



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 211 OF 2012**

**DAVIS MWALIMO MWANGEKA.....PLAINTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY**

**CEMTEC ENGINEERING LIMITED.....DEFENDANT**

**R U L I N G**

1. By an application by Notice of Motion dated 16/11/2015 and expressed to be premised on the provisions of sections 1A, 1B and 3A as well as Order 45 Rule 1 of the Civil Procedure Act, the Attorney General, on record as appearing for one Samuel Cheruiyot Tuei, the deponent of an affidavit sworn on the 31/3/2015 and filed in court the same day, applied that the court set aside its orders of 9/10/2015.
2. The application was supported by the affidavit of Mr. Richard Ngari, state counsel whose gist was that when the Order was made they were not represented and that the order to cross examine the deponent would defeat the initial purpose of the court of asking the deponent to swear an affidavit to assist the court. To Mr. Ngare, rather than seeking the cross-examination of his client, the court has the option of grating to the other parties leave to file opposing affidavit.
3. The application was opposed by the Respondent who filed affidavit by one Bildad Kisero, the principal administration officer of the Defendant, who contends that the interest of justice would be served best by cross examination of the deponent as he has asserted matters of facts that would assist the court determine the dispute. He further contends that the attendance for cross examination by Mr. Tuei would not defeat the initial purpose of the court but further it. Lastly the Respondent contend that there had been failure to meet the conditions for review under Order 45 Rule 1.
4. For the plaintiff, a replying affidavit was filed on the 3/5/2016. It takes the side of the Attorney General and asserts that the deponent of the affidavit need not attend court for purposes of cross examination and asserts that although the premises were built by Kenya Ports Authority, he does not have any agreement with them and pays the Rent to PPO - Coast.
5. The parties equally filed written submissions and attend court to highlight the same. While the plaintiff and the Attorney General took the same side that there is no need to have the deponent cross examined, the Respondent was deeply for the cross examination.
6. I have had the benefit of hearing and reading both oral and written submissions together with the decided cases cited by the Respondent.

7. To this court, the application as crafted and filed is essentially an application for review although it is worded as setting aside. To that extent, this court has come to the position that the issues for determination are:-

**i) Whether a case for review has been established?**

**ii) When would a Civil Court Order a deponent of an affidavit to attend court for purposes of being cross examined?**

8. To address the issues, this court deems it appropriate to lay a basis how the affidavit of Samwel Cheruiyot Tuei came to be filed. By the court ruling of 3/3/2015 the court delivered itself in part as follows:-

**“a) Notice of Motions dated 26/11/2012, 4/12/2012, 16/2/2014 and 27/2/2014 shall be determined by this court after the officer in-charge of Part Police provides information on the tenancy of the Plot No. 971/972 MN SHIMANZI ROAD.**

**The Attorney General is hereby ordered to assist this court to obtain an affidavit sworn by the Officer In Charge of the Port Police Station whereby that Officer will inform the Court whether or not DAVID MALIMO MWANGEKA is a tenant of the police at Plot No. 971/972 MN Shimanzi Road Mombasa. If he is a tenant the said officer in charge of Port Police shall indicate the period of such tenancy”.**

9. It is apparent that Order was deemed a facilitative Order because it is apparent it was made by the court *Suo motto* without any party seeking it from the court. If it is to me one of those Orders a court makes to enable it effectually and justly determine a dispute before it. It can only be seen that there was need of an independent and impartial witness the court though necessary to enable it determine the four applications. I get the impression that the court considered the officer in-charge of Port Police Station a competent and compellable witness. The foundation of law permitting cross examination in section 128 and 146(4) of the Evidence and Order 1a Rule 2 and 9 of the Civil Procedure Act.

10. The moment Mr. Tuei swore and filed the affidavit, he became a witness for determination of the status of the tenancy of the plaintiff and the law under section 128, Evidence Act is that he cannot be excused from answering any questions on his evidence. His evidence in all fairness is subject to test of veracity by the process of cross-examination. The deponent is a public servant who is commanded to exercise certain level of ethical standards including the duty to be forthright and candid. Infact the motto of the police service is “Service To All”. In this case he can be seen to be non -partisan when he surrenders himself to the court and answers the question the parties and the court may want him to clarify to test the truthfulness of his evidence on oath. To shield him away from that responsibility may lead to the inference that there is something he fears may be revealed which is not disclosed or concealed in his averments on oath. I do not think that a court of law can countenance such a practice. In all fairness and even without the consent of the parties recorded herein, the court, wherever it appears that there is a person with information to assist it make a just determination retains the power to summon such a person. At this juncture it is important to reproduce the provisions of section 128 of the Evidence Act on the compellability of a witness. It provides:-

**“A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer”.**

11. Contrary to what the Attorney General and the plaintiff say the Cross-examination will not defeat but enhance and further the purpose for which the court sought and requested for the affidavit of SAMUEL

CHERUIYOT TUEI. To shield him from being cross- examined is what would defeat that purpose for the court will lack the chance to interrogate the credibility of his assertions. I hold that Mr. Samwel C. Tuei is not only a competent but also compellable witness. Being such a witness he is bound to attend for purpose of being cross examined and there are legal tools at the courts disposal to compel such attend.

12. On whether or not there the applicant has met the pre-requisite for an order for review or setting aside, I take the view that the substantive parties to this suit are the plaintiff and the Defendant. Mr. Samuel Cheruiyot Tuei is not a party at but a witness. His participation on the 9/9/2015 was not necessary, unless for purposes of being cross-examined and therefore the fact that the order was made in his absence or the absence of his counsel is not a reason to justify a review. I find no merit in the application and dismiss it. Additionally, none of the Pre-requisites set under Order 45 Rule 1 have been made to justify an order for review.

13. The foregoing lead me to the inescapable conclusion that there is no merit nor justification to consider granting the application dated 16/11/2015. The affidavit filed is part of the court record and is evidence of an oath. Being an oath the Senior Police Officer and a Senior Public Officer has no reason not to attend court and reiterate the truth he has put on oath.

14. It is not good enough that we are in an election year and that the Officer is now stationed in Pap Onditi, Kisumu County. No part of County is far or to remote to stop a law enforcement officer from accessing to enforce the law. In any event no duty is compelling on all of us Kenyans than to ensure that justice is done for we sing and appreciate that justice shall be *'our shield and defender to enable us leave in unity, peace and liberty for prosperity to thrive within our borders'*.

15. The application is dismissed but as the applicant is not a substantive party but only a witness, I make no order as to costs.

**Dated** and delivered at **Mombasa** this **31st** day of **March 2017**.

**HON. P. J. O. OTIENO**

**JUDGE**