



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 125 OF 2015

ALBERT KIGERA

KARUME.....1ST.PLAINTIFF

SAMUEL WANJEMA

KARUME.....2ND PLAINTIFF

LUCY WANJIRU

KARUME.....3RD PLAINTIFF

VERSUS

**GEORGE NGUGI WAIRERI, HENRY WAIRERI KARUME, KUNG’U GATABAKI &
MARGARET NDUTA KAMITHI**

**(sued as trustees of the Njenga Karume Trust.....1ST
DEFENDANT**

**THE NJENGA KARUME TRUST REGISTERED
TRUSTEES.....2ND DEFENDANT**

AND

**GRACE NJOKI NJENGA KARUME.....1ST
INTERESTED PARTY**

**JANE MUKUHI MATU.....2ND
INTERESTED PARTY**

**TERESIA NJERI KARUME.....3RD
INTERESTED PARTY**

**DR. FRANSISCA WANJIKU KAHU.....4TH
INTERESTED PARTY**

**KENNETH WATHUGI KARUME.....5th
INTERESTED PARTY**

MICHELLE WARIARA KARUME.....6TH
INTERESTED PARTY

DR. MICHELLE WARIARA KARUME.....7TH
INTERESTED PARTY

MAURICE WAGACHIRE KARUME.....8TH
INTERESTED PARTY

Ruling on cross-examination

1. On 17th December 2015 this court gave directions after hearing all the parties concerned, on the mode of disposal of the Originating Summons herein dated 25th March, 2015.

2. At page 212 of the handwritten proceedings, the court directed as follows;

“I direct that the Originating Summons shall be disposed of by way of the affidavits filed and to be filed. Parties are however at liberty to seek to cross examine the deponents thereof. And in order for each of the parties to feel that they have had their day in court, the Originating Summons shall be heard by way of oral submissions on the number of days that the court shall set with the agreement of the parties advocates.

Orders accordingly”

3. After the above directions, each of the parties advocates who wished to cross examine deponents of respective affidavits did address the court on their intentions and this was as follows;

(1) Mr Munge intimated that he wished to cross examine George Waireri Ngugi on his affidavit, and Margaret Nduta Kamithi

(2) Mr. Kingara intimated that he wished to cross examine Kungu Gaatabaki and Dr. Fancisca Wanjiku Kahiu on their affidavits and the deponents mentioned by Mr. Munge.

(3) Senior counsel G. Oraro Intimated that he would give notice on who he will wish to cross examine after receiving all the affidavits to be filed.

(4) Mr. Cohen intimated that he will give notice on who to cross examine after receiving he affidavits

(5) Miss Odari also intimated that she will give notice after receiving all affidavits.

(6). Mr. Deya intimated that he would give notice if there will be need for cross examination.

4. After hearing out the above advocates for the parties indicating their intentions to cross examine the deponents of the various affidavits filed and to be filed, the court made the following orders:-

“Court;

As all the parties advocates are now clear that they will if need be cross examine the deponents mentioned or on notices to issue upon receipt of all affidavits, leave be and is hereby granted for such cross examination of all the deponents if need be.”

5. The record is clear that all the parties who wished to cross examine deponents filed notices of intention to cross examine such deponents. Mr Kamau Karori and his law firm of IKM representing Dr. Francisca Kahiu did not give notice of intention to cross examine the 1st Defendant who is the chairman of the

NKT. Neither did the 4th interested party's counsel at the time of giving of directions on the mode of disposal of the Originating Summons intimate to court that he wished to cross examine this witness.

6. However, after the 1st Defendant was examined in Chief by Senior Counsel Mr G. Oraro and cross examined by Mr. Munge for the Plaintiffs and Mr. Gichuki King'ara for the 3rd and 8th Interested Parties, Mr. Kamau Karori intimated to court that he was also interested in cross examining the 1st Defendant who is the chairman of the trust.

7. Nevertheless, as Mr. Kamau Karori had an urgent assignment to handle before the Court of Appeal on 1/2/2017, the matter was adjourned for 2/2/2017 to enable him proceed with such cross examination.

8. It was on the latter occasion that Mr. Musyoka counsel for the Plaintiffs and Ms Kimere counsel for the 3rd and 8th Interested Parties vehemently opposed the cross examination of the 1st Defendant on the grounds that Mr. Kamau Karori's client did not have any adverse interest to those of the 1st Defendant and that infact, she had filed a sworn affidavit wholly supporting the 1st Defendant and the trustees hence she could only re- examine the 1st Defendant and not cross examine him.

9. Further, that in any event, the 1st Defendant is the chairman of the (Njenga Karume Trust) NKT and that Mr. Kamau Karori partner in IKM Advocates are the secretariat of the subject trust hence they are involved in decision making processes of the administration of the Trust and as such, the 1st Defendant and other trustees are Mr. Kamau Karori's clients hence he cannot cross examine his own clients; and that in any event, the law does not allow cross examination of a party whose interests are not adverse to those of the party seeking to cross examine, as leading questions will be put thereby prejudicing the Plaintiff's case and that since the Plaintiff cannot re-examine a witness whom it has cross examined.

10. Mr. Musyoka cited Black's Law Dictionary, definition of who an adverse party is and **Sections 145** and **146** of the **Evidence Act** and maintained that IKM's interests and those of the trustees are intertwined hence it does not make sense for IKM advocates to cross examine the chairman of the trust yet the firm is on the payroll of the trust to date.

11. In opposing the objections raised by Mr, Musyoka, Mr. Kamau Karori conceded that he had not served any notice to cross examine the 1st Defendant George Ngugi Waireri. However, that in any event, the Plaintiff had not given any notice of intention to object to the cross examination of the 1st Defendant by the 4th Interested Party.

12. Mr. Kamau Karori recalled that as the court had already directed, in adjourning the matter on 31/1/2017 that he would proceed with the cross examination of the 1st Defendant on 2/2/2017 which order had not been set aside, no objection to his cross examination of the witness should be sustained by the court.

13. In addition, Mr. Kamau Karori submitted that it is the Plaintiffs who enjoined the 4th Interested Party as an Interested Party to these proceedings as opposed to being a defendant hence she has equal rights like all other parties to this suit to participate fully including cross examining the 1st Defendant as she is a child of the founder and a beneficiary of the trust.

14. According to Mr. Kamau Karori, the 4th Interested Party has a right to put to the 1st Defendant questions that are designed to protect her interests. Counsel asserted that in the cause of cross-examination of the 1st Defendant, questions were raised touching on affidavits of others and that the court allowed cross examination regarding qualifications of the witness and his status with Credit Reference Bureau CRB which were all new matters raised in the cause. that therefore these appears to be a clear intention to prevent the 4th Interested Party from participating in these proceedings yet she did not file any affidavit responding to the Defendant's allegations.

15. Further, it was submitted that the fact that the 4th Interested Party does not agree with the Plaintiff's assertions made about the founder of the trust who was also her father does not mean that she does not disagree with the Defendants. Therefore, it was contended that the 4th Interested Party has a right to protect her interests as a beneficiary and to ensure that the trustees do not infringe on her rights as such beneficiary therefore she is entitled to field questions and submit on her position regarding the manner in which the trust is being administered, arising from answers obtained in cross examination.

16. Further, that the 4th interested party has previously complained that her son's fees was not being paid hence there is no commonality between her interests and the interests of the Defendant/Respondents.

17. According to Mr. Kamau, the right to cross examination is part and parcel of the right to a fair hearing under **Article 50** of the Constitution hence the court should not bar an Interested Party from asking questions that will assist the court in arriving at a fair decision. That since the 1st Defendant is not a witness called by the Plaintiffs, the only party who can object to his being cross examined in the 1st Defendant himself.

18. That it is only through cross examination that this court will get the truth hence the objection by Mr. Musyoka is with an ulterior purpose preventing the court to fully and fairly determine the matter.

19. In a brief rejoinder, Mr. Musyoka submitted reiterating that the 1st Respondent and the 4th Interested party are on the same side and that parties are bound by their pleadings and that the 4th Interested Party took a position in this matter upon being served with the Originating Summons, by filing a sworn affidavit supporting what her late father, the founder of the trust did and what the trustees are doing and have done.

20. That she has not sworn any affidavit challenging the trustees and their deeds hence her position is not adverse to that of the trustees to entitle her the right to cross examine the trustees.

21. On the assertion by Mr. Kamau Karori that the objection to cross examination of the 1st Defendant had come too late in the day, Mr. Musyoka submitted that he cannot consent to what the Evidence Act prohibits and that in any event, the objection has been raised before the commencement of the said cross examination.

22. Further, it was submitted by Mr. Musyoka that it is the duty of the court to establish the truth only in accordance with the Rules of the game which is the Evidence Act.

23. In addition, it was submitted that the 1st Defendant never mentioned the 4th Interested Party in any adverse way therefore the right to cross examine the witness does not arise. According to Mr. Musyoka, Mr. Karori can only re-examine the witness since the rules of cross examination are different from the rules of re-examination. He therefore urged the court to uphold the objection.

DETERMINATION

24. Having carefully considered Mr. Musyoka's objection to the cross examination of the 1st Defendant GEORGE Ngugi Waireri by the 4th interested party Dr Francisca Kahi and Mr. Kamau Karori's response on whether or not his client the 4th Interested Party has a right to cross examine the 1st Defendant in this matter, the issue for determination is whether the 4th Interested Party Dr. Francisca Kahi is entitled to cross examine the 1st Defendant George Ngugi Waireri.

25. The right to adduce and challenge evidence is stipulated in **Article 50 (2),(k)** of the Constitution.

26. **Section 161** of the **Evidence Act** Cap 80 Laws of Kenya provides for cross examination of own witness at Court's discretion the Section provides;

“The court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party.”

27. Further, Section 163 (1) of the Evidence Act Provides that;

“The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him.

a)...

b)...

c) by proof of former statements, whether written or oral, inconsistent with any party of his evidence which is liable to be contradicted.

28. From the above provisions of the law, it is clear that the Evidence Act provides for cross examination of a witness by the party who called them, with the consent of the court.

29. In this case, the 4th Interested Party swore an affidavit filed on 17/11/2015 fully supporting the trustees in their undertakings in the administration of the trust. No part of her affidavit contradicts the Trustee’s defence to the allegations leveled against them by the Plaintiffs.

30. In addition, It therefore follows that albeit the 4th Interested Party was enjoined to these proceedings by the Plaintiffs as such interested party and not as defendant, the 4th Interested Party’s affidavit filed on 17/11/2015 no doubt places her in the position of a witness for the Defendants.

31. The 1st Defendant Mr. George Ngugi Waireri is the Chairman of the NKT. He has been cross examined by the Plaintiff’s counsel and counsel for the 3rd and 8th Interested Parties.

32. It is not in dispute that the Plaintiffs, the 3rd and 8th Interested Parties have adverse interests in this case and therefore their right to cross examine the 1st Defendant is unfettered, as stipulated in **Section 145 and 146 of the Evidence Act, Cap 80 Laws of Kenya.**

33. However, as it is also crystal clear that the 4th Interested Party is a witness to the 1st Defendant, the 1st Defendant or the 4th Interested Party can only cross examine each other with the consent of the court and in the court’s discretion. The question is, under what circumstances would the court consent to or exercise its discretion to allow a party to cross examine own witness?

34. In this case, the court already gave directions that albeit the matter was originated by way of an Originating Summons, deponents of affidavits shall be cross examined by parties who shall seek such cross examination, and parties agreed would be , after giving advance notices as some affidavits had not been filed at the time of giving of such directions.

35. The 4th Interested Party did not indicate that she wished to cross examine DW1 and only waited until after DW1 the 1st defendant had been cross examined by the Plaintiffs and the 3rd and 8th Interested Parties, that she sought to cross examine the witness whom her own depositions fully support.

36. In **Kibaki Vs. Moi & Another (ELEC Pet 1/98** the court in dismissing an application for cross examination of a deponent held;

“In the exercise of its ordinary jurisdiction, the High Court is vested with the discretionary power to allow the cross examination of a deponent upon an application for such an order.

However, the power will only be exercised after a proper basis has been laid.

If the facts of the deponent are not disputed, cross examination will not be ordered”. [emphasis added].

37. In **Hudson Enterprises Ltd Vs. Kenya Cold Storage (Foods) Ltd & 14 Others (2006) eKLR**, Azangalala J (as he then was) following the decision in **Kibaki VS Moi (Supra)** while dismissing an application for cross examination stated;

“Under this provision of Order XVIII Rule 2 (1), the right to cross examine a deponent on his affidavit is discretionary. Like all judicial discretions it has to be exercised judicially and not whimsically or capriciously. In the case at hand the circumstances are such that I had to decline the application.

All the complaints made by the Plaintiff can be established by means other than cross examination of WilfredNyasimiOroko.”

38. In **Irish Bank Resolution Corporation Ltd VS.Quinn (2012) 1 EHC 510**. Kelly J held inter alia, that **cross examination is necessary to fill the vacuum**. Further in **Director of Corporate Enforcement Vs, Symour (2006) 1 EHC 369**, O’Donoran J made it clear that **cross examination of a deponent would only make sense if there are material conflicts of facts between the deponents in the affidavit since it would be impossible for a Judge to resolve a material conflict of facts disclosed in affidavit...**

“... at the end of the day, it is within the discretion of the court as to whether or not such cross examination should be directed and that discretion should only be exercised in favour of such cross examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine.”

39. The court can determine an Originating Summons by affidavit evidence since every Originating Summons must be supported by an affidavit annexing all the exhibits that the applicant wishes to rely on. The Respondent in defence then files a replying affidavit (s) placing before the court all the materials challenging the allegations or claims by the Applicant.

40. At the pre-trial stage, the court then like in all other Civil trials, calls upon each party to indicate whether they will call any other witness, or witnesses who have sworn affidavits to orally testify and or whether they wish to rely on affidavit evidence and either of the parties may indicate the particular witness (s) that they wish to cross examine. In doing all that, the court bears in mind the overriding objective of the law on the need for a just, efficient and expeditious disposal of the Originating Summons.

41. It is therefore on that basis that this court would exercise its discretion, taking into account such factors, among others that indeed, cross examination of own witness is not a matter of course. The party seeking to cross examine the witness must first demonstrate to court that the material contained in the affidavit or in answers given in cross examination by the adverse party are adverse or are disputed matters when examined against the affidavit or evidence by the party seeking to cross examine.

42. In the instant case, for this court to exercise its discretion in favour of the 4th Interested Party, the 4th Interested party must demonstrate that the witness – DW1’s evidence, compared to the 4th Interested Party’s evidence as deposed in her replying affidavit filed on 17/11/2015 were at variance and that the only way the court was going to resolve those disputed facts was by cross examination of the 1st Defendant.

43. In other words, it must be demonstrated that the 1st Defendant during his cross examination by the other adverse parties, contradicted the statement made by him or his witness the 4th interested party herein; or that he retracted his own statement and that of his witnesses in material particulars, in which event, he would then be declared a refractory or hostile witness and liable to be cross examined by the party whose evidence he was expected to corroborate or support.

44. Although Mr. Musyoka gave no notice, I find that such notice was not necessary with regard to objection to cross-examination of the 1st defendant as such objection on a point of law could be raised any time.

45. In ordinary parlance cross examination is done by the adverse party and only done by the party to his witness if the evidence of the witness tends to favour the adverse party. As earlier stated, in the instant case, the 4th Interested Party's depositions having clearly been made in full support of the 1st Defendant and all the trustees in their administration and execution of the trust instrument, in the absence of any evidence that the 1st Defendant's evidence is in any way adverse to the evidence which the 4th Interested Party intends to adduce or has adduced, it would not serve any interest of justice to allow the 4th interested party to cross examine the 1st Defendant.

46. Furthermore, the 4th Interested Party did not take this court through the parts of the affidavits or evidence of the 1st Defendant that demonstrate matters considered contentious.

47. The fact that the cross examination of the 1st Defendant by the other adverse parties was broad and touched on affidavit of other parties and or witnesses in itself is not in itself prima facie prejudicial to the 4th Interested Party thereby making it necessary to invoke **Article 50 2 (k)** of the Constitution which is itself is clear that the right is that of adduction and challenge evidence. In this case, the 4th interested party has not been denied the right to adduce evidence and evidence can only be challenged if it is shown to be adverse to her case which she has failed to demonstrate hence she cannot claim that the right to challenge the 1st Defendant's evidence has been denied.

48. Parties are bound by their pleadings and as the 4th Interested Party has not altered her position of supporting the 1st Defendant, Trustee's action, she cannot change her position through cross examination especially where the 1st Defendant trustee has not given evidence adverse to that of the 4th Interested Party, and as cross examination is never intended to build one's case.

49. **Section 146 (2)** of the **Evidence Act** is clear that;

“Subject to the following provisions of this Act, the examination in chief and cross examination must relate to relevant facts, but the cross examination need not be considered to the facts to which the witness testified in his examination in chief.”

50. Thus, the cross examination of the witness or 1st Defendant in this case need not have been confined on his depositions alone and therefore the plaintiffs and 3rd and 8th Interested Parties cross examination touching on or while referring to other parties depositions was grounded in law.

51. This court has no doubt that the 4th Interested Party has a direct identifiable interest in these proceedings as she is a beneficiary of the trust and a child of the founder. She will have an unfettered opportunity to put forth her case and cross examine if she is granted leave, any witness who will give evidence adverse to her rights.

52. However, this is not a case of distribution of the Founder's Estate and hence in the absence of any prejudice demonstrated, I hesitate to allow blanket cross examination. There is also no doubt that the 4th Interested Party was enjoined to this suit as a Primary party (Interested Party) by the plaintiffs. However, being an interested party, one is neither a plaintiff nor a defendant and as such, one can choose to either respond to the summons or remain neutral. But the moment an interested party who was enjoined to the suit as a primary party chooses to fully support either the Plaintiff or defendant as is the case with the 4th interested party herein, then her interests are not adverse to those of the 1st Defendant and therefore for her to cross examine the 1st defendant, she must demonstrate to the satisfaction of the court that DW1's evidence deserves to be challenged by her through cross examination because it is adverse to her interests. That was not done. In the circumstances, I find the 4th Interested party has not laid a basis upon

which she should be permitted to cross examine the 1st Defendant. Accordingly, her request is rejected.

53. I must however mention that albeit Mr. Kamau Karori counsel for the 4th interested party contended that in any event the court had ordered that he cross examines the 1st Defendant and that in the absence of an order reviewing that directive, the objection by Mr. Musyoka came too late in the day, I beg to disagree.

54. This is because this court did give directions on the mode of disposal of the Originating Summons and at that time, Mr. Kamau Karori, like all other parties' advocates was given an opportunity to indicate which deponent he wished to cross examine and to-date, it is conceded that he never issued any notice to cross examine that 1st Defendant. Further, even if that were not to be the case, the directive of 31/1/2017 for Mr. Kamau Karori to proceed with cross examination of the 1st Defendant on the 2.2.2017 was predicated on the understanding that he had given notice to cross examine the witness but that he required more time to prepare for such cross examination in view of his engagement before the Court of Appeal.

55. Nonetheless, such cross examination should be grounded in law and which law I have clearly set out as above. The directive, in my humble view, was therefore made *per in curium* and this court retains the inherent power to vacate any order which is made *per incuriam* which I hereby invoke and vacate the directive of 31/1/2017 which was to the effect that the 4th Interested Party's counsel do proceed with cross examination of the 1st Defendant on 2/2/2017.

56. The court is bound to refuse to follow its own decision which is made *per incuriam*. Such vacation can be done by way of an amendment or correction of errors as stipulated under Section 99 of the Civil Procedure Act which stipulates that a clerical or arithmetical mistake in any judgment of the court or any error arising therein from an accidental slip or omission may be corrected by the court either of its own motion or on the application of the parties

57. The correction thereof is intended to give effect to what the intention of the court was when the judgment or order was made. In other words an order of the court may at any time be corrected by the court either of its own motion or on the application of any interested person if it does not correspond with the decision it supports or where the order or judgment has been corrected, with the judgment as so corrected.

58. The above section donates to this court the power to correct any clerical or arithmetical mistake or any error(s) arising therein from the accidental slip or omission., or in the case of a matter which was overlooked where the court is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention (See **Valla BhdasKarsandaRanika Vs. MansukhlalJirraj and other (1965) EA 700.**

59. In **Lachamshi Brothers Limited Vs. R. Raja & Sons (1966) EA 313 Page 314** paragraph E-F Sir Charles Newbold P. observed that;

“indeed there has been a multitude of decisions by this court on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment or order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribe. Broadly, these circumstances are where the court is asked in the application subsequent to judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted.

I would here refer to the words of this court given in the Rainga Case (2) [1965] EA at page 703 as follows;

“A court will, of course only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when the judgment was given or, in the case of a matter

which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

60. The above decisions clearly stipulate the rule which exists to enable the court to correct a mistake so as to give effect to what was the intention of the court at the time when the mistake was made, in order to ensure public confidence in the administration of justice and to avoid miscarriage of justice.

61. In this case, if it had been brought to the attention of the court that the 4th Interested Party’s affidavit filed on 17/11/2015 fully supported the 1st Defendant’s position and that the court had infact already given directions concerning the parties seeking to cross examine deponents, and that the 4th Interested Party had infact not given any notice of intention to cross examine DW1, the court would not have adjourned the matter on the basis that Mr. Kamau Karori required time to cross examine DW1 for on 2/2/2017.

62. Therefore, applying the slip rule, I hereby recall the order of 31/1/2017, specifically the part that states.....”***when Mr. Kamau Karori shall cross examine the witness Mr. George Ngugi Waireri***” and vacate it and substitute it with an order that Mr. Kamau Karori for the 4th interested party shall not cross examine the 1st defendant Mr. George Ngugi Waireri for the reasons given herein.

63. Finally, although Mr. Musyoka counsel for the plaintiffs extensively submitted on the status of Mr. Kamau Karori advocate of IKM in these proceedings, I decline to make any substantive decision on that issue which is subject of an application which is still on record and which was spent by the directions of this court made on 17th December, 2015.

64. Those shall be orders of the court. Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 6th day of February, 2017.

Signed

R. E. ABURILI

JUDGE