



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 157 OF 2015

PAPINDER KAUR ATWAL.....PLAINTIFF

VERSUS

HARBANS SINGH AMRIT1ST DEFENDANT

KAMAL PARKASH AMRIT 2ND DEFENDANT

RULING

The Plaintiff by a notice dated 23rd March 2015 gave notice and intimated that she wished to cross examine the 1st Defendant/Respondent on the contents of his affidavit sworn on 10th March 2015. Under Order 19 rule 2 the power of the court to order a party to be summoned to be cross-examined on the contents of his affidavit is discretionary and in order for the court to exercise its discretion a basis has to be established by the party who seeks to have another party attend court to be cross-examined.

Order 19 rule 2 (1) of the Civil Procedure Rules pursuant to which the application for leave to cross examine the deponent is made provides thus:-

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.

The 1st defendant through his counsel opposed the plaintiff's application to have the 1st Defendant summoned to be cross-examined by the plaintiff. Both counsel for the plaintiff and the 1st Defendant made oral submissions before me on 16th April 2015 in respect of the plaintiff's application to cross-examine the 1st defendant.

The plaintiff in the submissions averred that the 1st defendant under paragraphs **8, 15 and 16** of the replying affidavit sworn on 10th March 2015 stated that the 1st defendant alleges the plaintiff wants to defraud and/or extort the 1st defendant and that no substantiation of the alleged fraud and/or extortion is furnished by the 1st Defendant. The plaintiff claims if the cross-examination of the 1st Defendant is allowed, the 1st Defendant will be put to task to substantiate and explain the allegations. The plaintiff explained that the plaintiff's claim is founded on proprietary estoppel which is equitable and the court will be expected to be guided by equitable principles in determining the matter.

Mr. Ouma counsel for the 1st Defendant opposed the application by the plaintiff arguing that the 1st Defendant will be available to be cross-examined during the trial and there was absolutely no basis for him to be cross-examined at this stage as that would amount to carrying out a trial within a trial and/or would amount to allowing the plaintiff to go on a fishing expedition which would be prejudicial to the defendants. The 1st Defendant contended the discretion of the court under Order 19 Rule (2) of the Civil Procedure Rules can only be exercised under limited and clear circumstances. The cross-examination has to relate to the contents of the affidavit and not to test the credibility of the deponent which can only be done at the trial. The party seeking to cross-examine the deponent has to lay a proper basis to enable the deponent to be called for cross-examination. The 1st defendant referred the court to the ruling by **Waweru, J** in the case of **Nancy Wanja Gatabaki –vs- Ashford Muriuki Muguku (T/A Ashford & Co. advocates (2013) eKLR** where the learned Judge considered the circumstances under which a deponent may be summoned to be cross-examined on the contents of an affidavit and urged the court to be guided by the principles discussed and articulated by the learned Judge.

The 1st Defendant in response to the contentious paragraphs 8, 15 & 16 of the replying affidavit stated that the same were derived from the outcomes of the various cases that had been heard and determined where the marriage of the plaintiff to the son of the 1st defendant was annulled. The 1st defendant's position being that the plaintiff was allowed/permitted to occupy the suit premises by reason of having been married to the 1st Defendant's son. The 1st Defendant asserts that the marriage of the plaintiff to the 1st Defendant's son having been annulled in **HC Divorce case NO. 122 of 2006** and the decision of the High Court upheld in **Civil Appeal NO. 299 of 2009** the plaintiff lost the right to continue in possession and occupation of the suit premises and her claim of proprietary estoppel is far fetched and unmerited. The 1st Defendant avers that the only reason the plaintiff was allowed to occupy the suit premises was because the child of the marriage **Akash Amrit** was residing with the mother, the plaintiff herein, and orders had been made relating to residency in **children's case NO. 278 of 2006- Manjit Singh Amrit aqnd in the case of Manjit Sing Amrit –vs- Papinder Atwal (In the case of Manjit Signh Amrit –vs- Papinder Atiral (In the matter of Akash Amrit), HCCC NO.6 of 2009 and Civil Appeal NO. 20 of 2010 Papinder Atwal –vs- Manjit Signh Amrit**. The said child is now over 18 years and the protective orders in the above cases now have no application.

I have considered the pleadings and submissions by counsel and I agree with both learned counsels that under Order 19 Rule 2 of the Civil Procedure Rules the court is expected to exercise its discretion whether or not to summon the deponent to be cross-examined. In my view there has to be a clear and proper basis laid by the applicant before the court can exercise that discretion. It is not a discretion that should be exercised liberally without a concise review of any factors that make it necessary to have a party cross-examined at the hearing of an interlocutory application as in the present case. There is a danger that if the courts were to liberally grant leave to cross-examine deponents of affidavits without serious scrutiny of the basis upon which an application to cross-examine a deponent is founded the courts may find themselves inundated with such applications such that “**minitrials**” or “**trials within a trial**” would be the order of the day which would not augur well for the administration of justice. The courts therefore have to trend carefully and allow only those applications that are merited.

I am in agreement with the observations of **Waweru, J** in the case of **Nancy Wanja Gatabaki –vs- Ashford Muriuki (supra)** where he observed thus:-

“5- In litigation governed by the Civil Procedure Act and Rules, the grant of leave to cross-examine the maker of an affidavit is a discretionary power of the court under Order 19 Rule 2 of the Civil Procedure Rules, 2010----- it bears remembering, however, that the exercise of discretion by the court must have a sound basis, it should not be exercised in a whimsical or capricious manner see the case of National Bank of Kenya Ltd & 2 others –vs- Kisumu Paper Mills Ltd (2009) e KLR. See also the case of Mbogo –vs- Shah (1968) EA 93. The question to ask is whether any material has been placed before the court which would assist in the exercise of its discretion.

6. an applicant to cross-examine the deponent of an affidavit must lay a proper basis for

such application. He must state which specific paragraphs and allegations in the affidavit in question give rise to the need for cross-examination”.

In the matter before me the applicant has alleged that the deponent under paragraphs 8, 15 and 16 of the replying affidavit has branded her a fraudster and an extortionist while the respondent has countered that the terms “**fraud**” and **extortion**” used in the said paragraphs are used in the context that the courts have in their respective rulings finally determined the plaintiff is not the wife of the 1st Defendant’s son and that any rights that accrued to her by virtue of her being the wife of the 1st Defendant’s son cannot be continued more so since their son from the annulled marriage has now become of age.

I cannot say what the cross-examination is intended to achieve if leave was to be granted but on the basis of the material before the court and the submissions by both counsel I am not persuaded that the plaintiff has laid a sound basis upon which I can grant her leave to cross-examine the 1st Defendant at this stage. I certainly see the cross-examination sought by the plaintiff as best suited for the trial when each party will have the opportunity to cross-examine each other. My view is that for the present the parties can adequately deal with the matters/issues raised in the affidavits during the hearing of the interlocutory application for injunction and specifically in the parties submissions respecting the plaintiffs application.

The upshot is that I decline to grant leave to the plaintiff/Applicant to cross-examine the 1st Defendant on the replying affidavit of 10th March 2015 and direct that the substantive application dated 24th February 2015 do proceed to hearing on merits. The parties shall exchange written submissions within the next 21 days of this ruling and the parties will highlight their submissions on 11th June 2015. The interim orders are extended till then. Costs of the application shall be in the cause.

Orders accordingly.

Ruling dated, signed and delivered this 7th day of May 2015.

J. M. MUTUNGI

JUDGE

In the presence of :

Gomba..... For the plaintiff

Ouma..... For the Defendants