



P Sang and Company advocates v Stegro (EPZ) Tea Factory Limited (Miscellaneous Civil Application E008 of 2023) [2024] KEHC 9595 (KLR) (26 June 2024) (Ruling)

Neutral citation: [2024] KEHC 9595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CIVIL APPLICATION E008 OF 2023**

**RL KORIR, J
JUNE 26, 2024**

BETWEEN

P SANG AND COMPANY ADVOCATES APPLICANT

AND

STEGRO (EPZ) TEA FACTORY LIMITED RESPONDENT

RULING

1. The Applicant/Advocate filed an Advocate-Client Bill of Costs dated 7th February 2023 against the Respondent/Client for the amount of Kshs 4,802,666.80/=. In response to the aforementioned Bill of Costs, the Respondent/Client filed a Preliminary Objection dated 12th April 2023 that is now the subject of this Ruling.

Preliminary Objection

2. The Respondent/client filed the Preliminary Objection dated 12th April 2023 and relied on the following grounds:-
 - I. The Respondent/Client never appointed the firm of P. Sang and Company Advocates to act for it in Petition Number 7 of 2018. The Applicant/Advocate could not have been possibly instructed by the Respondent/Client as the directors of the latter were removed.
 - II. That there was no valid resolution by the Respondent/Client to appoint the said P. Sang and Company Advocates to represent it. The Applicant/Advocate in filing the Bill of Costs did not produce any evidence to show that he was indeed retained by the Respondent/Client.
 - III. What the Applicant/Advocate has attempted is to lift the corporate veil of the Respondent/Client without following the laid down procedure.
 - IV. From the foregoing, the Bill of Costs filed lacks basis and ought to be struck out.



V. The Bill of Costs is otherwise an abuse of the process of the court.

The Response

3. The Applicant/Advocate filed a Replying Affidavit dated 9th May 2023 sworn by Rogers Mugumya Advocate. The Applicant stated that he represented the Respondent in Kericho High Court Constitutional Petition Number 7 of 2018 as he was appointed through a Letter dated 19th October 2018. That he thereafter filed a Notice of Appointment of Advocates and represented the Respondent by attending court on several occasions on its behalf.
4. It was the Applicant's case that Stegro Sacco Limited was a shareholder of the Respondent. That on 25th September 2020, the Applicant was relieved off its instructions and a Consent filed under Order 9 of the *Civil Procedure Rules*.
5. The Applicant stated that the Preliminary Objection had been brought in contravention to the precedent set in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Ltd* (1969) EA 696. That it was misplaced, improper, and unprocedural and was meant to delay the payment of what is owed to it.
6. On 20th June 2023, I directed that the Preliminary Objection be canvassed through written submissions.

Respondent/Client's submissions.

7. Through its submissions dated 6th November 2023, the Respondent submitted that the Applicant had no instructions to act on its behalf. That there was no meeting of the Board of Directors or a special resolution passed instructing the Applicant to act on its behalf. The Respondent further submitted that in the absence of such evidence, no decision purported to emanate from itself could hold. It relied on *Affordable Homes Ltd vs Ian Henderson & 2 others* (2004) eKLR, *Assia Pharmaceuticals vs Nairobi Veterinary Centre Ltd* (2000) eKLR and *Bugerere Coffee Growers Ltd vs Sebaduka & another* (1970) EA 147.
8. It was the Respondent's submission that the Applicant was misleading the court by claiming for costs in non-existent legal proceedings. That the Applicant's Bill of Costs should be struck out.

Applicant/Advocate's submissions

9. Through its submissions dated 19th June 2023, the Applicant submitted that the Preliminary Objection was not properly before court. That it was anchored on the issue of representation, a dispute which fell under the umbrella of facts. The Applicant further submitted that the Respondent had not raised a point of law in its Preliminary Objection and thus it lacked merit. He relied on the *Mukisa Biscuit Manufacturing Company Limited (supra)*.
10. It was the Applicant's submissions that the Respondent had denied it from responding to the issues it raised as it had framed its issues in a Preliminary Objection. It relied on *Samuel Waweru vs Geoffrey Muhoro Mwangi* (2014) eKLR and *National Bank of Kenya Ltd vs Peter Kipkoech Korat & Another* (2005) eKLR where the courts held that a Respondent would be allowed to respond to allegations if they were raised in a formal application as opposed to a Preliminary Objection.
11. The Applicant/Advocate submitted that the Preliminary Objection be dismissed.
12. I have considered the Preliminary Objection dated 12th April 2023, the Replying Affidavit dated 9th May 2023, the Respondent's written submissions dated 6th November 2023 and the Applicant's



written submissions dated 19th June 2023. The only issue for my determination was whether the Preliminary Objection was sustainable.

13. What constitutes a Preliminary Objection was set out in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, where it was held that:-

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.” (Emphasis mine)

14. In *Daqare Transporters Limited vs Zainab Hashi* (2021) eKLR, Mogeni J. held:-

“In the case of Ahmed Noorani & another v Rajendra Ratilal Sanghani [2020] eKLR the Court of Appeal held that: “For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.” (Emphasis mine)

15. Likewise in *Karata Ernest & others vs Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), the Tanzanian Court of Appeal stated: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.”

16. It is clear from the Preliminary Objection that the Respondent did not raise any point of law. The main contention between itself and the Applicant was the issue of representation in Kericho High Court Constitutional Petition Number 7 of 2018. The Respondent responded by stating that it was properly instructed by the Respondent and attached various documents in support of its averments.

17. The dispute between the Applicant and the Respondent is factual and can only be determined by way of production of evidence. It is my finding that this dispute cannot be resolved by means of a Preliminary Objection. By raising a Preliminary Objection instead of filing an Application, the Applicant ensured that the dispute on whether or not there was a Board to instruct the advocate could not be determined at this stage.



18. In the final analysis, it is my view, the present Preliminary Objection was not an objection but a response to the Bill of Costs dated 7th February 2023 disguised as a preliminary point.
19. In the end, the Preliminary Objection herein has not been raised on a pure point of law but facts. Therefore, the Preliminary Objection dated 12th April 2023 has no merit and is dismissed with costs to the Applicant/Advocate.
20. The file is remitted back to the Deputy Registrar of this court for the taxation of the Advocate-Client Bill of Costs dated 7th February 2023.
21. Orders accordingly.

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

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Mugumya for the Applicant, Ms. Oganga h/b for Mr. Mutai for the Respondent and Siele (Court Assistant).

