



REPUBLIC OF KENYA



KENYA LAW

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**East Africa Development Bank v Ari Limited & 5 others (Civil Case 001 of 2020)
[2024] KEHC 7634 (KLR) (Commercial and Tax) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 001 OF 2020
A MABEYA, J
JUNE 26, 2024**

BETWEEN

EAST AFRICA DEVELOPMENT BANK JUDGMENT CREDITOR

AND

ARI LIMITED 1ST JUDGMENT DEBTOR

RAPHAEL TUJU 2ND JUDGMENT DEBTOR

MANO TUJU 3RD JUDGMENT DEBTOR

ALMA TUJU 4TH JUDGMENT DEBTOR

YMA TUJU 5TH JUDGMENT DEBTOR

SAM COMPANY LIMITED 6TH JUDGMENT DEBTOR

RULING

1. Before Court is the Chamber Summons application dated 30/1/2024. It is brought under Order 19(1), 19(2) and Order 19(9) of the *Civil Procedure Rules*, sections 1A, 1B, 3A of the *Civil Procedure Act* section 153 of the *Evidence Act*, Article 50(2) of the *Constitution* of Kenya.
2. The application seeks that David Odongo do appear before court for cross examination on the averments made on his replying affidavit sworn on 21/11/2023. That further, orders be granted for the attendance of the Investigating officer Abdullahi Shuria for cross examination.
3. In support of the application, the applicant relied on the grounds set out on the face of the application and the affidavit of Raphael Tujusworn on even date. The applicants' case was that, the 2nd, 3rd and 5th judgment debtors were summoned by the directorate of criminal investigations for purposes of an



- investigation into the criminal conduct of the respondent. The judgment debtors were directed to avail documents pertaining to the transactions between the judgment-creditor and the judgment-debtor.
4. That in turn, the judgment-debtors requested for copies of statements and documents collected for furthering the said investigation. That upon perusal of the documents, the applicants discovered that David Washington Barnabas Ochieng, by his further witness statement dated 21/12/2023 had recanted his evidence captured in his witness statement of 13/10/2023. That there was a difference between the further witness statement and the other statements written on behalf of the judgment-creditor.
 5. That in the further witness statement, David Washington Barnabas had corroborated the 1st judgment-debtor's position with respect to the nature of the facility as well as the history of the engagement between the 1st judgment debtor and its directors and the judgment-creditor.
 6. It was the applicants position that the averments made in the further witness statement were at odds with the replying affidavits sworn by the same deponent David Washington Barnabas on 21/11/2023. That the Court could only ascertain the veracity of the facts deposed therein upon cross examination of the deponent.
 7. The judgment-creditor opposed the application vide a replying affidavit of Carol Luwaga dated 14/2/2024. She deposed that the replying affidavit sworn by David Odongo on 21/11/2023 did not exist as the proper date for the affidavit was 20/11/2023. That this error was not a mere technicality rather a grave issue that went to the core of the application. It was further averred that the judgment-debtor had not given reasons as to why the application should be heard on priority basis and it continued to enjoy the status quo orders made on 22/11/2023.
 8. With respect to the prayer for summoning the investigating officer Abdullahi Shuria, it was averred that the Court lacked jurisdiction under the Civil Procedure Act. That Order 19 rule 2 allows for cross examination of a deponent to an affidavit while the investigating officer had not deposed any. That he was therefore not a witness capable of being summoned.
 9. The application was canvassed by way of written submissions which I have carefully considered.
 10. I have considered the pleadings before court and the submissions on record. The prayers sought in the application are two-fold. In the first instance, the judgment-debtors sought to have this application determined on priority and secondly, the summoning and cross examination of David Washington Ochieng and investigating officer Abdullahi Shuria.
 11. The judgment debtors had filed an application dated 8/11/2023 for referral of the matter to Mediation. In opposition, the judgment-creditor filed a replying affidavit dated 20/11/2023 sworn by David Odongo. This affidavit forms the subject of this application.
 12. The judgment-debtors contended that the averments in the replying affidavit were in contradiction to the averments in the further witness statement tendered to the DCI. Based on the foregoing, the applicants stated that it would be in the interest of justice to have the deponent of the replying affidavit be availed before court for cross examination.
 13. On its part, the respondent first corrected the date for the replying affidavit to being 20/11/2023 as opposed to 21/11/2023 as averred by the applicants. The court's jurisdiction was also challenged on the grounds that the application was res-judicata as the English High Court had already addressed the issues raised in the further witness statements.



14. The applicants invoked Order 19 of the *Civil Procedure Rules*, 2010 to support their position which provides: -

“ 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 conditions 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 attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”

15. In *Republic v Kenya Revenue Authority ex parte, 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 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.” (see also *Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited* (2) [2006] 2 EA 6.)

16. Similarly, in *GGR v H-PS* [2012] eKLR, it was 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, 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.”

17. Applying the foregoing principles, the Court’s discretion can be invoked to allow cross examination of a witness in order to ascertain the veracity of facts that are in dispute. The present application challenges the averments made on oath in the replying affidavit sworn by one David Odongo.
18. In *Law Society of Kenya v Faith Waigwa & 8 others* [2015] eKLR, the Court set out the rationale for cross examination of witnesses as follows: -

“First, it is a mechanism which is used to bring out desirable facts to modify or clarify or to establish the cross-examiner’s case. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness. In cross-examination a witness may be asked questions tending for example to expose the errors, contradictions, omissions and improbabilities. In the process, the veracity of a witness’s averments is tested.”
19. In the instant case, the impugned affidavit was made in response to the application for referral to mediation. The Court notes that the law allows cross examination to allow authenticity of facts and this is a proper case for cross examination.
20. I note that the judgment-creditor will not be prejudiced if the orders are granted for cross examination of the deponent David Odongo. It is proper for the truth to be established. It will be a travesty of justice if parties would be allowed to make statements on oath lightly. Court proceedings are solemn moments and a Court of law should not countenance falsehoods. If that were to allowed, the administration of justice would be in jeopardy.
21. With respect to the fourth prayer in respect of Abdullahi Shuria, the Court finds that the same is not tenable. Order 19 of the *civil procedure rules* calls for the cross examination of deponents to the affidavits. There is no affidavit on record by the said person. Second, he is not a party to the suit and his connection to this matter is based on a criminal case that this Court is not privy to. The Court notes that the matter is on its tail end and therefore cross examination should not be used to re-litigate issues afresh.
22. Based on the foregoing, the judgment debtors’ application succeeds with respect to prayer no. 3 for cross examination of David Odongo.
23. Accordingly, the application dated 30/1/2024 hereby succeeds to the extent that David Odongo is hereby summoned for cross-examination. The ruling on the application dated 8/11/2023 is hereby arrested pending the said cross-examination on 11/7/2024. The judgment-debtors shall bear the costs of the application.

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE, 2024.

A. MABEYA, FCI Arb

JUDGE

