



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 103 OF 2008**

**MANSUKHALAL JESANG MARU.....PLAINTIFF**

**VERSUS**

**FRANK WAFULA.....DEFENDANT**

**RULING**

1. The application dated **26/2/2020** and filed in court on the same date has been brought by the defendant. He seeks the following orders:

**(1) That this court be pleased to issue summons to MANSUKHALAL JESANG MARU, who swore an affidavit dated 6/1/2020, to attend court for cross-examination.**

**(2) That the costs of this application be borne by the plaintiff/respondent**

2. The applicant has brought the application pursuant to **Section 1A, 1B, 3A Civil Procedure Act, Order 19 Rule 2 of the Civil Procedure Rules 2010.**

3. The grounds upon which the application is brought are that the plaintiff is purveying falsehoods and should be cross-examined to establish if he is guilty of perjury. It is alleged that the subject affidavit contains matters that are not only scandalous but also oppressive to the applicant, hearsay. The applicant avers that the affidavit was prepared with an intent to mislead the court.

4. The application is supported an affidavit of the defendant dated **26/2/2020**. The gist of that affidavit is that the suit plot has never been surveyed by the Director Of Surveys and that the documents of the plaintiff are therefore not genuine and the plaintiff should hence appear in court to shed more light on the contents of his affidavit. The defendant alleges that the Police have already declared the plaintiff and others not named as persons on interest in the alleged fraudulent acquisition of the suit land.

5. The plaintiff filed a replying affidavit dated **10/3/2020** on the same date. He averred that no proper basis has been laid for his proposed cross-examination as the averments in the instant application's supporting affidavit are not found in the affidavit attracting the defendant's desire for cross-examination. The plaintiff further avers that the defendant has not identified any conflict on any issues of fact in that affidavit. He expresses his concern that the plaintiff is out to further delay the hearing and determination of this suit.

6. The plaintiff filed his submission on **12/5/2020**. The defendant filed his submissions on **20/5/2020**. I have considered the application, the response and the submissions.

7. The background to the instant application is that after the plaintiff had closed his case the defendant filed an application dated **5/12/2019** seeking leave to file a further list and bundle of documents which the plaintiff responded to through the impugned affidavit.

8. In appropriate circumstances the court will allow cross-examination of a deponent (see the case of **R -vs- Constituency Development Fund Board & Another Ex-parte Robert Iltaramwa Ochale & 5 Others [2012] eKLR.**)

9. Cross-examination on an affidavit in support of an interlocutory application is to be allowed only in special circumstances. (See the case of **Republic -vs- Kenya Revenue Authority Ex-Parte Althaus Management & Consultancy Ltd [2015] eKLR.**)

10. In the case of **G G R vs. H-P S [2012] eKLR** it was held that a court may order cross-examination in instances of allegation contained in affidavits of matters touching on fraud, mala fides, authenticity of the facts deponed, and bad motive among others.

11. In **R -vs- Constituency Development Fund Board & Another Ex-parte Robert Iltaramwa Ochale & 5 Others [2012] eKLR** the

court dismissing an application for orders allowing cross-examination stated as follows:

**“They (the applicants) seem to clearly know what is not right about those affidavits. What they should have done is to seek leave so that they can file further affidavits to countermand the falsehoods in the affidavits. In my view they have not advanced any good reason for wanting to cross examine the deponents.”**

12. In the instant application the applicant has failed to single out any paragraph in the impugned affidavit save **paragraph 8**. That paragraph is alluded to in his grounds at the foot of the instant application. That **Paragraph 8** only states that this court had allowed the defendant an opportunity to cross-examine the plaintiff earlier, before the two applications were filed.

13. I have noted that the defendant has raised a host of new matters in his supporting affidavit to the instant application which are not supported by any evidence in the form of annexures.

14. It is clear that besides raising many new issues unrelated to **paragraph 8** of the impugned affidavit, the approach by the plaintiff has made it very difficult to identify what he wishes to cross-examine the plaintiff on that can not be responded to by way of a replying affidavit at the interlocutory stage. In this court’s view, **paragraph 8** alone of the impugned affidavit has not much that can be the subject of cross-examination. It merely states that this court had allowed the defendant to cross-examine the plaintiff and his witness earlier.

15. Consequently I find that the defendant has not justified his application for orders to have the plaintiff appear in court and be cross-examined.

16. The application dated **26<sup>th</sup> February 2020** lacks merit and the same is hereby dismissed with costs to the plaintiff.

**Dated, signed and delivered at Kitale via electronic mail on this 30<sup>th</sup> day of June, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**