



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 374 OF 2015

NURU ABDULLA AHMED. 1ST APPELLANT/APPLICANT

MOHAMMED HAILE JILLO. 2ND APPELLANT

VERSUS

ABDIRASHID ADAN HASSAN. RESPONDENT

***(Being an Appeal against the Ruling of Hon. Chief Magistrate, The Hon. Mr. Obulutsa as Read By
Hon. E. K. Usui (Mrs.) on 3rd July, 2015 Nairobi CMCC Civil Case No. 7112 of 2014)***

RULING

The Respondent herein has moved this Honourable by way of a Notice of Motion dated the 15th January, 2016 under the provisions of Order 19 Rule (2), Order 51 Rule 14 (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The following orders are sought.

1. Spent.
2. That pending the hearing of the Appellants Notice of Motion dated 12th November, 2014 coming up for hearing on 1st February, 2016, the Respondent be allowed to file a supplementary further affidavit to the Notice of Motion on issues raised in the Appellant's supplementary affidavit dated the 16th day of December, 2015 and on the amended record of appeal.
3. That the Honourable Court be pleased to order that the Deponent of the Affidavit dated 16th December, 2015 herein the 1st Appellant be ordered to attend court on 1st February, 2016 to be cross-examined on the basis of the contents of the sworn further supplementary affidavit paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20, 22 and 25, dated 16th December, 2015.
4. That the Honourable court be pleased to order the said sworn supplementary affidavit be expunged from the record.
5. Costs of the application be in the cause.

The application is premised on the grounds set out on the body of the same and on the annexed affidavit of **ABDIRASHID ADEN HASSAN** sworn on the 15th January, 2016.

In the said affidavit he depones that the contents of the Affidavit dated the 16th December, 2015 are malicious and character assassinating to him in person and he is seeking for a court order for the deponent to appear in person in court to be cross-examined to the contents thereto particularly paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20, 22 and 25.

He states that he has been demeaned by the contents of the said affidavit which are untrue whereof its sources have not been disclosed. He denies that he is from Somali origin as alleged and portrayed by the deponent but he is a Kenyan.

He further depones that as a Kenyan citizen, he has always condemned terrorist activities and as such he cannot assist or in any other way participate in criminal activities or join any terrorist activities as alleged by the deponent. That the Affidavit portrays him as a terrorist and that the anti terrorist police are looking for him and the deponent may use this affidavit to assassinate his character and his name in public domain.

He depones that based on the allegations of the said supplementary affidavit the applicant presented himself to the anti-terrorist police headquarter in Nairobi where he sought an explanation from the police as to whether they were looking for him, a fact which was denied by police. He has written an Occurrence Book complaining against the deponent and the police have dissociated themselves from any allegations as deponed in the affidavit of the deponent. He seeks that the affidavit be expunged from the record.

The Appellant/Respondent has opposed the application by way of a replying affidavit sworn on 1st February, 2016, on the grounds that the same is an abuse of the court process and that it is made in bad faith. He avers that the contents of the affidavit sworn on 16th December, 2015 are true to the best of his knowledge and information whose sources he has disclosed. According to him his affidavit is properly on record as it was filed with the leave of the court and the same should not be expunged from the record based on the bare denial of the contents therein by the Applicant.

He depones that the Respondent's own identity is in issue, his purported signature in his replying affidavit which allegedly differs with his earlier known signatures. Even his identity card is in issue.

The Respondent avers that where one discloses his source of information, he is allowed to depone to such matters as provided for by order 19 of the Civil Procedure Rules. That the contents of the said affidavit are not malicious or character assassinating as alleged, but are aimed at aiding the court to understand the gravity of the matter before it. That failure by the applicant to annex the Occurrence Book referred to, if one existed, indeed confirms that the contents of his affidavit are true.

He believes that, the call for his cross-examination on the contents of the supplementary affidavit sworn on 16th December, 2015 is done solely to waste the court's time and for the reason that, he had made a similar request and leave had been granted by the court. He avers that an applicant will not normally be granted leave to cross-examine a deponent when a determination is made that he is employing a tit for tat tactic as the Applicant herein seeks to do. He urges the court to dismiss the application.

The submission by the learned counsels mirrors the contents of their respective affidavits. On his part the counsel for the applicant in addition to what is contained in the affidavit in support, submitted that the supplementary affidavit did not disclose the sources from where he got the information and how the information reached him. That though the Appellant deponed that he got the information from the anti terrorist police, that could not be true as part of the information stated that the Somali government was looking for him at which time he was in Somalia and he could have been arrested there.

On his part counsel for the Appellant/Respondent submitted that unless it's very clear, the court should be reluctant to order cross-examination of a deponent as tit for tat just because the other party requested for cross-examination. He denies that the deponent/Appellant has attributed terrorism activities to the Applicant. According to him, the deponent has only stated that by the time the Affidavit was done he applicant was in Somalia – which fact has not been denied by way of an affidavit.

He further submitted that the deponent has stated the source of information as the Kenyan Anti-Terrorism Police whom he had interacted with on the 7th day of December, 2015. He, however, has no opposition to prayer 2 of the application subject to his costs.

I have carefully considered the materials before me and the submissions made by the learned counsels. What is before the court is the Appellant's appeal from a ruling by the Chief Magistrate, Hon. Obulutsa delivered on the 3rd day of June, 2015 wherein the learned magistrate dismissed the Appellant's/Defendants application to set aside the order dated 9th December, 2014.

The Appellants filed the application dated 12th November, 2015 for stay of execution pending appeal among other orders but before the same could be heard, the Respondent filed the application dated 15th January, 2016 which is the subject of the ruling herein. Thereafter, this court made orders that the Respondent's Application be heard first. In the application dated 15th January, 2016, the Applicant seeks to cross-examine the deponent on the contents of various paragraphs as set out earlier in this ruling.

I have perused the supplementary affidavit and the paragraphs that the Applicant alleges portrays him as a terrorist and in particular paragraph 5 of the same, where he depones: -

“I state the foregoing because in the week of December, 7th to date, I was contacted by the Kenyan Anti-Terrorism Police at the physical place of the suit property who asked me if I knew the whereabouts of the Respondent. I stated I did not.”

Paragraph 6 states as follows: -

“At that stage, I enquired as to why they wanted him as he had invaded my suit property, whereupon the Anti-terrorism police informed me that the Respondent had been reported as one of the Kenyans who had left Eastleigh into Somalia for suspected terrorism activities.”

The supplementary affidavit complained off was made pursuant to the Respondent/applicants replying affidavit sworn on the 15th December, 2015.

In the supplementary affidavit the deponent doubts that the Respondent/Applicant was in Kenya when the replying affidavit was sworn and he explains why he so doubted and for that reason, he had sought and obtained the leave of the court to cross-examination the deponent of the replying affidavit. He avers that the Applicant/Respondent was in Somalia at the material time. He has disclosed the source of that information as the Kenya Anti-terrorism Police who informed him that he Applicant has been reported as one of the Kenyans who had left Eastleigh onto Somalia for suspected terrorist activities.

In rebuttal, the Applicant depones that he presented himself to the anti-terrorist police headquarters who denied that they were looking for him and though he depones that he wrote an Occurrence Book complaining against the Respondent/Appellant, an extract of the same was not annexed to his affidavit and this court is not in a position to verify the truthfulness of the said assertion.

I have perused and considered the provisions of order 19 of the Civil Procedure Rules which are critical in this application and in particular Rule 3 thereof which provides: -

“3(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

And in the event that a deponent depones to matters that are scandalous, irrelevant or oppressive the court may order to be struck out from any affidavit any such materials, under Order 19 Rule 6.

In my view, and being guided by the provisions of Order 19 Rule 3 (1) some of the contents of the supplementary affidavit are statements of information and belief and though the source has been disclosed, the leave of the court was not sought to include them in the affidavit, Further, some of the contents are not relevant to the Appeal before the court and should, therefore, be struck out.

In the premises aforesaid, this honourable court makes the following orders: -

1. Prayer 2 of the application dated 15th January, 2016 is allowed.

2. Prayer 3 of the application is disallowed.

3. In respect to prayer 4, the following paragraphs are expunged from the record. Paragraphs 4, 5, and 6.

4. Costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 2nd day of June, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Appellant/Applicant.***

..... ***for the 2nd Appellant.***

..... ***for the Respondent.***