



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli. 800 of 2007

MOHAMED KORIOW NUR.....APPLICANT

Versus

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA ANTI CORRUPTION COMMISSION.....2ND RESPONDENT

THE CHIEF MAGISTRATE’S COURT MAKADARA.....3RD RESPONDENT

RULING

The Chamber Summons dated 25th January 2008 is brought under the inherent jurisdiction and powers of the court, Order 18 Rules 2 and 8 of the Civil Procedure Rules and other enabling provisions of the law. The ex parte applicant, Mohamed Korior Nur prays that Mr. Stephen Macharia Kimani, Advocate, do attend court to be cross examined on oath on the contents of the replying affidavit sworn on 28th September 2007, that the contents of paragraphs 12 to 18 of the replying affidavit sworn on 21st December 2007 by Mr. Stephen Kimani Macharia be expunged from the court records and lastly that costs of the application be provided for. The application is premised on grounds found in the body of the application and a supporting affidavit sworn by the ex parte Applicant.

The application was opposed by the 1st , 2nd and 3rd Respondents on points of law. The 2nd Respondent filed grounds of opposition on 11th February 2008. Mr. Munyu appeared for the Applicant, Mr. Bryant for the 1st and 3rd Respondents while Mr. Rugo appeared for the 2nd Respondent.

It is the Applicants contention that paragraphs 12 – 15 of Mr. Stephen Kimani’s affidavit dated 28th September 2007 conflict with the court record and that the deponent was not in court when the order of 15th August 2007 which is under challenge was made by Justice Osiemo and he cannot make allegations as to what transpired in court. That the deponent has alleged that Mr. Munyu gave false information to the court, that he failed to disclose certain material facts and that Counsel misrepresented certain matters to the court. That all these allegations are contested and yet the deponent did not disclose the source of his information. That is why the Applicant would want a cross examination of the deponent. Mr. Munyu submitted that the court has a wide discretion to allow cross examination for the interests of justice. He relied the case

1. **R V STOKESLEY JUSTICES ex parte BARTRAM (1956) 1 ALL ER 563** where the court held that it is rare to call for cross examination in Judicial Review proceedings but it can be done in exceptional cases;

2. **REKAPACIFIC BHD V SECURITIES COMMISSION OF MALAYSIA CA W-02-845-02 & OTHERS (CAM)** where the court observed that it is in rare cases that courts will order cross examination and discovery in Judicial Review proceedings, especially where there is a serious dispute in Judicial Review;

3. **NH INTERNATIONAL (CARIBEAN) LTD V URBAN DEVELOPMENT CORPORATION OF TRINIDAD & TOBAGO LTD, HCAC V 3181/2004**, the court emphasized that even in public law there can be cross examination on affidavits. The Counsel urged the court to exercise its discretion and grant the orders based on these authorities.

Mr. Bryant in reply urged that Order 53 Civil Procedure Rules does not provide for injunctions, discovery or declarations unlike the English Order 53 which was amended in 1977 and there cannot be discovery, cross examination, declarations or injunctions in Judicial Review, Counsel referred to the case of **OREILLY V MACKMANN (1982) 3 ALL ER AND STOKESLEY CASES**, cited by applicant. The exceptional circumstances that in that case, referred to were under the 1977 procedure which allows for discovery and injunctions. That the court has not been told what the rules in **TRINIDAD** are and that until there are amendments to the Kenyan law, there should be no cross examination in Judicial Review. He further submitted that the **STOKESLEY CASE** indicated it was the first time for such an occurrence and there has not been sufficient material placed before the court to enable the court exercise its discretion.

Mr. Rugo in opposing the application adopted Mr. Bryant's submission and added that Mr. Kimani in the affidavit that is challenged stated at para 11 stated that he had perused the file and what he deponed to was from perusal of the file and that is not disputed.

That on whole, the Applicant filed an affidavit in which at paragraph 14-15, he responds to Mr. Kimani's remarks. That the Applicant is interested in enforcement of his constitutional rights and not interested in the dispute between Mr. Munyu and Mr. Kimani as to what transpired in the court before Justice Osiemo. That this application lacks bona fides and is meant to delay the Judicial Review application as the Applicant is enjoying Orders of Stay. Counsel cited Mullah on the Code of Civil Procedure 16th ED where he says at page 2343 that cross examination on affidavits is absolute discretion of the court and that the court must be satisfied that it made bona fide.

The substantive motion within which this application is made is a Judicial Review one. Normally, the proceedings are by way of affidavit evidence. The applicant wants this court to step out of the box to allow for cross examination of Stephen Kimani, who has deponed to an affidavit in these proceedings.

As evidenced by the authorities cited by Counsel for the Applicant cross examination on an affidavit in Judicial Review proceedings is a very rare occurrence. The **STOKESLEY JUSTICES CASE (supra)** where cross examination was allowed in a Judicial Review application, it was heard in 1956 and Lord Goddard observed that it was the first time for him to come a cross examination in a Judicial Review application. The judge observed that they allowed cross examination because it was a case of a remarkable character. The next case in which such cross examination was allowed was in the **O'REILEY CASE (Supra)** in 1982, about 24 years later. By then the English law had been amended by the 1977 Act which relaxed the law in Judicial Review allowing for discovery and grant of orders like injunctions and declarations. That is not the position in Kenya yet. The law in Kenya is like what was prevailing in England in 1956. Cross examination was so rarely done that it was only in rare cases of remarkable character or in very special circumstances. In my view the Applicant has not demonstrated that there are any special circumstances in the instant case to call for the exercise of this court's discretion to call for cross examination of the deponent. If an affidavit offends provisions relating to the swearing of affidavits i.e. if it contains information that is irrelevant, hearsay, scandalous or oppressive the court can strike it out or expunge the offending paragraphs and not necessarily call for cross examination in a Judicial Review application that does not normally allow for that process. Besides, as pointed out, the Applicant makes a blanket application for cross examination of the said deponent, but does not lay the basis for the said cross examination, what the Applicant intends to establish or achieve by the said cross examination. That is why the court is of the view that the Applicant has not made a case for cross

examination on the affidavit nor has he shown any special circumstances that warrant the cross examination of the deponent.

I have seen the affidavit under challenge and at paragraph 3 and 11 thereof, the deponent claims to have perused the court file and even the Applicant's application on record. That seems to be the basis of his deponements. In my considered view there was no need to file another application within an application that was already partially heard for cross examination of the deponent but the Applicant should have sought to have the paragraphs expunged within the hearing of the application in which the affidavit is sworn. The court would look at the file, ascertain if indeed the deponement in that affidavit could have drawn those conclusions he depones to from the file.

This application is made right in the middle of another application when Counsel for the Applicant was making submissions in a Constitutional Application. The decision to make this application for cross examination comes as an afterthought or is it meant to slow down these proceedings? The affidavit under challenge can be considered within that application under consideration and submissions made on it.

I have also noted that the deponements by Mr. Kimani are directed on Mr. Munyu Advocate in regard to his appearance and prosecution of the Applicant's Judicial Review application before the court on 15/8/07.. The applicant has made this application for cross examination for reasons that he has made an application for protection of his constitutional rights and the same may be prejudiced. The cross examination of the deponent would not have a direct bearing on the Applicants constitutional rights and that is why it was important that the nature of the cross examination be disclosed.

In my view allowing this application would be allowing this court to wonder or drift away from the real issues before this court but deal with side issues. This court should not lose sight of the real issues. What the applicant wants is a long winded way but that can be achieved within the application in which the challenged affidavit is sworn. For all the above reasons I find no merit in the application and it is hereby dismissed with costs to the Respondents.

Dated and delivered this 3rd day of October 2008.

R.P.V. WENDOH

JUDGE

Present:-

Ms. Mate for Applicant

Mr. Bryant for 1st and 3rd Respondent

Mr. Murei for 2nd Respondent