



**Neptune Credit Management Limited v Raja (Commercial Case E412 of 2022)
[2024] KEHC 68 (KLR) (Commercial and Tax) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 68 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E412 OF 2022
JWW MONG'ARE, J
JANUARY 11, 2024**

BETWEEN

NEPTUNE CREDIT MANAGEMENT LIMITED PLAINTIFF

AND

HITEN KUMAR RAJA DEFENDANT

RULING

1. On 19th October, 2022, The Plaintiff filed a suit against the Defendant vide a plaint and on 30th November 2022, obtained an interlocutory judgment against the Defendant. Subsequently, the Defendant vide a Notice of Motion dated 16th December 2022 sought to set aside the interlocutory judgment and to obtain leave to file a defence out of time which application triggered the filing of the instant application by the Plaintiff, seeking to have the Defendant cross-examined. Directions were given by Mabeya J. that the application for cross-examination be heard first.
2. This ruling therefore determines the Notice of Motion application dated 23rd January, 2023. The Application is brought under Order 19 Rule 2 of Civil Procedure Rules, Sections 1A, 1B, 3 & 3A and Article 157 of *the constitution* and all other enabling provisions of law. The Application seeks to an order to cross-examine Hiten Kumar Raja, the Defendant, on matters deposed in respect of the affidavits sworn on 12th October, 2012, 26th May 2014 and 7th August 2015 in ELC No. 261 of 2010, ELC 262 of 2010 and in the Court of Appeal Civil App No. 94 of 2015. It also seeks for an Order for the costs of the application be provided for.
3. The application is supported by the supporting affidavit by Briyan Yongo sworn on 23rd January, 2023 and the grounds thereon. The gist of the application is that under Section 34(1)(b) and (d) of the *Advocates Act*, the evidence tendered by a witness in a judicial proceeding is admissible in subsequent judicial proceedings for purposes of proving facts which related to it, and that therefore the affidavits



- deponed by the Defendant depict the fraudulent and extravagant character of the Defendant, they constitute misrepresentation and a forgery to suit different circumstances. The Applicant argues that the Defendant has committed perjury under Section 108 of the Penal Code, which is an offence punishable under Section 110 of the Penal Code. Further the Applicant contends that the Defendant has come to the court seeking various orders under equity with unclean hands and has failed to do equity. The Applicant seeks to be allowed to cross examine the Defendant on matters related to previous judicial proceedings before other courts but which argue are key to the case present before the court.
4. The Defendant in response to the Applicant's application on 14th February, 2023 filed the Replying Affidavit opposition thereto sworn by Hiten Kumar Raja. In the said Affidavit Mr. Raja avers the application as filed is speculative, misconceived, bad in law and an abuse of the court process based on the fact that the Applicant has failed to set out with specificity the exact paragraphs in the affidavits that it seeks his cross-examination. In addition, the Respondent states that the averments contained in the said affidavits do not relate to the instant suit nor to his application dated 16th December, 2022. It is Mr. Raja's position that the Plaintiff has failed to demonstrate any nexus between the affidavits deponed in the various suits and the instant suit. Further, Mr Raja argues that the issues so raised in the affidavits can be dealt with by way of supplementary affidavits or submissions and therefore cross-examination of the Defendant is not necessary. The Defendant further contends that the Plaintiff cannot rely on the provisions of section 34 of the *Evidence Act* as it was not a party to the proceedings, and the issues in the said suits do not arise in the current suit. Further, the Defendant avers that the orders sought are prejudicial to him as they deny the court an opportunity to review the context, issues and facts against which the affidavits were sworn as the Applicant has failed to annex the applications. He urges the court to dismiss the application with costs.
 5. In his Supplementary Affidavit sworn on 14th February, 2023 Bryan Yongo Otumba attached the impugned affidavits pointing out the crucial paragraphs to be subjected to cross-examination. Sufficient evidence has been adduced to demonstrate it is necessary to cross-examine the Defendant.
 6. Both parties filed written submissions with the Plaintiff submissions dated 2nd February 2023 and the supplementary submissions on 24th February 2023, while Defendant filed submissions on 1st March 2023.

Plaintiff's Submissions

7. Mr. Luko, Counsel for the Plaintiff submits that alleged averments in the affidavits sworn by the defendant herein dated 26th May 2014 filed in ELC of 262 OF 2010 are in respect to paragraphs 3,4,5,6,7,8,16,17,18 and 19. In the affidavit sworn on 12th October 2012 is in respect to paragraphs 5,6,7,8,9,10,11,13,14,15 and 21 which ought to be read conjunctively with the affidavit sworn by the Defendant herein dated 16th December 2022.
8. It is submitted that the affidavits aforesaid contain contradictions that depict the fraudulent and profligate character of the Defendant. The Defendant has contradicted himself on oath by telling lies and casting aspersions on people he instructed to render services for him at a very difficult time. The illegality of Perjury, once raised, is to be treated the same way as want of jurisdiction.
9. Mr. Luko cited the case in John Buog Bange Vs Chrispin Alouch & Others, Kisii High Court Civil Case No 209 of 1995 where the court held "An Applicant who makes statements which are obviously untrue, disqualifies him from coming to court for an equitable remedy"



10. Counsel argued the Plaintiff has established a good reason and/or basis for the Defendant to be cross-examined on his affidavits. The cross-examination being sought is to test the credibility, the inherent believability of the Defendant and the internal consistency /reliability of the evidence.
11. It was further submitted that the court ought to look at the demeanour of the witness during cross examination as the allegations contained in the affidavits are a pack of lies, which constitutes perjury.
12. Mr. Luko also referred to the ruling of Honourable Justice Mutungi dated 23rd May 2013 and the judgement of the Court of Appeal in Civil Appeal No. 197 of 2015 wherein the Court of Appeal re-affirmed the ruling of Honourable Mutungi J wherein the effect of the ruling and subsequent judgement rendered the issues of Instructions and Letters denied by the defendant herein res-judicata. Counsel urged the court to allow the application as prayed.

Defendant's Submissions

13. Mr. Mwangi learned Counsel submitted the Supplementary affidavit, Supplementary submissions and replying affidavit in response to the Defendant's affidavit were filed without leave of the court in contravention of Order 51 Rule 14(3) of the Civil Procedure Rules. That the affidavits and submissions sought to illegitimately amend and expand the character of the Plaintiff's application from where the Plaintiff seeks cross-examination of the Defendant on various affidavits to one where the Defendant ought to be punished for the alleged perjury in previous proceedings. That the Applicant disregarded the orders of Chepkwony J. as delivered by Mabeya J. where a response was to be filed within 14 days and thereafter parties were to exchange submissions. Counsel called on the court to expunge the documents filed without leave of the court.
14. Mr. Mwangi further submitted that there were only two issues for the court to consider, the first issue being whether the Applicant has made an appropriate case for cross-examination of the Defendant with respect to the supporting affidavit sworn on 16th December 2022. Here, counsel argued that Plaintiff has failed to meet the threshold of the burden of demonstrating valid cause for cross-examination as laid down under Section 107 of the *Evidence Act*. Counsel stated that Plaintiff's application only makes general and vague allegations of perjury against Defendant without setting out the Specificity of the averments. Counsel cited the case in *GGR vs HPS (2012) eKLR* where the court held:-

“Further, the order for cross-examination is a discretionary order but as is in all discretion the same must be exercised judiciously and not whimsically, there should be specific circumstance before ordering a cross-examination of a deponent of an affidavit. the court must feel that adequate material has been placed before it that shows that it is in the interest of justice and to arrive at the truth, it is just and fair to order cross-examination”

15. In Further submissions, Counsel argued that the Plaintiff had failed to demonstrate how the cross-examination of the Defendant is in the interest of justice or will enable the court to determine the issues at hand efficaciously, the application is ripe for dismissal for failure to demonstrate any justifiable cause to warrant cross-examination. Counsel cited the case in *Nancy Wanja Gatabaki vs Ashford Muriuki Mugwuku (T/A Ashford & Co. Advocates) (2013) eKLR* where the court held:-

“...The question to ask is whether any material has been placed before the court which would assist in the exercise of its discretion. An application to cross-examine the deponent of an affidavit must lay a proper basis for such an application. He must state which specific paragraphs and allegations in the affidavit in question give rise to the need for cross-



examination. the applicant herein should have demonstrated which portions of the two affidavits of the Respondent she needed to cross-examine him upon and affidavits of the Respondent she needed to cross-examine him upon and why it was necessary to cross-examine. the Applicant has not discharged this burden. it is not sufficient merely to request for leave to cross-examine, there must be a proper basis for it.”

16. Further, Mr Mwangi argued the issues sought to be cross-examined in the affidavit sworn on 16th December 2022 are issues that cannot be addressed at an interlocutory stage, as they touch on main issues in the suit.
17. In addition to the above submissions, Counsel identified the second issue for consideration by the court as being whether the affidavits sworn on 12th October 2012, 26th May 2014 and 7th August 2015, were admissible having been filed without leave of the court. Counsel argued that the said affidavits were filed in contravention of Section 34 of the *Evidence Act* and having been filed without the requisite leave of the Court, the Defendant cannot be cross-examined on their averments. Further, there was no basis laid to demonstrate that the deponent of the affidavits, who is alive and available, why he could not be called to testify. It was further argued that the Plaintiff was not a party to the proceedings in Nairobi ELC No. 261 of 2010, 262 of 2010 and Court of Appeal application no 94 of 2015. And as such the Plaintiff did not have a chance to cross-examine the Deponent.
18. The Affidavits filed in Nairobi ELC No. 261 of 2010, 262 of 2010 and Court of Appeal application no 94 of 2015 are not relevant to the said proceedings. Counsel argued that there was mischief in the Plaintiff’s failure to furnish the court with all pleadings in the three suits. In conclusion Mr. Mwangi urged the court to dismiss the application as filed.

Analysis and Determination

19. I have considered carefully the application by the Plaintiff and the supporting affidavit, the Responses filed by the Defendant and the rival written submissions together with the oral highlights of the same. Two issues emerge for determination, to wit:-
 - i. Whether the Supplementary affidavit, Supplementary submissions and replying affidavit in response to the defendant’s affidavit ought to be expunged?
 - ii. whether Plaintiff has laid a legal basis for grant of the order sought for cross-examination of Defendant.
20. I will first deal with the first issue of expunging the documents filed without leave of the court. Mr Mwangi, Counsel for the Defendant submitted that the Plaintiff filed a supplementary affidavit, supplementary submissions and Replying Affidavit in response to the Defendant’s averment without first seeking the leave of the court to do so and effectively denying the Defendant an opportunity to respond thereto. Further, Counsel argues that the Plaintiff acted in total disregard the orders court issued by Lady Justice Chepkwony as delivered by Mabeya J. which was to the effect that the Defendant was to file a response to the application and thereafter parties to exchange written submissions. The said orders did not include leave to put in further supplementary affidavits or submissions thereto.
21. I have perused the documents seeking to be expunged, the same seeks to cure some inadvertent omissions in the Plaintiff’s case, the supplementary affidavit sworn on 14th February 2023, introduces the specific paragraphs in the said affidavits that the Plaintiff seeks the cross-examination of the Defendant. That the Supplementary Affidavit and the replying affidavit were filed after Defendant filed its replying affidavit sworn on 14th February 2023 where it raising the issue that Plaintiff had failed to



meet the threshold of granting the orders sought for failure to set out the specific paragraphs it sought to have Defendant cross-examined.

22. A perusal of the record of proceedings demonstrates the Defendant was indeed granted 14 days to file submissions and thereafter parties were to exchange written submissions and that there is no record that the Plaintiff sought the leave of the court to introduce new pleadings in form of a supplementary affidavit nor the supplementary submissions or the replying affidavit in response to Defendant's affidavit. It is thus clear that the documents were filed without leave of the court.
23. The question therefore is whether the said documents ought to be expunged from the record. Whereas I note that the Plaintiff amended its inconsistencies in the supplementary affidavit and introduced new facts, this action was prompted by the replying affidavit filed by the Defendant, the Defendant did not have a chance to respond to the supplementary affidavit as he proceeded to file written submissions.
24. It was the argument of Mr. Mwangi that the supplementary affidavit introduced a new concept of perjury and forgery as opposed to meeting the threshold of cross-examination. He averred that the Defendant stands to suffer prejudice if the same were allowed to stand as they did not have corresponding opportunity to rebut or controvert the new materials introduced by the supplementary affidavits.
25. It is paramount to note that parties ought to be guided by the directions issued by the courts as directions are not issued in vain. There must be a restriction on the number of documents a party files and is not to file a plethora of documents. Parties are also encouraged to adhere to the court orders to encourage expedient disposal of justice. In the spirit of Article 159(2) of *the constitution* court orders ought to be obeyed. The court having issued directions on how the application would be dispensed it was imperative for the Plaintiff to seek leave before filing the supplementary affidavit, and submissions and the Replying Affidavit.
26. In the circumstances this court finds that the impugned affidavits and supplementary submissions will cause prejudice to the Defendant on the basis that they introduce new facts that need to the Respondent by the Defendant, the Plaintiff seems to respond to every issue raised by the Defendant. I, therefore, find that the supplementary affidavit, supplementary submissions and replying affidavit filed without leave of the court ought to be expunged from the record.
27. Before I proceed with the second issue, I must state that I do agree with the Plaintiff that the issue of cross-examination of a deponent of his affidavits would not amount to res-judicata as the same does not amount to the determination of issues.
28. On the second issue as to whether Defendant ought to be recalled for cross-examination. The Plaintiff in its affidavit in support of the application did not single out the specific paragraphs to which he seeks the Defendant to be cross-examined. Plaintiff however singled out the specific paragraphs to show the perjury and misrepresentation by Defendant in the supplementary affidavit expunged supplementary affidavit which the court will not consider.
29. Order 19 of the Civil Procedure Rules. Rule 2(1) provides that a deponent may be called to attend Court for cross-examination at the instance of a party.

The provision states that: "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. Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs"



30. In *Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 Ors.*, [2013] eKLR, held that:-

“In my view then, the provisions of Order 19 Rule 2(1) of the Civil Procedure Rules and Rule 12(2) (c) of the Elections (Parliamentary and County Elections) Petition Rules should be interpreted to mean that the cross-examination of a deponent is not mandatory, but the court may, in the exercise of its discretion and on application by either party, order that a deponent be cross-examined. In the exercise of such discretion, the court should seek the demonstration by the applicant that there are sufficient grounds for making an order for cross-examination. Such demonstration should be by reference to the material contained in the affidavit whose deponent is sought to be cross-examined to show that the affidavit contains disputed matters when examined against the affidavit by the respondent. Where no sufficient basis has been laid the request to cross-examine should be declined.”

31. I, respectfully, agree with the above decision to the effect that the court is vested with the discretion to grant or decline to grant an order for the cross-examination of a deponent, the discretion should however be exercised judiciously. A party seeking the orders of cross-examination must demonstrate sufficient consideration for cross-examination for the court to exercise its discretion in doing justice to the parties.

32. Opposing the application for cross-examination the Defendant argues that is not necessary for the Defendant to be summoned to attend court but his cross-examination can be dealt with by way of an affidavit or submissions. Whereas I do agree that a party doesn't need to burden the court with oral presentations in court and the averments could be pointed out by way of submissions or affidavit. I find it in the interest of justice to accord all parties a fair chance for a hearing if sufficient cause for cross-examination has been established.

33. In the case of *LSK Vs Faith Waigwa & 8 others* 2015 eKLR the Court observed that cross-examination is:- Mechanism to bring out desirable facts to modify/clarify/establish cross-examiner's case. Impeach the creditworthiness of a witness. To give the Court an early opportunity to glimpse what is to be expected during the substantive hearing.

34. The Plaintiff failed to set out the specific paragraphs in the affidavit that he seeks the cross-examination of the Defendant, he set out the specific paragraphs in the expunged supplementary affidavit. In the absence of specific paragraphs to subject Defendant to cross-examination, I find that Plaintiff failed to lay a basis for cross-examination of the Defendant.

35. In the circumstances I do find that the Notice of Motion dated 23rd January 2023, is bereft of merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JANUARY, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

No appearance for the Applicant.

Mr. Mwangi and Ms. Kimani for the Respondent.

AMOS - COURT ASSISTANT

