



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC CIVIL SUIT NO. E20 OF 2020

ASSET RECOVERY AGENCY.....APPLICANT

VERSUS

HON. RIGATHI GACHAGUA.....1ST RESPONDENT

ANNE KIMEMIA T/A JENNE ENTERPRISES LIMITED.....2ND RESPONDENT

RULING

1. The main application in this case is the Originating Motion dated 7th October 2020 by which the Assets Recovery Agency is seeking orders that certain monies held in the accounts of the Respondents at Rafiki Micro Finance Bank be declared to be proceeds of crime and to have the same forfeited to the state.

2. On 22nd February 2021 with the consent of Counsel for the parties the court gave directions that the application would be heard on affidavit evidence and through written submissions. After parties filed their initial affidavits leave was sought and obtained to file further/supplementary affidavits and the same were duly filed. One of the affidavits filed pursuant to the leave granted was the Supplementary Affidavit sworn by the 1st Respondent on 26th May 2021. It is at paragraph 26 of that affidavit that the 1st Respondent first intimated that he wished to cross-examine Senior Sergeant Fredrick Musyoki the deponent of the affidavits in support of the Originating Motion. The reason given by the 1st Respondent is that the depositions of SSgt Fredrick Musyoki conflict in each and every material respect with those in the affidavit of one Benjamin Kuria Wangai, a Senior Manager at Rafiki Micro Finance Bank Ltd.

3. The desire to cross examine Ssgt Musyoki was renewed in an oral application made by Mr. Kilukumi Senior Counsel for the 1st Respondent when the parties appeared before my predecessor Wakiaga J on 12th May 2021 and when they came before me on 12th October 2021. Mr. Kilukumi reiterated the 1st Respondents averment that there was need to cross examine Ssgt Musyoki because his depositions and those of the 1st Respondent are in conflict. He submitted that in the absence of cross examination it would be difficult for this court to make a determination on who to believe. He also posed the question of how the court would justify believing one set of facts over the other. He urged this court to grant the application to cross examine Ssgt Musyoki on his affidavits sworn on 8th March 2021, 7th October 2020 and 6th September 2021.

4. Mr Mohamed Adow, learned Counsel for the Agency, vehemently opposed the application. He submitted that the clarification sought by the 1st Respondent was provided by Ssgt Musyoki in his further affidavit sworn on 6th September 2021 and dragging Ssgt Musyoki to court for cross examination will add no value. He described it as a waste of time and stated that in any event no formal application had been made. He urged this court to reject the application.

5. Mr Kilukumi SC relied on the following cases which were cited by the 1st Respondent at paragraph 25 of the affidavit dated 26th May 2021:

- **Katatina Garments Ltd Vs David Nyanarua [1976] eKLR**
- **Peter Gitahi Kamaitha Vs Nyeri Municipal Counsel [2014] eKLR**
- **GG – R V H – P – S [2012] eKLR**
- **Patrick Kagai Kiarie & 3 others Vs Michael Kahurani Kiarie; David Kiarie Kahuraini (Necessary Party) [2020] eKLR**

6. **Section 81 of the Proceedings of Crime and Anti Money Laundering Act (POCAMLA)** provides that proceedings under PART VIII of the Act are in the nature of civil proceedings and that the rules of evidence applicable in civil proceedings shall apply to proceedings under that part. The Civil Procedure Rules are therefore applicable to this case. **Order 19 Rule 2(1)** thereof provides **that 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. Order 19 Rule 9** provides that **applications under the Order 19 may be made by Chamber summons or orally in court.** This application is therefore properly before court.

7. The above being the position the issue for determination is whether sufficient basis has been laid to grant the application to cross examine Ssgt. Fredrick Musyoki on the contents of his affidavits.

8. In the case of **G.G.R Vs H.P S (Supra)** it was held 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 fide, authenticity of the facts deponed, bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is conflict of Affidavits on record or where the evidence deponed 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 of 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.”

9. My interpretation of the above holding is that to grant an order for cross examination the court must be satisfied that there is conflict of affidavits on record or in the evidence deponed to; that special circumstances exist and that adequate material has been placed before the court to demonstrate that in the interest of justice and to arrive at the truth it is just and fair to order cross examination. In other words, whereas to allow or to reject the application is in the discretion of the court that discretion must be exercised judiciously but not whimsically.

10. The test of conflicting affidavits is echoed in the case of **Karatina Ltd v David Nyanarua [1976] eKLR** and also in the case of **Peter Gitahi Kamaitha v Nyeri municipal council [2014] eKLR** which both dealt with Affidavits of Service. The issue also arose in the case of **Patrick Kagai Kiarie & 3 others v Michael Kahurani Kiarie & Another (supra)** where the Court stated:-

“15) The plaintiff raised an important point which is to the effect that the dispute involves family members. The central figure in this dispute is the necessary party. His evidence in the matter is very crucial to the determination of this dispute. This court has agonized whether it is appropriate at this stage to strike out the necessary party’s further supporting affidavit. There is no doubt the same contradicts the replying affidavit. The only way to resolve the contradiction is to subject the deponent to cross-examination. When taking into account such conflicting affidavit evidence the court will consider the weight and reliability of the same. I think the justice of this matter militates against an order striking out the aforesaid affidavit.”

11. The gist of this application emanates from an affidavit sworn by one Benjamin Kuria Wangai a Senior Manager at Rafiki Micro-finance Bank in which he disputed Ssgt. Musyokis deposition in the affidavit sworn on 7th October, 2020 that a sum of Kshs.12,530,754,485/= was transacted through the 1st Respondent’s accounts held at the bank.

12. I have considered the application, the rival submissions and the cases cited and applying the test in those cases to this case I have come to the conclusion that this application does not meet the threshold for grant of the order. Looking at the Originating Summons the prayers made are specific to certain monies and accounts. There is no mention of the sum of Kshs.12,530,784,485/= in those prayers. The said sum is not therefore the real issue in dispute between the parties and whether or not Ssgt. Musyoki is cross-examined on the issue will not have much bearing to the proceedings. I am also not persuaded that special circumstances exist and as this is a discretionary power that ought to be exercised sparingly the conflict in the affidavits alone does not suffice to grant the prayers sought.

13. In the premises the application is dismissed but with an order that costs shall be in the cause.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 4TH DAY OF NOVEMBER 2021

E. MAINA

JUDGE