



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. E033 OF 2022.

KWACHA COMMUNICATIONS LIMITED.....1ST APPELLANT

HAMPSHIRE COURT LIMITED.....2ND APPELLANT

VERSUS

PINDORIA HOLDINGS LIMITED.....1ST RESPONDENT

KWACHA GROUP OF COMPANIES.....2ND RESPONDENT

RULING

The applicant filed two applications dated 31st January, 2022 and 7th February 2022 respectively. Both applications are supported by affidavits sworn by Mr. Nicholas Reuben Nyamai Advocate. Counsel for the respondent filed two notices intending to cross-examine the deponent. The notices are dated 4th February and 16th February, 2022 respectively.

On record are two notices to cross examine the deponent, Mr. Nicholas Reuben Nyamai.

Mr. Bundotich, counsel for the 1st Respondent, submitted that the two notices expressly allude to the key paragraphs on which the 1st respondent's counsel plans to cross examine the deponent, who is counsel for both the appellants and the 2nd respondent. The deponent averred in his affidavit sworn on 31st January 2022 that the proclaimed goods are the property of the appellants, not the judgment debtor (2nd respondent), and that the trial court erred in holding Mr. Maina Wanjigi as a director of both the 1st appellant and the 2nd respondent. This should be sworn by the parties themselves, not by the advocate representing the parties. Due to the fact that the trial court dismissed the objection proceedings, counsel has chosen to assume the role of the deponent, necessitating the cross examination. An advocate is not entitled to swear affidavits on his/her client's behalf. .

In response, Mr Nyamai, counsel for the appellants, submitted that he did not represent the second respondent. He objects to the cross-examination as there are documentation submitted in the lower court, including certificates of establishment for both corporations, which have been attached in this appeal thus there is no basis for cross examination. Moreover, the pleadings contain the averments that are deponed on in the affidavits. One should only cross examine a deponent when the evidence is not clear.

Analysis and Determination

The issues for consideration are:

- 1) Whether an advocate can swear an affidavit on behalf of his client in a matter he/she is appearing.

2) Whether the two notices to cross-examine Mr. Nicholas Reuben Nyamai Advocate should be granted.

Regarding the first issue, Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

Further, Rule 9 of the Advocates (Practice) Rules states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

Both Rules are intended to prohibit and insulate the advocate from intervening in disputes between his/her clients and adverse parties. It is not always improper when an Advocate deposes on matters confined to the facts that the deponent may prove from his own knowledge. As a result, not all affidavits sworn by Advocates are automatically defective. In my opinion, an affidavit sworn by an Advocate that is limited to facts which he/she is capable of proving on his own knowledge and does not disclose any issue necessitating his/her cross-examination is not flawed.

The Court of Appeal expressed the following concept in **HAKIKA TRANSPORTERS SERVICES LTD V ALBERT CHULAH WAMIMITAIRE [2016] EKLR**, citing its decision in **SALAMA BEACH LTD V MARIO ROSSI, CA. NO. 10 OF 2015**:

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deposed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others*, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

The two affidavits sworn on 31st January and 7th February 2022, by Mr. Nicholas Reuben Nyamai Advocate make only inferences from the Court record. The deponent advocate has deposed to facts strictly within his knowledge as regards the issues giving rise to this appeal. The disputed paragraphs are largely comprised of rephrased elements of the memorandum of appeal and the applications of both 31st January 2022 and 7th February 2022. The advocate was on record for the Appellants in the case before the lower court. These are matters within the court’s record. As a result, I do not find the affidavits to be defective.

However, I concur with the finding in **MAGNOLIA PVT LIMITED VS SYNERMED PHARMACEUTICALS (K) LTD (2018) EKLR** that cautions advocates from swearing affidavits on their clients’ behalf:

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.”

On the second issue of whether the notices to cross-examine the deponent should be permitted, Order 19 Rule 2 of the Civil Procedure Rules states:

“(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.”

Allowing cross-examination on an affidavit is a matter of discretion, and cross-examination should be avoided unless exceptional circumstances exist. Any party wishing to cross-examine a deponent must convince the court that the cross-examination is justified. Given that Order 19 permits the use of affidavits as evidence, courts should avoid allowing cross-examination of the deponent's affidavits unless the circumstances merit it. Additionally, this action may result in increased costs due to cross-examination during interlocutory proceedings and unduly prolonging the suit, which is not envisioned in sections 1A and 1B of the Civil Procedure Act.

In the case of **G G R vs. H-P S [2012] eKLR**, where the court outlined instances where a deponent may be subjected to cross-examination:

“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 deposed (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 deposed (sic) 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.”

The first Notice, dated 4th February 2022, states the intention to cross examine the deponent on the substance of paragraphs 13, 15, and 16 of the affidavit sworn on 31st January 2022 in support of the appellants' application of 31st January 2021. The three paragraphs states as follows: According to the disputed paragraphs of affidavit, the deponent avers that the appeal has a strong likelihood of success on the aforementioned reasons and request that the court issue a stay of execution of the ruling/order. The paragraphs just deduces what is on the Court record, namely the memorandum of appeal, the application, and the lower court proceedings. The impugned paragraphs mostly restate the grounds of appeal set forth in the Memorandum of Appeal and the application's orders. Additionally, allowing cross-examination of the deponent on the grounds of the appeal cuts into the heart of the appeal, and the appeal has not yet been admitted for hearing pursuant to Section 79B of the Civil Procedure Act.

The second Notice, dated 16th February 2022, expressly states the intention to cross examine the deponent on the contents of paragraphs 10, 11, 13, and 16 of the affidavit sworn on 7th February 2022 in support of the appellants' application of 7th February 2022.

The fact impugned paragraphs contained in the affidavit states as follows:

“THAT: I aver that the Appeal has overwhelming chances of success in THAT:-

a) The Honourable trial Magistrate erred in law and fact by failing to hold that KWACHA COMMUNICATIONS LTD and KWACHA GROUP OF COMPANIES were two distinct legal entities.

b) The Honourable trial magistrate erred in law and fact in holding that HON. MAINA WANJIRU owned both KWACHA COMMUNICATIONS LIMITED and KWACHA GROUP OF COMPANIES hence the proclamation/attachment of the goods in issue was lawful.

c) The Honourable trial magistrate erred in law and fact in holding that it was a must for the Appellants to produce delivery notes to back up the receipts the appellants produced in court to prove the attached/ proclaimed goods belonged to them.

d) In spite of overwhelming evidence adduced by the Appellants the Honourable trial Magistrate erred in law and fact by failing to hold that the proclaimed goods belonged to the 1st and 2nd Appellants.

e) In spite of overwhelming evidence adduced by the appellants the Honourable trial Magistrate erred in law and fact by failing to hold that the proclaimed goods did not belong to the 2nd Respondent/ KWACHA GROUP OF COMPANIES.

f) The Honourable Trial Magistrate erred in law and facts by holding that KWACHA COMMUNICATIONS LIMITED and KWACHA GROUP OF COMPANIES were the same and owned by HON MAINA WANJIGI

g) The Honourable Trial Magistrate erred in law and facts by disregarding/ ignoring /violating the well- established Company law principle which states that a Company is a distinct legal entity that through its legal Organs and a company is a distinct legal entity from other companies and its shareholders.

h) The Honourable Trial Magistrate was totally biased in favour of the 1st Respondent in his Ruling /Order and he deliberately disregarded weighty issues raised by the Appellants in their written submissions/ documents filed in Court.

i) The Honourable trial magistrate was unreasonably biased against the Appellants at all material times during the proceedings and during and after delivery of the Ruling in issue and he favoured the 1st Respondent and he even denied the Appellants stay of execution pending the filing of an appeal.

j) The Honourable Trial Magistrate erred in law by giving a Ruling Decision/order that caused grave miscarriage of Justice to the Appellants and which violated the Appellants' right to a fair hearing and trial.

k) The Honourable Magistrate abused his powers by failing to fairly/impartially address all the issues raised for determination and in ignoring the weighty issues raised by the Appellants before and after delivery of the Ruling.

l) The Honourable Trial Magistrate erred in law and fact by delivering/giving a Ruling/Court Order which had no legal or factual basis and/or which was devoid of substance/sound analysis backing it.

I urge this Honourable court to issue a temporary stay of execution of the Ruling/Decision/ Order delivered/given at Nairobi on 26TH JANUARY 2022 by HONOURABLE CHIEF MAGISTRATE H.M NYABERI in CHIEF MAGISTRATE'S CIVIL SUIT NUMBER 8248 OF 2016: PINDORIA HOLDINGS LIMITED VERSUS KWACHA GROUP OF COMPANIES pending the inter partes hearing and determination of the Application herein.

I urge this Honourable court to issue a stay of execution of the Ruling/Court Order delivered/given at Nairobi on 26TH JANUARY 2022 by HONOURABLE CHIEF MAGISTRATE N H.M. NYABERI in CHIEF MAGISTRATE'S CIVIL SUIT NUMBER 8248 OF 2016: PINDORIA HOLDINGS LIMITED VERSUS KWACHA GROUP OF COMPANIES pending the hearing and determination of the Appeal herein.”

Upon examination of the disputed paragraphs of affidavit, it becomes clear that they are largely a repetition of certain averments made in the supporting affidavit sworn on 31st January 2022 and the application dated 7th February 2021. There is nothing unusual about their averments that warrants cross examination.

If the respondent objects to the deponent's averments, the same can be addressed and/or determined by a replying affidavit and/or submissions rather than through cross-examination of the deponent. The affidavits are repetitive and mainly expound on the grounds of appeal. The deponent is of the view that the trial court erred in reaching its finding. The other averments are mainly pleas urging the court to stay execution. Even if the deponent were to be cross-examined, I do find that such a process will not add any value in determining the dispute herein.

After considering the foregoing, I conclude that the notices to cross-examine the deponent are not merited and the same are hereby dismissed. Cost to abide the outcome of the appeal.

Dated and Delivered at Nairobi this 17th day of March 2022

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S.J. CHITEMBWE

JUDGE



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