



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 290 OF 2015

BICO LTD.....PLAINTIFF

-VERSUS-

KENYA RAILWAYS CORPORATION....DEFENDANT

RULING

1. For determination by the Court is the application dated 10th May 2017 and brought under the provisions of Order 19 rule 2 of the Civil Procedure Rules Cap 21. The plaintiff/applicant prays for Orders:

1. That this Honourable Court be pleased to Order the attendance of the deponent Justin Omoke for the purpose of being cross-examined on the contents of paragraphs 8 (a) (b) and (c) of his replying affidavit sworn on the 13th May 2016 and filed the following day; and any matters related to and incidental thereof.

2. That costs of this application be provided for.

2. The application is opposed by the Respondent's grounds of objection dated 13.6.2017 which list five (5) grounds inter alia that the application is an attempt to fill in gaps because the matters raised are not material to the issues raised in the application notice. Secondly that the facts raised by the Respondent's affidavit have not been disputed by way of further affidavit or otherwise.

3. I have read paragraph 8 (a), (b) and (c) of the replying affidavit for which the applicant wishes to cross-examine the maker of the replying affidavit as well as paragraph 8 and 10 of the plaintiff. In paragraph 8 & 10 of the plaintiff it is pleaded thus:

8. "The defendant in breach of clause 6 and 9 aforesaid unilaterally allocated the sidings and road to a third party who has embarked on construction works over the sidings and the road thus rendering the plaintiff's operations in the suit property as a godown or warehouse inoperative."

10. "The plaintiff will aver that the purported allocation of the sidings to a third party is in breach of the written agreement made between the parties herein."

4. Paragraph 8 of the replying affidavit also states thus:

a) The property in construction is being undertaken by a 3rd Party as conceded under paragraph 8 and 10 of the plaintiff.

b) The said 3rd Party is not privy to the lease between the plaintiff and the defendant.

c) The 3rd Party is not an agent, employee, servant or a contractor of the defendant. Therefore the defendant is not liable directly, vicariously or otherwise responsible for the actions of the 3rd Party.

5. I note from the plaintiff that it is the applicant who introduced the issue of the 3rd Party into the pleadings and paragraph 8 (a), (b) & (c) of the replying affidavit merely denies what the applicant has already pleaded. The applicant states on the grounds on the face of his motion that the cross-examination is necessary to establish the terms of the lease allegedly given to the 3rd Party and to also get the identity of that 3rd Party. From the contents of the plaintiff, the applicant is alleging breach of the terms of lease as executed between it and the Respondent. To seek to establish the terms of a lease between the Respondent and the 3rd Party who has not been joined in these proceedings amounts to going beyond what is pleaded. Parties are bound by their pleadings and until some amendment is done to the plaintiff on record, the

explanation that the cross-examination is meant to establish the terms of **a lease which is not the subject of dispute** before this Court is frivolous. Further when the plaintiff/applicant pleaded that it is a 3rd Party undertaking the construction works in the disputed area, it must have had some basis for stating so. It can still carry its investigations to find out who the 3rd Party is without making this Court to do that which is a party's duty of seeking identities of parties to be sued.

6. In summary, I do agree with the statement of objection by the Respondent that the application is trying to fill the gaps in the case. This matter is still at an interlocutory stage and the decision in **James Kamangu Ndimu vs Margaret Ndimu & Another (2007) eKLR** sums it up well, where Dulu J. quoted the dictum of Cross L. J in the case of **Comet Products UK Ltd vs Hawkex Plastics Ltd** thus, ***"The applicant has to lay a proper basis upon which cross-examination will be ordered. If the facts of the deponent are not disputed, cross-examination will not be ordered. These passages confirm that cross-examination will be ordered to permit such an applicant to rove in search of matters not material or relevant to the particular proceedings before the Court."***

7. In the instant case, the applicant has not disputed the facts as contained in the replying affidavit for which it wishes to cross-examine Mr Justin Omoke. The applicant has not also laid a basis how the cross-examination will aid the application that is pending for hearing and determination. I therefore find the present application wanting in merit and proceed to dismiss it with costs to the Respondent.

Dated, signed & delivered at Mombasa this 8th March, 2018.

A. OMOLLO

JUDGE