



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 42 OF 2014

BETWEEN

APA INSURANCE LIMITED APPELLANT

AND

JENNIFER ADOYO OREMO suing as the

administrator of the estate of HENRY ANYANGO RESPONDENT

(Being an appeal from the Ruling and Order of

Hon. Atonga, PM in the Chief Magistrates Court at Kisumu

in Civil Case No. 205 of 2011 dated 28th March 2014)

JUDGMENT

1. In the subordinate court, the respondent sued the appellant seeking a declaration that it was under a duty to satisfy a decree issued in its favour in **Kisumu High Court Civil Case No. 428 of 2001** following a judgment and decree issued against the appellant's insured for the sum of Kshs. 570,000.00 costs and interest. The claim was denied by the respondent.
2. In due course, the respondent lodged a Notice of Motion dated 30th July 2013 under **Order 2 rule 15(1)(b)(c) and (d)** of the **Civil Procedure Rules** applying to strike out the appellants defence for being scandalous and frivolous and on the grounds that it may embarrass, prejudice or delay the fair trial or is otherwise an abuse of the court process. The appellant opposed the application through an affidavit of James Wanyanga sworn on 7th August 2013.
3. When the matter came up for hearing on 22nd August 2013, counsel for the respondent applied for leave to file a further affidavit and to cross examine James Wanyanga on the issues raised in the affidavit. Since the application was not opposed, it was allowed. On 7th February 2014, the appellant's counsel once again applied for leave to file a fresh affidavit as James Wanyanga had left the appellant's employment and procuring his attendance would be difficult. The application was allowed without objection. Thereafter another replying was filed sworn by Paul Kariba sworn on 1st November 2013 which was similar to the one sworn by James Wanyanga.
4. When the matter came up for hearing on 28th March 2014, counsel for the appellant opposed the application by counsel for the respondent to cross-examine Paul Kariba. He stated that, "*I oppose the application for my colleague cross-examining the deponent on his fresh replying affidavit because he*

should prosecute the application first.” The trial magistrate allowed the cross-examination to continue. After the cross-examination of Mr Kariba, counsel for the respondent applied for leave to file a further affidavit to highlight the issues that had arisen in the cross-examination. Counsel for the appellant opposed on the application on ground that the matter was now part-heard and allowing the respondent to file a further affidavit would prejudice the appellant’s case. Nevertheless, counsel added in his submissions that, *“In the event the application is granted for leave, we shall seek the same.”*

5. After hearing the objection, the trial magistrate made an order granting leave to the respondent to file a further affidavit and corresponding leave to the appellant to file a further affidavit. It is this order that had precipitated this appeal.

6. In prosecuting this appeal, Mr Nyamweya, learned counsel for the appellant, who was also acting for the appellant before the trial court, submitted that the issue in this matter concerned the scope of cross-examination of a deponent afforded by **Order 19 rule 2** of the **Civil Procedure Rules** which states;

2(1) Upon any application, 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.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs. [Emphasis mine]

7. The appellant also implicated the power of the trial magistrate to allow parties to file further affidavits while hearing application was ongoing. He asserted that this was contrary to **Order 51 rule 14(3)** of the **Civil Procedure Rules** which provides;

14(1) Any respondent who wishes to oppose any application may file any one or combination of the following documents-

(a) a notice of preliminary objection; and/or

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in subrule (1) and list of authorities, if any shall be filed and served on the applicant not less than three clear days before the hearing date.

(3) Any applicant upon whom a replying affidavit or statement of the grounds of opposition has been served under sub-rule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with sub-rule (1) and (2), the application may be heard ex-parte. [Emphasis mine]

8. The record of proceedings reflects that counsel for the appellant accepted that if application for leave was granted, he would seek or require corresponding leave to respond to the additional affidavit. By making the order, the learned magistrate merely obliged in granting the order appealed from. Counsel for the appellant cannot turn around and complain when the learned magistrate acceded to his request.

9. The grant of leave to file a further affidavit, to cross-examine a deponent and to determine how an application is urged are matters for the discretion of the court. It cannot be gainsaid that the provisions **Order 19 rule 2** and **Order 51 rule 14** of the **Civil Procedure Rules** imbue the court with discretion. In view of the position taken by the appellant’s counsel before the trial court, this is a matter I should not intervene within the rule in **Mbogo v Shah [1968] EA 93**, where Newbold P., expressed the nature and extent of the appellate court’s jurisdiction to interfere with the discretion of the lower court as follows;

A court of appeal should not interfere with the exercise of the discretion of a judge unless it is

satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.

10. This though is not the end of the matter; I must say that the primary duty of the court is do justice without delay and undue regard to technicalities. This is the constitutional duty enshrined in **Article 159(2)(b) and (e)** of the Constitution. This provision is augmented by the provision of **sections 1A, 1B and 3A** of the **Civil Procedure Act** which set out the overriding objective and empower the court to do justice and prevent an abuse of the court process.

11. An application to strike out a suit is a summary procedure designed to obviate a full-length hearing when the claim or defence is hopeless. Where it results in the cross-examination of deponents and filing of counter affidavits, it defeats the very purpose of the summary process. In my view, the trial court has sufficient power and authority to ensure that the parties get to the heart of the matter and give necessary directions particularly where it appears in this case that the summary process has morphed into a full-length trial.

12. I would be remiss if I did not deal with the issue of cross-examination of the deponent of an affidavit under **Order 19 rule 2** of the **Civil Procedure Rules**. The power granted to the court to order cross-examination of a deponent is discretionary but it is an exception in interlocutory matters particularly in a case of striking out a pleading. The trial magistrate readily acceded to the request by counsel thereby opening the door to a convoluted hearing of an application that stated that the defence would, “*delay a fair trial of the suit.*” I would accept the statement of principle so ably stated by Odunga J., in regard to cross-examination of deponents in interlocutory applications in **R v Kenya Revenue Authority ex-p Althaus Management and Consultancy Ltd** NRB Misc. JR No. 393 of 2014[2015]eKLR where he stated as follows;

14. Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent’s affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held by Ochieng, J. in the case of Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2) [2006] 2 EA 6.

15. In fact in Lawson And Anor vs. Odhams Press Ltd. and Anor. (1948) 2 All ER 717, it was held that cross-examination on an affidavit in support of interlocutory application is to be allowed only in special circumstances.

13. This is the kind of case that requires the court to give necessary directions to ensure that matter is dealt with expeditiously having regard to the fact that the case was filed in July 2011 and the application to strike out filed in June 2013. 5 years down the line the suit is yet to be determined. This is an interlocutory appeal that will do nothing to finalise the matter without further delay.

14. To ensure that the matter now proceeds with finality, I now invoke the inherent power of the court to ensure that the matter before the subordinate court is determined without further delay. I now make the following orders;

(a) The appeal is dismissed.

(b) The parties shall fix the matter for the pre-trial conference before the subordinate court within **thirty (30) days** from the date hereof and the matter shall be heard and concluded within **six (6) months** from the date hereof.

(c) The respondent shall have costs of this appeal assessed at Kshs. 15,000/00.

DATED and DELIVERED at KISUMU this 2nd day of December 2016.

D.S. MAJANJA

JUDGE

Mr Nyamweya instructed by L. G. Menezes and Company Advocates for the appellant.

Mr Otieno instructed by Otieno Ragot and Company Advocates for the respondent.