



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E005 OF 2020

INNOCENT ENOCE OMBOKO.....PETITIONER

VERSUS

THE SPEAKER & CHAIRPERSON OF BUSIA

COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

THE CLERK & SECRETARY OF BUSIA

COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

THE BUSIA COUNTY ASSEMBLY SERVICE BOARD...3RD RESPONDENT

THE CHAIRPERSON, BUSIA COUNTY

ASSEMBLY STAFF ADVISORY BOARD.....4TH RESPONDENT

BENARD MUBINJA WAMALWA.....5TH RESPONDENT

ALLAN WAFULA MABUKA.....6TH RESPONDENT

GABRIEL ERAMBO ESONGA.....7TH RESPONDENT

RULING

1. Before Court is the Petitioner's application dated 25th November, 2021, expressed to be brought pursuant to Article 50(1) of the Constitution, Section 12(3) & 20(4) of the Employment and Labour Relations Court Act, Rule 20 of the Employment and Labour Relations Court (Procedure) Rules, Order 19 Rule 2 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.
2. The Petitioner seeks to cross-examine one **Allan Wafula Mabuka**, the 6th Respondent herein, on specific paragraphs of his affidavit sworn in support of applications dated 2nd and 17th November, 2021, in this matter.
3. The application is supported by grounds on the face of the Motion and the affidavit of **Innocent Enoce Omboko**, the Petitioner/Applicant herein. Specifically, the Petitioner avers that the 6th Respondent has made allegations of fraud, deception, defamation, scandal, and vexation, which make it necessary that he be cross-examined.
4. The paragraphs for which cross-examination is sought, are Ground 8 of the application and Paragraphs 6,7 and 10 of the supporting affidavit dated 2nd November, 2021, Ground 37 of the application and Paragraphs 10,38 and 40 of the supporting affidavit dated 17th November, 2021 and Paragraphs 15 and 21 of the affidavit dated 22nd November, 2021, all sworn by the 6th Respondent.
5. The Petitioner states that cross-examination will accord the deponent an opportunity to substantiate the allegations of fraud in his affidavits. He sought to rely in the case of *Majanja Luseno & Co. Advocates v Sammy Boit Arap Kogo (2016) eKLR* to buttress this position.
6. It is the Petitioner's further position, that denial of an opportunity to cross-examine the deponent, will amount to denial of his right to be heard under Article 50(1) of the Constitution. He sought to rely in *Re Estate of the Late Harvinder Singh Rechal (Deceased) (2020) eKLR*,

7. The Respondents opposed the application vide grounds of opposition dated 29th November, 2021. Counsel for the Respondents Mr. Juma, submitted that it is against the interest of justice and a waste of judicial time to cross-examine the 6th Respondent, as the same will amount to trial on affidavits.

8. The Respondent further avers that the averments in the paragraphs for which cross-examination is sought, are verbatim with the averments in the Respondents' statement of response, and cross examination on these paragraphs will be tantamount to proceeding with the hearing of the suit on affidavits. The Respondent cited *Nyoro Construction Co. Limited v Prashanth Projects Ltd & Another 144 of 2015* for the argument that in exercising power to allow cross-examination, care should be taken not to extract evidence at interlocutory stage.

9. Mr. Juma further submitted that the averments in ground No.37 and paragraphs 10, 38 and 40 in the application dated 17/11/2021, have been used justifiably, as it is true that the Petitioner resigned, the suit property has been transferred as stated thereon, and that it is a fact that the suit property has been transferred to a third party.

10. The Counsel for the Respondent further states that the 6th Respondent will be present during the hearing of the petition and will be cross-examined then, on the issues raised herein.

Determination

11. I have considered the application, the grounds and the affidavit in support, the Respondent grounds of opposition, the Parties' written and oral submissions.

12. Order 19 Rule 2 of the Civil Procedure Rules, provides as follows in regard to an application for cross-examination:

“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.”

13. Arising from the wording of this provision, it is clear that cross-examination is not a right of a party, but an exercise of judicial discretion, and which should be exercised only where it is justified. (*See Republic v Kenya Revenue Authority ex parte Althaus Management & Consultancy Ltd [2015] eKLR*)

14. The issue for this court to determine is whether there exist sufficient reason(s) to call the 6th Respondent for cross-examination. The Petitioner's case, is that the 6th Respondent, *Allan Wafula Mabuka*, has made allegations of fraud and for which he should be given an opportunity to substantiate, by way of cross-examination.

15. In *GGR v HPS [2012] eKLR*, the court held;

“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, malafides, authenticity of the facts deponed (sic), bad motive among others are raised, cross examination of the deponent of an affidavit may be ordered. 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 shows that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.” this position was adopted by Justice Sewe in *Prof. Tom Ojienda & Associates Advocates v National Land Commission, Misc. Application No. 29 'B' of 2016*, where she stated:

“There should be special circumstances before ordering a cross-examination of a deponent on an affidavit. The court must feel that adequate material has placed before it, that shows that in the interest of justice, and to arrive at the truth, it is just and fair to order cross-examination.”

16. The 6th Respondent through his Counsel submitted that allowing the prayer for cross-examination, amounts to proceeding to hear the suit through affidavits. As submitted by Counsel for the 6th Respondent, the issues for which cross-examination is sought, are more or less the same issues raised in the Respondents' response to claim. Further, it is not denied that the suit property was transferred to a third party during the pendency of this matter. These are amongst the issues for which the Petitioner seeks to cross-examine the 6th Respondent.

17. As correctly submitted by the Petitioner, the 6th Respondent's affidavits are littered with allegations of fraud, deception and general bad faith. I however agree with the submissions of the Counsel for the Respondents, that to allow cross-examination of the 6th Respondent at this stage, will prejudice the entire suit, for reason that the issues giving rise to the instant application, are largely the issues giving rise to the main claim. Suffice it to say, the Petitioner will have an opportunity to cross-examine **Mr. Allan Wafula Mabuka** during the hearing of the main suit.

18. Consequently, I decline to grant the order to cross examine **Mr. Allan Wafula Mabuka**.

19. The costs of the application shall be costs in the cause.

20. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. I. O. Omboko Petitioner/Applicant present in person.

Ms. Okoth h/b for Mr. Juma for the Respondents

Christine Omollo – C/A