

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 920 OF 2021**

*(ARISING OUT OF MISC. APPLICATION NO.843 OF 2021)
Arising out of Misc. Cause No. 287 of 2021*

MALE H MABIRIZI K. KIWANUKA:.....APPLICANT

VERSUS

ATTORNEY GENERAL:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant has brought this application under Articles 28(1), 44(c), & 126(1) of the Constitution, Section 33 & 39 of the Judicature Act, Section 98 of the Civil Procedure Act, and Order 19 rule 2 and Order 52 rule 1 of Civil Procedure Rules for orders that;

1. Leave be granted for the attendance and cross-examination of Mr. Jimmy Oburu Odoi, Principal State Attorney in the Ministry of Justice and Constitutional affairs.

2. The costs of this application be personally and individually paid to the applicant by Mr. Jimmy Oburu Odoi, Principal State Attorney in Ministry of Justice and Constitutional Affairs.

The applicant laid out grounds on which he sought to rely in his affidavit in support to his application and they include;

1. That the said Jimmy Oburu is required to test his professional capacity as far as information technology is concerned.

2. That Mr. Oburu's averments were hearsay and need to be tested at cross examination.
3. That Mr. Oburu's affidavits contain contradictions which can only be dealt with at cross examination.
4. That Mr. Oburu's swearing of the affidavit was unprofessional, reckless and negligent and thus amounted to abuse of public powers by the deponent.

In reply, Mr. Jimmy Oburu swore an affidavit in which he contends that this application is redundant since the applicant already challenged the affidavit evidence on grounds of Information technology proficiency and hearsay which he explained in paragraph 16 and 23 of his affidavit in support.

ANALYSIS

Order 19 rule 2 of the Civil Procedure Rules S.I 71-1 grants the court powers at the instance of either party, to order the attendance of the deponent for cross examination.

However, the power to order attendance of the deponent for cross examination is discretionary in nature. This position was clearly set out in the case of **Vitabiotics Limited and Harleys Limited versus Ripples Pharmaceuticals Limited and Metro Pharmaceuticals Limited civil case no. 118 of 2015** in which court noted that the right to cross-examine a deponent on his or her affidavit is discretionary in nature.

This honorable court, in the case of **LT. GEN. (RTD) Henry Tumukunde vs Attorney General and Grace Akullo Miscellaneous Application NO. 489 of 2020** exhaustively discussed circumstances under which leave to cross examine a deponent on his or her affidavit evidence may be granted and they include;

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

It was emphasized in the case of **GGR vs H-PS [2012]eKLR** that whereas the order for cross examination is discretionary in nature, the same should be exercised judiciously and not whimsically. There should be special circumstances and adequate material before the court to show that in the interest of justice it is fair and just to order for the cross examination.

This discretion ought to be invoked sparingly considering the fact that allowing cross examination would lead to unnecessary delays in expeditiously determining applications of this nature thus defeating the policy considerations for adopting such a special procedure.

It is this court's opinion that the applicant's grounds bear no merit whatsoever and the application is rather based on the need to halt and delay the dispensation of justice. As such, this court would be failing in its obligations to dispense justice without undue delay if it were to allow this application since the clarifications sought by the applicant, as already stated by the said Mr. Jimmy Oburu, were already given in his affidavit in reply and so, the application is moot.

The application is coming belatedly after the court has already given directions to file submissions and indeed all parties have filed their submissions. The application to cross-examine should be made promptly and not in haphazard manner with no clear intention like in in this present case. The applicant has been caught in his 'own web of abuse of court process' after he failed to appear in court on two occasions when he ought to have made such an application.

It quite clear that the application to cross-examine was made with the sole aim of delaying the trial like the 8 applications that arise out of the main application for contempt.

Based on the reasons given above, this application is hereby dismissed with costs.

Ssekaana Musa

Judge

27th January 2022