



**Gulf Energy Holdings Limited v Mugwetwa (Environment & Land
Case 002 of 2022) [2024] KEELC 3744 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3744 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE 002 OF 2022**

CK YANO, J

APRIL 25, 2024

BETWEEN

GULF ENERGY HOLDINGS LIMITED PLAINTIFF

AND

MUTEGI MUGWETWA DEFENDANT

RULING

1. The Plaintiff commenced this suit vide a plaint dated 23rd March, 2022 seeking orders of permanent injunction directed to the defendant restraining from inter alia, interfering with the plaintiff's continued quiet possession and occupation of the suit premises known as title number Chuka Township/3 and a declaration that the plaintiff has rights as registered lessee in respect of the said property to have quiet possession and user in accordance with the terms of the lease made on 18th June 2009 as varied vide a Deed of Assignment and variation dated 13th January 2020 between the plaintiff and the defendant. Simultaneously, the plaintiff filed a Notice of Motion of even date mainly seeking orders of temporary injunction.
2. The Defendant filed a statement of Defence and counterclaim dated 16th November 2023. In the counter claim, the defendant is seeking inter alia a declaration that the said lease agreement and the Deed of Assignment and Variation is terminated.
3. The defendant also filed a Notice of Motion application dated 16th November 2023 seeking to strike out the plaint dated 23rd March, 2022 as against the defendant for lack of a reasonable cause of action.
4. In opposing the Defendant's application dated 16th November 2023, the plaintiff filed grounds of opposition dated 22nd March 2023 on the grounds inter alia, that the application is supported by an affidavit that deliberately conceals material facts to the court including the matters that culminated into a settlement of the issues between parties and whose deponent ought to be cross-examined on oath. The plaintiff's advocate therefore made an oral application to cross-examine the deponent of



affidavit dated 16th November, 2023 in support of the application of even date. The plaintiff's counsel in particular wants the said deponent cross-examined on the contents of paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the said affidavit.

5. The defendant's counsel opposed the application to cross-examine the said deponent. It is his contention that no basis has been laid.
6. I have considered the said application. The only issue for determination is whether the court should allow the plaintiff to cross-examine the deponent on the affidavit in question.
7. Order 19 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 proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such condition 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 the deponent.

(2) Such attendances shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”

8. Where an application is supported by affidavit evidence, a party may ask the court to make an order for cross-examination of the deponent of the affidavit. The rule confers on a trial court absolute discretion to order attendance of a deponent of an affidavit for cross-examination. However, like any other discretion the discretion to order cross-examination must be exercised judicially, and only in cases where it is to enhance the course of justice. A party must also lay a basis for it. This view has been held to be the position in various decisions.
9. In Republic –vs- Kenya Revenue Authority exparte, Althaus Management & Consultancy Ltd (2015) eKLR the court stated:

“ [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 the deponent. As the requisite rules recognize the user of affidavits in evidence especially in the court 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 application 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 –vs- National Bank of Kenya Limited (2) [2006] 2 EA 6.)

10. Similarly, in *Lawson and Anor –vs- Odhams Press Ltd. And Anor.* (1948) 2 All ER 717, the court held that cross-examination on an affidavit in support of an interlocutory application should be allowed only in special circumstances. Similarly, in *GGR –vs- H-P S* [2012]eKLR, the court stated:

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that 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. Further, the order for cross-examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.”

11. And in *Baby –vs- Sekar*, Petition M.P No. 1 of 2014 (2 December 2014), the High Court of India sitting at Madras while dealing with Order 19 rule 2 of the India Code of Civil Procedure which is similar in all fours to ours, stated:

“(i) It has been stated that the party has to make out a case for the exercise of that power by the court and absolute discretion is vested with the court either to allow it or reject the same. Further, a reading of Order XIX Rule 2 of the Code of Civil Procedure makes it clear that when any evidence is given by affidavit, the court may at the instance of either party order the attendance for cross examination of the deponent.”

12. The above decisions agree that cross examination is a tool that is allowed in law and the court has discretion to order a deponent to appear for cross examination. The defendant argued that the plaintiff did not lay the basis for the order for cross-examination. In their view, the issues that the defendant sought to cross examine them on, could only be resolved in the application and not through cross-examination.
13. The plaintiff took the view that they had laid grounds for the order to cross examine the deponent. They contended that the affidavit in question deliberately conceals material facts including the matters that culminated into a settlement of the issues between the parties and whose deponent ought to be cross-examined on oath.
14. I have considered respective parties’ arguments and perused the court’s record. The plaintiff’s counsel has applied to the court to have the deponent cross-examined on his affidavit. The power to order cross-examination is discretionary. The power can be exercised where there are allegations on matters touching on fraud, mala fides, authenticity of the facts deponed to or bad motive, among others.
15. The Plaintiff stated that the defendant’s Application is supported by an Affidavit that deliberately conceals material facts to the court including the matters that culminated into a settlement of the issues between parties and whose deponent ought to be cross-examined on oath. Bearing all these in mind, it



is my view that there is a basis for allowing cross-examination. I do not therefore see the prejudice the defendant would suffer if the deponent is cross-examined.

16. In the result, the application to cross examine the deponent of the defendant's affidavit in support of the application dated 16th November 2023 is allowed.

17. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH APRIL, 2024

In the presence of:

Court Assistant – Martha

Muchiri for Plaintiff

Ms. Mwikali holding brief for Murimi Murango for Defendant.

C.K YANO,

JUDGE

