



**Kimemia v Juma & 5 others (Environment & Land Case
351 of 2008) [2024] KEELC 1436 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 351 OF 2008**

**AA OMOLLO, J
MARCH 19, 2024**

BETWEEN

AURIEL MARIE JOY KIMEMIA PLAINTIFF

AND

JACOB JUMA 1ST DEFENDANT

MARY WANJIRU CHEGE 2ND DEFENDANT

COMMISSIONER OF LAND 3RD DEFENDANT

WILLIAM TUMATA SILALA SANO 4TH DEFENDANT

LATOO ENE PRIANKA NCHEPAI 5TH DEFENDANT

KENYA UNITED SPORTS LTD 6TH DEFENDANT

RULING

1. The 3rd Respondent filed a notice to cross examine dated 24th November 2023 stating that during the hearing of the application for contempt they shall require the appearance in person of Wambugu Gitonga Advocate for the purposes of cross examination on the entirety of the contents of verifying affidavit sworn on 14th September 2023 pursuant to the provisions of order 19 rule 2 of the [Civil Procedure Rules](#).
2. The Plaintiff opposed the Notice vide grounds of opposition dated 23rd January 2024 contending that it is incompetent and ought to be struck out in limine and that the notice is bad in law, going against the holding in *Mawani vs Mawani* (1982) KAR.
3. The 3rd Respondent filed submissions dated 20th December 2023 in support of the notice to cross examine while the Plaintiff filed submissions dated 23rd January 2024 in its opposition. The 3rd Respondent submitted that there is nothing barring an advocate from swearing an affidavit in



- appropriate cases but where advocate, swears an affidavit on disputed issues which removes them from their role of legal counsel to that of a witness thus subject themselves to the process of cross-examination. This Respondent cited the case of *Magnolia Pot Limited Vs Synermed Pharmaceuticals (K) Ltd* (2018) eKLR that cautions advocates from swearing affidavits on their clients' behalf.
4. The 3rd Respondent submitted further that the affidavit by Wambugu Gitonga an advocate of the high court raised various controversial issues among them issues delving in the interpretation of the directions of the material decree and service of statutory declaration which need to be clarified. In support they cited the case of *G G R vs. H-P S* [2012] eKLR, where the court outlined instances where a deponent may be subjected to cross-examination to include;

“... where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record... or where the evidence deponed (sic) to is conflicting in itself”.
 5. They also relied in Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated) *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (5 September 2022) (Judgment) paragraph 25....
 - ...(c) The affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed that all the Forms 34A attached to those affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the Public Portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective affidavits was not only inadmissible, but are also unacceptable. It has been established that none of the agents on whose behalf the forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two have gone ahead to depone on matters that are not within their knowledge.
 -(d) This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed. We must remind counsel who appear before this court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of the Penal Code, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings.
 6. The Plaintiff submitted that there is a substantive application that is pending before the Honourable Court dated 14th September 2023 that seeks to commit David Nyandoro and J Kamuyu to civil jail for contempt of court. She contended that the notice to cross-examine goes against the holding in *Mawani vs Mawani* [1977]1 KLR 159 which held that the fact that a party to a case has disobeyed a court order... then the court may in its own discretion refuse to hear him until the impediment is removed or a good reason is shown why it should not be removed.
 7. That the holding of that case has been applied in other cases such as *Shah & another TIA Lento Agencies VS National Industrial Credit Bank Ltd*, (2005) 1 KLR that a contemnor will not even be heard on



review until he purges the contempt for the preservation of the dignity and integrity of the court. She added that a party who is in contempt has a right to be heard only in his defence of a motion of contempt and does not have a right to be heard on a motion filed as in this case and this is because an application for committal to civil jail is a very serious application which proceedings are quasi criminal and the contemnor must be heard on his defence.

8. The Plaintiff stated that once an application for contempt is filed, the court is enjoined to first deal with the application before anything else as was approved by the Court in the case of *Econet Wireless Kenya Ltd -v- Minister for Information & Communication of Kenya & Another* (2005) eKLR.
9. The Plaintiff contended that the contemnors filed the "Notice" without any supporting evidence through an affidavit thus lacked evidence to support their claim. She also submitted that the contemnors issued a search after the Applicant filed the application for committal and are yet to comply with order two of the order namely, "That a declaration that the title held by the 1st defendant, the 2nd defendant, the 4th, 5th and 6th defendants and the 7th defendant in respect of the suit property are fraudulent, null and void and the same are hereby cancelled," (cancellation of the titles).
10. She concluded that the deponent, Mr. Wambugu Gitonga though an advocate was a witness in the main hearing and is competent to swear the affidavit as he is appraised of facts thus there is no conflict.

Analysis and determination

11. The Plaintiffs filed an application dated 14th September 2023 and filed on 17th October 2023. On 4th October 2023, the Plaintiff sought for leave to commence committal proceedings in term of prayer (1) of the application which leave was granted. Before the application could be prosecuted, the 3rd Respondent filed notice to cross examine the deponent of the affidavit sworn in support of the contempt application. The notice to cross examine is opposed by the Plaintiff stating that the Respondent was in contempt of the court's orders and should not be given any audience.
12. Order 19 of the *Civil Procedure Rules*, 2010 provides:
 - “ 1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved 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 authorising 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. (underline for emphasis)
13. An interpretation of the above provision shows that any party can with the permission of the court cross examine the deponent of the material affidavit. Justice G V Odunga in *Republic v Kenya Revenue Authority Ex Parte Althaus Management & Consultancy Limited* [2015] eKLR discussed that:
 - “ [14.] 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. 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." (see also *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited* (2) [2006] 2 EA 6.)

14. The Plaintiff has argued that the 3rd Respondent being in contempt of the court orders should not be heard by this court on its Notice to cross examine. That this will be contrary to the holding in *Mawani vs Mawani* (1982) KAR which held that the fact that a party to a case has disobeyed a court order, then the court may in its own discretion refuse to hear him until the impediment is removed or a good reason is shown why it should not be removed. However, the contempt proceedings instituted by the Plaintiff is yet to be determined as of now, thus it cannot be said that the 3rd Respondent is in contempt of the court's orders.
15. I have looked at the verifying affidavit sworn on 14th September 2023 by Wambugu Gitonga and he deposes inter alia of receiving instructions from the Applicant/Plaintiff to follow up in the execution of the decree issued on 14th November 2022. That in doing so, he served the decree on the Chief Land Registrar Mr. David N. Nyandoro.
16. The 3rd Respondent contended that the affidavit raised contentious issues and also involved an interpretation of the decree directions which requires cross-examination before the contempt proceedings could be heard. In the case of *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others* [2013] Eklr, Justice A.O. Muchelule held;

“Cross-examination of a deponent is not mandatory, but the court may, in the exercise of its discretion and on application by either party, order that a deponent be cross-examined. In the exercise of such discretion, the court should seek the demonstration by the applicant that there are sufficient grounds for making an order for cross-examination. Such demonstration should be by reference to the material contained in the affidavit whose deponent is sought to be cross-examined to show that the affidavit contains disputed matters when examined against the affidavit by the respondent. Where no sufficient basis has been laid the request to cross-examine should be declined.”
17. It is trite law that evidence should not be adduced through submissions and so the 3rd Respondent ought to have set out the grounds or paragraphs he intended to cross-examine Mr Wambugu on in the Notice filed. Be that as it may, I will determine whether or not to grant the orders sought. The reasons for which the cross-exam is sought are contained in paragraph 9 of the 3rd Respondent's submissions



and most of it refers to the contents of the pleadings filed and the decree rendered. For instance, they submit thus;

“That I wish to state that the court decree issued on 14th November 2022 declared that the plaintiff as the lawful owner of the suit land and revoked the 7th defendant’s titles and the subdivisions arising therefrom but did not in any certain terms direct the land registrar to issue the plaintiff with the title either provisional or any search in relation to the suit land. That from the amended plaint and relief sought by the plaintiff, the plaintiff had not sought for issuance of a provisional title and the court did not decree as such in its judgment.”

18. Such issues can be responded to as the record does not constitute a contested issue. It is my opinion and I so find that the averments in the said verifying affidavit does not swear to disputed facts which can only be resolved first by cross-examing the maker of the impugned affidavit. For instance, the question of whether or not Mr Wambugu advocate proceeded to Ardhi House on the 27th of June 2023 was an action personally undertaken by counsel and does not in any way amount to swearing to contested facts. The 3rd Respondent can rely on the provisions of section 33 and 34 of the [Land Registration Act](#) in defending the application for contempt on issues of law but that cannot form a basis for cross-examination of an advocate swearing an affidavit.
19. In gist, I find that the 3rd Respondent has not laid any basis to cross-examine Wambugu Gitonga, the deponent of the verifying affidavit sworn on 14th September 2023. The notice is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2024

A. OMOLLO

JUDGE

