



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO.315 OF 2017

KAMONJO KIBURI T/A KAMONJO KIBURI CO ADVOCATES.....APPLICANT

VERSUS

UAP INSURANCE CO.LTD.....RESPONDENT

RULING

1. This is a ruling on preliminary objection dated 9th July 2018. It seeks to strike out bill of costs Advocate-Client Bill of Costs dated 29th August 2017 and filed on 4th September 2017. Grounds for the preliminary objection is that the applicant failed to serve the respondent before filing bill of costs.

2. Counsel for the respondent argued that **Section 48** of the **Advocates Act** provide that a bill of costs can only be brought on after service on a client; that the provision gives a client an opportunity to know what is owing and make arrangements to pay. That there is no default by the respondent to settle by way of Advocate-client bill of costs filed.

3. In response, the applicant submitted that the preliminary objection is misconceived, as it does not raise point of law. He argued that to the extent that the respondent wants the court to investigate whether the bill was served, is an issue of fact not law; that it fails a test as to whether it is a preliminary objection. He added that Section 48 of the Advocates Act talks of a different thing; that it talks of a situation where an Advocate enters into an agreement with a client.

4. Further, the applicant argued that the issue raised does not merit any legal attention, as they have not paid the bill. He urged the court to reject the preliminary objection.

5. I have considered arguments by counsels herein. I wish to consider whether the preliminary objection is merited. I will start by considering what a preliminary objection.

6. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696**.

"So far as I'm 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 may dispose of the suit."

7. Further, in the same **Mukisa Biscuit** case, **Sir Charles Newbold** in the judgment stated as follows:-

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

8. A similar decision was held in **Avtar Singh Bhamra & Another VS. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, the Court held that:

"A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

9. Preliminary objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by court upon perusal of evidence.

10. This position was illustrated in **Natin Properties Limited vs Jaggit Singh Kalsi & another Court of Appeal Civil Appeal No. 132 of 1989 (Gicheru, Kwach & Shah JJA)**. The court of appeal further emphasized that when a preliminary objection is raised, it should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone. Preliminary objections, which are premised on facts that are disputed, cannot be used to determine the whole matter as the facts must be precise and clear to enable the court say that the facts are not contested or disputed.

11. A preliminary objection should be capable of disposing the matter initially without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone. Since a preliminary objection is raised on points of law only, this suggests that the point of law raised should be so vital in the case as to render the suit dismissed if allowed. In essence, this implies that a preliminary objection once raised can lead to the court dismissing a suit without determining the merits of the case.

12. From the above decisions, it comes out clearly that a Preliminary Objection is raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A preliminary objection raised on such grounds is from the face of it a breach of rules of procedure and amount to abuse of court process.

13. In the instant case, the respondent has alleged that the bill of costs was not served on client as required by Section 48 of the Advocates Act. This is an issue, which can be ascertained by evidence of service being adduced.

14. Service of bill is intended to make the client aware of costs payable to advocate and 30 days period that must pass before filing bill of costs is intended to give the client opportunity to arrange to make payment and avoid costs attendant to taxation.

15. The respondent in paragraph 10 of submissions filed state that, the applicant has not produced any evidence to prove that there was service or attempted service of Advocates bill of costs. It is evident that Service of bill of cost is a disputed fact, which require prove. Matters, which require ascertainment of facts, cannot be determined by way of preliminary objection. This is an issue, which I believe can be raised in a reference while determining costs for taxation and interest is to be paid or when interest should start running if any party is dissatisfied with taxing masters ruling.

16. From the foregoing I see no merit in the preliminary objection raised here and do dismiss with costs to the applicant.

Ruling Dated, signed and delivered at Nakuru this 30th day of May, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola COURT ASSISTANT

Mr. Aim holding brief for Mr. Karanja counsel for appellant

Ms. Wangari holding brief for Mr. Kiburi counsel for respondent