were necessary for the court to determine the application. He contended that, as long as the facts sought to be adduced in cross-examination were relevant and emanated from the affidavit in question, and as long as the deponent could be produced, then an order ought to be made by the court for his cross-examination. He reiterated that the larger interests of justice were always that the court should have all the relevant evidence, not selective evidence. He stressed that rule 2 emphasized the centrality of viva voce evidence. It was his contention that when certain evidence was withheld matters could not be adjudicated upon.

In response to the preliminary objection to the notice to cross-examine filed on behalf of the plaintiff, Mr. Ojiambo submitted that the contention that the cross-examination would be an abuse of process of the court was fallacious. He contended that adducing more evidence could not be an abuse of the court process. On the objection that the application to cross-examine the plaintiff was vexatious and scandalous and meant to perpetuate a vendetta, he submitted that there was no mandatory requirement that the respondents had to file a replying affidavit before they could be allowed to cross-examine. The law allowed them to either file replying affidavits or grounds of opposition. In the present case they filed grounds of opposition. That did not amount to any vendetta. He took strong exception to the third ground of preliminary objection which was to the effect that counsel for the respondent had engaged in vendetta. He reiterated that counsel for the respondent did not have any personal interests in the matter. On the fourth ground of objection that there was no conflict of facts necessitating cross-examination, he contended that a mere cursory look at the affidavit in question would show that there was need for cross-examination. He submitted that paragraph 3 of the affidavit alluded to a marriage that took place between 1978 to 1980. He contended that it was the first time ever that he had heard of such a marriage. There was therefore need for explanation. He also contended that the pleadings herein were omnibus covering the existence of a marriage, constitutional issues, as well as restraining orders. Therefore the plaintiff should be subjected to cross-examination for the court to know where the truth lies. He also referred to paragraph 7 and 12 of the affidavit in which the plaintiff deponed that he was the father of two children of the 1st defendant and that he got married to one Mbairu who

took care of his parents with the consent of the 1st defendant, as paragraphs that justified cross-examination. The same applied to paragraph 19 of the affidavit.

Mr. Ojiambo further sought to rely on the case of MWAI KIBAKI –vs- DANIEL TOROITICH ARAP MOI AND OTHERS – Election Petition No. 1 of 1998 – and contended that in that case it was held that a court could grant orders for cross-examination on the matters contained in an affidavit. He contended that so long as those matters were relevant and material the court was bound to allow cross-examination. He submitted that the issue of the existence of a marriage was relevant and justified cross-examination.

Mr. Ojiambo also sought to rely on the case of JOYCE MUTHONI NOTTINGHAM & 2 OTHERS – vs – PHEROZE NOWROJEE – Nairobi Civil Case No. 1305 of 2000 as well as the case of OGUK & OTHERS –vs- WESTMONT POWER LTD (2003) LLR 5259 (HCK) for his contention that the court had wide discretion to order cross-examination of a deponent of an affidavit. He emphasized that where there was ambiguity such as in paragraph 3 of the affidavit, there was need to cross-examine. He also sought to rely on the English case of PERGAMON PRESS LTD – vs- MAXWELL [1970] 2 All ER 809. He contended that, in that particular case, the court said that it was not appropriate to allow cross-examination where the court could not ultimately be required to make a finding. In our present case the court would have to make certain findings. He also cited the case of GANDHI BROTHERS –vs- H.K. NJAGE T/A H.K. ENTERPRISES – Nairobi Milimani commercial Court Civil Suit No. 1330 of 2001 and asserted that where there was conflict of facts, the court had to ask for more information. He also relied on the case of KIMANI –vs- GIKANGA [1965] EA 735 that a customary marriage had to be proved. He submitted therefore, that where there was ambiguity and conflict of facts, the court must in the interests of justice get issues clarified first before it could give conservancy orders.

Mr. C.N. Kihara for the plaintiff opposed application for the cross-examination of the plaintiff on the contents of the affidavit. He stated that none of the defendants had filed any documents to state whether they admit or deny the facts in the plaintiff's affidavit. They had neither filed a replying affidavit nor a defence to know the matters in controversy before they could be allowed to cross-examine the plaintiff. He further submitted that the issue of the relevance was common in all the cases cited by the counsel for the defendants. If there was no replying affidavit or defence filed, it would not be possible for the court to determine the relevant issues for cross-examination.

He further submitted that the suit was a declaratory suit governed by Order 6 of the Civil Procedure Rules. He stated that in accordance with the provisions of Order 18 of the Civil Procedure Rules, in interlocutory applications such as this Chamber Summons, only affidavit evidence was necessary. He contended that the court could allow cross-examination only where the one who wanted to cross-examine had showed bona fides. In this case, it was his view that the defendants had failed to show a just cause.

He submitted that though he was aware that pleadings herein had not been closed, however, where facts were not denied, they were taken to be admitted. Under section 61 of the Evidence Act (Cap.80) a fact that the parties had agreed to did not require to be proved. He submitted that the attack on paragraph 3 of the supporting affidavit was unwarranted. He contended that a Kikuyu customary law marriage had to go through stages, which would of necessity take a period of time. He sought to rely on the book Facing Mount Kenya by Jomo Kenyatta. He also cited Contran's Case Book on customary Law – Nairobi University Press 1987. He contended that Order 6 of the Civil Procedure Rules had provisions on how a fact could be denied.

In response to the cases cited by counsel for the defendants, he contended that the case of MWAI KIBAKI –vs- MOI decided that if matters were not disputed then cross-examination was to be refused. The case of JOYCE –vs- NOWROJEE also emphasized the same position. In the case of OGUK –vs- WESTMONT the court observed that cross-examination could put the court in a situation of hearing a full suit at a preliminary stage. He submitted that the plaintiff was not opposed to cross-examination a such and was not withholding any evidence. However, he would be ready for cross-examination when directions were given to take or give evidence. He felt that the defendants should first dispute whether there was a marriage or presumption of a marriage before the court could allow cross-examining the plaintiff on the affidavit. He also stated that the decision in the case of PERGAMON –vs- MAWWELL was not in favour of the respondents' application for cross-examination of the plaintiff.

He submitted that counsel for the plaintiff had not cited a single case to guide the court in exercising its discretion to allow cross-examination of a deponent of an affidavit, in a situation where the applicant for cross-examination had not disclosed his side of the story.

He also took issue with the similarity of the two defendants' notices of preliminary objections, the grounds of objection and the notice to cross-examine. He submitted that paragraph (c) of the plaintiff's preliminary objection to the notice to cross-examine did not intend to refer to the party's counsel, but to the party, that was the defendants.

He lastly submitted that as the intended wedding of the 1st and the 2nd defendants was scheduled to take place on 10th February 2007, the ruling should be made before 10th February 2007 or the court should give protective orders.

In reply, Mr. Ojiambo stated that the issue of failure to file a defence did not arise. Under Order 8 rule 1 of the Civil Procedure Rules a defence became due only when summons had been issued and served. In this present case the defendants had not been served with summons. As regards the failure to file replying affidavits, he submitted that the defendants had already filed grounds of opposition, which was in itself denial. They also filed preliminary objections to the application and the entire suit. He contended that the sections of law cited by Mr. Kihara were not relevant. Section 109 of the Evidence Act (Cap. 80) required a plaintiff to give evidence. He submitted that the issue revolved around an alleged customary marriage which was not clear and the defendants did not want to make presumptions on facts. On the ruling date, he stated that it was the discretion of the court.

I must say here that I am grateful to both learned counsel for the parties for their thorough and clear submissions.

I have gone to great lengths to highlight the pleadings filed in this matter. That was merely meant to put the matter into context for better understanding of the issues. However, what is for my decision now is the application by the defendants to cross-examine the plaintiff on the contents of his affidavit in support of the Chamber Summons which was sworn on 30th January 2007.

The application to cross-examine the plaintiff on the contents of his affidavit was made under Order 18 rule 2 of the Civil Procedure rules. The said rule 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, it is clear to me that in any application before the court, the court has discretion at the instance of any party to allow the cross-examination of a deponent of an affidavit in the application. It is my humble view therefore, that this court has the discretion to order the cross examination of the plaintiff herein on the contents of his affidavit sworn on 30th January 2007.

This application for cross-examination of the plaintiff has been argued extensively on both sides. Learned counsel for the defendants, Mr. Ojiambo, has argued that the general rule is for a court to hear evidence and to have cross examination of witnesses. He has relied on the principle under section 109 of the Evidence Act (Cap 80) that he who alleges must prove. Secondly, he has relied on Order 18 rule 1 of the Civil Procedure Rules, which he contends introduces rule 2. For the sake of clarity, the said rule 1 provides:

1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read out at the hearing, on such conditions as the court thinks reasonable:

Provide that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such a witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

If I get Mr. Ojiambo right, he is saying that even in the case of the Chamber Summons herein the general rule is for oral evidence to be given, unless the court for sufficient reasons orders that a particular fact or facts be proved by affidavit. In my humble view, that is stretching the meaning of rule 1 for Order 18 too far. In my view, rule 1 is a general rule covering the normal hearings. That rule covers situations where though oral evidence is generally to be given, the court orders, for sufficient reasons, that particular facts be proved by affidavit. What we are dealing with here is a Chamber Summons application brought under Order 39 of the Civil Procedure Rules, for restraining orders. Order 39 rule 9 of the Civil Procedure Rules requires that such an application be made by way of Chamber Summons. Order 50 rule 7 of the Civil Procedure permits a supporting affidavit to be filed with such Chamber Summons.

In my humble view, rule 2 of Order 18 is not subordinate to rule 1. The two rules are addressing separate situations. Whereas rule 1 allows a court where oral evidence is to be tendered, for sufficient reasons, to order proof of facts by affidavit evidence, rule 2 specifically addresses situations of applications which are supported by affidavits. These applications are in normal circumstances, heard by way of submissions on the affidavits filed. However, under rule 2 the court may allow cross-examination of a deponent of an affidavit in such an application. In my humble view therefore there is no general rule for giving oral evidence in an application such as the Chamber Summons herein.

Mr. Kihara has argued that the application for cross-examination of the plaintiff on the contents of his affidavit should not be allowed as the defendants have not filed any replying affidavit to the application. He conceded that the pleadings in the suit had not been closed, as apparently, a defence had not yet been due. Mr. Ojiambo submitted that the law did not require the defendants to file replying affidavits. His contention was that the grounds of opposition filed were a denial of the entire application and the suit and, therefore, the failure of the defendants to file replying affidavits could be a ground for the court to deny the application to cross-examine the plaintiff on the contents of his affidavit.

Indeed Order 50 rule 16(1) of the Civil Procedure Rules gives a respondent who opposes an application an option either to file a replying affidavit or to file grounds of opposition. The said rule provides –

“16(1) Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing”

It is therefore clear to me that a respondent in an application or a motion has a right to file either a replying affidavit or grounds of opposition. Though Mr. Kihara has argued that the fact that there is no replying affidavits filed by the defendants means that they have admitted the facts deponed to by the plaintiff, and that therefore, they cannot be allowed to cross-examine the plaintiff, that cannot be so. The defendants having filed grounds of opposition are clearly contesting the application. Furthermore, issues for cross-examination can arise from the affidavit of the deponent himself. If for example, the affidavit has contradictions, in my view, that can be a justifiable ground for a court to allow the cross-examination of the deponent. Though the cases cited were all cases in which replying affidavits appear to have been filed, I have not been referred to, and I am not aware of any law or court case decision that says that a respondent who files grounds of opposition cannot be allowed by the court, to cross-examine a deponent of an affidavit in an application. In my humble view therefore, the defendants herein cannot be denied a chance to cross-examine the plaintiff merely because they did not file replying affidavits.

The specific grounds regarding the affidavit that Mr. Ojiambo relies upon, in the application for cross-examination of the plaintiff, is gaps

and uncertainties in the affidavit. On this, he has cited several court case authorities. He submitted that the contents of paragraph 3 of the supporting affidavit really called for the exercise of the court's discretion to allow the cross-examination of the deponent to shed more light and clarify the alleged existence of a marriage. His contention was that the paragraph was ambiguous and unclear. It was not clear whether the plaintiff celebrated a Kikuyu customary marriage with the 1st defendant. It was no possible, in his view, to celebrate a marriage as deposed in the paragraph, between 1978 and 1980 without any specific dates. He also took issue with the contents of paragraph 7, 12 and 19 of the affidavit and stated that all these paragraphs were enough justification for the court to allow the cross-examination of the plaintiff. Mr. Kihara felt that the contents of all these paragraphs of the supporting affidavit did not justify the cross-examination of the plaintiff at this preliminary stage. His contention was that the plaintiff was ready to be cross-examined but at the case hearing stage, after directions are given. Paragraph 3 of the affidavit was an acknowledgment that a Kikuyu customary marriage was done in stages and took time to accomplish, which was not unusual.

For the sake of clarity I will reproduced here the contents of the subject paragraphs of the plaintiff's affidavit. They are as follows –

3. THAT between 1978 and 1979/80 years I married the 1st defendant, a female single while she was then a spinster, and celebrated our marriage under Kikuyu Customary law by among others visiting her parents in Westlands where her mother Wanjira was working and I have later visited them in Kiamwangi Village Gatundu Division, Thika District, when the 1st defendant accepted my hand in marriage in the presence of her family members and my family members. I also attended her father's funeral in Gatundu.

7. THAT in particular my sons Stephen Ndimu Kamangu and Evans Kariuki were admitted in Westlands Primary School on 6th January 1986, as Admission Number 2167 and 2514 respectively.

12. THAT Beatrice Mbaire has now been married to me under Kikuyu customary law and traditions which is polygamous in nature and which marriage was approved by the 1st defendant and she is the one who helps me in taking care of my aged and frail father, one Ndimu Kamangu

19. THAT thereafter a few days later I confirmed to the media that indeed I was the true husband of the 1st respondent and father of her two sons, there occurred a flurry of public exchanges and the 1st respondent is reported to have said that she will proceed to marry the said Matjeke whether I like it or not and that it did not matter whether I was alive or not. She further went on to say that if I did not like it I can go hang myself after which she would officiate at my funeral in her capacity as a Bishop. (copies of the media extracts are annexed hereto assert to this fact as exhibit and marked JKN 3(a), 3(b), 3(c), 3(d) respectively.

What are the considerations for the court in exercising its discretion to order that a deponent of an affidavit in an application be cross-examined? I have considered the submissions of learned counsel for the parties and perused all the authorities cited to me. Clearly the discretion of the court under Order 18 rule 2 of the Civil Procedure Rules is wide and unrestricted.

In my view, one of the important considerations to be taken by the court in exercising its discretion is for the court to examine what the applicant for cross-examination wants to establish from the proposed cross-examination of the deponent see – MWAI KIBAKI –vs- DANIEL TOROITICH ARAP MOI & TWO OTHERS (supra). Mr. Ojiambo submits that there are uncertainties and gaps in the affidavit in question. His clients want the full evidence to come out. There is no suggestion as to what that full evidence is. The defendants are baffled that a Kikuyu customary marriage can take from 1978 to 1980 to be completed. Those are the gaps that are to be filled with the cross-examination. Proof of the paternity of the children is also to be done through the cross-examination. Proof of the consent of the 1st defendant to the customary marriage between plaintiff and one Mbaire is also to be dealt with through examination. Obviously all these are matters raised in the affidavit, and a court could order cross-examination if there is a just cause. On my part, I agree with what was held by the High Court Three Judges bench in the case MWAI KIBAKI, in which the learned Judges, while citing with approval the dictum of Cross L.J. in the case of COMET PRODUCTS UK LTD –vs- HAWKEX PLASTICS LTD, had this to say –

“The mere filing of and use of an affidavit in court is not sufficient without more. The applicant has to lay a proper basis upon which cross-examination will be ordered. If the facts of the deponent are not disputed, cross-examination will not be ordered. These passages confirm that cross-examination will not be ordered to permit such an applicant to rove in search of matters not material or relevant to the particular proceeding before the court”

It should be remembered that the proceedings before the court now is the Chamber Summons, which was due for hearing inter-partes. It is for the applicant for cross-examination of the deponent of the affidavit to lay a proper basis upon which cross-examination may be ordered. The reason given that is, filling alleged gaps or challenging the averments in the affidavit are in my humble view, not material to the application. In my view, a deponent of an affidavit can choose to be brief or long. That is not a reason to cross-examine him on the contents of his affidavit. The averment by the deponent of the affidavit that a Kikuyu customary marriage took place between 1978 to 1980 is also not a good reason for a allowing cross-examination. Jomo Kenyatta in the book Facing Mount Kenya stated that there are four principal stages for a Kikuyu marriage. There is no indications as far as I am aware, of a time limit. As for controverting an affidavit, it is usually done through a replying affidavit, not through cross-examination of the deponent. In my view, the applicants have not placed facts before me that would justify or lay the basis for my exercising this court's discretion to allow the cross-examination of the plaintiff on his affidavit. It is apparent that the applicants for cross-examination want to rove in search of matters and materials which they have not particularized. This court does not know the nature and extent of the proposed cross-examination and cannot therefore decide whether or not the same will be material or relevant to the application. I will not allow the applicants to rove in search of matters not material or relevant to the application.

The other important consideration for the court in an application for allowing cross-examination of a deponent of an affidavit at an interlocutory stage, is the consequences that the cross-examination will have on determination of the entire suit. The issues relating to the existence of a marriage between the plaintiff and the 1st defendant and paternity of the two children are core issues in the substantive suit which has been filed. These are the issues targeted for cross-examination. The suit is still pending, and no defence has been filed. I am in

agreement with what was held by my Brother, Serгон J., in the case of OGUK AND OTHERS –vs- WESTMONT POWER KENYA LTD and ANOTHER, where the learned Judge had this to say –

“It is clear from the above that this court was given wide discretionary powers and no conditions are set for the court to exercise that discretion. However this discretion must be exercised carefully because there is the risk of the court being trapped into a full hearing of the suit at an interlocutory stage”

Since the issues of the existence of a marriage between the plaintiff and the 1st defendant and the paternity of the children are core issues in the main suit, in my humble view, it will be inappropriate to allow general cross-examination on those two issues at this interlocutory application stage as requested. If we go into the cross-examination requested by the defendants, there is the real danger that, we will be trapped in the hearing of evidence on substantive issues in the main suit through preliminary procedure, while the main suit is still pending. That should not happen. It will not be in the interests of justice. On this consideration also, I decline to grant the application for cross-examination of the plaintiff.

For the above reasons, the application by the 1st and 2nd defendants to cross-examine the plaintiff on the contents of his affidavit sworn on 30th January 2007 cannot succeed and I dismiss the same. However, I order that costs will be in the cause.

On 7th February 2007, I granted prayer 2 of the Chamber Summons up to 15th February 2007. I extend the same orders which will now remain in force until the hearing and determination of the Chamber Summons.

It is so ordered.

Dated and delivered at Nairobi this 15th day of February 2007.

George Dulu

Judge

In the presence of –