



**Nzomo (Suing as the Legal Representative of the Estate of the Late Daniel Nzomo Wambua) v Makueni County Government (Environment & Land Case 355 of 2017) [2022] KEELC 15312 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15312 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 355 OF 2017  
TW MURIGI, J  
DECEMBER 7, 2022**

**BETWEEN**

**THOMAS MATEE NZOMO ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
DANIEL NZOMO WAMBUA**

**AND**

**MAKUENI COUNTY GOVERNMENT ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 20<sup>th</sup> June, 2022 brought pursuant to the provisions of Article 159(2)(d) of the *Constitution*, Section 1A, 1B, 3A & 95 of the *Civil Procedure Act*, Order 42 Rule 6(1), Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law the Applicant seeks the following orders:-
  - i. Spent.
  - ii. The Honourable Court be pleased to extend the time within which the Defendant/Applicant should have lodged the Notice of Appeal pending the hearing and determination of this application.
  - iii. The Honourable Court be pleased to admit the Notice of Appeal exhibited to this application as duly on record upon payment of requisite Court filing fees pending the hearing and determination of this application.
  - iv. The Honourable Court does direct that the Court's Deputy Registrar to endorse the copies of the Notice of Appeal to be provided by the Defendant/Applicant as soon as possible and pending the hearing and determination of this application.



- v. The Honourable Court to grant stay of execution of the judgment delivered on 31<sup>st</sup> of May, 2022 pending the hearing and determination of the intended Appeal to be registered by the Defendant/Applicant.
- vi. The costs be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Dr. Benjamin Munywoki Musau, Advocate on the even date.
3. In opposing the application, the Plaintiff/Respondent filed a replying affidavit sworn by Thomas Matee Nzomo on 7<sup>th</sup> July, 2022 together with a Notice to Cross-examine Dr. Benjamin Munywoki Musau, Advocate for the Defendant.
4. On 12<sup>th</sup> October, 2022 when the matter came up for directions, both Counsel for the parties herein submitted at length on the Notice to cross-examine Dr. Benjamin Musau, Counsel for the Defendant, on the averments in his affidavit in support of the Notice of Motion dated 20<sup>th</sup> June, 2022.
5. Counsel for the Defendant contended that the supporting affidavit was sworn in performance of his instructions from the Defendant. That the Defendant's Director Legal Affairs swore an affidavit equally confirming the said instructions. Counsel argued that cross examination on an affidavit should be avoided except in exceptional circumstances since allowing it would prolong the case contrary to the provisions of Section 1A and 1B of the *Civil Procedure Act*. Counsel argued that the Applicant has not shown any special circumstances in which this Court should exercise its discretion in his favour.
6. Counsel stated that the Respondent was questioning the validity of the instructions given to them which is privileged information. Counsel argued that if there were no instructions it is the client who would be complaining. He went on to add that the instructions attached together with the supplementary affidavit clearly demonstrates that the firm of B M Musau & Co Advocates had received instructions to act for the Defendant.
7. Counsel went on to state that pursuant to Order 19(3) (1) of the *Civil Procedure Rules*, he swore the affidavit on matters that were within his knowledge as Counsel and not on matters that would necessitate him to be called as a witness. In addition, Counsel stated that the Applicant has not laid any basis on why Mr. Mulanga should be cross examined as his affidavit is based on matters within his knowledge as the Director of Legal Affairs in the Defendant's Legal County Department.
8. Counsel further submitted that the Plaintiff has not disclosed the specific averments on which cross-examination is being sought. He argued that cross-examination of a deponent should only be allowed in rare and exceptional circumstances such as fraud, mala fides or where there are bad motives. It was submitted that the Notice to Cross-Examine was intended to prolong the proceedings before the Court. Counsel relied on the following cases to buttress his oral submissions: -
  - i. *Kwacha Communications Limited & another v Pindoria Holdings Limited & Another* [2022] eKLR;
  - ii. *GGR v HPS* [2012] eKLR;
  - iii. *Nyoro Construction Co Limited v Prashanth Projects Ltd & another* [2015] eKLR.
9. Ms. Munyao, Counsel for the Plaintiff, submitted that, Dr. Musau deponed to issues that are contentious and did not disclose the source of the information in his Supporting affidavit. Counsel argued that Dr. Musau lacked the requisite authority to depone the affidavit since he is not an employee of Makueni County Government, an Attorney or an accounting officer.



10. Counsel went on to state that Dr. Musau prepared the Notice of Appeal before the Defendant issued instructions. Ms. Munyao argued that Mr. Mulanga ought not to have sworn the affidavit since there is no office created under the County Attorney Act known as the Department of Legal Affairs. Counsel contended that they had specified in the Notice to Cross Examine that they wanted to cross examine Dr. Musau on the contents of his affidavit.
11. Lastly, it was argued that should the Court admit the supplementary affidavit they would be seeking to cross examine Mr. Mulanga on the contents of his affidavit. Counsel relied on the following cases to buttress her arguments: -
  - i. *Odinga & 16 Others v Ruto & 10 others; Law Society of Kenya & 4 Others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment).
  - ii. *Regina Waitihira Mwangi Gitau v Boniface Nthenge* [2015] eKLR.
  - iii. *Simon Isaac Ngui v Overseas Courier Services (k) Limited* [1998] eKLR.

## ANALYSIS AND DETERMINATION

12. Having considered the oral arguments made by Counsels for the parties herein, I find that the only issue that arises for determination is whether, Dr. Musau Advocate, should be cross-examined on the contents of his the Supporting affidavit.
13. Order 19 Rule 2 of the *Civil Procedure Rules*, 2010 governs instances when the deponent of an affidavit may be ordered to attend Court for cross-examination. The law provides as follows: -
  1. Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.
  2. Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.
14. From the above, it is evident that the power to summon a deponent for cross-examination is at the discretion of the Court. Even though such discretion has no certain limits, it must be exercised judiciously in order to prevent any manifest injustice which is likely to occur.
15. In *Republic v Kenya Revenue Authority Ex Parte Althaus Management & Consultancy Limited* [2015] eKLR, G.V. Odunga (as he then was) observed as follows: -
  - “ 14. Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the *Civil Procedure Rules*. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words, a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent’s affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited



time available for applications would be further curtailed to the detriment of the wider interests of justice.”

16. Similarly, in *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR, the Court held as follows: -

“21. In instances where the Court is called upon to consider summoning a deponent for cross examination, it does so only in special circumstances. In *Lawson and Another v Odhams Press Ltd & Another* [1948] 2 All ER 717, the Lord Green MR laid emphasis on the point that Courts should be reluctant to permit oral cross-examination in interlocutory proceedings. In 22 Atkin’s Court Forms (2 ed) at 462 and 486 (Form 17), Lord Atkin advises as follows: “Whilst the court may order an oral examination of the person answering the interrogatories, such an order is infrequently applied for and will only be made where there are special circumstances.”

17. Further, in the case of *G G R v H P S* [2012] eKLR, the Court outlined instances where a deponent may be subjected to cross-examination as follows;

“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) to 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.”

18. From the above authorities it is clear that allowing cross-examination on an affidavit is a matter of discretion, and cross-examination should be avoided unless exceptional circumstances exist. Any party wishing to cross-examine a deponent must convince the Court that the cross-examination is justified.

19. The law is clear that the person desiring to cross-examine a deponent of an affidavit must set out the particular paragraphs he wishes to cross-examine the deponent on. He must also lay a basis for it.

20. Order 19 Rule 3 (1) of the [Civil Procedure Rules](#), 2010 provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

21. Further, Rule 9 of the [Advocates \(Practice\) Rules](#) states that:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:



Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

22. Both Rules are intended to prohibit and insulate the Advocate from intervening in disputes between his/her clients and adverse parties. Where an Advocate swears an Affidavit relating to contentious evidential facts or issues, such an Advocate runs the risk of being invited into the witness box and thereafter be subjected to cross-examination.
23. The Notice to Cross Examine dated 7<sup>th</sup> July, 2022 expressly states the intention to cross examine the deponent on the contents of the affidavit sworn on 28<sup>th</sup> June, 2022 in support of the application of even date.
24. At a glance, no averment in the Supporting affidavit sworn by Dr. Musau connotes a bad motive on the part of the Advocate, or a discrepancy in the movement of the Court file or an indiscretion too great as to cause manifest injustice to the Plaintiff’s case. In the affidavit sworn on 20<sup>th</sup> June, 2022, by Dr. Musau Advocate has deponed to facts strictly within his knowledge as regards the issues giving rise to this appeal. Looking at the supporting affidavit sworn by Dr. Musau, I do not see how the Supporting Affidavit has delved into any disputed facts, that brings the said Affidavit to the proscribed tenets stipulated vide Rule 9 of the Advocates (Practice) Rules.
25. If the Respondent objects to the deponent averments, the same can be addressed and/or determined by a replying affidavit and/or submissions rather than through cross-examination of the deponent.
26. After considering the foregoing, I conclude that the Notice to Cross-Examine the deponent is not merited and the same is hereby dismissed with costs.

.....  
**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 7<sup>TH</sup> DAY OF DECEMBER, 2022.**

**IN THE PRESENCE OF: -**

Court Assistant – Mr. Kwemboi

Ms. Kyania for the Defendant

Ms. Munyao for the Plaintiff

