



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO.315/2015**

**MICHAEL ANDREW SUTER.....PETITIONER**

**-VS-**

- 1. LEILA JAMES VAN ROSI (ALIAS LEILA IBRAHIM KHAN)**
- 2. LEKEV HOLDINGS LIMITED**
- 3. MILFAN DEVELOPERS LIMITED**
- 4. ABDULHAKIM ABDALLA**
- 5. THE LAND REGISTRAR MOMBASA**
- 6. THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

1. The Application subject of this ruling is for the court to order the attendance of Abdulhakim Abdalla for cross- examination as to the contents of his affidavit dated 14<sup>th</sup> September 2017. The Application is brought under Sections 1A and 3A of the Civil Procedure Act and Order 19 Rules 1 and 2 of the Civil Procedure Rules.

2. The Application is supported by the affidavit of Stephen Oddiaga Advocate sworn on 23<sup>rd</sup> October 2017. The Applicant states that the deponent has lied under oath as to the circumstances bedevelling **Plot No.1610/1/MN**. That the deponent has failed to disclose that he had knowledge of the Petitioner's claim of title and even must have read a caveat emptor placed in one of the local dailies but still ignored and proceeded to purchase and develop the said plot.

He avers that it is important that the deponent be cross-examined as to the truth as regards his averments and argues that it is in the interest of justice that this Application be allowed.

3. Abdulhakim Abdalla filed a Replying Affidavit sworn by himself on 15<sup>th</sup> November 2017 alleging that the Application is a desperate attempt by the plaintiff to defend his suit against summary dismissal and that the Application is an abuse of the court process as he is the registered owner (of the suit property) and that the High Court has pronounced itself severally in **HCCC NO. 151 of 2006 and HCCC NO. 24 of 2009**. That the Application is an afterthought and only intended to delay the summary dismissal of the suit. Replying on legal advice, he states that the Applicant has not identified, demonstrated or established special circumstances to warrant cross-examination. He avers that the issue of caveat emptor is a non-starter as the caveat published in the newspaper dated 14<sup>th</sup> December, 2009 was after the transfer to his name. And further relying on legal advice, he states that the facts deponed in his affidavit have not been disputed by way of further affidavit or otherwise and accordingly the Applicant has not placed facts or laid proper or sufficient legal basis for cross-examination.

4. The Application was canvassed by way of written submissions with the Applicant filing his submissions on 19<sup>th</sup> January 2018 and the 4<sup>th</sup> Respondent on 24<sup>th</sup> January, 2018.

5. The Petitioner has submitted that the Respondent has made an Application to strike out the petition herein which relates to a claim over land. The suit is premised on the fact that the 4<sup>th</sup> Respondent has through his illegal ways violated the Petitioner's right to property and therefore violated his constitutional right as envisaged under Article 40 of the Constitution. The 4<sup>th</sup> Respondent obtained his ownership through the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents against whom judgment has been sought and entered. It is the Petitioner's submission that the 4<sup>th</sup> Respondent cannot purport to retain a good title if the persons who gave him the title did not have a good title. According to the Petitioner,

the 4<sup>th</sup> Respondent has lied under oath as to the encumbrances which bedevil the Suit Property and has failed to disclose that he had knowledge of the Petitioner's ownership before he purchased the property. It is the Petitioner's submission that the Respondent must be ready to be cross-examined at this point why such drastic action as striking out of the petition should be issued. The Petitioner further submits that he wished to have the 4<sup>th</sup> Respondent to clarify issues in his affidavit which, when clarified, the court will find that the Application to strike out cannot stand. The Petitioner cited the case of **Law Society of Kenya –v- Faith Waigwa & 8 Others (2015) eKLR**.

6. The 4<sup>th</sup> Respondent has submitted that the Application is an attempt to abuse the process of the Court in order to avoid striking out of the petition and that it is an attempt to fill in gaps and to challenge the averments of the affidavit of the 4<sup>th</sup> Respondent through the back door. It is the 4<sup>th</sup> Respondent's submission that the Applicant has not laid any or any proper factual or legal basis upon which cross-examination could be ordered. Relying on the case of **James Kamange Ndimu –v- Margaret Wanjiru Ndimu & Another (2007) eKLR**, the 4<sup>th</sup> Respondent submitted that the facts deposed to by himself have not been controverted or disputed by way of Replying Affidavit or otherwise and that the Application is seeking to fill in gaps. Citing the case of **Lawson & Another –v- Odhanus Press Ltd & Another (1948) 2 All ER 717**, the Respondent submitted that no special circumstances have been pleaded to warrant the discretion of the court to grant the order for cross-examination.

7. I have considered the Application, the affidavits in support and against the rival submissions and authorities filed.

Order 19 Rules 1 and 2 of the Civil Procedure Rules provides as follows:

**(1) Any court may at any time for sufficient reason order that any particular fact or facts may be provided by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:**

**Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.**

**(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.**

8. As was stated by Odunga, J **in Republic –v- Kenya Revenue Authority Ex-parte Althans Management & Consultancy Limited (2015) eKLR**, "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."

In **Lawson and Another –v- Odhams Press Ltd and Another (1958) 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.

9. The Application before me was prompted by the 4<sup>th</sup> Respondent's Application filed on 15<sup>th</sup> September 2017 seeking to have the suit against him struck out. The grounds for seeking the cross-examination of the 4<sup>th</sup> Respondent is that he has lied under oath as to the encumbrances bedevelling **PLOT NO.1610/1/MN** and that he has failed to disclose material facts within his knowledge as regards the subject matter.

10. The Petitioner has not filed a further affidavit to dispute the averments in the 4<sup>th</sup> Respondent's affidavit in support of the Application to strike out the suit. The question, therefore that becomes is whether there are exceptional circumstances of disputed facts which require to be tested on cross-examination before the court can make determination as to the true state of affairs with respect to the facts of the case. In my view, there are no diametrically opposed positions of the parties that have been laid before court to warrant the issuance of the order sought. In my view, no exceptional circumstances have been shown to justify the cross-examination of the deponent of the affidavit on the matter. No proper basis has been shown for ordering the deponent of the affidavit in question to be cross-examined.

11. Having considered the issues raised herein, it is my view and I so hold that no basis has been laid before me to warrant this court directing that Abdulhakim Abdalla the deponent of an affidavit sworn herein on 14<sup>th</sup> September 2017 be availed for cross-examination on the said affidavit and I decline to make such directions. The chamber summons dated, 23<sup>rd</sup> October 2017, is without merit and dismissed with costs to the 4<sup>th</sup> Respondent.

**Dated, signed and delivered at Mombasa this 23<sup>rd</sup> day of May 2018.**

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**C. YANO**

**JUDGE**