



**Magendo & another v Miningwo & 3 others (Environment & Land Case
13 of 2021) [2023] KEELC 20472 (KLR) (2 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 13 OF 2021
LL NAIKUNI, J
OCTOBER 2, 2023**

BETWEEN

MWANAMISI ALI MAGENDO 1ST PLAINTIFF

STEPHEN MUTHOKA JAMES 2ND PLAINTIFF

AND

KIPLANGAT CHRISPTOPHER MININGWO 1ST DEFENDANT

JOAN JEPTOO NG'ENO 2ND DEFENDANT

**SHIMAKA NECHEZA LEONARD T/A MARENDE NECHEZA
ADVOCATES 3RD DEFENDANT**

LANDS REGISTRAR, MOMBASA 4TH DEFENDANT

RULING

I. Introduction

1. What is before this Honorable Court for determination is a Notice to Cross examine dated June 8, 2023 by the 3rd Defendant herein, Shimaka Necheza Leonard trading as Marende Necheza Advocates. From the said notice he has indicated his intention to cross examine to cross examine Mr Daniel Mutiso Ngonze, an Advocate of High Court and who is currently and was for the Plaintiffs.
2. There was no opposition to the said notice and parties elected and did not submit on the application.

II. Analysis and Determination

3. The only issue for consideration is whether the notice to cross examine Mr Daniel M Ngonze should be granted.



4. Order 19 Rules 1 & 2 of the [Civil Procedure Rules](#), Cap 21 states:

“Power to order any point to be proved by affidavit [Order 19, rule 1]

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. Power to order attendance of deponent for cross-examination [Order 19, Rule 2]

(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.”

5. Allowing cross-examination on an affidavit and documents drafted and filed 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. Given that Order 19 permits the use of affidavits as evidence, courts should avoid allowing cross-examination of the deponent’s affidavits unless the circumstances merit it. Additionally, this action may result in increased costs due to cross-examination during interlocutory proceedings and unduly prolonging the suit, which is not envisioned in sections 1A and 1B of the [Civil Procedure Act](#).

6. In the case of:- “[Republic – Versus - Kenya Revenue Authority Ex - Parte, Althaus Management & Consultancy Ltd](#) [2015] eKLR”, the Court stated:

“[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. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined.” (see also [Ahmednasir Abdikadir & Co Advocates – Versus - National Bank of Kenya Limited \(2\)](#) [2006] 2 EA 6).”



7. Similarly, in the case of:- “*Lawson and Anor – Versus - Odhams Press Ltd and Anor* (1948) 2 All ER 717”, the court held that cross-examination on an affidavit in support of an interlocutory application should be allowed only in special circumstances. In the case of “*G G R – Versus - H-PS* [2012] eKLR”, where the court 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.”

8. And in the case of “*Baby – Versus - Sekar*, Petition MP No 1 of 2014 (2 December 2014)”, the High Court of India sitting at Madras while dealing with Order 19 rule 2 of the *India Code of Civil Procedure* which is similar in all fours to ours, stated:

“...it has been stated that the party has to make out a case for the exercise of that power by the court and absolute discretion is vested with the court either to allow it or reject the same. Further, a reading of Order XIX Rule 2 of the Code of Civil Procedure makes it clear that when any evidence is given by affidavit, the court may at the instance of either party order the attendance for cross examination of the deponent.”

9. The decisions are in agreement that cross examination is a tool that is allowed in law and the court has discretion to order a deponent to appear for cross examination. The notice of cross examination dated June 8, 2023 stated that the intention to cross examine the Learned Counsel for the Plaintiffs was on the documents over the facts he knows and the documents drawn and commissioned by himself and/or firm. The paragraphs just deduces what is on the Court record, namely the Plaint, verifying affidavit by the Plaintiff and annexures.

10. In the case of “*Francis Mugo & 22 others – Versus - James Bress Muthee & 3 others* [2005] eKLR” Justice Daniel Musinga (as he then was) as sighted in the case of:- “*Sbalimar Limited & 2 others – Versus - Sadrudin Kurji & Another* [2015] eKLR” noted that:

“... an advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself and a duty to the state as was well put by Richard Du Cann in “The Art Of The Advcoate.” As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client and that is to the cause of justice and truth.”

11. Order 19 rule 2 of the *Civil Procedure Rules* gives the court the power to allow the cross-examination of a deponent on the contents of an affidavit. Order 19 Rule 2(1) provides as follows:

“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.”



12. The court retains the discretion whether to allow or not to allow the cross-examination. However, that discretion must be exercised judiciously upon demonstration of sufficient grounds in reference to the contents of the affidavit in question. To allow cross-examination on the contents of an affidavit, the Court must be satisfied that the cross-examination is necessary in the interest of justice as seen in the decision in “*GGR vs HP S [Supra]*”. The provision of Order 51 rule 1, Order 1 rule 2 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 65 (e) of the Civil Procedure Act do not donate any jurisdiction to the court to issue any of the orders sought.
13. Be that as it may since the Notice to Cross examine Mr Daniel Mutiso Ngonze has been made by the 3rd Defendant’s advocate and the Plaintiffs’ advocate Mr Ngonze has not opposed the same, I find that his testimony may add value in determining the dispute herein.

IV. Conclusion & Disposition

14. For the foregoing reasons, and based on the in-depth analysis of all the framed issues herein the Honorable Court on preponderance of probability, fairness, equity and conscience arrives at the following findings:-
 - a. That the Notice to Cross examine application dated June 8, 2023 by the 3rd Defendant herein of Mr Daniel Mutiso Ngonze be and is hereby found to have merit. Hence, the said application is allowed.
 - b. That the Plaintiffs’ advocate Mr Daniel Mutiso Ngonze is hereby called to be cross examined by the Advocate for the 3rd Defendant on February 7, 2024 and further direction. In essence the earlier hearing date scheduled for November 14, 2023 be and is hereby vacated.
 - c. That the Advocate for the Plaintiffs is at liberty to file any document he may want to relay on before embarking on the Cross examination, per excellence.
 - d. That costs of this application shall be in the cause.

It is so ordered accordingly

**RULING MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DELIVERED AT MOMBASA
THIS2NDDAY OF.....OCTOBER..... 2023.**

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HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of: -

- a. M/s. Yumnah Hassan, the Court Assistant.
- b. No appearance for the Plaintiff/Respondent.
- c. No appearance for the 1st Defendant.
- d. M/s. Kiti Advocate for the 2nd Defendant.
- e. Mr. Ondieki holding brief for Mr. Shimaka for the 3rd Defendant/Applicant.

