



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

**Civil Case 317 of 2006**

**ANNE NDUNGE NZIOKA.....APPLICANT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL.....RESPONDENT**

**RULING**

The Applicant by way of this Chamber Summons dated 25<sup>th</sup> August 2006 and expressed to be brought under Order XVIII Rule 8 of the Civil Procedure Rules seeks orders that Mr. Nzuki Mwinzi Advocate, counsel for the Respondent be ordered to attend court for cross examination on the replying affidavit sworn on 18<sup>th</sup> May 2006.

The application is based on the ground that there is a bona fide need for the deponent to be cross examined to establish the terms under which the out of court settlement reached on or about 1<sup>st</sup> September 2003 were made.

The application is supported by an affidavit sworn by Kyalo Mbobu counsel for the Applicant on 25<sup>th</sup> August 2006 in which he avers that pursuant to instructions received he personally initiated and successfully negotiated out of court settlement of the applicant's claim against the Respondent; that the said negotiations started on 9<sup>th</sup> April 2003 and stretched over a period of several months but in the end on or about 1<sup>st</sup> September 2003 an agreement was reached between the counsels on special and general damages payable; that when the issue of costs was raised on 17<sup>th</sup> September 2003. Mr. Nzuki Mwinzi conceded on telephone confidentially that he had placed the agreed settlement before the Tender Committee of the Respondent for approval without factoring the costs; that however when he received Mr. Nzuki's reply dated 17<sup>th</sup> September 2003 he noted that Mr. Nzuki took a dishonest position that the question of costs had been overtaken by events when he fully well knew that it was not and had personally acknowledged this fact to him in their telephone discussion; that Mr. Nzuki in his reply had alleged that costs in any event are neither due nor payable in our of court settlement negotiations.

This application is brought under Order XVIII rule 8 which provides:

**“XVIII – “8” An application under this order shall be by summons or orally in court”.**

The Respondent on being served filed a replying affidavit sworn by Nzuki Mwinzi on 2<sup>nd</sup> November 2006 in which he avers that indeed the agreement was reached between the two parties on 1<sup>st</sup> September 2003 but not only on special and general damages but the same was actually in full and final settlement; that he never conceded to Mr. Kyalo on any issue and denies any telephone conversation with Mr. Kyalo and in conclusion he also sought orders that Mr. Kyalo be summoned to appear in court on 8<sup>th</sup> November 2006 for cross examination on the said affidavit as he is the one who is being dishonest.

The alleged conversation upon which counsel for the applicant intends to cross examine counsel for the Respondent was by telephone. There was no case filed in court. There is no documentary evidence to prove that there was agreement for the payment of costs and this application is filed after the claim has been settled and payment received. And each party wants to cross examine the other on the alleged telephone conversation.

I must confess that this mode of procedure is not provided for in our rules. To cross examine a party on the alleged telephone conversation so what is next. Further the order under which this application is brought is irrelevant and the order sought is not tenable.

In the result the Applicants Chamber Summons dated 25<sup>th</sup> August 2006 is dismissed with costs.

Dated and delivered at Nairobi this 20<sup>th</sup> day of July 2007.

**J.L.A. OSIEMO**

**JUDGE**