



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION ON**  
**CIVIL SUIT NO.144 OF 2015**

**NYORO CONSTRUCTION CO LIMITED.....PLAINTIFF**

**Versus**

**PRASHANTH PROJECTS LTD.....1<sup>ST</sup> DEFENDANT**

**KENYA PIPELINE COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Cross-examination of deponent**

[1] I have before me a Chamber Summons application dated 2<sup>nd</sup> June 2015 by the 1<sup>st</sup> Defendant seeking and order that JOSIAH NJOROGENJUGUNA attend court for cross-examination on his affidavits sworn on 24<sup>th</sup> March 2015 and 16<sup>th</sup> April 2015. The application if made under section 3A and Order 19 rule 2(1) and 9 of the Civil Procedure Act and Civil Procedure Rules, respectively. It is supported by the affidavit of NADATHUR A. BHARATH.

[2] The Applicant intends to cross-examine the deponent on paragraphs 4, 5, 6 and 7 of the supporting affidavit on the reason that they contain fabrications based on falsehoods. And that JNN 3 is mere afterthought intended to bolster the plaintiff's case. from the affidavit in support of this application, other paragraphs are also mention as candidates for cross-examination, namely; paragraph 6 which alleges 'that they tendered jointly tendered as parties for the tender'; paragraph 14 of the Further Affidavit which avers that the Plaintiff participated at all levels of the tendering process; paragraphs 6,7,8,9 and 10 of the Further Affidavit which are said to be falsehood calculated at giving legitimacy to the annexure JNN3.

[3] The 2<sup>nd</sup> Defendant also filed an affidavit in support of the application by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant wishes to cross-examine the Josiah NjorogeNjuguna on some of the documents at page 365 of their documents filed in court with regard to their authenticity. They insisted that it is important to establish the source of those documents which are supposed to be confidential.

**DETERMINATION**

[4] The law is clear that the person desiring to cross-examine a deponent of an affidavit must set out the particular paragraphs he wishes to cross-examine the deponent on. He must also lay a basis for it. But, in determining an application for cross-examination of a deponent of an affidavit, the court should be careful not to conduct a hearing in the process or prejudice the trial of the case. Judicial decisions on this matter

are legion and I do not wish to multiply them. I am content, however, to cite a work of the court in an earlier but similar application as follows:

**“...However, it is worth repeating that, in exercising the power to order cross-examination of a deponent, care should be taken not to turn the interlocutory application into a hearing or delve into evidence in so intrusive manner that any subsequent trial will have been prejudiced. Therefore, cross-examination should not be used to afford the Applicant undue advantage over the Respondent, but rather to enable the court resolve the issues in the application on prima facie basis. Accordingly, cross-examination should be ordered only on matters which are deposed upon and not others; and the court should take firm control of the proceedings to ensure these boundaries are not exceeded”.**

[5] The present application seeks to cross-examine the deponent herein on matters on whether the plaintiff and the 1<sup>st</sup> Defendant were partners in the tender. The Legal officer was cross-examined on the same issue and provided her perspective and that of the 2<sup>nd</sup> Defendant on the relationship between the plaintiff and the 1<sup>st</sup> Defendant. The participation of the plaintiff in the tender was also comprehensively addressed by the legal officer of the 2<sup>nd</sup> Defendant. Accordingly, there is enough material to decide the application on injunction especially regarding the status of the plaintiff in the tender process as well as their participation thereof. Any further intrusive examination like this application portend will only delay this matter and catapult the court into a full-scale trial of the suit in an interlocutory application. Therefore, no useful purpose will be served by cross-examination of Josiah Njoroge Kariuki on these issues. The source or authenticity of any of the documents filed in court by the plaintiff in support of its claim will be unravelled in the trial during admission of documents. For the comfort of parties, the court is aware that it should not make findings or opinions in an interlocutory application that will prejudice the trial. I take particular note of matters such as the alleged meeting between the Managing Director of the 1<sup>st</sup> Defendant and one J.N. Njuguna on 9<sup>th</sup> May 2014; that is a matter for trial and cannot be determined at this stage even through cross-examination as real evidence and appropriate cross-examination in the trial will be required. The kind of cross-examination under Order 19 of the Civil Procedure Rules is quite limited to resolve such a huge issue. The upshot is that the request for cross-examination of Josiah Njoroge Njuguna is denied. In light, thereof, I give the following directions as promised on 17<sup>th</sup> June 2015:

- a) **That the Applicant in the application for injunction dated 24<sup>th</sup> March 2015 shall file and serve written submissions within 14 days.**
- b) **On service in (a) above, the Respondents shall file and serve submissions within 14 days thereof.**
- c) **Mention on 27<sup>th</sup> August 2015 to assign case a date for ruling.**

**Dated, signed and delivered in court at Nairobi this 20<sup>th</sup> day of July 2015.**

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**F. GIKONYO**

**JUDGE**