



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 322 OF 2011

ITEN BUSINESS CONSULTING LTD.....PLAINTIFF

VERSUS

COMZTEC EAST AFRICA CO. LTD.....1ST DEFENDANT

REED ROOTS RESOURCES.....2ND DEFENDANT

RULING

1. For determination is the preliminary objection raised by **Iten Business Consulting Ltd** (hereafter the Plaintiff) to the replying affidavit sworn by one **Anthony Abira** on behalf of **Comztec East Africa Co. Ltd** (1st Defendant) in opposition to the Plaintiff's Notice of Motion dated 17th September, 2020 seeking to set aside the interlocutory judgment entered against the Plaintiff in respect of the 1st Defendant's counter claim herein

2. The preliminary objection, raised within the so-called supplemental affidavit of **Hasmukh Rasiklal Chudasama**, described as the Plaintiff's Managing Director is to the effect that the Replying affidavit is incompetent and ought to be struck out. Annexed to the affidavit is what is referred to as "**a document showing the current profile of the said ANTHONY ABIRA**". It is deposed in the further affidavit of **Hasmukh Rasiklal Chudasama** that the said **Anthony Abira** is well known to the deponent and that he denied during a telephone call with the deponent, to have sworn the impugned replying affidavit on behalf of the 1st Defendant. Hence it is asserted that the Relying Affidavit may be false and therefore, the alleged deponent ought to be produced during the *viva voce* hearing sought by the Plaintiff in connection with the Plaintiff's application.

3. The court directed the parties to file brief submissions which were subsequently highlighted orally. The Plaintiff's submission is that **Anthony Abira**, described as an accountant is not an officer of the 1st Defendant company in terms of Section 2(1) of the Companies' Act and therefore needed the authorization of the 1st Defendant to swear the replying affidavit and that no such authorization has been disclosed. Moreover, that the deponent's current profile indicates that at the time of swearing the disputed replying affidavit, he had long left the 1st Defendant company, having worked with the said company between 2007 and 2014, and is presently employed by **Henkel Kenya Ltd**.

4. Thus, paragraphs 1, 2 and 16 asserting that he was an employee of the 1st Defendant are false. The Plaintiff submitted that the deponent has denied swearing the replying affidavit in dispute and that these pieces of evidence have not been controverted by the 1st Defendant. They therefore pray that the replying affidavit of **Anthony Abira** be found incompetent and struck out. It was asserted that the matters raised in support of the preliminary objection represent pure points of law.

5. On their part, the 1st Defendant submitted that the Plaintiff's preliminary objection does not raise pure points of law, and that it does not satisfy the test enunciated in **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696** to the effect that a preliminary objection: -

- a) must raise a pure point of law which has been pleaded;
- b) is argued on the assumption that all the facts pleaded by the adverse party are correct;
- c) cannot be raised if any fact has to be ascertained or what is sought is judicial discretion; and
- d) must be capable of disposing the entire suit.

6. The 1st Defendant submitted that the preliminary objection is an attempt to steal a march against it on the basis of a technicality which does not rise up to the requisite threshold. It was asserted that the Plaintiff has not cited any provision of the law that has been violated and

that the veracity of the depositions in the impugned replying affidavit can be ascertained through the ordinary court process. The 1st Defendant urged that the preliminary objection ought to be dismissed.

7. The court has considered the material in the Plaintiff's affidavits and annexures as well as the rival submissions of the parties. In **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J. A.** stated that:

“So far as I am aware, 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

8. In the case of **Oraro v Mbaja (2005) KLR 141, Ojwang J** (as he then was) reiterated the foregoing by stating that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

9. Applying the above tests to the preliminary objection raised by the Plaintiff, it is evident that it is primarily grounded on two key disputed matters, namely, whether **Anthony Abira**, the purported deponent to the replying affidavit is an employee of the 1st Defendant and therefore authorized to swear the disputed affidavit, and secondly, whether indeed the said deponent swore the disputed affidavit. The Court views the latter issue as grave raising as it does, the allegation that the Replying Affidavit purportedly sworn by **Anthony Abira** was not sworn by him. This assertion, if established would have serious legal repercussions.

10. Additionally, I note upon perusing paragraph 1 of the disputed replying affidavit that it is made up of an incomplete sentence to the effect that: -

“THAT accountant for the 1st Defendant/Respondent herein.” (sic)

The capacity of the deponent in the 1st Defendant is a matter in issue and notwithstanding the deposition at paragraph 16 of the replying affidavit, it is essential that the deponent's current position and relationship with the 1st Defendant be clearly deposed to in his purported affidavit.

11. In view of the foregoing, and without saying more, considering the orders I propose to make, it is the court's opinion that the preliminary objection raised by the Plaintiff is not entirely a pure point of law and is cannot be sustained. The court is of the view that the issues raised in the preliminary objection ought to be canvassed at the same time as the Plaintiff's pending application. For this purpose, I hereby direct as follows:

a) Leave is granted to the 1st Defendant to file a supplementary affidavit in answer to and limited to the pertinent issues raised in the supplemental and further affidavit of the Plaintiff, within 14 days and to address the defect at paragraph 1 of the replying affidavit of **Anthony Abira**. For the avoidance of doubt, the said 1st Defendant's affidavit is to be sworn by the said **Antony Abira**.

b) During the oral canvassing of the Plaintiff's motion, the said **Anthony Abira** is to be presented in court for the purpose of cross - examination on the contents of his alleged affidavits.

c) Upon receipt of the supplementary affidavit in (b) above the Plaintiffs are to file and serve brief skeletal written submissions on the motion dated 17th September, 2020 within 7 days which will be heard on a date to be assigned immediately after delivery of this Ruling.

d) The 1st and 2nd Defendants will upon receipt of the Plaintiff's skeletal submissions in (c) above have equal time to file/serve their brief skeletal submissions.

e) The Plaintiff is to extract these directions and serve them together with the hearing notice in respect of the motion, upon the 1st and 2nd Defendants.

f) Costs will abide the outcome of the motion dated 17th September, 2020.

DELIVERED AND SIGNED ELECTORNICALLY ON THIS 25th DAY OF JUNE 2021.

.....

C. MEOLI

JUDGE

In the presence of:

Mr. Nabutete for Plaintiff

No appearance for the 1st and 2nd Defendant

Court assistant – Carol