



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 10 OF 2019

KHEN KHARIS MBURU.....1ST APPELLANT

RECHEAL WANJIKU KHARIS.....2ND APPELLANT

VERSUS

JAMES KARONG NG'ANG'A.....1ST RESPONDENT

EXECUTIVE SUPER RIDES LTED.....2ND RESPONDENT

JUDGMENT

(Appeal from the ruling and order of the Chief Magistrate's Court at Kajiado (Hon. E. Mulochi. (RM), dated 25th March, 2019 in Misc. Application No. 5 of 2019)

1. By an order dated 25th March, 2019, the trial magistrate allowed the respondents' application to cross examine the appellants as deponents of the affidavits filed before that court.

2. The appellants were aggrieved with that order and filed a memorandum of appeal dated and filed on 28th March, 2019 and raised the following grounds, namely:

- 1. That the learned magistrate erred in allowing the respondent's application to cross-examine the appellants on their replying affidavits.***
- 2. That the learned magistrate erred in failing to appreciate that the respondents did not lay any proper basis or legal foundation to justify their application to so cross-examine.***
- 3. That the learned magistrate erred by giving the order to cross-examine without perusing the appellants replying affidavits.***
- 4. That the learned magistrate erred in exercising his general power of discretion without ascertaining whether cross-examination was justified.***
- 5. That the learned magistrate erred by not giving a reason for the order to cross-examine.***
- 6. That the learned magistrate erred in not recognizing that cross-examination would amount to settling substantive issues which should be settled in a suit which in this case is non-existent.***
- 7. That the learned magistrate erred in failing to appreciate that such cross-examination would disadvantage the appellants.***
- 8. That the learned magistrate erred by allowing the application to so cross-examine not taking into account the wider interests of justice.***
- 9. That the learned magistrate did not exercise his discretion judiciously.***

3. Parties filed written submissions and relied on those submissions in disposing of this appeal.

4. The appellants submitted through their submissions dated and filed on 8th July, 2019, that the applicant did not lay any basis for the order for cross examination given that the respondents merely stated that there were contradictions in their affidavits without pointing out those

contradictions. According to the appellants, cross-examination is not by right but is exercise of the trial court's discretion which should be exercised judiciously and only where it is justified.

5. They cited the decision in *Nyoro Construction Co. Ltd v Prashanth Projects Ltd & Another* [2015] eKLR, for the argument that a person desiring to cross examine a deponent of an affidavit must set out particular paragraphs he wishes to cross examine the deponent on and lay a basis for it. They also cited *Republic v Kenya Revenue Authority ex parte, Althaus Management & Consultancy Ltd* [2015] eKLR for the argument that cross examination on affidavits is a discretionary power conferred upon the court by Order 19 rule 2 of the Civil Procedure Rules and is not given as a matter of right. A party wishing to cross-examine a deponent, must satisfy the court that there is good reason for doing so.

6. The appellants again relied on *Lawson and Another v Odhams Press Ltd & Another* [1948] 2 All ER 717, for the holding that cross examination on an affidavit in support of interlocutory application is to be allowed only in special circumstances. They also relied on *GGR v HPS* [2012] eKLR on under what circumstances cross examination should be allowed, among other decisions.

7. The appellants submitted that the notice issued for purposes of cross-examination was not clear on the substance of cross-examination or reasons for which cross examination was sought. They argued that although order 19 rule 2 allows for cross-examination on affidavits, the decisions show that it should be allowed in special circumstances. They cited *Simon Kitavo Nduto & Another v Owenga Anjere* (CA No. 170 of 1995) for the argument that a wrong statement of fact made in an affidavit makes the statement worthless and the same can be dealt with by way of submissions instead of cross-examination.

8. The appellants submitted that the respondents were required to demonstrate compelling reasons to warrant an order for cross-examination which they failed to do. They further argued that cross-examination would settle substantive issues that could only be resolved in a suit. According to the appellants, the affidavits filed before the trial court raised the issue of ownership of the motor vehicle and rights and obligations of the parties.

9. They relied on *Joseph Kibowen Chemjor v William C. Kiseru* [2013] eKLR, for the submission that a party can file a miscellaneous application where rights of parties are not sought to be determined. They relied on many other decisions and urged the court to allow the appeal and order the application before the trial court dismissed.

10. The respondents filed their written submissions dated and filed on 17th December, 2020. They submitted that the basis of their notice to cross-examine the appellants was the averments in their affidavits and the authenticity of the documents annexed to those affidavits. They submitted that they made their application in good faith; that the appellants bought two motor vehicles but did not pay for them in full and, for that reason, ownership did not pass and they were challenging the images of the logbooks attached to the appellant's affidavits

11. On the rationale for cross-examination, the respondents relied on *Law Society of Kenya v Faith Waigwa & 8 Others* [2015] eKLR, to argue that cross-examination is a mechanism used to bring out desirable facts to modify, clarify or establish a fact through cross-examination. According to the respondents, since both parties had challenged each side's evidence, the veracity of the averments could only be proved or disproved through cross-examination.

12. The respondents argued that they had challenged the authenticity of copies of the logbooks produced by the appellants in paragraphs 7 and 9 of the supplementary affidavit, and that the 2nd respondent had not parted with possession of logbooks of the subject motor vehicles. That was the basis of the application for cross examination. They therefore accused the appellants of fraud, perjury and lying to the court.

13. They relied on *Republic v Ministry of Roads & Another ex parte, Vipingo Ridge Ltd & Another* [2015] eKLR, for the argument that the court has power and discretion to order cross-examination where the applicant has set out sufficient basis for the order. They maintained that the court must retain discretion whether or not to allow cross-examination. They urged the court to dismiss the appeal with costs.

14. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial court's record and the impugned decision. This being a first appeal, it is the duty of this court as the first appellate court, to reevaluate, reconsider and reanalyze the evidence and come to its own conclusion on it.

15. In *Gitobu Manyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal held:

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

16. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court stated:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

17. This is an interim appeal because it challenges an order allowing cross-examination and not the decision on the main matter on merit. There was therefore no evidence adduced before the trial court for reconsideration by this court.

18. The genesis of the dispute leading to this appeal was an application by the respondents dated 8th March 2019 for orders for police escort and protection to enable the applicants execute instructions by attaching the appellants' moveable properties at their residence. The respondents stated that the appellants' premises were permanently closed and, therefore, they could not gain access to execute their instructions which prejudiced the 2nd respondent herein who was said to be owed over Kshs. 8,000,000 by the appellants.

19. The letter of instruction which was attached to the respondents' affidavit, instructed the 1st respondent to repossess two motor vehicles KCD 400M, Toyota Land Cruiser V8 and KCH 888D, Toyota Harrier for failure to pay Kshs. 8,651,116/=.

20. The appellants filed grounds of opposition and replying affidavits denying owing money to the 2nd respondent. They stated that they had fully paid for the motor vehicles and attached documents of ownership including copies logbooks as evidence of this fact. They therefore termed the application for police escort unfounded and attachment uncalled for. They sought dismissal of the applications.

21. The 2nd respondent filed a supplementary affidavit responding to the appellants' contention that they had fully paid for the vehicles and that they had obtained transfer of the motor vehicles into their names. The 2nd respondent termed the appellants' claim fraudulent and was emphatic that he had not parted with possession of ownership documents for the motor vehicles which would have enabled the appellants access TIMS at National Transport and Safety Authority to effect changes of ownership of the vehicles.

22. When the application came up for hearing on 25th March 2019 before the trial court, the respondents' counsel informed that court that he had notified the appellants' counsel his desire to cross examine the appellants. He therefore asked that an order be issued for cross-examination. The appellants' counsel objected to this move and told the court that they were opposed to cross-examination. The trial court ordered that the appellants attend court for cross-examination, prompting this appeal.

23. In this appeal, the appellants challenged the trial court's decision to order that the appellants be cross-examined on their affidavits filed before that court. Their reason for challenging that decision was that the respondents did not satisfy the grounds for cross-examination on affidavits. It was their case that an order for cross-examination does not issue as a matter of course, but an applicant must lay a basis for it. The respondents countered that they had a basis for cross-examining the appellants because there were discrepancies or contradictions in their affidavits. They also stated that the authenticity of the documents attached to the appellants' replying affidavits was disputed. They also argued that the trial court had discretion to allow an application to cross-examine.

24. Both parties relied on Order 19 of the Civil Procedure Rules, 2010 to support their respective positions. The Order provides:

“1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the

production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. (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.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.” (Emphasis)

25. Where an application is supported by affidavit evidence, a party may ask the court to make an order for cross-examination of the deponent of the affidavit. The rule confers on a trial court absolute discretion to order attendance of a deponent of an affidavit for cross-examination. However, like any other discretion the discretion to order cross-examination must be exercised judicially, and only in cases where it is to enhance the course of justice. A party must also lay a basis for it. This view has been held to be the position in various decisions.

26. In ***Republic v Kenya Revenue Authority ex parte, Althaus Management & Consultancy Ltd*** (supra), the court stated:

“[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.” (see also ***Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited (2) [2006] 2 EA 6.***)

27. 15. Similarly, in ***Lawson and Anor v Odhams Press Ltd. and Anor.*** (1948) 2 All ER 717, the court held that cross-examination on an affidavit in support of an interlocutory application should be allowed only in special circumstances. Similarly, in ***G G R v H-P S [2012]***

eKLR, the court stated:

“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.” (Emphasis).

28. And in ***Baby v Sekar***, Petition M.P No. 1 of 2014 (2 December 2014), the High Court of India sitting at Madras while dealing with Order 19 rule 2 of the India Code of Civil Procedure which is similar in all fours to ours, stated:

... [i]t has been stated that the party has to make out a case for the exercise of that power by the court and absolute discretion is vested with the court either to allow it or reject the same. Further, a reading of Order XIX Rule 2 of the Code of Civil Procedure makes it clear that when any evidence is given by affidavit, the court may at the instance of either party order the attendance for cross examination of the deponent.”

29. The decisions are in agreement that cross examination is a tool that is allowed in law and the court has discretion to order a deponent to appear for cross examination. The appellants argued that the respondents did not lay the basis for the order for cross examination. In their view, the issues that the respondents sought to cross examine them on, could only be resolved in a suit and not in a miscellaneous application.

30. The respondents took the view that they had laid grounds for the order to cross examine the appellants. They contended that there were authenticity issues in the annexures to the appellants’ affidavits and, therefore, cross examination would assist the court make an informed decision on the veracity of the appellants’ affidavit evidence.

31. I have considered respective parties’ arguments and perused the trial court’s record. I have also perused the application that was before the trial court and the order made for cross examination. It has not been denied that the respondent’s counsel informed the court that he wanted to cross examine the appellants on their affidavits they had filed in response to the respondents’ application. The appellants’ advocate opposed the move stating that there was no basis for it. The respondents’ counsel responded that there were contradictions in the affidavits. It was on that basis that the court then allowed the respondents’ request and ordered the appellants to appear for cross-examination.

32. As already alluded to, the power to order cross-examination is discretionary. The power can be exercised where there are allegations on matters touching on fraud, mala fides, authenticity of the facts deponed to or bad motive, among others.

33. The respondents stated that there were issues of authenticity regarding the documents the appellants had attached to their affidavits. They also stated that there were allegations that payments had been made which were untrue because the 2nd respondent, the seller of the motor vehicles, still had in possession logbooks for those vehicles. Bearing all these in mind, it is my view that there was basis for allowing cross-examination.

34. I also note that the main application has not been heard and is still pending. Even though the trial court had ordered that the appellants be cross-examined, that alone was no guarantee that the main application would be allowed. The appellants could be cross-examined but still the application be dismissed. I do not therefore see the prejudice the appellants would suffer if they were cross-examined.

35. Finally, I must point out that it is a general principle of law that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because the court misdirected itself or it acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and, in doing so, arrived at a wrong conclusion. (***Mbogo v Shah*** [1968] EA 93)

36. Having considered is appeal, submissions and the law, the conclusion I come to is that this appeal is for dismissal. It is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 5TH DAY OF MARCH, 2021.

E.C MWITA

JUDGE