



REPUBLIC OF KENYA



KENYA LAW
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**Maraga v Abdullahi (Civil Case 047 of 2021)
[2024] KEHC 11744 (KLR) (Civ) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 047 OF 2021

JN MULWA, J

OCTOBER 3, 2024

BETWEEN

HONOURABLE JUSTICE RTD DAVID KENANI MARAGA PLAINTIFF

AND

AHMEDNASIR MAALIM ABDULLAHI DEFENDANT

RULING

1. The plaintiff herein is the immediate former Chief Justice of the Republic of Kenya, President of the Supreme Court, former Chairperson of the Judicial Service Commission and former Chairperson of various Councils on the Administration of Justice in Kenya.
2. The defendant is an Advocate of the High Court of Kenya, Senior Counsel and former Commissioner of the Judicial Service Commission.
He operates a social media handle on Twitter through which he posts comments, messages and tweets on various areas with over 1.1 million followers on the twitter handle who read comment and retweet on his posts.
3. By a plaint dated 22/02/2021 the plaintiff claims that on 12/01/2021 the defendant posted, published and circulated a defamatory libelous and scandalous tweet on his twitter handle @ahmednasirlaw directed at the plaintiff (particulars provided) that he avers to have been false, malicious and were designed and intended to disparage, belittle and injure his character and reputation as a retired Chief Justice of the Republic of Kenya with false twisted facts that were presented as absolute truth.
4. The plaintiff therefore sought court's intervention by way of declarations that the said posts are false, defamatory, libelous and malicious; and sought grant of permanent injunction restraining the defendant from publishing further defamatory posts and/or statements in reference to himself as well



as an award of general damages, exemplary damages and aggravated damages for the injury to his character, reputation and respect among others.

5. In Response to the claim, the defendant denied all the allegations by his statement of defense dated 20/04/2021 urging the court to dismiss the suit with costs.
6. By an Amended Chamber Summons dated 18/11/2021 premised upon provisions of Sections 1A, 1B of the *Civil Procedure Act* and Order 19 Rules 2, 3 and 9 of the *Civil Procedure Rules* as well as Articles 48, 50 and 159 of the Kenya 2010 Constitution the plaintiff sought orders:-
 1. That the Honourable Court be pleased to issue an order compelling the personal attendance of the Defendant/Respondent herein, Mr. Ahmednasir Maalim Abdullahi in open Court on a date to be given for cross-examination on the contents of his Replying Affidavit sworn on 1st November, 2021 in opposition to the Plaintiff/Applicant's Notice of Motion dated 3rd march, 2021 generally and in particular the averments and/or allegations made at paragraphs 5, 6, 22, 30, 31, 31 (in its entirety), 33, 34, 35, 36, 37, 38, 39, 40, 42 (in its entirety), 43, 44 and 46 of the said Replying Affidavit.
 2. That in default of the Defendant's Appearance in Court for cross examination, the Honourable Court be pleased to issue an Order expunging paragraphs 5, 6, 22, 30, 31, 32 (in its entirety) 33, 34, 35, 36, 37, 38, 39, 40, 42 (in its entirety), 43, 44 and 46 of the Defendant/ Respondent's Replying Affidavit sworn on 1st November, 2021 from the Records of this Honourable Court.
 3. That the costs of this application be borne by the Defendant/Respondent.
7. The application is premised on grounds stated on its face, notably breach of provisions of Order 19 Rule 3(1) and (2) of the *Civil Procedure Rules* 2010 and by the Defendants own Affidavit sworn on 1/11/2021 to the effect that an affidavit ought to be confined to facts from own knowledge save where a deponent gives statements of information and belief wherein he must show the sources and grounds thereof.
8. It is the Plaintiff's averments that the impugned affidavit makes general prolix and argumentative statements of facts, containing falsehoods and therefore seeks orders to cross-examine the defendant to clarify several averments that he claims are not borne out by facts and not supported by any evidence.
9. Additionally, the Plaintiff points to the averments needing cross examination as found at paragraphs 5, 6, 22, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40, 42, 43, 44 and 46 of the said affidavit .
10. For clarity, the impugned affidavit sworn by the defendant on 1st November, 2021 was in opposition to the plaintiff's Notice of Motion dated 3/03/2021 in which the Plaintiff sought temporary injunctive orders to restrain the defendant by himself, his agents, servants or any other person acting under his instructions from further posting or publishing any defamatory statements or publications in reference to the plaintiff in his twitter handle , or in any other social, print, electronic or other media whatsoever.
11. In opposition to the motion dated 3/03/2021, the defendant filed grounds of opposition dated 21/04/2021 and the impugned affidavit sworn on 1st November, 2021.
12. The court notes that the Motion had been fully heard before Hon. Chitembwe J after which it was assigned to this court on 25/09/2023. The parties confirmed the above status and urged the court to proceed to deliver ruling on the said motion. At the same time the court was informed of another Application filed by the Plaintiff dated 18/11/2021. The parties urged that the Motion dated



18/11/2024 ought to be determined before a ruling is delivered on the former Application dated 3/03/2021.

13. Directions on the two motions were taken that ruling in Notice of Motion dated 3/03/2024 shall be kept in abeyance, and the Motion dated 18/11/2021 be heard and determined first.

Analysis and Determination on the Amended Notice of Motion Dated 18/11/2021.

14. The court has considered the supporting grounds of the Application in terms of Order 51 Rule 4 of the Civil Procedure Rules (CPR) save that no affidavit was filed as is provided where the motion is grounded on evidence.

15. In his Replying Affidavit sworn on 1/11/2021 the defendant avers that for lack of a Supporting Affidavit the Motion is defective and an abuse of court process to seek to cross examine him at the interlocutory stage and in depth, pointing to a personal vendetta by Advocate Oduor, who represents the Plaintiff in this case.

16. By these depositions running to over twelve detailed paragraphs, it is evident that the defendant and Mr. Oduor advocate are 'professional enemies' and one would then wonder the drama that may be played before the court at the hearing of the suit!

17. Nonetheless, it is the defendant's submissions that the plaintiff has failed to establish exceptional circumstances that would warrant his cross examination on the replying affidavit that would persuade the court to grant the discretionary orders for cross examination of a deponent of his affidavit.

18. At paragraph 14 of the impugned affidavit, the defendant avers:

“ That I stand by my averments. It is the truth. The Plaintiff and I know the Judge who took the bribe. It is material to note that the Plaintiff has not denied that fact”.

19. The defendant therefore submits that to allow the plaintiff to cross examine him at this stage would be tantamount to having a trial within a trial which would be an unjust advantage as that would be against the objectives and overriding purpose provided under Sections 1A and 1B of the *Civil Procedure Act*.

20. Order 19 Rule (1) and (2) CPR empowers the court to order any point to be proved by affidavit and by sufficient reason, order that any particular fact or facts may be proved by affidavits or that the affidavit of any witness may be read at the hearing, on such condition as the court thinks reasonable provided that:-

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

21. The orders sought by the plaintiff are subject to the court finding bonafide in the request upon which the court may order attendance of the deponent for cross-examination.

22. I have carefully considered the paragraphs of the impugned replying affidavit by the defendant. Without a doubt, they contain in their entirety the defendant's defense against the plaintiff's claim, particularly at paragraphs 10, 13, 14 of the Plaintiff's claim wherein particulars for false twisted and presented as absolute truth of the publication of the alleged defamatory and scandalous tweet are set out; and at paragraph 17 (plaintiff) wherein particulars of malice are stated.

23. The court has perused and considered the very detailed Reply to Defence dated 7/05/2021 running to 52 paragraphs. My observations in the manner of reply to the defense are that the plaintiff is actually



making submissions to his case by “adducing evidence” before the case is set down for hearing wherein each party would be accorded an opportunity to adduce evidence in support of their respective cases.

24. The decisions cited, particularly Supreme Court case of *Republic Vs. Ahmed Abolfathi Mohammed & Another* [2019]eKLR speak volumes in courts view of the professional relationship between the defendant and the Supreme Court of Kenya Justices.
25. It is trite that cross-examination of a deponent in his affidavit is allowed under Order 19 Rule 3 Civil Procedure Rules (CPR) and particularly where there is conflict in the affidavit and when the court is satisfied that there exists special circumstances to warrant cross-examination of a deponent.
26. The right to challenge evidence or depositions of an adverse party is guaranteed under *the Constitution* at Article 50 (2) (K). Cross-examination is a mechanism used to bring out desirable facts, modify or clarify or establish the party’s case, as well as intended to impeach the deponent’s credit worth as stated in the case of Reuben Kitonyi Ngila V. Governor of Central Bank of Kenya [2017] eKLR.
27. In *Simon Kitavi Nduto & Another v. Benson Omwenga Anjere*[1997] eKLR, the court of Appeal while discussing the import of Order 19 Rule 3(1) *Civil Procedure Rules* (CPR) (then Order 18 Rule 3(1) rendered that:-

“It is well settled that where an affidavit is made on information it should not be acted upon by any court unless the source of information is specified...”
28. Additionally, the court in the case of *Khen Kharis Mburu & Rachael Wanjiru Kharis & Another V. James Kerong Nganga* [2021]eKLR rendered that:-

“...cross-examination on the affidavit is a discretionary power conferred upon the court by provisions 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 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...”
29. Guided by the above the court agrees with the defendant that allowing the prayers sought in the application would be akin to conducting a trial within a trial, which would be prejudicial to the defendant’s case at the interlocutory stage.
30. On the impugned affidavit sworn by the defendant himself, he deposes that what is deposed thereto is true to the best of his knowledge save for matters on information sources disclosed and upon his belief upon grounds given.
31. It is this court’s opinion that if the court allows cross examination of the defendant at the interlocutory stage there will be nothing left for trial as he will in effect have testified to his defense leaving nothing at the main trial as the paragraphs sought for cross examination go to the root and merit of the suit between the parties.
32. To that extent therefore, the court is not persuaded that the plaintiff has laid a legal basis and foundation to justify the orders sought.

The Amended Application dated 18/11/2021 is dismissed with costs to the respondent.

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

JANET MULWA



JUDGE

