



**Affaki v Technoservice Ltd (Miscellaneous Application E049 of 2024)
[2025] KEHC 4291 (KLR) (Commercial and Tax) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E049 OF 2024**

NW SIFUNA, J

APRIL 4, 2025

BETWEEN

GEORGES AFFAKI APPLICANT

AND

TECHNOSERVICE LTD RESPONDENT

RULING

1. This ruling is on the Respondent's Application dated 4th March 2024. The same which is brought by way of a Chamber Summons has cited Article 159 of *the Constitution* of Kenya, Section 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21 Laws of Kenya), as well as Order 19 Rules 2 and 9 of the Civil Procedure Rules. It is supported by the Supporting Affidavit of Bullent Gulbahar a Director of the Respondent Company Technoservice Ltd; sworn on 4th March 2024.
2. This Application has been filed in this file a Miscellaneous Cause filed by the Applicant Georges Affaki.
3. The Application seeks an order that summons be issued to the said Georges Affaki and his Advocate herein Ms Eunice Lumallas; to both attend this Court and be cross-examined on the Amended Notice of Motion dated 15th February 2024, its Supporting Affidavit and Annexures.
4. From the grounds as stated in the Application, the main reason for the proposed cross-examination is to enable the Respondent re-test the accuracy and truthfulness and ascertain facts as stated by the Applicant and the said Advocate Eunice Lumallas in the said motion and Supporting Affidavit.

Analysis and Determination

5. The Application was canvassed by way of Written Submissions. I have considered the Application and its Supporting Affidavit, the response to it, as well as the rival submissions of the parties.



6. In any litigation, the court is an umpire and the litigation process is on the facts, evidence and the law; and on the standing of the parties. It is usually one litigant's word against the other's word. The pull and shove in this Application, evidences not only the dispute the subject of this litigation, but also the acrimony between the parties, as well as other underlying currents, and the apparently irreconcilable differences between the parties.
7. A court of law decides cases based on the law, rather than on the emotions of the parties. Despite the magnitude of their ill-will and hatred for each other, this Court should guard itself from descending into the dispute; no matter how much the parties desperately attempt to whip its emotions.
 1. I find no logically compelling grounds nor legal justification for granting the orders sought in the Respondent's Application for the cross-examination of the Respondent and his Advocate. A court cannot grant orders whose intended net effect is the inflaming of the already toxic passions between the parties, or the massaging of a party's ego. That is an enterprise that is not the province of litigation; and in that, a court should not venture.
 2. Order 19 Rule 2 (1) of the Civil Procedure Rules states as follows:

"Upon any application, evidence, may be given by affidavit, but the court may, at the instance of either party, order attendance for examination of the deponent."
10. This provision empowers a court to allow the cross-examination of a deponent that has sworn an Affidavit to attend for cross-examination on that Affidavit. That is not however as of right, but in the discretion of the court in accordance with the dictates of justice. That being neither for the mere purpose of interrogation or harassment; nor for mere sake of tongue-lashing; nor as a fishing expedition. Such an Application therefore has to be in the interest of justice and made in good faith.
11. Besides, an Order 19 order for cross-examination, is limited only to a deponent and on the particular Affidavit. It can neither extend to the witnesses in the case, or be on the dispute generally. Courts should grant this order very sparingly. More so in interlocutory proceedings, there is no need for the parties to dance themselves lame before the main dance commences.
12. Before such an Application is granted, the requisitioner must justify and lay a solid foundation for the need for such examination.
13. Besides, the Application should not be made in bad faith and not maliciously, or be merely a curtain-raiser or precursory fight in the main duel at the main hearing, or be merely calculated to cleverly obtain from such examination, answers for use at the main hearing. In other words, that cross-examination should not be intended to be mock trial or a "trial within trial."
14. In the instant case, from the grounds stated in Mr Bullent's lengthy and overly argumentative Supporting Affidavit, the proposed cross-examination is all the above; and for the wrong reasons. To the extent that his Application is not only misconceived, but is also vexatious and an abuse of the court process.
15. That notwithstanding, Advocates should refrain from swearing Affidavits for their client's case; especially on contested contentious issues or matters and facts that are not within their knowledge or that they are not sure about. This is what Ms Lumallas the Applicant's Advocate did in this matter. Where a party's Advocate considers it prudent to swear an Affidavit in the litigation, he or she should before doing so, insist on obtaining relevant documents and sufficient evidence for any facts they intend to depone to.



16. Proceeding as Ms Lumallas did, may not only open them to cross-examination, but may also lead to such Affidavits being struck out and the Application they support remaining naked and unsupported. It is a dicey and sometimes needless venture worth avoiding. Even just the potential embarrassment that may result from any Order 19 cross-examination.
17. In the end, I find that this Application has failed to meet the legal threshold for the orders sought. In terms that the Respondent's plea for the cross-examination of the said Ms. Eunice Lumallas Advocate and her client Georges Affaki, is hereby declined. In consequence, the Respondent's Application is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF APRIL 2025.

PROF (DR) NIXON SIFUNA

JUDGE

