



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO.321 OF 2014

RANSLEY, McVICKER & SHAW ADVOCATES.....APPLICANT

VERSUS

SHARAD DHAYABHAHI PATEL.....1ST RESPONDENT

LALITABEN SHARAD PATEL.....2ND RESPONDENT

RULING

Before this Court is the **Notice of Preliminary Objection to the Proceedings of Taxation of the Advocate/client Bill of costs** dated **10th June, 2016**. The Preliminary Objection is predicated on the following grounds:-

“1. The 1st and 2nd Respondents, on individuals have never given the Applicant firm of Advocates any instructions for restructuring of the company known as Tricon International Limited, for it would have been unlawful as for them to give instructions on behalf of the company yet the company is a legal entity that is capable of operating on its own for all intents and purposes.

2. The 2nd Respondent has never been a shareholder and/or a Director of the company known as Tricon International Limited, and therefore she is a stranger to the proceedings herein. She pleads that the Application should be struck off and dismissed for suing her without justification and proof of her association with the company known as Tricon International Limited.

3. The 2nd Respondent cannot be sued in her personal capacity, whether as a director or a shareholder of the legal entity known as Tricon International Limited. It is trite law that if the instructions were given for restructuring of Tricon International Limited, the instructions ought to have been given by the legal entity known as Tricon International Limited. In any case the Application before court is clearly an abuse of the court process, and the same being scandalous, ought to be dismissed with costs.”

The Applicants opposed the Preliminary Objection and the matter was disposed of by way of written submissions. The 1st and 2nd Respondent filed their written submissions on **27th July, 2016** whilst the Applicants filed their written submissions on **16th August, 2016**.

In their submissions the 1st and 2nd Respondent insist that they are total strangers to the Bill of Costs filed against them as they had never given instructions to the firm of **Ransley, McVicker & Shaw Advocates**, in regard to any matters relating to the legal entity known as **Tricon International Limited**, more specifically that the Respondents at no time instructed the Applicant to act for Tricon International during its re-structuring process. The Respondents concede that **Mr. Ransley** as an individual has served as the Company secretary for the company but vehemently deny that the Applicant firm was ever engaged as the company secretary of Tricon International Limited.

The 2nd Respondent asserts that she has never had any interest at all in Tricon International Limited either as a shareholder or as a director and is therefore a stranger to the entire Bill of Costs. A copy of a letter from the Registrar of Companies dated **28th May, 2012** listing the names of the Directors/ Shareholders of Tricon International Limited was annexed as proof of this fact.

It was further submitted that Tricon International being a separate legal entity distinct from its individual shareholders/ directors ought to have been sued in its own name. Any attempt to sue the individual shareholders was said to be illegal. The Respondents expressed the view that the claims made by the Applicant against them are extortionist in nature and urge the court to dismiss the entire Bill of Costs.

The Applicant in opposing the Notice of Preliminary Objection submit that the 1st Respondent as the majority shareholders and sole investor

at Tricon International Limited did in the year 2011, appoint the firm of **Ransley McVicker & Shaw Advocates** as company secretary. The company was later embroiled in internal disputes which led to the restructuring of its shareholding. This task of re-structuring was undertaken and finalized by the Applicant. At no point did the Respondents deny having issued instructions to the Applicant and at no time were the said instructions ever withdrawn. The applicants submit that there exists sufficient evidence to support their claim that they had been instructed to act on behalf of the company.

More importantly the applicants submit that the Notice of Preliminary Objection is for dismissing as it does not meet the legal threshold as set out in the case of **MUKISA BISCUITS COMPANY –VS- WEST END DISTRIBUTORS LTD 1969 E.A. 700**.

ANALYSIS AND DETERMINATION

The question of what constitutes a Preliminary Objection was set out in the often cited case of **MUKISA BISCUIT COMPANY –VS- WEST END DISTRIBUTORS LTD (1969) E.A 700**, in which a Preliminary Objection was defined as

“...a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued on 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”.

In **ORARO –V- MBAJA [2005] KLR Hon. Justice Ojwang** (as he then was) held that

“A “Preliminary Objection” correctly understood is now well defined as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the processes 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 a matter of legal principle, a true Preliminary Objection that the Court should allow to proceed..... Where a court needs to investigate facts a matter cannot be raised as a Preliminary Objection [emphasis mine]”.

In the same case it was further held as follows:-

“As already remarked, anything that purports to be a preliminary objection must not deal with facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. [own emphasis].

The Preliminary Objection herein is premised on the following grounds:-

- (i) That the 1st and the 2nd Respondents never at any time gave the Applicant law firm instructions to act in the restructuring of the company known as Tricon International Limited.
- (ii) That the 2nd Respondent has never been a director and/or shareholder of the company known as Tricon International Limited and as such she is a stranger to the present suit.

In my estimation both grounds advanced as the basis for this Preliminary Objection do not involve strict points of law but rather involve matters of fact which would require evidence to either prove or disapprove them.

In **MUMMA KALUMA –VS- SHACHIN SHAH [2013] eKLR**, a case on all fours neither the present one **Hon. Justice Havelock** (as he then was) held as follows:-

“It appears that the basis of the client/ Respondents objection to the taxation is that he never gave instructions to the Applicant/ Advocate. That is a matter of fact which cannot be disposed of by way of a Preliminary Objection and should be ruled upon by the Deputy Registrar in her capacity as Taxing officer”.

From the above decision it is clear that the question of whether or not instructions to act for a particular client were issued cannot be deemed to be a point of law. It is a factual matter and therefore is purely a matter of evidence.

In order for the court to determine whether or not the 1st and 2nd Respondent (or either one of them) issued instructions for and on behalf of the company known as **Tricon International Limited**, the Applicant would be required to adduce evidence either oral or documentary to prove the existence of such instructions. Likewise the 1st and 2nd Respondents would be obliged to adduce evidence to disprove the existence of any such instructions.

Similarly the question of whether or not the 2nd Respondent was a shareholder or a director of the company is not a point of law but is a question of fact that can only be determined upon the receipt of evidence. The applicant would be required to place before the court evidence and material to establish that the 2nd Respondent indeed had some relationship or association with the company in question.

It is only once the court has been persuaded through evidence that the 2nd Respondent indeed had no association in the Tricon International Limited in any capacity, that the court would proceed to strike off the 2nd Respondent from these proceedings. In the circumstances, the plea to be struck off from the present proceedings cannot be brought under the umbrella of a Preliminary Objection as it does not constitute a point of law.

The 2nd Respondent ought to have brought a Notice of Motion seeking to have the Court strike her out of these proceedings.

Finally based on the foregoing, I find that the grounds relied on by the 1st and 2nd Respondent do not meet the threshold required to establish a Preliminary Objection. The Respondents have not raised points of law but rather have raised factual matters which could require that the court receive actual evidence in order to determine those matters.

Accordingly, I find that this Preliminary Objection has no merit and the same is dismissed in its entirety. Costs are awarded to the Applicants.

Dated in Nairobi this 31st day of July, 2018.

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JUSTICE MAUREEN A. ODERO

Ruling delivered at the Nairobi High Court this 31st day of July, 2018.

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JUDGE