



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 1090 OF 2006**

**ARTHUR PAPA ODERA.....PLAINTIFF**

**VERSUS**

**THE BRITISH COUNCIL.....RESPONDENT**

**RULING**

The applicant has filed a chamber summons under order X rules 1 and 2 of the Civil Procedure Rules and Section 3A Civil Procedure Act seeking leave of court to deliver written interrogations to the defendant respondent. It is their stand that the response to the said interrogations are relevant to the proceedings and will assist the trial to proceed expeditiously. As per the supporting affidavit paragraph 4 and 5, the plaintiff lost his employment on allegation of sexual harassment from one Elizabeth Sadimba, Catherine Sagide and Sandra Ayimba and Pauline Murithi. The annexed interrogatories are addressed to those named in paragraph 4 and 5 of the supporting affidavit namely miss Sandra Ayimba, M/s Catherine Sagide, Elizabeth Salimba and M/s Pauline Mureithi. And Mr. Davi Higgs separately.

The defendant/respondent has opposed the same on the basis of the grounds in the replying affidavit and oral submissions in court. The major one are that:

1. The Rules require that interrogatories be addressed to the defendant. The applicant herein has not directed the interrogatories to the defendant.
2. They are addressed to ladies whom the plaintiff/applicant suspects to be witnesses two of whom were interns and have since left the establishment and it is not known where they are. The defendant has no control over them and so the interrogatories cannot be channeled through the defendant.
3. It is further their stand that the same cannot be responded to as they go to credibility of the witnesses but do not go to matters in question. The matter in question is the termination of the employment of the plaintiff.
4. They are scandalous as they impute immoral conduct .
5. Some relate to hearsay which cannot be substituted for evidence neither can it be allowed at the trial.
6. They are improperly laid as discovery and request for particulars has not been done.

In response Counsel for the applicant still maintained that the interrogatories are properly laid and interest of justice demands that they be answered. More so when it is the addressees which led to the termination of the plaintiff/applicants employment. Further since Mr. David Huggs is the CEO of the defendant he should answer them, and lastly that if there is any which is improperly laid then the court can strike out those that are improperly laid and leave those that can be answered.

On the courts assessment of the matters herein it is clear that the law both from the Civil Procedure Rules and case law are very clear on how interrogatories are to be laid, how they are to be determined to find out which ones are to stand or not. That being the case the task of this court is to determine whether those laid by the applicant are to stand or not. The requirement under order X rule 1 is that

(1) These must be in writing. The applicant has complied with this requirement as all the interrogatories delivered are in writing.

(2) The second requirement is that these are meant for the examination of the opposite parties. By use of the word “party” denotes the ordinary meaning in litigation language as a “party” brought on board in any litigation. The parties brought on board in this litigation are the plaintiff **ARTHUR PAPA ODERA** as the plaintiff and the British Council as the defendant. None of the addressees of the plaintiff’s interrogatories are named as parties in this case. The plaint is very brief. A reading of the same does not reveal the existence of the addressees in connection with the claim. They cannot even fit the description of frivolous and flimsy grounds as these are persons whose activities are supposed to be specifically stated as to what role each played in the causation of the matters complained of.

(3) The 3<sup>rd</sup> requirement is that only one set of interrogatories is to be delivered at any one time without leave of the court.

(4) The interrogatories that are to be delivered are only those that are relevant to the questions in issue in that suit not with standing that the same might be admissible on oral cross-examination of a witness.

Rule 2 there of places the court on the alert as to what to look for when examining the said interrogatories to decide whether to allow them. The court is enjoined to consider any offer made by the party to be interrogatories, to deliver particulars or to make admission or to produce documents relating to the matter in question or any of them. Herein the defence Counsel stated that discovery and exchange of documents should have been carried out first before turning to interrogatory. The court is also enjoined to ensure that it allows only those interrogated that are necessary for disposing fairly of the suit or saving costs.

The foregoing provisions have been tested in decided cases. In the case of **OMAR VERSS GURDHANBHAI AND ANOTHER [1974] E.A. 518** it was held that interrogatories may establish facts but not evidence and what case is to be met. In Milimani Commercial Courts HCCC NO.423 of 1997 Ringera J. as he then was at page 2 of the ruling after setting out in extensor the provisions of order X rule 1 and 2 sated thus *“From those rules themselves, it is quite clear that whether interrogatories are to be delivered is a matter within the discretion of the court and that such discretion is to be exercised only where the court considers that the interrogatories are necessary either for fair disposal of the suit or the saving of costs. It is also clear that interrogatories must relate to the facts in issue or facts relevant to the facts in issue. And of course, in deciding whether the interrogatories are necessary account should be taken of any offer either to admit certain facts or to supply particulars, or to produce documents pertinent to the matters in question.”*

In the case of **SEBASTIAN D’SOUZA AND OTHERS VERSUS CHARLES CLEMENTE FERRARO AND OTHERS [1959] E.A. 1000** it was held inter alia that even though a judge takes the view that the proposed interrogatories would not save costs, he should allow them if he considers them necessary to disposing fairly of the suit. Further that the judges view that interrogation to such an extend was not necessary for disposing fairly of the suit is justified.

In the case of **AGGARWAL VERSUS OFFICIAL RECIEVER [1967] E.A. 585** it was held inter alia that the general principle followed is to allow such interrogatories as may be necessary either for

disposing fairly or more expeditiously of the case or for the purposes for the saving of costs. Further that it is not the duty of the judge to redraft interrogatories for the parties.

In this court's own decision in the case of **TULIP PROPERTIES LIMITED VERSUS MOHAMED KURIO NUR AND FOUR OTHERS, NAIROBI HCCC NO. 1012 OF 2004** delivered on 8.6.2007 at pages 7 – 11 set out principles governing administration of interrogatories as derived from the legal text of **ODGERS PRINCIPLES OF PLEADINGS AND PRACTICE BY W. BLAKE ODGERS AND B.A. HAYWOOD LONDON STEVENS AND SONS LTD 1939 CHAPTER XVI page 270 and MULLA THE CODE OF CIVIL PROCEDURE ACT V OF 1908 SIXTEENTH EDITION PAGES 2120 -2133**. The salient features of the same are:-

- Must be relevant to the matters in issue and for the present action and not the future
- Must be put bona fide
- Should not be oppressive
- Those tending to test the credibility of the witness will not be allowed
- Should not be for purposes of discovering in what way his opponent intends to prove his case.
- The questions must not be flimsy.
- Objections to interrogatories only allowed where the same allege or go to show that the interrogatories are unreasonable, vexatious or scandalous with vexatious being taken to mean premature, and scandalous meaning insulting or degrading questions others not allowed are those that are irrelevant, mala fides, not sufficiently material, those dealing with privileged communication, those that are proxy, oppressive or fishing in nature.
- Should be solely for shortening the trial and serving the time for the court and the parties by serving expenses for summoning witnesses.
- Should not be for attempting to know the facts which constitute exclusively the evidence of his opponent's case in order to temper with the opponent's witnesses and manufacture evidence in contradiction in order to shape his case to defeat justice.

At page 18 of the same ruling this court singled out two cardinal principles that it is supposed to follow when dealing with interrogatories namely that the court has a discretion to allow or disallow interrogatories which discretion has to be exercised judiciously.

(2) That it is not the business of the court to redraft the interrogatories for the parties. This means that they stand or facts as a whole. A court has no right to mutilate them and order portions which are in compliance with the principles to be answered and those that are not within the rules not to be allowed or answered.

This court would like to add two more namely that room exists under the rules for the court to exercise its discretion to allow a party whose interrogatories have been disallowed leave to deliver fresh and proper ones. This observation was made per *CURIAM INSEBASTIANS* case (supra) but this court finds it to be good law.

Another principle that emerges both from a reading of the relevant rules and case law is that the interrogatories have to pass both the technical test and the merit test. The technical test arises where there is need for the interrogatories to comply with the requirements under both rules 1 and 2. The merit test arises where each interrogatory laid is required to comply with the ingredients set out herein earlier.

Applying the tests to the interrogatories filed herein the court finds that though the interrogatories

herein have satisfied the first requirement of being in writing, they have not satisfied the second requirement of being directed to the opposite party. As observed earlier on in this ruling, the person, named namely MISS SANDRA AYIMBA, CATHERINE SAGIDE, ELIZABETH SADIMBA, PAULINE MUREITHI AND MR. DAVI HIGGS are not named as parties to the suit and so no interrogatories can flow directly to them more so when some of them are indicated not to be within reach of the defendant. It is submitted and also deponed in the supporting affidavit that these are the parties whose accusations or allegations led to the plaintiffs loss of employment. In other words they may be potential witnesses. The rules do not make provision for serving of interrogatories on potential witnesses.

As for Mr. Davi Higgs, the court was informed that he is the CEO and so he should answer the set delivered to him. As submitted by the defence Counsel, these are improperly addressed. They should have been directed to the defendant with a note that they be answered by the CEO. In the absence of that, this court cannot proceed to examine them to determine whether they comply with the rules or not. In doing so this court would be in essence redrafting them to read that they have been directed to the defendant and are to be answered by the defendant's CEO. Such a move would amount to redrafting of the said interrogatories.

The best way forward is to strike out those directed to Miss SANDRA AYIMBA, CATHERINE SAGIDE, ELIZABETH SADIMBA AND PAULINE MUREITHI without an order for reserving as they do not fall into the bracket allowed by the rules. And then strike out those addressed to Mr. DAVI HUGGS but with leave to the applicant to refile them properly by addressing them to the defendant with a note that they be answered by the CEO as the case may be or some other principal officer.

The Respondent defendant will have costs of the application.

**DATED, READ AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2007.**

**R. NAMBUYE**

**JUDGE**