



**Abbey v Inspector General of the National Police Service & 2 others (Constitutional Petition E008 of 2024) [2024] KEHC 3589 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3589 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E008 OF 2024**

**OA SEWE, J**

**APRIL 15, 2024**

**IN THE MATTER OF ARTICLES 19, 20, 21 AND  
22 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLES 26 OF THE CONSTITUTION AND THE RIGHT TO LIFE**

**AND**

**IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION  
AND THE PROTECTION OF TH RIGHT TO PROPERTY**

**BETWEEN**

**DAVID ABBEY ..... PETITIONER**

**AND**

**INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**MINISTER FOR INTERIOR AND NATIONAL COORDINATION .... 2<sup>ND</sup>  
RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This matter was filed under a Certificate of Urgency on 11<sup>th</sup> March 2024 by the petitioner. It was accordingly certified urgent and interim relief granted pending hearing of the application on 11<sup>th</sup> March 2024. When it came up for hearing, counsel for the respondents indicated that, along with



their Replying Affidavit, they had filed a Notice to Cross-examine the Petitioner at the hearing of the application. Indeed, the said Notice, dated 18<sup>th</sup> March 2024, is on the e-filing portal.

2. In his submissions to the Court on 19<sup>th</sup> March 2024, Mr. Makuto, counsel for the respondents pointed out that the Notice to Cross-examine along with the respondents' Replying Affidavit had been served on the petitioner's counsel, Mr. Magolo, on 18<sup>th</sup> March 2024; and while Mr. Magolo conceded to having received the Notice to Cross-examine, he denied service of the Replying Affidavit. He further objected to the Notice to Cross-examine, contending that that a formal application ought to have been filed and served to give the petitioner an opportunity to be heard in that regard.
3. On his part, Mr. Makuto was of the conviction that the Notice to Cross-examine is sufficient in itself; hence this ruling. Counsel pointed out that the need to cross-examine the petitioner is necessitated by the fact that he was declared a persona non grata and was accordingly deported, as confirmed by the documents annexed to the respondent's Replying Affidavit. Thus, Mr. Makuto disclosed that the respondents only seek the cross-examination of the petitioner to confirm that he is indeed in the Country.
4. I have considered the arguments presented by learned counsel in the light of Order 19 Rule 2(1) of the Civil Procedure Rules, which is explicit that:

“(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.

5. To my mind, the provision requires that a formal application be made for leave to cross-examine a deponent; and therefore, I take the view that, for purposes of the above rule, cross-examination of a deponent is not to be initiated by a simple notice as the respondents purported to do, but must be ordered for by the Court upon sufficient cause being shown for such an order. Needless to say that, this being a discretionary power, it is to be exercised judiciously, and therefore some good reason ought to be shown to warrant the invocation of the power. In connection with this provision, I associate myself with the position taken in *G G R v H P S* [2012] eKLR that:

“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.”

6. Similarly, in *Republic v Kenya Revenue Authority, Ex Parte Althaus Management and Consulting Ltd* [2015] eKLR, it was held:
  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.”

7. In the premises, I find merit in the objection by Mr. Magolo to the Notice to Cross-examine, filed by the respondents. The objection is hereby sustained. The respondents are at liberty to file an application to that effect for consideration by the Court on notice to the petitioner.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15<sup>TH</sup> DAY OF APRIL 2024**

**OLGA SEWE**

**JUDGE**

