



**Taibjee & another v Kanabar & another (Environment & Land Case  
154 of 2019) [2024] KEELC 13521 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13521 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 154 OF 2019**

**JO MBOYA, J  
DECEMBER 3, 2024**

**BETWEEN**

**AZIM TAIBJEE ..... 1<sup>ST</sup> PLAINTIFF**

**MADHAV BHALLA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HARISH KUMAR BHAGWANDAS KANABAR ..... 1<sup>ST</sup> DEFENDANT**

**NCBA BANK KENYA PLC ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the course of carrying out and/or undertaking re-examination, learned counsel Mr. Kyalo Mbobu [EBS] posed a question to Harris Kumar Kanabar [DW1] pertaining to whether the Plaintiffs herein were advocates for the various companies, namely, the 2nd to 7th Counter-claimers.
2. Arising from the question that was posed to DW1, learned counsel Taib Ali Taib [SC] took an objection and contended that the question under reference was raising new issues which had not been addressed during the cross examination. In particular, it was contended that re-examination is circumscribed and confined to matters that arose during cross examination and not otherwise.
3. Furthermore, learned counsel for the Plaintiff contended that re-examination is guided by the provisions of Section 146[3] of the *Evidence Act*, Chapter 80 Laws of Kenya. To this end, it was therefore contended that the re-examination must be limited to the issues that arose during the Cross-Examination and cannot be expanded to address questions that were not touched on during cross examination of the witness.
4. On his part, learned counsel Mr. Kyalo Mbobu contended that the witness [DW1] had been subjected to cross examination on a number of issues including whether the Plaintiffs herein were the advocate for the witness.



5. Additionally, it was contended that though the witness was cross examined whether the Plaintiffs were his [witness] advocates, it is instructive to recall that the witness herein was not only testifying on his own behalf, but also on behalf of the counter-claimers. In particular, it was contended that the witness was also testifying on behalf of the various companies who are the counter-claimers herein.
6. Further and at any rate, learned counsel Mr. Kyalo Mbobu also submitted that during cross examination, learned senior counsel Mr. Taib Ali Taib did not distinguish to the witness whether the question concerned the witness as the 1st Defendant or the witness in his capacity as a director of the companies, who are the counter-claimers.
7. To this end, it was contended that Learned counsel Mr. Taib Ali Taib [Sc] cannot now be heard to draw a distinction between the witness and the companies, namely, the Counter-Claimers.
8. Other than the foregoing, learned counsel Mr. Kyalo Mbobu also contended that the objection being taken by learned senior counsel Mr. Taib Ali Taib, is intended to restrict and/or limit the evidence being tendered on behalf of the 1st Defendant. In this regard, learned counsel Mr. Kyal Mbobu posited that the objection under reference constitutes a violation of the provisions of Article 50 of *the Constitution* 2010.
9. Finally, learned counsel Mr. Kyalo Mbobu also submitted that the 1st Defendant herein has adverted to the fact that the Plaintiffs herein were both his lawyers as well as the lawyer/advocate for the various companies in which the witness was/is a director. In this respect, learned counsel Mr. Kyalo Mbobu has highlighted and referenced paragraph 27 of the statement of defence and counterclaim.
10. Arising from the foregoing submissions, learned counsel Mr. Kyalo Mbobu has therefore invited the court to find and hold that the objection taken/raised by Mr. Taib Ali Taib [SC] is misconceived and thus ought to be dismissed.

#### **Issues For Determination:**

11. Having listened to the submissions canvassed by and on behalf of the parties, the following issues emerge [crystallise] and are thus worthy of determination;
  - i. Whether the witness [DW1] was cross examined on the issues surrounding whether the Plaintiffs were advocates for the various companies or otherwise.
  - ii. Whether an issue which was not taken during cross examination can found and/or anchor a question on re-examination or otherwise.

#### **Analysis And Determination**

##### **Issue Number 1 Whether the witness [DW1] was cross examined on the issues surrounding whether the Plaintiffs were advocates for the various companies or otherwise.**

12. DW1 [Harish Kumar Kanabar] tendered evidence in chief and thereafter produced various documents which had been filed on behalf of the 1st Defendant and on behalf of the counter-claimers. Thereafter, the witness was subjected to extensive cross examination by learned counsel for the Plaintiffs and learned counsel for the 2nd Defendant, respectively.
13. During and in the course of cross examination by learned counsel for the Plaintiff, namely, Taib Ali Taib [SC], the witness was cross examined on whether the Plaintiffs herein were his [witness] advocates. Pertinently, the witness [DW1] posited that the Plaintiffs herein had been his [witness] advocates for more than 15 years.



14. Arising from the answer that was given by the witness [DW1], learned counsel for the Plaintiffs ventured forward and sought to know from the witness whether same [witness] had tendered any document to demonstrate that the Plaintiffs were his advocates for 15 years in the manner contended. However, the witness herein was unable to highlight any document.
15. Be that as it may, it is apposite to underscore that the witness was not cross examined on whether the Plaintiffs herein were advocates for the various companies, namely, the 2nd, to the 7th counter-claimers.
16. Notwithstanding the foregoing, learned counsel for the 1st Defendant chose to undertake re-examination and posed a question as to whether the Plaintiffs were advocates for the various companies, namely, the 2nd to the 7th counter-claimers. It is this question that generated the objection by Taib Ali Taib [SC] for the Plaintiffs.
17. I beg to underscore that the questions which were posed to the witness concerned a specific area/issue, namely, whether the Plaintiffs were advocates for the witness. In any event, the responses that were given by the witness were clear and devoid of ambiguity. For good measure, the witness posited that the Plaintiffs were his [witness] advocates for 15 years.
18. I must point out that no question was posed to the witness as to whether or not the Plaintiffs were advocates for the various companies, namely, the 2nd to the 7th counter-claimers. To this end, it is common ground that no re-examination can therefore be undertaken on the aspect pertaining to whether or not the Plaintiffs were advocates for the various companies, namely, the 2nd to the 7th counter-claimers.
19. Additionally, it is instructive to underscore that even though DW1 could very well be a director of the 2nd to the 7th Counter-claimers, but there is no gainsaying that DW1 is a separate and distinct person from the said companies. Consequently, where a question concerned DW1 in person, such a question cannot be misunderstood to touch on and/or concern the company, wherein same [ Witness] is a Director.
20. For the avoidance of doubt, DW1 understood the import and tenor of the questions that were posed to him by learned counsel Taib Ali Taib [Sc]. Pertinently, the response by DW1 was a personalized response. It had nothing to do with the companies.
21. Before departing from this issue it is apposite to cite and reference the decision[s] in *Salmond v Salmond* [1897] AC 22; *Omondi v National Bank of Kenya* [2001]eKLR and *Ardhi Highway Developers Ltd v Westend Butchery Ltd & 6 Others* [2015]eKLR, respectively, where the courts underscored the distinction between the directors and the company.
22. Having cited and referenced the decisions [supra], it suffices to underscore that the questions that were posed to the witness touched on and concerned whether the Plaintiffs were advocates for the witness and not the companies wherein the witness was a director.
23. Consequently and in the premises, the learned counsel for the 1st Defendant cannot be allowed to conflate the question[s] and thereafter bring the companies into perspective. Such an endeavour will venture outside the area wherein the Witness was cross-examined.

**Issue Number 2 Whether an issue which was not taken during cross examination can found and/or anchor a question on re-examination or otherwise.**

24. Having found and held that the question[s] that were posed to the witness touched on and concerned whether the Plaintiffs were advocates for him [witness] and not the 2nd to the 7th Counter-claimers,



the next issue that merits discussion relates to whether learned counsel for the 1st Defendant can be allowed to re-examine on an aspect and issue that did not arise during cross examination.

25. To start with, there is no gainsaying that re-examination is confined to questions and issues that arose during cross examination. In any event, re-examination is intended to clarify any controversy and/or ambivalence that arose out of the cross examination.
26. On the other hand, it is also worth stating that re-examination cannot be deployed for purposes of bringing forth new issues that were not touched on and/or addressed during cross examination. For coherence, re-examination is circumscribed by the law and the parameters thereof are well set vide the provisions of Section 146[3] of the [Evidence Act](#), Chapter 80 Laws of Kenya.
27. For ease of appreciation, the provisions of Section 146[3] of the [Evidence Act](#) [supra] are reproduced as hereunder;
  146. Order and direction of examinations
    1. Witnesses shall first be examined-in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.
    - (2) Subject to the following provisions of this Act, the examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief.
    - (3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
    - (4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively
28. Flowing from the foregoing provisions, it is crystal clear that an issue that did not arise during cross examination cannot be addressed and/or adverted to during re-examination, unless the Leave of the Court has been sought for and obtained beforehand. To do so would be tantamount to introducing a new issue and thus exposing the adverse party to undue prejudice and grave injustice.
29. Suffice it to posit that the aspect which was being adverted to by learned counsel for the 1st Defendant [Mr. Kyalo Mbobu], maybe contained at the foot of paragraph 27 of the statement of defence and counterclaim. However, what can be dealt with and adverted to during re-examination is not guided by the contents of the pleadings filed, but by what arose during cross examination and no more.
30. In a nutshell, it is my finding and holding that the question touching on and concerning whether the Plaintiffs were advocates for the companies wherein the 1st Defendant was a director, would bring forth a new issue.
31. Such new issue, is prohibited during re-examination.

### **Final Disposition:**

32. Flowing from the discussion [details enumerated in the body of the ruling], it must have become crystal clear that the endeavour by learned counsel [Mr. Kyalo Mbobu] for the 1st Defendant to address a question that was not canvassed during cross examination, is clearly barred by Section 146[3] of the [Evidence Act](#), Chapter 80 Laws of Kenya.



33. In the premises, the objection by and on behalf of the Plaintiffs is merited. Consequently, same be and is hereby upheld.

34. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2024.**

**OGUTTU MBOYA,**

**JUDGE.**

In the Presence of:

Benson - Court Assistant.

Mr. Taib Ali Taib [SC] for the Plaintiffs.

Mr. Kyalo Mbobu EBS for the 1<sup>st</sup> Defendant/Counter-claimers.

Mr. Victor Kioko h/b for Mr. Emanuel Mumia for the 2<sup>nd</sup> Defendant.

