REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 285 of 2003

MOHAMED MUIN AHMAD MALIK …….…….....…….PLAINTIFF

VERSUS

JOSEPH MUIRURI GITHONGO…….....……DEFENDANT

R U L I N G

The plaintiff has come by way of chamber summon brought under Order XVIII Rule 1 (2) and 8. That application seeks two prayers. Firstly it seeks an order for cross-examination, of the defendant, on the content of his affidavit sworn in support of an application to set aside an exparte judgment. Secondly it seeks the striking out of that affidavit because of its failure to have a date that is similar to the date of the application it supports.

In support of the first prayer the plaintiff sought to cross examine the defendant on maters in his affidavit relating to, the defendant's statement that he did not know the identity of the plaintiff's principal, on the defendant's challenge of the amount of money lent to him, on the defendant's statement that he had repaid the plaintiff kshs 5 million and on paragraphs 34 and 35 of the affidavit which the plaintiff alleged were false.

In support of the second prayer for striking out the affidavit, the plaintiff stated that the defendant's affidavit was dated 3rd February 2004 and yet the application it supported was dated a day earlier that is, 2nd February 2004. Because of the difference in those dates plaintiff's counsel argued that the affidavit was not available for that application and accordingly that affidavit ought to be struck out.

The defendant opposed both prayers. On the difference in dates between the affidavit and the application the defendant counsel stated that it did not render the affidavit unavailable to the application. He said that the application was dated once it was ready and the affidavit was dated when the defendant executed it.

The defendant opposed the prayer for cross-examination of the defendant on the basis that the defendant had failed to lay down a foundation for such cross-examination. That such cross-examination could only be in relation to the application to set aside exparte judgment but not in relation to the defendant's future defence. The defendant's counsel was of the view that the question formulated by the plaintiff for cross-examination belonged to the trial and not at an interlocutory stage. The defendant relied on the case HC ELECTION PET. NO. 1 OF 1998 MWAI KIBAKI – AND DANIEL TOROITICH ARAP MOI AND OTHERS. The court in this case held that a party cannot be cross examined on matters he has not deponed in the affidavit. It also held that to or not to cross-examine was at the discretion of the court.

In my response to the arguments before me I wish to start with the argument that an affidavit not

dated the same date as the application is liable to be struck out. Order XVIII Rule 9 provides:

"**Unless otherwise directed by the court an affidavit shall not be rejected because it was sworn before the filing of the suit concerned**."

That means that the defendant could possibly have relied in this case on an affidavit sworn in the year 2002 even though this case was filed in 2003. For the court to direct that affidavit sworn before the filing of the suit, cannot be relied upon there has to be material information laid before the court. No such information was put before me by the plaintiff. The defendant explained the difference in the date of the application and the date of the affidavit. The plaintiff prayer for the striking out the affidavit has no basis and the same is rejected.

In respect of the prayer for cross-examination of the defendant, the court is of the view that no party has absolute right to cross-examine his opponent on the contents of the affidavit. The court has discretion whether or not to allow cross-examination. In the exercise of that discretion the court has to be satisfied with the bona fide desire of one party to cross examine another, once an order for cross examination is given at interlocutory stage the party may be cross examined, on issues raised in the affidavit and not other matters.

I have considered the issues the plaintiff wishes to cross-examined the defendant and I have also considered the application for which the subject affidavit supports. I am of the view that it would not be just to allow the defendant to be cross examined on those issues proposed by the plaintiff. If the court was to allow the defendant to be cross examined on issues of whether he did or did not know the principal, the issue of the defendant challenge of the amount lent, or the amount the defendant claims to have repaid would be tantamount to having a trial within a trial. Such a trial would be unjust because only the defendant would be cross examined and the plaintiff would end up by having an unfair advantage in that even before the trial of the suit the plaintiff will have rehearsed the evidence to be tendered by the defendant. I am of the view that the application by the defendant for setting aside exparte judgment can appropriately be disposed by use of the affidavit evidence without cross examination.

The end result is that the plaintiff's application dated 3rd February 2006 is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 3rd May 2006.

MARY KASANGO

JUDGE