

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 489 OF 2020
(ARISING FROM MISCELLANEOUS CAUSE NO. 231 OF 2020)

LT. GEN. (RTD) HENRY TUMUKUNDE..... APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. GRACE AKULLORESPONDENTS

BEFORE: HON JUSTICE SSEKAANA MUSA

RULING

This is a ruling arising out of an oral application for leave of the court to have the 2nd respondent cross examined on her affidavit filed in court.

The applicant was represented by *Anthony Wameli* and *Achoka Egesa* and the respondents were represented by *George Kalemella* (Commissioner), *Richard Adrole* (PSA) and *Muwonge Mark* (SA)

The applicant by letter dated 7th September 2020 intimated to the respondent that they will seek leave of court to have the 2nd respondent cross-examined on her said affidavit.

The applicant's counsel made the oral application at the trial seeking the leave of the court to have Grace Akullo the 2nd respondent cross examined on her affidavit in reply filed in this application.

It was the applicant's counsel's submission that they wish to cross examine the 2nd applicant on how she instructed the Attorney General to represent her in these proceedings. Secondly, they wish to cross examine her to

establish whether she appeared before a Commissioner for Oath. Lastly, they wished to cross examine the 2nd respondent on her averments her paragraph 3 of the affidavit which is to the effect that;

“I received numerous intelligence reports that the Applicant was engaging and meeting with Army Veterans at both his office and residence I Kololo and discussing ways in which to disrupt the ongoing electoral process in Uganda”.

The respondents counsel opposed the application and contended that the right to cross examine is a discretionary and it is not given as of right. The applicant must set out good reasons for seeking to cross examine the on an affidavit. The respondents’ counsel supported his arguments with several authorities and contended that the applicant has not advanced good reasons or any justification for seeking to have the 2nd respondent cross examined.

Analysis

While arguing for cross examination, this court realized that the applicant’s counsel seemed to be trying to get more evidence or information to buttress their case at this interlocutory stage. The cross examination envisaged under Order 19 of the CPR is highly restrictive and true as argued by all counsel it is allowed at the discretion of court.

The main basis for cross examination will arise, if a conflict in the evidence is found, the judge may exercise their discretion to allow cross examination depending on particular factors of each case:

- The importance of the issue;
- Whether cross examination will unduly delay the trial or expeditious disposal
- Whether the cross examination is likely to elucidate the relevant issues in controversy.

The cross examination cannot be used to operate as an examination for discovery in testing the merits of the applicant’s case or investigate matters which have not been deposed to by the deponent. See *Male H Mbirizi*

Kiwanuka v Attorney General & Hon. Lukwago Erias & 13 Others v EC & 2 Others Miscellaneous Application No. 237 & 431 of 2019.

The applicant for cross examination must demonstrate that the cross examination will assist in resolving the issue before the court and that it will not result in any injustice or delay of the trial.

Therefore the discretion to allow cross examination is exercised after a proper basis has been laid before the court. If the facts of the deponent are not disputed cross examination will not be added.

In the case of *Vitabiotics Limited & Harleys Limited v Ripples Pharmaceuticals Limited & Metro Pharmaceuticals Limited Civil Case No. 118 of 2015*, the court noted that the right to cross examine a deponent on his/her affidavit is discretionary. But all the complaints set out by the applicants could be addressed by means other than cross examination. See *Hudson Enterprises Ltd v Kenya Cold Storage (Foods) Ltd & 14 Others [2008]eKLR*

In the present case the applicant was allowed to file an affidavit in rejoinder and this would have been the best opportunity to address any complaints which could have arisen from the affidavit in reply by the 2nd respondent.

It was wrong for the applicant's counsel to make an application for cross examination in a haphazard manner without genuine and sound reasons. It would appear that this application was made to delay the hearing of the application for temporary injunction since the same is sought at an interlocutory or preliminary stage.

The affidavit evidence does not contain any allegations touching on fraud, malafides, authenticity of facts, bad motive which would necessitate and justify seeking an order for cross examination. In the case of *GGR v H-PS [2012]eKLR* court noted thus;

“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 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 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.” See R v Kenya Revenue Authority Exparte Althaus Management & Consultancy Limited Misc. Civil Application No. 393 of 2014

The affidavits from both parties appear straight forward and the responses have not shown any contentious issues that would require cross examination. The rules of court determine the nature and type of process or procedure parties may take in a particular case. The exercise of that discretionary power in such cases is placed on a higher pedestal than in ordinary civil cases. Therefore, the discretion is exercised under the inherent power of the court and ought to be invoked sparingly taking into account the fact that allowing cross-examination would lead to unnecessary delays in determining applications of this nature expeditiously and thus defeat the policy considerations for adopting such a special procedure.

The discretion of this court in allowing cross examination on affidavits must be exercised on proper principles and in normal course will be ordered where the deponent’s affidavit contains facts that are in issue or conflicting facts in evidence. In the case of *Royal Bank of Canada v Larry Micheal Jones 2000 BCSC 520 Justice Chamberlist* summarized the law;

“...the discretion of this court in allowing cross examination on affidavits must be exercised on proper principles and in the normal course will be ordered where the deponent’s affidavit contains facts that are in issue...”

See also *Auton (Guardian of) v British Columbia (Minister of Health) 1999 12 Admin LR (3d) 261*

If a party wishes to cross-examine, they must put forward affidavit evidence which factually contradicts the deponent’s sworn evidence. The applicant’s counsel’s submission that they wish to cross examine the 2nd respondent on how she swore an affidavit is a fishing expedition since there is no evidence to the contrary. The applicant’s counsel should have established this fact from the Commissioner for Oaths and not through cross examination of the 2nd respondent.

Therefore, cross examination of a deponent would only make sense if there are material conflicts of facts between deponents in the affidavit since it would be impossible for a Judge to resolve a material conflict of facts disclosed in affidavit. See *Director of Corporate Enforcement v Symour [2006] 1 EHC 369; Irish Bank Resolution Corporation Ltd v Quinn [2012] 1 EHC 510*

The right to cross examine is not absolute. There are limits on the rights of a party to legal action to cross examine a deponent on the contents of their affidavit. The court has discretion to order the cross examination of a deponent on the contents of an affidavit. Secondly, the court’s discretion to order cross examination should only be granted if the court is satisfied that there is a conflict of fact or evidence set out in the affidavits that is necessary for the court to resolve, in order to dispose of the issues.

As conceded to by both counsel, the nature of cross examination is very limited and should not be used for ulterior purposes or motives. Cross examination should not be used as a tactic, particularly by lawyers/litigants to intimidate, frustrate, delay or add unnecessary costs.

*“The order for attendance of a deponent of the affidavit for cross examination is absolute discretion of the courts. It is true that absolute discretion means not arbitrary but judicious discretion having justice oriented approach in summoning the deponent for cross examination would not be ordinarily made unless the court is satisfied and convinced that the application for summoning the deponent for cross examination is necessary in the interest of justice. Unless both conditions co-exist the courts have no jurisdiction to summon a deponent for cross-examination”. See **Kenya Deposit Insurance Corporation v Hassan Ahmed Abdul Haedi Zubeidi & 5 others HCC No. 467 of 2015***

In avoiding cross examination, the court will limit the delays, expense and risks that the parties may have for strategic or petty reasons that do not further the interests of justice. See *Marsden v Amalgamated Television Services Pty Ltd [2000] NSWSC 66*

The intended cross examination if granted would defeat the expeditious disposal intended under the rules. Such leave will seldom be given in circumstances where court thinks cross examination will be necessary or justified. Otherwise the purpose of ordering a trial by affidavit may, self-evidently be defeated.

The applicant has not laid out a proper basis for this court to exercise its discretion to allow cross examination of the 2nd respondent-Grace Akullo.

This court shall proceed to determine the matter without any further delay.

I so Order

Ssekaana Musa

Judge

11th September 2020.