



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 433 of 2006

ANNE KAHIRI PLAINTIFF

VERSUS

RUSINGA INVESTMENTS COMPANY LIMITED DEFENDANT

R U L I N G

By its Chambers Summons dated 21.9.2006, the defendant seeks one primary order; that the judgment entered against it and all consequential orders be set aside on such terms as are just. The application is brought under Order IXA Rule 10 of the Civil Procedure Rules and is supported by an affidavit sworn by Jacob Mwangi, the Chairman of the Board of Directors of the defendant company.

The plaintiff has opposed the application upon grounds of opposition filed by her advocates and in a replying affidavit sworn by her on 5.10.2006. When the application came up before me on 9.10.2006 for hearing Counsel for the plaintiff intimated that she wished to cross-examine the deponent of the supporting affidavit on his affidavit. The application was then adjourned to enable counsel for the plaintiff lodge a formal application which is now the subject of this ruling.

The application is based on Order XVIII Rule 2 of the Civil Procedure Rules. The reasons for the application are that the said affidavit contains material allegations which are patently not within the knowledge of the deponent; that the affidavit contains material allegations which are patently untrue and only cross-examination of the deponent will yield the truth that will enable the court to arrive at an informed and just decision. The application is supported by the plaintiff's affidavit which is an elaboration of the said grounds.

The defendant has opposed the application upon the grounds that the application is devoid of merit, it is fatally defective, frivolous, vexatious and an abuse of the court process.

I have considered the application, the supporting affidavit, the Grounds of Opposition and the submissions made to me by the Learned Counsels appearing. Having done so, I take the following view of the matter. Under Order XVIII Rule 2(1) of the Civil Procedure Rules, the court has a discretion to allow cross-examination of a deponent upon his/her affidavit. However, if the facts are not disputed, there would be no point in ordering cross-examination (**see Kibaki vs. Moi & 2 others – Election Petition No.1 of 2000 UR**) at page 7. Cross-examination will also not be allowed if the applicant's desire is to fish out a case from the cross-examination. The discretion to allow cross-examination will also be exercised cautiously to avoid turning the exercise into a full hearing at an interlocutory stage. (See **Oguk & 4 others vs. Westmont Power Kenya Ltd. & Another: Mombasa HCCC No.187 of 2003 (UR)**).

I have carefully read the affidavit sworn in support of the application to set aside the default judgment and the affidavit of service sworn by the process server. The manner of service as described by the process server, seems to be substantially admitted by the defendant. The cross-examination of the deponent of the said supporting affidavit will therefore serve no purpose with regard to the issue of service of the Summons to Enter Appearance upon the defendant.

With regard to the merits or demerits of the proposed defence I am of the view that a decision thereon may still be made without the necessity for the cross-examination sought. I dare say that the risk of the court being trapped into a full hearing of the application to set aside the default judgment in the proposed cross-examination is real. That risk should be avoided.

Having considered all matters placed before the court, I find no merit in the application which I hereby dismiss. Costs shall be in the Cause.

Orders accordingly.

DATED at **NAIROBI** this 4th day of December 2006.

F. AZANGALALA

JUDGE

MARY KASANGO

JUDGE