



IN THE SUPREME COURT OF NAURU  
AT YAREN DISTRICT  
CIVIL JURISDICTION

CIVIL CASE NO. 8/2023

BETWEEN

SHARONA CAIN of Uaboe District

Applicant

AND

GRETA HARRIS of Uaboe District

Respondent

Before:

Khan, ACJ

Date of Hearing:

19 June 2023

Date of Ruling:

4 July 2023

Case to be known as: *Cain v Harris*

**CATCHWORDS:** Affidavit of a witness filed on behalf of the plaintiff – Where the plaintiff decided not to call the deponent of the affidavit as a witness – Where the defendant served a witness summons for the deponent of the affidavit to attend court and give evidence – Where an application was made on behalf of the witness to set aside the witness summons – Whether the defendant can rely on the affidavit as evidence of the matters stated therein – Where Order 34 rule 1(rule 4) provides that affidavit may be used in any proceedings – Held that the evidence in the affidavit can be relied upon by the defendant

**APPEARANCES:**

Counsel for the Applicant:

L Aingimea

Counsel for the Respondent:

J Olsson

## BACKGROUND

## RULING

1. The plaintiff filed an ex parte application for interlocutory injunction against the defendant on 18 April 2023 and obtained orders against the defendant restraining her from stopping the plaintiff and members of the public from accessing the access way on land portion 126 Uaboe District, and an order to remove the slab constructed on the access way forthwith.
2. The defendant failed to comply with the orders made on 18 April 2023 and on 19 April 2023 the plaintiff filed a summons for an order for committal against the defendant for disobeying the court orders.
3. On 25 April 2023 the defendant filed a motion to set aside the orders made on 18 April 2023 and in support of her application she filed an affidavit on 25 April 2023 which was sworn on 24 April 2023.
4. On 26 April 2023 the plaintiff's pleader, Mr Tannang, filed an affidavit of Chaize Doweiya in reply to the defendant's affidavit filed on 25 April 2023.
5. The application for setting aside of the ex parte interlocutory orders was set down for hearing on 3 May 2023. When I suggested to the parties that to expedite and finalise the matter it would be better that I should hear the substantive matter instead of the interlocutory application. The parties accepted my suggestion and orders were made to complete their pleadings, including filing the statement of defence and reply to the defence and the matter was adjourned to 9, 10 and 11 May 2023 for hearing. On 9 May 2023 it was ordered by consent that each party was to file affidavits of their witnesses by 2.30pm on that day.
6. Mr Tannang filed the affidavits of the following witnesses:
  - 1) The plaintiff herself;
  - 2) Khemindra Doweiya; and
  - 3) Elsa Amwano.
7. Miss Olsson filed the affidavit of the following witnesses:
  - 1) The defendant;
  - 2) Muna Amram; and
  - 3) Belasco Belasco.
8. When the Court resumed in the afternoon, I informed both parties that an inter parte application for interlocutory injunction was filed by Khemindra Doweiya against the defendant in action No. 9 of 2023.

9. Both parties agreed that they will be calling the witnesses whose evidence will be given in accordance with their affidavits and that they will be available for cross examination.
10. Mr Tannang advised the Court that he will not be calling Chaize Doweiya nor will he make him available as a witness. Miss Olsson invited the Court to call him as a witness and I told her that I did not have any powers to do so and she stated that she will file a summons to witness to call Mr Chaize Doweiya as a witness.

### WITNESS SUMMONS

11. The witness summons was filed by Miss Olsson against Chaize Doweiya on 9 May 2023 and was issued by the Registrar and he was required to attend Court on 10 May 2023.
12. On 10 May 2023 Mr Aingimea appeared in the matter of Khemindra Doweiya v Greta Harris – Civil Case No. 9/2023 and he also appeared on behalf of Chaize Doweiya, the witness, and challenged his appearance as a witness on the grounds of privilege. He was allowed time until 12 May 2023 to file a proper application to set aside the witness summons.
13. On 12 May 2023 Mr Aingimea filed an application to set aside the witness summons. In the written submissions filed by him in support of the application he raised the following issues:
  - 1) Spousal privilege;
  - 2) That Chaize Doweiya was not a party in respect of this claim; and
  - 3) Short service.
14. Miss Olsson in response submitted that Chaize Doweiya voluntarily made an affidavit in support of the plaintiff's case in response to the defendant's affidavit filed on 25 April 2023 and that the contents of his affidavit is evidence on behalf of the plaintiff; and that spousal privilege is not available to Chaize Doweiya – that the defendant should be allowed to call him as a witness.

### CONSIDERATION

15. Order 34 rule 11 of the Civil Procedure Rules 1972 (CPR) provides as follows:

#### Use of Original Affidavit or Office Copy

- 1) Subject to paragraph (2), an original affidavit may be used in proceedings in any court with the leave of that court, notwithstanding that it has not been filed in accordance with Rule 10.
  - 2) An original affidavit may not be used in any proceedings unless it has previously been stamped with the appropriate fee stamp, if any.
  - 3) Where an original affidavit, is used, then, unless the party whose affidavit undertakes to file it, he or she shall immediately after it is used leave it with the Registrar or the Deputy Registrar, as the case may be, in court or in chambers, as the case may be, together with the proper filing fee and that officer shall send it to be filed.
  - 4) Where an affidavit has been filed, an office copy thereof may be used in any proceedings.
16. Order 34 rule 11 was adopted in the CPR from Order 41 rule 10 of the Supreme Court Practice 1967 volume 1.

#### NOTICE TO USE

17. Order 41 rule 9(3) of the Supreme Court Practice 1967 made provisions for the notice of intention to use and this provision was not incorporated in the CPR and it states as follows:

**Notice of Intention to Use.** – Notice should be given to the parties concerned of intention to use, upon any application, affidavits already filed (D.C.P. 543, 856; D.C.F. p.14, and see O. 32, r.17). Where they are to be used at a hearing, notice should be given by delivering a list of the affidavits to the other parties or their solicitors, and on motions, by a statement at the foot of the Notice.

An applicant is at liberty to read the respondent's affidavits, notwithstanding the objection that in his own affidavits no case is made requiring an answer (*Re Margetson*, [1897] 2 Ch. 314).

If the plaintiff gives notice of intention to read an affidavit but declines to do so, the defendant is entitled to read it (*Cauty v Houlditch*, 14 SIM. 75).

18. In *Margetson and Jones, In re'* it is stated at page 317 as follows:

“.... First, Mr Margetson has a lien for his costs as solicitor to the Pughs on what may be recovered in the taxation proceedings against Mr Jones; and secondly, Mr Margetson may, in order to obtain those costs, go on with those proceedings. The evidence in support of this application is conclusive as to our right to an order, but we are content to rely on Mr Jones' own affidavit and

<sup>1</sup> (1897) 2 Ch 314


the facts stated in the declaration by the Pughs which he himself exhibits, and therefore we will read that affidavit first.

[Rivtoen. You have no right to refer to my evidence until it is put in. You must read your own evidence first of all, and give me the opportunity of submitting that you have made out no case.

Kekewich J. I'm not going to shut out any of the evidence. It is competent for the applicant's counsel, if they find the respondent's affidavit in their favour, to read it first; and I so hold, unless any authority can be cited to the contrary.]”

19. Chaize Doweiya's affidavit was filed by the plaintiff in response to the defendant's affidavit and the defendant can rely on it as evidence to support her case and her counsel perhaps should give notice of intention to use it to the plaintiff's counsel.
20. For the reasons given above, the application to set aside the witness summons of Chaize Doweiya is misconceived and is dismissed.
21. So that leaves the defendant both with the option of just relying on Chaize Doweiya's affidavit as evidence of the matters stated therein or to call him as a witness for the defence.

DATED this 4 day of July 2023

  
Mohammed Shafiullah Khan  
Acting Chief Justice

