



Maina v Kenya Commercial Bank PLC & another (Constitutional Petition E003 of 2023) [2023] KEELRC 2442 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2442 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E003 OF 2023
BOM MANANI, J
OCTOBER 12, 2023**

BETWEEN

JOSEPH KAMAU MAINA PETITIONER

AND

KENYA COMMERCIAL BANK PLC 1ST RESPONDENT

CENTRAL BANK OF KENYA 2ND RESPONDENT

RULING

Background

1. The application before me is dated 31st May 2023. It is expressed to have been filed pursuant to various provisions of the *Civil Procedure Act* and rules. The application is also premised on rule 33 of the Employment and Labour Relations Court (Procedure) Rules.
2. In the application, the 1st Respondent/Applicant prays for the following orders:-
 - a. Spent.
 - b. That the court reviews, sets aside and or varies its orders issued on 18th April 2023 and all other consequential orders.
 - c. That the court issues directions as to costs of the application.
3. The basis for the application is that the orders to cross examine one Bonnie Okumu (the affiant) on her affidavit in support of the application to refer the cause to arbitration were irregularly issued pursuant to an informal application. Further, the 1st Respondent/Applicant argues that the court did not accord its counsel adequate time to be heard on the oral application. In the 1st Respondent's/Applicant's view, the failure to grant its advocates time to respond to the application contravened the rules of procedural fairness.



4. The 1st Respondent/Applicant argues that the request to cross examine the affiant on her affidavit ought to have been made formally in writing. In the 1st Respondent's/Applicant's view, the oral request was defective for want of form.
5. Further, it is the 1st Respondent's/Applicant's contention that the Petitioner did not provide a basis for the request to cross examine the affiant. It is contended that the Petitioner did not for instance indicate the specific areas of the affidavit that he wished to cross examine the affiant on. In the 1st Respondent's/Applicant's view, allowing cross examination of the affiant will force the court to go into the merits of the case.
6. The Petitioner has opposed the application for review. The Petitioner's response to the application is set out in his replying affidavit dated 27th June 2023. In addition, the Petitioner filed Grounds of Opposition to the application.
7. After setting out the chronology of events that led to the issuance of the orders on 18th April 2023, the Petitioner contends that the orders are properly on record. In the Petitioner's view, the 1st Respondent/Applicant has not provided sufficient reasons to warrant the setting aside of the impugned orders.

Analysis

8. The provisions that regulate the process of cross examination of a deponent to an affidavit are set out under Order 19 of the Civil Procedure Rules. Sub rule two (2) of the Order provides as follows:-

“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.”
9. On the other hand sub-rule nine (9) of the Order provides as follows:-

“Applications under this Order may [be made] by chamber summons or orally in court.”
10. In the application before me, the 1st Respondent/Applicant has taken issue with the fact that the application to cross examine the affiant was made orally. The 1st Respondent/Applicant argues that this was improper thus rendering the request fatally defective for want of form.
11. However, this submission is at cross purposes with Order 19 rule 9 of the Civil Procedure Rules which permits parties to an action to make such application orally in court. Consequently, the contention by the 1st Respondent/Applicant that the application ought to have been lodged formally in writing is unmerited.
12. In *Ndunde Investments Limited v Eugene Muthoni Dadet* [2020] eKLR, the court reiterated the above position when it expressed itself as follows:-

Contrary to the plaintiff's assertions, Order 19 Rule 2 does not specifically provide that a formal application to cross examine a deponent must be filed before an order to that effect can be made. All that the order states is that the court may order attendance of a deponent for cross examination at the instance of either party.”
13. The record shows that on 18th April 2023, counsel for the Petitioner applied for an order to cross examine the affiant on the affidavit under consideration. The record shows that this application was made in the presence of one Husna representing the 1st Respondent/Applicant. The record does not show that the lawyer for the 1st Respondent/Applicant objected to the application. In effect, the



application for cross examination of the affiant was unopposed. The 1st Respondent/Applicant having not opposed the oral request aforesaid, the court granted it.

14. The 1st Respondent/Applicant now seeks to review the order on the grounds that its lawyers were not given sufficient time to respond to the oral application. Yet, this objection was not raised by counsel before the orders of 18th April 2023 issued.
15. The 1st Respondent/Applicant also argues that the application ought to have been made formally in writing. However, this view was not expressed to the court by counsel for the 1st Respondent/Applicant when the oral application was made on 18th April 2023.
16. Whilst it is true that the law makes provision for a written application of this nature, it is also evident that the application may be tendered orally in court. Thus, if the advocates for the 1st Respondent/Applicant desired that the Petitioner lodges a written application, they ought to have expressed this position on 18th April 2023 when the oral application was lodged. As the record shows, counsel did not do so.
17. The 1st Respondent/Applicant has also submitted that the Petitioner did not specify the paragraphs that he wished to cross examine the affiant on. With respect, this again is a matter that ought to have been raised by counsel for the 1st Respondent/Applicant on 18th April 2023 as she was present in court. As the record demonstrates, counsel did not raise the matter then. Absent objection to the request to cross examine the affiant and absent a request that portions of the affidavit that were to be the subject of cross examination be flagged, the court could not have placed further impediments on the Petitioner's request.
18. As a matter of fact, the party requesting to cross examine a deponent of an affidavit is entitled to cross examine such deponent on the entire of the affidavit. There is no provision of law that limits this right to particular sections of the affidavit. The requirement that the party requesting to cross examine points out the specific paragraphs that are in contention is, in my view, only intended to enable the deponent have clarity of mind about the portions of the affidavit that are in contention.
19. The court does not get into the arena of litigation. It only acts on requests that have been presented to it by the parties to the action. Therefore, it would have been improper for the court to have purported to raise objections to the Petitioner's application on behalf of the 1st Respondent/Applicant particularly when the 1st Respondent's/Applicant's counsel was present in court on the date that the impugned orders were issued.
20. The 1st Respondent/Applicant argues that its Advocates were not granted sufficient time to respond to the request by the Petitioner's lawyers to cross examine the affiant. However, and as has been stated earlier, this indication was not made by counsel for this litigant (who was present in court) when the impugned orders were issued.
21. Importantly, the record shows that the Petitioner filed Grounds of Opposition (GO) to the 1st Respondent's application to refer the dispute to arbitration. The GO are dated 12th April 2023. At paragraph 13 of the said GO, the Petitioner gave notice of his intention to cross examine the affiant on her affidavit in question.
22. The Petitioner avers that the GO were served on the 1st Respondent/Applicant on 12th April 2023, well before 18th April 2023 when he (the Petitioner) lodged his oral application to cross examine the affiant. The 1st Respondent/Applicant does not deny service of the GO as alleged. Therefore and contrary to the assertion in the application for review, the Advocates for the 1st Respondent/Applicant were made



aware of the Petitioner's intention to cross examine the affiant on her affidavit on 12th April 2023, long before 18th April 2023 when the impugned orders issued.

23. I agree with the 1st Respondent/Applicant that an order for cross examination of a deponent to an affidavit should only issue after the applicant has laid basis for the request. In this case, I was satisfied that the Petitioner had met this requirement prior to moving the court on 18th April 2023.
24. As indicated earlier in the ruling, the Petitioner had filed a notice of intention to move the court for leave to cross examine the affiant on her affidavit. This notice is contained in paragraph 13 of the GO filed by the Petitioner on 12th April 2023. The GO were served on the 1st Respondent/Applicant the same day.
25. At paragraphs 12 and 13 of the said GO, the Petitioner set out, in detail, the reasons why he considered it necessary to cross examine the affiant on her affidavit. The Petitioner indicated that the affiant's affidavit in question was founded on misrepresentations of facts with the intent of misleading the court into accepting a position that was inaccurate in the dispute.
26. In *GGR v HPS* [2012] eKLR quoted with approval in *Ndunde Investments Limited v Eugene Muthoni Dadet* [2020] eKLR, the court indicated that an order for cross examination of a deponent to an affidavit may issue where, inter alia, the affidavit is alleged to contain misleading averments. The court expressed this view as follows:-

“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.” Emphasis added by underlining.
27. There is no legal requirement that the applicant lays the basis for the request to cross examine a deponent through another affidavit or indeed orally. It is sufficient for the applicant to place material in this respect on the court's record including through a written document. Having regard to the foregoing, I was satisfied that the Petitioner had met this requirement by alluding to the reasons why he wanted to cross examine the affiant through the grounds of opposition that he had filed and served on the 1st Respondent/Applicant on 12th April 2023.
28. Before an order for review can issue, the applicant must demonstrate the presence of sufficient reasons to warrant grant of the orders. Therefore, the critical question for consideration in the present application is whether the 1st Respondent/Applicant has placed before me sufficient reasons to warrant the setting aside of the orders of 18th April 2023.
29. As indicated earlier, the suggestion by the 1st Respondent/Applicant that the application ought to have been presented formally in writing before the court could consider it is not entirely correct. The law permits such application to be lodged either in writing or orally.
30. Further, the argument by counsel for the 1st Respondent/Applicant that he/she was not given time to respond to the application for leave to cross examine the affiant is incorrect. First, the record shows that counsel was present in court at the time the impugned orders were issued but did not raise any such concern.



31. Second, counsel for the 1st Respondent/Applicant had been served with the Petitioner's GO to the application to refer the matter to arbitration as early as 12th April 2023. Therefore, he/she had sufficient time between this date and 18th April 2023 when the application to cross examine the affiant was made to consider whether to oppose it.
32. The fact that the Petitioner did not specify the paragraphs in respect of which he proposed to cross examine the affiant does not, in my view, constitute sufficient reason to review the orders of 18th April 2023. The lawyers representing the 1st Respondent/Applicant on 18th April 2023 never took up this issue on that day. It cannot therefore have occurred to them that this was necessary only after the orders had issued.
33. In any event, there is no rule that expressly requires that a party seeking leave to cross examine a deponent of an affidavit must specify the paragraphs of the affidavit that he wishes to cross examine on. In my view, so long as the cross examination is confined to the content of the affidavit, the deponent can lawfully be cross examined on the entire of it.
34. The indication that the Petitioner wishes to utilize cross examination to get to the merits of the dispute is not, in my view, well founded. The Petitioner is entitled to question the deponent on her affidavit to ascertain the truthfulness of her depositions including whether she swore the affidavit under her correct job title.
35. Counsel for the 1st Respondent/Applicant has suggested in his submissions that the application under consideration is not opposed by the Petitioner. Therefore, it should be allowed as presented.
36. I doubt that this position is correct. A perusal of the Petitioner's replying affidavit dated 27th June 2023 suggests otherwise.
37. To be specific, from paragraph 38 onwards of the said affidavit, the Petitioner alludes to the chronology of events that preceded the issuance of the impugned orders. He avers that notice to cross examine the affiant was issued to counsel for the 1st Respondent/Applicant on 12th April 2023 when they were served with the GO. He further indicates that the impugned orders issued on 18th April 2023 in the presence of the 1st Respondent's/Applicant's lawyer, one Husnah Bosibori. Thus, the Petitioner contends that there are no sufficient reasons why the orders for review should issue.
38. The Petitioner further avers that the orders of 18th April 2023 were issued in accordance with the applicable law. It was the Petitioner's view that the current application was intended to delay the speedy resolution of the dispute between the parties.
39. These averments which are substantially reiterated in the GO dated 21st June 2023, in my view, are in direct response to the application for review dated 31st May 2023. Therefore, counsel's suggestion that the application is unopposed is not accurate.
40. In his response to the application for review, the Petitioner has raised various other matters that are not directly related to the application. These include whether the lawyers on record for the 1st Respondent/Applicant are conflicted. In my view, such matters should be the subject of a standalone application which the 1st Respondent/Applicant should then react to. In the premises, I decline to make any orders that go beyond the boundaries of the application for review.
41. Finally, the Petitioner suggests that because the 1st Respondent/Applicant has not filed a substantive response to the Petition, it should not participate in the case. I do not think that this argument is correct. The application before me is of an interlocutory nature. As long as the Respondents have



entered appearance in the cause, they are entitled to make such applications whether or not they have filed a response to the Petition.

Determination

42. The upshot is that the application dated 31st May 2023 is declined for want of merit.

43. Costs of the application are granted to the Petitioner.

DATED, SIGNED AND DELIVERED ON THE 12TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

Wetangula for the Applicant/Respondent

Nderitu for the Respondent/Applicant

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

