



**Technoservice Limited v Microsoft East Africa Ltd & 3 others (Commercial Case E535 of 2020) [2025] KEHC 12411 (KLR) (Commercial and Tax) (4 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12411 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E535 OF 2020**

**PM MULWA, J**

**SEPTEMBER 4, 2025**

**BETWEEN**

**TECHNOSERVICE LIMITED ..... PLAINTIFF**

**AND**

**MICROSOFT EAST AFRICA LTD ..... 1<sup>ST</sup> DEFENDANT**

**MICROSOFT MOBILE OY ..... 2<sup>ND</sup> DEFENDANT**

**MICROSOFT INTERNATIONAL HOLDING BV ..... 3<sup>RD</sup> DEFENDANT**

**MICROSOFT CORPORATION-USA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before me is the Chamber Summons application dated 19<sup>th</sup> March 2024 brought under Article 50(1) and 159 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 19 Rules 2 and 9 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.
2. The Applicant seeks orders for the cross-examination of Ms. Kendi Nderitu on her affidavit sworn on 19<sup>th</sup> October 2021, together with the annexures thereto marked MEA-1 to MEA-6, in support of the Chamber Summons dated 21<sup>st</sup> October 2021. The basis of the application is that the impugned affidavit contains inconsistent, incoherent and conflicting depositions in paragraphs 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 16 and 17, coupled with allegations of perjury, fabrication, and forgery of documents.
3. The application is supported by the affidavit of Bulent Gulbahar, a director of the Plaintiff, sworn on 19<sup>th</sup> March 2024. He depones that the Chamber Summons dated 21<sup>st</sup> October 2021 and the supporting affidavit sworn on 19<sup>th</sup> October 2021 contain several inconsistent, incoherent and false statements necessitating the cross-examination of the deponent, Ms. Kendi Nderitu. It is contended that the depositions in paragraphs 1, 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 16 and 17 are internally contradictory or



based on matters outside the deponent's personal knowledge. In particular, while Ms. Nderitu claims authority to swear on behalf of the 1<sup>st</sup> Defendant and supports a Chamber Summons referring the matter to arbitration, she simultaneously denies the 1<sup>st</sup> Defendant's involvement with the Plaintiff, asserts that the agreements were transferred to the 2<sup>nd</sup> Defendant, and alleges that the 1<sup>st</sup> Defendant was improperly joined. These positions, it is argued, are inconsistent and mutually destructive.

4. The Applicant further avers that Ms. Nderitu was neither an employee nor officer of the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant, nor Nokia at the material time, thus casting doubt on the veracity of her statements on corporate arrangements, transfer of business, and arbitration proceedings. It is also alleged that the averments in paragraphs 9, 10 and 17 amounts to perjury in relation to the Stock and Asset Purchase Agreement, assumption of liabilities, and termination of arbitration. The annexures marked MEA-1 to MEA-6 are said to be fabricated and forged. The Applicant therefore urges that without cross-examination of Ms. Nderitu, the truthfulness of her affidavit will remain unresolved to the Plaintiff's prejudice. He prays that cross-examination be ordered to test credibility, resolve contradictions, determine authenticity of documents, and aid the Court in fairly disposing of the 1<sup>st</sup> Defendant's Chamber Summons dated 21<sup>st</sup> October 2021.
5. The application is opposed through a replying affidavit sworn on 18<sup>th</sup> June 2024 by Otilia Phiri, the Principal Corporate Counsel of the 1<sup>st</sup> Defendant. He avers that Ms. Kendi Nderitu swore the impugned affidavit in her capacity as the former Country Manager of the 1<sup>st</sup> Defendant, though she has since left its employment. It is contended that the application for cross-examination does not meet the legal threshold as it fails to demonstrate fraud, mala fides, or bad motive. Mr. Phiri maintains that the depositions made by Ms. Nderitu were based on her personal knowledge and belief, consistent with Order 19 Rule 3 of the Civil Procedure Rules, 2010. Where she relied on information from other sources or documents, she explicitly disclosed the basis of such information.
6. It is further averred that although Ms. Nderitu was not personally involved in the transactions between Nokia Corporation and the 2<sup>nd</sup> Defendant regarding the transfer of the Frame Repair Services Agreement, she was, by virtue of her position as Country Manager, privy to the operations and dealings of other Microsoft entities. The 1<sup>st</sup> Defendant, being an affiliate of the Microsoft Group, operates various businesses within the region, and her knowledge of such matters cannot be dismissed as hearsay. Mr. Phiri adds that the sale of Nokia's business to the 2<sup>nd</sup> Defendant was widely publicized in the mainstream media and remains accessible to the public, thereby rendering Ms. Nderitu's depositions a matter of public knowledge rather than fabrication.
7. On the issue of annexures, it is contended that their veracity can be tested by examining the documents themselves, and that no probative value would be gained by subjecting Ms. Nderitu to cross-examination. The Respondent denies allegations of perjury, arguing that any variance in the dates of commissioning is a minor irregularity that does not vitiate the substance of her affidavit. Mr. Phiri therefore urges the Court to dismiss the application, maintaining that the real issue for determination is whether this Court is properly clothed with jurisdiction to hear and determine the matter.
8. The parties filed written submissions. The Applicant filed submissions dated 4<sup>th</sup> June 2024 and 11<sup>th</sup> July 2024, while the 1<sup>st</sup> Defendant filed submissions dated 19<sup>th</sup> June 2024. Oral highlights of the submissions were made by counsel.

### **Analysis and determination**

9. I have considered the application, the supporting affidavit, the grounds in opposition thereto, and the rival submissions both written and oral by learned counsel for the parties.



10. In regard to an application for cross-examination Order 19 Rule 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 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 of the deponent.
    - (2) Such attendances shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.
11. The plain wording of the above provision makes it evident that cross-examination of a deponent is not a right available as of course. It is a matter within the judicial discretion of the court, to be exercised sparingly and only where sufficient cause has been demonstrated. (See Republic v Kenya Revenue Authority ex parte Althaus Management & Consultancy Ltd [2015] eKLR).
12. The issue that falls for determination is therefore whether sufficient reasons have been established to warrant calling Ms. Kendi for purposes of cross-examination. The Applicant has pointed to particular paragraphs of the impugned affidavit which are said to be inconsistent and contradictory. It is alleged that Ms. Kendi deponed to matters relating to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and Nokia, yet denied involvement of the 1<sup>st</sup> Defendant while simultaneously asserting that the 2<sup>nd</sup> Defendant assumed liabilities and obligations.
13. In response, the 1<sup>st</sup> Defendant has explained that Ms. Kendi was, at the material time, the Country Manager for Microsoft in Kenya and therefore privy to the operations of affiliate companies. It has further been pointed out that some of the issues she deponed to, such as the transfer of Nokia's business to the 2<sup>nd</sup> Defendant, are matters of public record and thus properly within her competence.
14. In GGR v 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, 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.”
15. 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. I am alive to the fact that allegations of perjury and forgery are serious. Nonetheless, such allegations must be backed by cogent and credible evidence. In the instant case, the Applicant has merely pointed to contradictions without producing any independent material to establish deliberate falsehood.
17. I reiterate that cross-examination on affidavits is not a matter of course. The burden rests upon the Applicant to demonstrate that such an order is indispensable for a fair and just determination of the dispute. In the present case, the alleged contradictions in the affidavit are, in my view, matters that go to the interpretation of corporate arrangements and the weight to be accorded to the deponent's knowledge. These are issues that can adequately be addressed through submissions and documentary evidence, without the need for cross-examination. I further note the Respondent's averment that the deponent in question has since left its employment, a fact which further weakens the necessity for such an order.
18. As regards the alleged discrepancies in the dates of commissioning of the affidavit and annexures, while irregular, they do not amount to perjury. As was held in *Moses Wachira v Niels Bruel & 2 Others* [2015] eKLR, not every irregularity in affidavits will justify striking out or cross-examination. The court must remain guided by the overriding objective of facilitating the just, proportionate and expeditious disposal of proceedings.
19. On the whole, I am not satisfied that the Applicant has demonstrated sufficient grounds to justify the cross-examination sought.
20. In the result, I find that the application dated 19<sup>th</sup> March 2024 lacks merit. It is hereby dismissed. Costs shall be in the cause.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Bulent for Plaintiff/Applicant

Mr. Odhiambo h/b for Mr. Weru for 1<sup>st</sup> Respondent

Court Assistant: Carlos

