



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE NO. 3 OF 2013

KERICHO COUNTY PLAINTIFF

VERSUS

KENYA FOREST SERVICE & 8 OTHERS - DEFENDANTS

R U L I N G

1. The Preliminary Objection by Mr. Langat relates to the Notice of change of Advocates by Lilan & Koech Associates dated 17th February, 2015.
2. M/S Onesmas Langat and Company advocates had been appearing for the plaintiff before the filing of the Notice of Change of advocate was filed by Lilan & Koech Associates.
3. In his Preliminary Objection Mr. Langat listed the following grounds in support thereof:
 - a. *That the notice is fatally defective on the face of it as the same is dated 17th day of February, 2015 but filed in court on 16th day of February, 2015.*
 - b. *That the said firm seeks to come on record way after the decree has been drawn and issued yet leave of the court has neither been sought nor granted.*
 - c. *That the consent and/or concurrence of the counsels already on record has not been obtained.*
 - d. *That the alleged appointment of the firm by the plaintiff/applicant which is a public entity is in violation of the Public Procurement and Disposal Act 2005.*
4. When the Preliminary Objection came for hearing Mr. Langat abandoned grounds (ii) and (iii) and only argued grounds (i) and (iv).
5. On ground (i) he submitted that the notice by Lilan & Koech associates dated 17th February, 2015 was received in the Registry on 16th February, 2015. To him this was not a proper record and should not be admitted.
6. On ground (iv) he submitted that the plaintiff did not procure the services of Lilan & Koech associates in line with **Article 227** and the **Public Procurement and Disposal Act**. That the appointment of the said firm was not competitive.
7. Mr. Terer of Lilan & Koech associates opposed the Preliminary Objection.

On ground (i) he argued that the application was filed on 17th February, 2015 and this is supported by the receipt issued. The court stamp bears the date of 16th February, 2015 and that is purely administrative. That justice could not be defeated by virtue of such.

8. On ground(iv) he submitted that the ground was not a pure point of law as is expected of a Preliminary Objection.

He cited the cases of:

- a. **Employment Migration Agency Vs Police Service Commission & 9 others Nairobi Industrial Court Cause No. 36 of 2014.**
 - b. **Mukhisa Biscuits Co. Ltd Vs Westend Distributors Ltd [1969] E.A 696.** He submitted that Lilan & Koech associates are in the panel of advocates prequalified to act for the plaintiff. Mr. Langat confirmed this.
9. The only issue for determination is whether the grounds raised, qualify for determination in the form of a Preliminary Objection. What then is a Preliminary Objection?

In the case of **Mukhisa Biscuits Co. Ltd V Westend Distributors Ltd** *supra* – the court stated thus:

“The framing of the Preliminary Objection sounds like an application in these Proceedings. I must emphasize that a Preliminary Objection dwells on strict matters of law and must be restrained to such. This was observed in the authority of Mukhisa Biscuits Co. Ltd. V. Westend Distributors Ltd, supra, where the court observed as follows;

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 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”

Further,

“ 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 the judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”

10. It is therefore clear that a Preliminary Objection only deals with points of law and law alone, and not issues of fact.
11. In ground (i) Mr. Langat argued that the Notice of change filed herein was improperly filed as it bore different dates. The Notice is dated 17th February, 2015 and bears a court stamp for 16th February, 2015. The same court whose stamp is dated 16th February, 2015 has issued a receipt **No. 2932858** dated 17th February, 2015. A document is deemed filed upon payment of requisite fees.
12. To find out why the court stamp on the Notice shows 16th February, 2015 would require the officer in charge of the Registry to explain the error. Stamping of documents received at the Registry is the work of the court, and the Counsels and Litigants have no control over this. To insinuate that the document was filed on 16th February, 2015 and later dated 17th February, 2015 is not backed by any evidence.

13. Would this ground satisfy the category of a Preliminary Objection? My answer is in the negative as this ground would require ascertainment from the Registry concerned, through some form of evidence.

14. Coming to ground (iv) – it has been admitted by both counsels that the firm of Lilan & Koech associates is prequalified among others to act for the plaintiff.

For this court to arrive at any finding on how the advocates were appointed to act for the plaintiff it would require material to be laid before it to enable it determine the issue. It is not a matter of course. This will not equally qualify for a Preliminary Objection.

15. From the above findings, I do arrive at the conclusion that the Preliminary Objection raised lacks merit and I dismiss it with costs.

Further I direct that the application dated 17th February, 2015 should be listed for hearing on the earliest date available.

Dated, signed and delivered this 27th day of March, 2015

H.I. ONG'UDI

JUDGE

In the presence of

Mr. Langat for Terer for Applicants.

Mr. Akello for Defendant – absent

Mr. Motanya for 4th, 6th, 7th and 8th Interested Parties – absent