



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**MISC APPLI 472 OF 2004**

**IN THE MATTER OF ARBITRATION ACT**

**AND**

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**FRANCIS K. E. HINGA .....CLAIMANT**

**VERSUS**

**GEORGE B. NYANJA .....RESPONDENT**

**RULING**

The respondent **Mr. George B. Nyanja** made an application for cross-examination of the deponent of the affidavit sworn on 6<sup>th</sup> July, 2004. The respondent says Order XVIII Rule 1 (2) of the Civil Procedure Rules gives the court powers to order the attendance of a deponent of an affidavit for purposes of cross-examination. The court therefore has wide and unfettered powers to make such an order.

The claimant contends that the court will not order the cross-examination of the deponent of an affidavit automatically and in particular, such cross-examination will not be ordered where;

- (1) The facts in the subject affidavit are not disputed.
- (2) The matters on which such deponent is to be cross-examined are irrelevant or immaterial to the application before court or
- (3) Where cross-examination will result in the trial of the suit in its entirety at an interlocutory stage.

The claimant maintains that there was service which was effected by his Advocate, who is the deponent of the disputed affidavit of service. The respondent/applicant goes to great lengths to shoot holes on the procedural laws of service.

The applicant says that the conflict in the affidavit can only be resolved by cross examination of the deponent. The Advocate for the applicant contends that if there is no proper service of the said notice of filing an award, the resulting default judgement is an irregular one which the court must set aside as a

matter of right.

No doubt the service of the alleged notice of filing the alleged award has been asserted by one party and it is denied by the other, both assertion and the denial being on solemn oath taken before a commissioner for oaths. The applicant thinks that unless cross examination is ordered, the court would be left in a quandary as to the disputed issue of service.

Order 18 Rule 1 says;

**“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 over at the hearing on such conditions as the court thinks reasonable provided that where it appears to the court that either party bona fide desires the production of a witness for cross examination and that such witness can be produced an order shall not be made authorizing the evidence of such witness to be given by affidavit”.**

It is clear in my mind that the court at the request of either party can order the attendance for cross-examination of the deponent of an affidavit that contains disputed facts. As a matter of law, an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove.

The gist of the affidavit by **Mr. Timothy Wamiti** Advocate has been captured in paragraph 2 which says;

**“On 1<sup>st</sup> July 2004, I effected service of the notice of filing of award herein dated 30<sup>th</sup> June 2004, the original whereof is returned herewith on the respondent by registered post vide his postal address that appears on his complimentary slip and which was confirmed by the applicant his long time friend and one time business associate. Copies of the complimentary slip and the certificate of postage by registered mail appear at the exhibit annexed hereto and marked TWI”.**

The applicant says that service has never been validly effected on him or his Advocates on record. And that he has been advised that a valid and proper service of notice of filing of the award in court is a mandatory requirement in law before any other adverse action or proceedings are taken. I think the question for determination is whether the applicant was properly and validly served by the claimant. In answering that question the court would determine the service allegedly effected by **Mr. Wamiti** Advocate. It is essential to understand that it is incumbent upon the claimant to show or demonstrate that the applicant was properly and regularly served. And in doing the essential considerations are;

- (1) The correct mode of service available to the claimant
- (2) Whether the address shown belongs to the respondent/applicant,
- (3) Whether the registered mail was sent to that correct address.
- (4) Whether it was collected or claimed or whether it was returned unclaimed.
- (5) Whether the mode of service employed by the claimant is the correct one under the circumstances of this case.
- (6) What is the purpose and intention of service on a particular party?
- (7) Is it available to a party who was aware of certain proceedings to turn around and say he was not properly served as per a particular procedure, even when he was aware and received the documents or proceedings.
- (8) Which order would serve the ends of justice in order to minimize costs and time involved in litigation.

(9) What would be the reason to set aside a judgement which would succeed against a party the next day? That whether a party has a sustainable defence to the claim.

(10) That it is against the very existence of the court to condemn a party unheard, while at the same time remembering that vexatious and frivolous litigants leave no room before court.

Having taken into consideration the above factors enumerated hereinabove, I do not think that **Mr. Wamiti** Advocate would be in a position to answer those questions. I also do not think it is necessary to cross examine **Mr. Wamiti** on facts which are clear but only disputed by the respondent/applicant. The task of **Mr. Wamiti** was to send the disputed document to an address allegedly owned by **Hon. George Nyanja**. And in evidence he exhibited a certificate of posting of a registered mail to address No.52661 Nairobi, Kenya. In the circumstances of this case I do not think it is necessary to order for cross examination of **Mr. Wamiti**. To do so would unnecessarily delay the hearing and determination of this simple and straight forward matter.

It is therefore my decision that the application to cross examine **Mr. Wamiti** is gross abuse of the court process and it is hereby rejected. The applicant shall pay costs of Kshs.10,000/= to the claimant before the next hearing date.

Dated and delivered at Nairobi this 11<sup>th</sup> day of December, 2007.

**M. A. WARSAME**

**JUDGE**

**Court:** Ruling delivered in the presence of Mr. Kamau for the applicant and no appearance for the respondent in open court.

**M. A. WARSAME**

**JUDGE**