



REPUBLIC OF KENYA



Vale Royal Trust & another v Rwika Aggregates Co. Ltd & 6 others (Environment & Land Case 49 of 2020) [2022] KEELC 15285 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 49 OF 2020
LA OMOLLO, J
DECEMBER 8, 2022**

BETWEEN

VALE ROYAL TRUST 1ST PLAINTIFF

DELAMARE ESTATES LIMITED 2ND PLAINTIFF

AND

RWIKA AGGREGATES CO. LTD 1ST DEFENDANT

CABINET SECRETARY MINISTRY OF LANDS 2ND DEFENDANT

DIRECTOR OF PHYSICAL PLANNING 3RD DEFENDANT

DIRECTOR OF SURVEY 4TH DEFENDANT

GILBERT OKECH AYOO 5TH DEFENDANT

REGISTRAR OF LANDS 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. This ruling is in respect of the 1st defendant's notice to appear for cross-examination. It is dated July 18, 2022 and filed in court on September 19, 2022.
2. The said notice is for cross-examination of one Nelson Rotich on the contents of his affidavit sworn on May 24, 2022 in support of the plaintiff's notice of motion application dated May 24, 2022.

Factual Background.

3. This suit came up for hearing on May 5, 2022 but counsel for the plaintiffs intimated that he was not ready to proceed with the hearing for the reason that he intended to file an application for leave to



- amend the plaint. Counsel further explained that they had hoped to produce the original title of the suit property in support of their case but he had since learnt that the property was sub-divided and the original title surrendered to the Registrar of Lands.
4. Counsel also explained that they were awaiting the issuance of a new title document which would bear a different number thus necessitating an amendment to the plaint so as to capture this new number.
 5. Counsel for the 2nd, 3rd, 4th, 6th and 7th defendant did not oppose the adjournment. Counsel for the 1st Defendant was absent. An adjournment was granted and the matter scheduled for mention on May 31, 2022 to confirm filing of the application for leave to amend the plaint.
 6. Before the mention of May 31, 2022, the Plaintiffs indeed filed the application. It is dated May 25, 2022. It is supported by an affidavit sworn by one Nelson Rotich.
 7. On May 31, 2022 the matter came up for mention to confirm filing of the application. Counsel for the 1st Defendant confirmed that he had been served with the application for leave to amend the plaint and sought 21 days to file his response. Counsel for the Plaintiffs was agreeable to the 1st Defendant being granted more time. The application was rescheduled to July 5, 2022 for hearing.
 8. On July 5, 2022 counsel for the 1st Defendant sought orders for cross examination of Nelson Rotich on the contents of the affidavit sworn by him.
 9. The court directed that the 1st Defendant files and serves notice to cross examine and further that all parties file their responses to the said application by July 19, 2022.
 10. On July 19, 2022 counsel for the 2nd, 3rd, 4th, 6th and 7th Defendant intimated that they would not be opposing the application for leave to amend the plaint. Counsel for the 1st Defendant, on the other hand, intimated that he had filed and served the notice to cross examine the deponent of the affidavit in support of the application for leave to amend the plaint adding that he had however not received the Plaintiffs' supplementary affidavit.
 11. The application was confirmed for hearing on November 14, 2022 and an order made that Mr Rotich appears on the same date for cross- examination on the contents of his affidavit.
 12. On November 4, 2022 Mr Nelson Rotich appeared and was cross-examined on his deposition as contained in paragraph 2, 3 and 5 of the affidavit in support of the application and paragraph 5 of the supplementary affidavit.
 13. Briefly, Mr Nelson Rotich reiterated that he had retired from the employment of the 1st and 2nd Plaintiff. He confirmed that paragraph 1 of the affidavit in support of the application describes him as a manger of the 1st and 2nd Plaintiff and explained that this was a typographical error. He added that the correct position was as contained in his testimony as presented in court on February 14, 2022 i.e that he was no longer an employee of the Plaintiffs.
 14. He also stated that the correct position as pertains to his relationship with the 1st and 2nd Plaintiff is contained in paragraph 3 of the supplementary affidavit; that he is a retired general manager.
 15. The court also noted that paragraph 3 of the supplementary affidavit describes him as a general manager of the Plaintiffs and to this, his response was that it, too, is a typographical error.
 16. On paragraph 5 of the supplementary affidavit, Mr Nelson Rotich confirmed that the suit property is now described as- LR No 9362/7. He explained that as at the time of his testimony, he did not have the original title adding that it was in the custody of the 1st Plaintiff. He stated that the 1st Plaintiff subsequently surrendered it to the Lands office to facilitate the process of sub-division. He further



explained that about 500 acres had been excised from it. He stated that he did not know the land parcel number for the 500 acres.

17. Mr Nelson Rotich confirmed that the affidavit sworn on May 24, 2022 has 17 paragraphs while the supplementary affidavit sworn on July 18, 2022 had 9 paragraphs. Mr Rotich further confirmed that paragraph 5 of the supplementary affidavit speaks to the sub-division of the suit parcel but does not specifically mention 500 acres.
18. Counsel for the 1st Defendant asked that Mr Rotich be excused adding that he wished to peruse the original title being alluded to by Mr Rotich at paragraph 5 of the supplementary affidavit.
19. After cross-examination, Counsel for the Plaintiffs submitted that the notice to cross-examine did not set out the paragraphs of the supporting affidavit that the 1st Defendant had wished to cross examine Mr Rotich on.
20. He further submitted that the cross-examination was delving into matters for determination at a trial and further that the questions put to Mr Rotich were touching on the merits of the application.

Analysis And Determination.

21. Order 19 Rule 2 of the [Civil Procedure Rules](#) provides as follows:

' (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order attendance for cross examination of the deponent.'

22. Order 19 permits the use of affidavits as evidence and cross-examination of the deponent's affidavits is discouraged unless the circumstances merit it. This is for the reason that it may result in increased costs during interlocutory proceedings and unduly prolong a suit.
23. It is clear that allowing cross-examination on an affidavit is a matter of discretion. This court exercised discretion in favour of the 1st Defendant and allowed it wide latitude in cross-examination of Mr Rotich including cross-examination on contents of the supplementary affidavit which did not form part of the notice to appear for cross-examination.
24. While it is true, as stated by counsel for the Plaintiffs, that the notice to cross-examine did not set out the paragraphs of the affidavit in support of the application that the 1st Defendant intended to cross-examine on, the Learned Judge in [Ndunde Investments Limited v Eugene Muthoni Dadet \[2020\]eKLR](#) held as follows;

'My finding is that affidavit evidence, like oral evidence, is not full proof or beyond challenge and may be interrogated through cross examination in order to test its credibility. I further find that just like in any normal cross examination after presentation of oral evidence, a party seeking to cross examine a deponent must not necessarily indicate up-front or beforehand, the nature of questions he intends to pose to the deponent during cross examination.'

25. Taking cue form the decision in Ndunde Investments Limited (Supra), I find that failure to set out the paragraphs intended for cross-examination is not fatal and is a better practice because it ensures that a deponent is not coached and therefore, truthfully responds to questions put to him.



26. In the decision of *GGR v HPS [2012] eKLR*, the Learned Judge outlined instances where a deponent may be subjected to cross-examination:

' The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.'

27. After listening to the questions put to Mr Nelson Rotich by counsel for the 1st Defendant and on interrogating the responses given by Mr Nelson Rotich, I am satisfied that Mr Nelson Rotich did not deliberately misrepresent his relationship with the 1st and 2nd Plaintiff. He reiterates that he is a retired manager.

28. The second set of questions put to Mr Nelson Rotich relate to the proposed amendment which amendment is intended to rectify the description of the suit parcel. He explained that the suit parcel, subsequent to his testimony, had been sub-divided and the Plaintiffs wish to amend the plaint to reflect the new number.

29. Counsel for the 1st Defendant might not find this explanation satisfactory and might not even believe it but it is an explanation nevertheless. I read apprehension on the part of the 1st Defendant on the effect of the proposed amendment. These apprehensions, real or perceived, are matters to be raised during the hearing of the application for leave to amend, it is then that the court will have opportunity to make a determination on them.

Disposition.

30. I find that there is no sufficient reason to disregard the affidavit in support of the application for leave to amend the plaint or the supplementary affidavit.

31. Consequently, I order as follows;

- a. The application dated May 24, 2022 shall proceed to hearing.
- b. The costs arising from the notice to cross-examine shall abide the outcome of this suit.

32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8th DAY OF DECEMBER, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Aim for the Plaintiffs.



Mr. Mbeche for the 1st Defendant.

No appearance for the 2nd – 7th Defendants.

Court Assistant; Ms. Monica Wanjohi.

