



REPUBLIC OF KENYA



Warui & 12 others v Nduhiu & 3 others (Environment & Land Case E011 of 2021) [2023] KEELC 902 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E011 OF 2021**

YM ANGIMA, J

FEBRUARY 16, 2023

BETWEEN

PAUL NDERI WARUI & 12 OTHERS PLAINTIFF

AND

CHRYSOGON WANG'ONDU NDUHIU & 3 OTHERS DEFENDANT

RULING

A. The Defendants' Application

1. By a notice of motion dated May 27, 2022 grounded upon Order 51 rule 1 of the [Civil Procedure Rules](#), sections 1A & 3A of the [Civil Procedure Act](#) (cap 21) and all other enabling provisions of the law, the defendants sought the following orders:
 - a. Spent;
 - b. That this honourable court be pleased to set aside the *ex parte* proceedings of May 24, 2022 and consequential orders therein.
 - c. That the honourable court be pleased to arrest its decision scheduled for delivery on September 29, 2022 and re-open the application dated April 6, 2021 for hearing.
 - d. That the court be pleased to allow the defendants/applicants to cross-examine Paul Nderitu Warui and Misheck Wanjohi Rukwaro the deponents of the plaintiffs' supplementary affidavits dated April 21, 2022 in support of the plaintiffs' application before or during the hearing of the application dated April 6, 2022.
 - e. The costs of this application be in the cause.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Kabugi C. Muguku on May 27, 2022. It was contended that the



defendants' failure to file their submissions to the plaintiffs' application dated April 6, 2022 was not deliberate because they intended to file the instant application and seek leave to cross-examine the deponents of the Plaintiffs' supplementary affidavits sworn on April 21, 2022. It was further contended that the advocates had erroneously diarized the mention date of May 24, 2022 for May 25, 2022 hence the reason for their non-appearance on May 24, 2022.

3. Regarding the prayer for leave to cross-examine the deponents of the supplementary affidavits, it was contended that it was necessary to cross-examine them due to some inconsistencies and factual errors in the said affidavits. It was contended that the court had unfettered discretion to grant the prayers sought and that the plaintiffs shall not suffer any prejudice if the application was allowed.

B. The Plaintiffs' Response

4. The 1st plaintiff filed a replying affidavit sworn on August 12, 2022 in response to the application. It was contended that the application was incompetent, bad in law and an abuse of the court process for several reasons. First, that the application was premature as leave to file the derivative action was yet to be granted. Second, that the issues sought to be interrogated can only be resolved at the hearing of the suit. Third, that the defendants had deliberately failed to observe the timelines for filing submissions without a good reason. Fourth, that the defendants were out to scuttle the hearing of the plaintiffs' application after failing in their preliminary objection. The court was consequently urged to dismiss the application with costs.

C. Directions on Submissions

5. When the application came up for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the defendants filed their submissions on October 11, 2022 whereas the plaintiffs filed theirs on October 14, 2022.

D. The Issues for Determination

6. The court has perused the defendants' application dated May 27, 2022, the plaintiffs' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the court should re-open the hearing of the application dated April 6, 2021.
 - b. Whether the defendants should be granted leave to cross-examine the deponents of the supplementary affidavits sworn on April 21, 2022.
 - c. Who shall bear costs of the application.

E. Analysis and Determination

(a) Whether the court should re-open the hearing of the application dated April 6, 2021.

7. The court has considered the material and submissions on record on this issue. It was submitted by the defendants that their failure to file submissions on the plaintiffs' application dated April 6, 2021 was not deliberate since they intended to file an application for two of the defendants to be struck out of the proceedings and for cross-examination of the deponents of the supplementary affidavits of April 21, 2022. It was further submitted that there was an error in diarizing the mention date of May 24, 2022 by the defendants' advocates with the consequence that they diarized it for May 25, 2022.



8. The court has noted that the plaintiffs did not directly submit on this issue. The court has noted that the defendants' advocate exhibited in his supporting affidavit what appeared like a diary of events in which the matter was apparently diarized for May 25, 2022. In the absence of evidence to the contrary, the court is inclined to accept the reason for the defendants' non-appearance on May 24, 2022 even though that does not explain their failure to comply with the timelines for filing submissions. There is also no explanation as to why the defendants did not file their application for the 2nd and 4th defendants to be removed from the proceedings much earlier bearing in mind that the defendants' preliminary objection was dismissed on November 18, 2021.
9. Be that as it may, it is evident from the material on record that the ruling on the plaintiffs' application dated April 6, 2021 is yet to be prepared. The court is aware that all disputes should, as far as is reasonably practicable, be heard and determined on merit. The court is thus inclined to grant the defendants another chance to file their submissions on that application within a specified period of time. There is no need of setting aside the proceedings of May 24, 2022 since on that date the court merely fixed a ruling date for the plaintiffs' application dated April 6, 2021.

(b) Whether the defendants should be granted leave to cross-examine the deponents of the supplementary affidavits of April 21, 2022

10. The court has considered the material and submissions on record on this issue. The defendants submitted that the supplementary affidavits sworn by Paul Nderi Warui and Misheck Wanjohi Rukwaro had some inconsistencies and factual errors hence the two should be cross-examined thereon at the interlocutory stage. It was submitted that serious allegations of fraud and forgery had been made against the defendants in those affidavits.
11. It was further submitted that the deponents had alleged that some of the members who were said to have attended the company's meeting of November 13, 2013 were deceased. It was contended that it was necessary to cross-examine the deponents in order to establish the authenticity of the copies of the death certificates which were annexed to the said affidavits. The defendants cited the case of *Khen Kharis Mburu & another v James Karong Nganga & another* [2021] eKLR in support of their submissions on the issue.
12. The plaintiffs, on the other hand, submitted that there was no justification or special circumstances in the matter to warrant cross-examination of the deponents of the supplementary affidavits at this interlocutory stage. It was submitted that the allegations of fraud and forgery sought to be interrogated at the interlocutory stage can only be resolved at the hearing of the suit.
13. The plaintiffs further submitted that the issue of the authenticity of the death certificates they had exhibited cannot be conclusively resolved through cross-examination at the interlocutory stage. It was contended that the issue could only be resolved at the trial after evidence has been tendered by all the concerned parties. It was further contended that the genuineness of the said death certificates could be confirmed by the Registrar of Births and Deaths who may be called as a witness at the trial. The plaintiffs, therefore, contended that the defendants had not met the threshold for the grant of leave to cross-examine the deponents of the supplementary affidavits. They cited the case of *Republic v Kenya Revenue Authority ex parte Althaus Management and Consultancy Ltd* [2015] eKLR in opposition of the prayer for cross-examination.
14. In the latter case it was held by the High Court, *inter alia*, that:

“Cross-examination on the affidavit is a discretionary power conferred upon the court by provisions 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 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. This was held by Ochieng, J. in the case of *Abmednasir Abdikadir & Co Advocates v National Bank of Kenya Limited (2)* [2006] 2 EA 6.”

15. The court further quoted from the earlier case of *GGR v HPS* [2012] eKLR the general rule on cross examination of deponents 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. 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.”

16. The court is of the opinion that even though the plaintiffs have made allegations attributing fraud, forgery, bad faith, and breach of trust against the defendants, this is not a proper case for the court to allow cross-examination of the deponents of the supplementary affidavits at the interlocutory stage. It is evident from the plaint dated March 25, 2021 that the plaintiffs' case was hinged upon alleged fraud and breach of trust on the part of the 1st and 2nd defendants in the manner in which they dealt with the suit property. The court is thus of the opinion that the allegations of fraud, forgery, bad faith etc can only be conclusively established at the trial once all the concerned parties have been accorded the opportunity to tender their evidence. The repetition of such allegations in an affidavit does not warrant cross examination of the deponents at the interlocutory stage.
17. Similarly, the authenticity of the copies of the death certificates exhibited by the plaintiffs cannot be conclusively resolved at the interlocutory stage. Even if the defendants doubt their genuineness, they cannot be able to establish that they are forgeries through cross-examination alone. Additional evidence would be required to demonstrate that they are bogus documents. The court is thus of the opinion that no useful purpose would be served by cross-examination. It would be more useful if the defendants obtained an affidavit from the Registrar of Births and Deaths disputing the genuineness of the death certificates.
18. Finally, the court has considered the defendants' submission that the supplementary affidavit of Misheck Rukwaro appears to have been signed by Michael Maina Nguyo on the last page. The plaintiffs' advocates submitted that appearance of the name Michael Maina Nguyo was a result of



mix up in the process of typing the affidavit. The court has no reason to doubt the explanation by the plaintiffs. Such typing errors occur from time to time not only amongst law firms but also within the Judiciary.

(c) Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason to deprive the plaintiffs' costs of the application. Although, the court has granted the defendants leave to file their written submissions out of time, the failure to file the same in the first instance was due to their own default. Accordingly, the plaintiffs shall be awarded costs of the application.

20. Conclusion and Disposal Order

21. The upshot of the foregoing is that although the court is inclined to allow the defendants leave to file their submissions to the plaintiffs' application dated April 6, 2021 out of time, it is not inclined to allow the prayer for cross-examination of the deponents of the supplementary affidavits sworn on April 21, 2022. Accordingly, the court makes the following orders for disposal of the application:
- a. The defendants are hereby granted 14 days to file their written submissions to the plaintiffs' notice of motion dated April 6, 2021.
 - b. Save as aforesaid, the rest of the prayers in the defendants' notice of motion dated May 27, 2022 are hereby denied.
 - c. The defendants shall bear the costs of the application.

- 22 Orders accordingly

RULING DATED AND SIGNED AT NYAHURURU THIS 16TH DAY OF FEBRUARY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

Y. M. ANGIMA

JUDGE

In the presence of:

Ms. Ndegwa for the Plaintiffs

Mr. Kabugu for the Defendants

C/A - Carol

