



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 52 OF 2015**

**SAMMY NDUNGU MUNGAI**

**T/A KINAMBA EVANS ENTERPRISES NAKURU.....PLAINTIFF**

**VERSUS**

**ANTI-COUNTERFEIT AGENCY..... RESPONDENT**

**RULING ON THE PRELIMINARY OBJECTION DATED 3<sup>RD</sup> NOVEMBER 2015**

1. The Plaintiff/Applicant by its Notice of Preliminary objection dated 3<sup>rd</sup> November 2015 objects to the hearing of the Notice of Motion dated 18<sup>th</sup> November 2015 on the following grounds:

- (1) That the plaintiff objects to the firm of Sichangi and Associates coming on record for the defendant and pray that the Notice of Appointment be struck out.**
- (2) That the appointment of Sichangi and Associates did not follow due process i.e procurement rules.**
- (3) That the Defendant was already represented by the Attorney General.**

2. This suit was instituted by the plaintiff against the Anti-Counterfeit Agency, the defendant. Upon service of the necessary court process, the defendant appeared through the Honourable Attorney-General and answered by filing its responses to the plaintiffs application dated 13<sup>th</sup> July 2015 and which the parties compromised by recording a consent order on the 20<sup>th</sup> July 2015.

The plaintiff thereafter filed a Notice of Motion dated 12<sup>th</sup> October 2015 and served the Honourable Attorney General on behalf of the Defendant.

On the 17<sup>th</sup> November 2015, a Notice of Change of representation was filed by the firm of Sichangi Partners Advocates to represent the defendant, and at the same time filed a Replying Affidavit to the application dated 12<sup>th</sup> October 2015. On the 18<sup>th</sup> November 2015 when the application come up for hearing before me, the defendant sought leave to file a response to the preliminary objection which was granted and a replying affidavit was duly filed on the 3<sup>rd</sup> December 2015, both on the preliminary objection and to the substantive application being supplementary to its earlier replying affidavit sworn on the 17<sup>th</sup> November 2015.

3. The thrust of the preliminary objection as stated by Mr. Mongeri, Advocate for the plaintiff in his submissions is that procurement procedures by the Attorney General for legal services that brought in the firm of Sichangi Partners into this suit to represent the defendant, a Government Agency, were not followed. It was his submission that while the Hon. The Attorney General were on record, the said firm of Advocates filed their Notice of Appointment without first withdrawing the earlier notice by the Attorney General. It is submitted that the said Notice of Appointment and Notice of Change of advocates filed on the 17<sup>th</sup> November 2015 were unprocedural and ought to be struck out.

4. In opposing the preliminary objection, Ms. Mwathani Advocate relied on the replying affidavit filed on the 3<sup>rd</sup> November 2015 and stated that a Preliminary Objection must only raise issues of law and by its nature, ought to strike out the suit in its entirety. She relied on the Court of Appeal decision in the **Owners of Motor Vessel “Lilian S” -vs- Caltex Oil Kenya (1989) KLR**. She submitted that issue of representation is not a matter of law, and stated that such issue ought to have been brought through a Notice of Motion where affidavit evidence could be filed for and in opposition. For this, she cited the case of **Samuel Waweru -vs- Geoffrey Muhoro Mwangi(2014) KLR**.

5. On procurement process, it was stated that the Respondent/defendant being a state agency is subject to the **Public Procurement And Disposal Act** in matters of procurement, and such process was duly adhered to, and by a letter dated 11<sup>th</sup> July 2014 Ref: ACA /PROC/1 (32) written by the Agency on the 11<sup>th</sup> July 2014 informed the law firm of its having been prequalified for legal services by the said agency, and its response accepting empanelment dated 22<sup>nd</sup> July 2014.

6. The court has considered the rival arguments by both counsel. The plaintiff, in my view, had genuine concern as to whether or not the defendant's Advocates, M/S Sichangi Partners Advocates had been procedurally procured to competently represent the defendant. These are matters of both law and fact. I have seen the procurement documents annexed as exhibits in the defendants/respondents replying affidavit. I am satisfied that the said law firm was empaneled after prequalification into the Defendants legal panel on the 22<sup>nd</sup> July 2014 and to date are still in the panel, and authorised to represent the respondent in courts of law as external legal counsel. A party is always at liberty to be represented in court of law by Advocates of its own choice.

The said law firm filed a Notice of Appointment to represent the respondent on the 2<sup>nd</sup> November 2015 and followed up with a Notice of Change of Advocates on the 17<sup>th</sup> November 2015.

7. The court has considered that issues of representation of parties require evidence and cannot be adequately urged by way of preliminary objections but by formal applications – as stated in the case **Samuel Waweru -vs- Geoffrey Muhoro Mwangi (Supra)**. In this present case, the defendant being a State Agency was under an obligation to follow the laid down procurement procedures pursuant to the **Public Procurement and Disposal Act** as opposed to individuals and corporates and non-governmental bodies/entities – which bodies are not bound by the above procurement rules. To that extent, the plaintiff was in order to bring the preliminary objection to ascertain adherence to the procurement process which, in my view, is a matter of law and bound under the Act, and thus falls under the ambit of the principles laid down in the **Mukisa Biscuits Manufacturing Co. Ltd. -vs- West End Distributors Ltd (1969) EA 696**, 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 preliminary point may dispose of the suit ---- it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion -----”*

The said procurement process having been followed, then, the application lacks merit.

8. For the above reasons, the preliminary objection is dismissed, but with no orders as to costs.

**Dated, signed and delivered in open court this 17<sup>th</sup> day of March 2016**

**JANET MULWA**

**JUDGE**