



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 103 OF 2008

MANSUKHALAL JESANG MARU.....PLAINTIFF

VERSUS

FRANK WAFULA.....DEFENDANT

RULING

(On deeming affidavit improperly on record and summoning deponent for cross-examination on Affidavit)

A. Introduction

1. On **15/12/2021** this matter came up for mention in the physical court for learned counsel to point out new matters he alleged were raised by the Defendant/Applicant in his further Affidavit sworn on **18/11/2021**. His contention was that the matters had not been raised in the Applicant's Supporting Affidavit sworn on **30/09/2021**. Thus, he too needed leave of the Court to file a Further Affidavit. The filed Further Affidavit was in regard to the Application dated **30/11/2009**. By the Application, the representation of the Plaintiff by the firm of M/S R. E. Nyamu & Co. Advocates alongside the firm of M/S Kiarie & Co. Advocates was challenged. That was after Mr. Nyamu, learned counsel who is the proprietor of the law firm of R. E. Nyamu & Co. Advocates, pointed out the number of paragraphs in the Further Affidavit that raised new issues. These were particularly paragraphs **6, 12, 16, 23** and **25**. The Defendant objected to the arguments that the paragraphs raised new matters. He argued that instead they raised points of law only. When the Court asked to clarify how each of the specific paragraphs mentioned raised only points of law and not facts, he was hard pressed to do so. He admitted to these having raised facts. He agreed that these were not raised in the Supporting Affidavit.

2. At that point the Defendant decided to change tune and move the Court to make findings on two issues, namely, that the Replying Affidavit filed by the Plaintiff was not properly on record and also that the deponent, Mansukhlal Jesang Maru, should be summoned by the Court for cross-examination on his Replying Affidavit sworn on **11/11/2021**. In support of the Defendant's argument that the Affidavit was not properly on record, he submitted that his argument was based on the fact that the Affidavit indicated "drawn and filed" by the firm of "R. E. Nyamu & Co. Advocates" who, according to him, were not properly on record. He said that the Affidavit should not be relied on, and that this was the issue he had raised on **7/12/2021** when the matter was mentioned online but the Court directed arguments to be made in the physical Court. He then submitted that the deponent was a wrong/different person who was not the Plaintiff. He submitted further that according to **Annexures MJM 4, 5** and **6** of the Replying Affidavit of the Plaintiff sworn on **11/11/2021**, the deponent of the Affidavit was not the same as the Plaintiff. He went on to ask the Court to order the said deponent to attend court to be cross-examined to reveal his identity.

3. The Defendant argued that the identity of the person who deposed the Replying Affidavit was "crucial in this case" (**sic**) hence the need for cross-examination. He submitted that the deponent should take to the witness stand so that the cross-examination of him "*exposes the contradiction in the name which contradicts the identity of the Plaintiff.*" He singled out to Court the paragraphs he wanted to cross-examine the deponent in order to show the Court that the deponent was not the Plaintiff. These were **paragraphs 2, 5, 6, 7, 10, 13, 14, 19, 23** and **29** of the Replying Affidavit of the deponent Mansukhlal Jesang Maru. He relied on **Order 19 Rule 2** of the **Civil Procedure Rules** to support his prayers. He summed it up that he made the Application in good faith.

4. In response, learned counsel submitted that the Applicant's response and application were yet another gimmick by him to prolong this matter, and that was plainly wrong. He stated rather strongly that he was "tired of this matter" by it being taken in circles by the Defendant not wanting to proceed. He emphasized that the Plaintiff who was the deponent of the Further Affidavit testified in Court earlier and was known hence his identity was not in issue. He then submitted that the Defendant raised no issue that would warrant the cross-examination of the Plaintiff and that the Defendant should have raised in the Further Affidavit the issues he felt needed cross-examination. Further, he stated that the Defendant had not laid the basis for praying for the cross-examination of the Plaintiff and the Application ought to be rejected. Lastly, he submitted that notice ought to have been issued earlier but not just as a mere ambush.

B. History

5. The history of this matter was given in this Courts' ruling delivered on **21/10/2021**. It is a long one running to more than three pages. It referred to some prior history of the same matter which was given by the previous judge on **7/11/2019** when he dismissed the Defendant's Application dated **18/09/2019** that sought to stay proceedings in this suit. The judge noted then at **paragraph 11** that "the Defendant is only intent on willfully obstructing the progress of this suit for reasons best known to himself." Suffice it to say that on **21/10/2021** when this Court delivered its ruling on another application by the Plaintiff, it noted at **paragraph 13** as follows, "That is the tired history of this matter." This Court notes that from **29/09/2021** when this matter came before me the first time and for the **six times** subsequent to that, there is a deliberate trend being set by one party herein in raising issue after another so as to delay the matter, rather than going to the merits of the suit. Actually, on the **29/09/2021** the Applicant's own words were, "I do not agree that the matter proceeds. I oppose Mr. Nyamu being on record." The have come the applications thereafter. That notwithstanding, this Court shall remain focused on the duty to deliver justice impartially, expeditiously and without consideration of the referenced past notes.

C. Determination

6. I have carefully considered the oral Application, the oral submissions made thereon by both the Defendant/Applicant and learned counsel, and the relevant law. I found four issues for determination which were:

- (a) *Whether the Respondent should be granted leave to file a Further Affidavit.*
- (b) *Whether the Replying Affidavit is wrongly before Court.*
- (c) *Whether the deponent of the Replying Affidavit should be called for cross-examination.*
- (d) *What orders should issue?*

7. I am alive to the duty of this Court. The Court is under duty to do justice and not only do it but do so in such a manner that everyone sees that it has been done. As the Court fulfills that duty, it is guided by the overriding Objective under **Sections 3** of the **Environment and Land Court Act** and **1A (1)** of the **Civil Procedure Act**, which is "... to facilitate the just, expeditious, proportionate and accessible resolution of disputes..." That was the reason this Court gave the nearest possible date for this ruling despite the pressure of work hence it had to burn the midnight oil to ensure that any interlocutory applications are concluded early so that both the Plaintiff and Defendant get to the merits of the suit rather than being bogged down with the interlocutory arguments. I therefore turn to the issues raised on **15/12/2021**.

(a) Whether the Respondent should be granted leave to file a Further Affidavit

8. The law regarding the procedure and conduct of Applications in the superior and subordinate courts is **Order 51** of the **Civil Procedure Rules 2010**. **Order 51 Rule 1** provides for the form of Applications which is by Notice of Motion unless otherwise expressly provided. **Rule 3** stipulates that Notice of the Motion be given on all parties. **Rule 14** provides for the filing of grounds of opposition, replying Affidavit and/or preliminary objection to the Application in case a party wishes to oppose it. **Sub-rule 3** provides for the filing of a Supplementary Affidavit if need be but with leave of the Court. This presupposes a situation where the Replying Affidavit raises new issues which call for a further response. How about where an Applicant raises new issues in the Supplementary Affidavit? While the law is silent on this issue, many Courts have held that the Court may grant leave to the Applicant, but in rare cases, to respond to the new issues. In my view, what is neither expressly nor specifically prohibited by the law is impliedly left to the discretion of the Court as considers the ends of justice.

9. It is clear from the Court session of **15/12/2021** that the Applicant introduced new factual issues in his Further Affidavit sworn on **18/11/2021**. These were not raised in the earlier Affidavit which he swore on **30/09/2021** in support of his Application. When asked to clarify how the specific and other paragraphs raised only points of law he could not. Instead, he agreed to the fact that the Affidavit, particularly the paragraphs pointed out, raised new factual issues. When the Court analyzed each of them, it agreed with both him and learned counsel that the paragraphs touched on factual issues. For instance, **paragraph 6** refers to **Section 45(1)** of the Advocates Act and the existence or otherwise of an Advocate-Client agreement. The latter part of the paragraph is a fact submitted to the Court for examination. **Paragraph 12** refers to the Plaintiff herein hiring the law firm of R.E. Nyamu & Co Advocates to act alongside another law firm and raises the issue of whether or not the other law firm gave consent to that effect. Those are factual issues. **Paragraph 16** referred to a previous judge indicating existence of another suit between the parties herein. That is a fact to be addressed. **Paragraph 23** raises an issue that the impugned firm drew and filed documents dated **11/07/2017**, **29/9/2018** and **6/10/2018** without the consent of the firm of M/s Kiarie & Co. Advocates. The existence or otherwise of such a consent raises a serious factual point especially when it would form the basis of his request to expunge from the record the documents filed earlier. The other point on that is, counsel ought to be given chance to reply as to whether or not there was need of such a consent. These are new issues the Applicant raised. I could go on to show more but the totality of all the arguments on this issue is that the Applicant admitted to raising new factual issues in the Further Affidavit. Where does that leave the Respondent? The straight answer to the question is, at a point of disadvantage if he is not given chance to respond to the facts.

10. One of the enduring rules of natural justice is that a party shall not be condemned unheard. When, in a duel, a being raises a fist against another, that other is automatically naturally expected to defend himself. He does not have to hit back but can, for instance, raise hands to cover the part of the body aimed at or wade off the fist or even run away. These are natural instincts which cannot be taken away from any being. Nature has made it in such a manner that once a being is aware of danger befalling it, its body will automatically react to the danger by activating adrenalin to cater for quick action. And so it is for a vigilant party against whom factual issues are raised. He will not keep quiet but take the next step of defending or clarifying his cause. This is what the Respondent has done by taking the proper step of informing the Court of the need to defend his position hence the further need for leave of the Court.

11. When a party raises new issues in an affidavit which is a rejoinder to one sworn by the other, in a situation such as the present one, where the Respondent may not have a chance to reply to them unless leave is granted by the Court, there are two options for him. One, is that he will apply to Court to expunge those new paragraphs from the record. Even the Court can do so *suo motto* in the interests of justice. It is a

discretionary issue. But expunging the paragraphs would be a painful step to take as against the Applicant, especially one who is acting in person and has taken the rigour of searching and researching about the issues raised. Second, is for the party to ask for leave to answer to the new issues raised. By this, he extends an olive branch to the party who raised the new issues by calling on the Court to give chance to him (that other) to give all material to the Court for it to decide on everything at once. It is a softer landing for the party who raised new issues than expunging them. In the instant case, learned Counsel has chosen the softer route. This Court will not do what it has not been called upon by the parties and is permitted by law to do. Put differently, I have not been moved by any of the parties to expunge the paragraphs that raise new issues and the interests of justice require that I look at all issues raised. I will therefore now consider whether it is just and reasonable to exercise my discretion to grant leave to the Respondent to respond to the new matters raised in the Further Affidavit sworn on **18/11/2021**. All reason commends to me to exercise my discretion which I hereby do to grant leave to the Respondent to file a Further Affidavit in response to the new issues raised by the Applicant in his latter Affidavit.

12. In regard to a Court exercising discretion to grant a Respondent to file another affidavit, my brothers and sisters have trodden this path before. Some have arrived at the same destination as I have. I find boldness in being joined in that destination of granting justice from the point of sound reasoning. **Article 159(2) (d)** of the **2010 Constitution** comes to the aid of the Respondent herein. Thus, in the persuasive case of **E. N. K v J. N. K [2013] eKLR** the Justice Kimaru stated, “*It is only fair that the Respondent be allowed to put on record all the evidence that he deems necessary to advance his case. Any prejudice that the applicant may suffer, will be compensated by an award of costs...The Respondent is granted leave to rely on the further affidavit at the hearing of the suit.*” Whereas in the cited authority, the Respondent sought to file a further affidavit to introduce evidence that he did not have at the time of filing his replying affidavit, in the instant case, it is the Applicant who caused the Respondent to seek leave to respond to other new matters the Applicant introduced. Thus, granting of costs to the Applicant will not be an appropriate thing to do as I grant the leave to file a further affidavit.

(b) Whether the Replying Affidavit is wrongly before Court

13. The Applicant attacked the status of the entire Replying Affidavit by arguing that it was not properly before the Court. The thrust of his proposition was for the Court to not consider the entire Replying Affidavit in this matter hence deem his Application unopposed. His argument was based on the fact that at the bottom end of the Replying Affidavit was the indication of who drew and filed the same. It was his view that since it was “drawn and filed by” M/S R.E. Nyamu & Co. Advocates of **P. O. Box 2900 - 30200, Kitale**, that should deprive the Respondent of the opportunity to be heard by the Court on the issue as to whether or not he appointed the firm of M/S R.E. Nyamu & Co. Advocates. It is needless to point out that the Deponent of the Replying Affidavit made an oath right from the introductory part of the Affidavit by stating that his address was **P. O. Box 95 - 30200, Kitale**. It is clear that if this Court finds the Applicant’s argument sound, it will need not to go into the next issue as to whether or not to call the deponent for cross-examination on the said Affidavit.

14. I have found the Applicant’s arguments not only puzzling and confounding but also unsettling and an abuse of the process of the Court for a number of reasons. First, the Applicant’s Application dated **30/09/2021** which gave rise to the instant Application seeks the Court’s declaration that the firm of M/S R.E. Nyamu & Company Advocates are not on properly on record in this matter. The Court has not determined this issue. This is a point the Court has reminded the Applicant so many times over orally whenever he applies to expunge documents filed by the Plaintiff/Respondent herein. He wants this Court to find that documents filed on behalf of the Plaintiff by the said law firm are not properly on record. This cannot be unless and until the Court has determined on the issue of the said law firm acting alongside the firm of M/S Kiarie & Co. Advocates. If this Court expunges the Affidavit or orders as the Applicant prays at this stage, by so doing the Court shall have indirectly agreed with the Applicant that the said law firm is improperly on record. What then will be the point of urging the Application dated **30/09/2021**? This is the subtle position the Applicant wants to hang on and bog this Court down with application after another. And by bringing other applications before the determination of the dated **30/09/2021** the Applicant is delaying the progress towards concluding the said application.

15. I have perused the Court file. I note that the Affidavit sworn by Mansukhlal Jesang Maru on **11/11/2021** was paid for by the said deponent. It was received in Court on the same date. At the same time, I have noted, and I have indicated it above, that the Affidavit shows that it is the deponent whose residence is in Kitale that has sworn it. I have also applied my mind to the fact that the issue of M/S R.E. Nyamu & Co. Advocates representing or not the deponent has not been determined by this Court.

16. The deponent has stated repeatedly in the Affidavit that he instructed the said law firm to act for him alongside M/S Kiarie & Co Advocates. As to whether that is in line with the law, right or wrong, it is a matter to be determined when this Court determines the Application dated **30/09/2021**. The Respondent cannot therefore be barred at this stage from having documents drawn and filed by an Advocate he believes he rightly instructed to act for him. That can only be after the Court finds the said firm to be improperly on record. Otherwise, if one were to ponder loudly, barring the Respondent from filing a document through the said law firm whose presence is challenged, through whom does the Applicant wish that the Respondent answers to his challenge? This argument reminded me of the Hoplite warfare in ancient Greece where often for lack of enough soldiers to fight and at the same time people tend to farms wars were tactical, short, bloody and brutal. If one side called for battle and it was refused, it would retreat into the city and later the attackers enjoy the plunder as it ravaged abandoned the countryside. That is what the Applicant wants subtly in this case, that the Respondent is made by this Court to ‘abandon’ his side of the story for him to execute a ‘bloody’ plunder in the Application dated **30/09/2021**.

17. Moreover, this Court finds that the aspect of the affidavit regarding by whom it was drawn and filed is a matter of form and not substance. This Court cannot, in the interest of justice, place form above substance. Such are the issues **Article 159(2) (d)** of the **Constitution of Kenya, 2010** was entrenched in the Constitution to take care of. Mere and simple technicalities that do not go to the root of the substance of the issue before the Court are cured by that Sub-Article. I end it there.

(c) Whether the deponent of the Replying Affidavit should be called for cross-examination on the paragraphs singled out

18. The Applicant moved this Court orally for an order that the respondent be called for cross-examination on some specific paragraphs of his Affidavit sworn on **11/11/2021**. He based his Application on the argument that the deponent of the Affidavit was not the Plaintiff. His argument was that the identity of the deponent was crucial in this case. This Court understood the Applicant to mean that the Plaintiff in this case was not the one who swore the Affidavit. He based his claim on the **Annexures MJM 4, 5 and 6**. He singled out paragraphs **2, 5, 6, 7, 10, 13, 14, 19, 23 and 29** to show that cross-examining the deponent on them would (*sic*) “*expose the contradiction in the name...(and)...*”

identity of the Plaintiff.”

19. The law on cross-examination of a deponent of an Affidavit is governed by **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. **Rule 9** provides that the Application shall be made in chambers or orally in Court. Thus, it is not necessarily correct that the instant application ought to have been made formally as learned counsel submitted. But the proper procedure should have been that the Applicant ought to have given notice to the other side that he was to move the Court to order the deponent to attend Court for cross-examination. Fair trial entails that a party is given notice of the matters that shall be raised in Court in order to sufficiently prepare for them. Trial by ambush is not one of the processes anyone should be involved in this modern era. The practice of law is not the rule of the jungle where carnivorous animals ambush others to devour. The constitutional obligation laid on every individual is that each acts in such a manner as to guarantee the adverse party fair trial which arises by the practice of fair play. Fair play calls for each party giving the other adequate notice of the issues he/she wishes to raise in the case.

20. That said, the step to order a deponent to attend Court for cross-examination lies at the discretion of the Court. The discretion therein is wide but it must be exercised judiciously. That means the Court should consider all factors and act reasonably towards the ends of justice. It therefore means not every prayer for cross-examination warrants positive consideration. A party must clearly lay the basis for the Court departing from the procedure that where necessary as in applications evidence be received by way of Affidavits. In *Republic v Kenya Revenue Authority ex parte, Althaus Management & Consultancy Ltd [2015] eKLR* the court stated:

“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.”

21. In instances where the Court is called upon to consider summoning a deponent for cross examination, it does so only in special circumstances. In *Lawson and Another v Odhams Press Ltd & Another [1948] 2 All ER 717*, the Lord Green MR laid emphasis on the point that Courts should be reluctant to permit oral cross-examination in interlocutory proceedings. In *22 Atkin’s Court Forms (2 ed) at 462 and 486 (Form 17)*, Lord Atkin advises as follows: “*Whilst the court may order an oral examination of the person answering the interrogatories, such an order is infrequently applied for and will only be made where there are special circumstances.*”

22. I would only voice my thoughts on the issue of oral cross-examination in Affidavits as follows, it is not given for a party to burden the Court with oral presentations where matters have been stated clearly by way of affidavit. When facts are not clear, the adverse party can point that in submissions and bring out inconsistencies therein by the said submissions. That is the essence of a Court inviting parties to submit on matters before it: some to emphasize points and others to point out the shortcomings of evidence and that evidence includes that brought to Court by way of Affidavits. In any event, inconsistencies or vagueness of issues in affidavits work to the disadvantage of the deponent and benefit the adverse party. While it is dutiful to lay all facts bare before a Court, the other party should not be hasty in summoning all his powers and artillery to put the deponent under his feet by way of oral examination on his Affidavit for that may work against that other party’s case just because of being buoyed by his ego and excitement to make a kill. Not all patients who go into theatre come out alive.

23. In the instant application, the Applicant sought to have the deponent of the Affidavit sworn on **11/11/2021** attend Court for cross-examination as to his identity and that of the Plaintiff herein (if ever they are different). As stated above, he relied on paragraphs **2, 5, 6, 7, 10, 13, 14, 19, 23** and **29** of the deponent’s Affidavit. I summarize here each paragraph and compare it with the issue of “identity” sought to be demystified by cross-examination. In **paragraph 2** the deponent states he is the Plaintiff hence competent to swear the Affidavit. In **paragraph 5** he depones he “approached the firm of M/S R.E. Nyamu & Co. Advocates to act alongside that of M/S Kiarie & Co. Advocates. In **paragraph 6** he depones the firm of Nyamu & Co. Advocates filed a notice of appointment indicating they were acting alongside that of Kiarie & Co. Advocates. In **paragraph 7** he depones the firm of Nyamu & Co. did not require leave of Court to do so. In **paragraph 10** he depones that on **9/2/2021** the Court looked at the history of the matter. In **paragraph 13** he depones he wrote to the Land Registrar Trans Nzoia who replied to him to wait for the determination in this matter. In **paragraph 14** he annexed a copy of the response by the Land Registrar. In **paragraph 19** he depones that **Kitale CMCC No. 334 of 2011** was struck out by Court. In **paragraph 23** he depones that **Order 9 Rule 5** of the **Civil Procedure Rules** do not support the Applicant’s Application. In **paragraph 29** the deponent attaches copies of pages of the Passport to show that he travelled out of the country and way away when he could not be in a position to swear the Affidavit in time as required hence he was permitted to swear it on arrival back in the country.

24. As I now compare the contents of each paragraph with the meaning of “identity” it is clear that except paragraph 29 all do not touch on identity. The meaning of identity of an individual is, it is who that individual is by name and appearance. It has nothing to do with what he says or does. The latter is his disposition. Identity has to do with the physical and not intrinsic aspects of a person. Garner, B. A. (2019). Black’s Law Dictionary, **11th Edition**, Thomson Reuters, p. **894** defines identity as “the authenticity of a person or thing”. For that reason, I find the argument that all the paragraphs except **29** form the basis for summoning the deponent for cross-examination as to his identity baseless and nothing but a figment of misguided imagination as to what amounts to the identity of the deponent.

25. Turning to the contents of paragraph **29** of the impugned Affidavit, the deponent attached copies of the pages of passport and visa stamp to show that he travelled to the United States of America on **17/09/2021** and came into Kenya on **07/11/2021**. That is shown on annexures **MJM 5** and **6**. Annexure **MJM 4** shows the facial appearance of the bearer of the passport whose name is adjacent to it. I do not have to repeat the name of the Plaintiff as appears in all the documents annexed and in this matter at the place of parties above. I refer to the name as appears on the copies of the documents annexed as **MJM 4** the page titled “DESCRIPTION/MAELEZO/DESCRIPTION”. It is Mansukhlal Jesang Maru which is the name I see on the Affidavit before me and is of the Plaintiff and was recorded in the proceedings of **23/10/2018** when the Plaintiff testified. From these documents referred to, I see no confusion in the identity of the Plaintiff to warrant his oral cross-examination in Court over his Affidavit. The Applicant is engaging in an academic exercise designed to delay this matter. He is doing nothing but abusing the Court process.

26. The Application for the attendance in Court of the deponent of the Affidavit sworn on **11/11/2021** for cross-examination was an application that was brought to vex the Court and keep it busy while keeping in abeyance the substance of the issues before the Court. I could

have dismissed it summarily. However, since the Applicant was in acting in person and may not have the grasp of all court processes, I had to determine it fully and give my reasons for its dismissal lest he misunderstood the Court and thought he was not given a fair hearing.

27. Lastly, I agree with the learned counsel in his submissions on behalf of the Respondent, even as admitted by the Applicant, that there are new matters raised in the Further Affidavit which require a response.

28. The upshot is that, on the one hand, the Respondent's request to be granted leave to file a Further Affidavit is merited as found in **paragraphs 11 and 12** above. The Respondent deserves to be given chance to respond to the new issues raised in the Further Affidavit sworn by Frank Wafula on **18/11/2021**. I therefore direct that the Respondent files and serves his Further Affidavit within **seven (7) days** of this Order. The Applicant shall have only **five (5) days** from the date of service of the Further Affidavit to file and serve his written submissions on the Application dated **30/09/2021**. The Respondent shall have **five (5) days** from the date of service of the Applicant's submissions to file and serve his. Each set of submissions shall not to exceed **Four (4)** pages of New Times Roman Font **12**, and **1.5** Spacing.

1. On the other hand, both oral Application made on **15/12/2021** by the Applicant for the Court to find the Replying Affidavit improperly on record and also to summon the deponent to Court for cross-examination is absolutely baseless, devoid of merit and an abuse of the Court process and is hereby dismissed with costs to the Respondent.

2. The Application dated **30/09/2021** shall be heard by way of the written submissions on **31/1/2022**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 20TH DAY OF DECEMBER, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.