



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 489 OF 2013**

**SAMUEL WAWERU .....PLAINTIFF**

**VERSUS**

**GEOFFREY MUHORO MWANGI .....DEFENDANT**

**RULING**

1. The plaintiff Samuel Waweru Kariuki filed this suit against the defendant Geoffrey Muhoro Mwangi on 2<sup>nd</sup> August 2013. Contemporaneously with the plaint, the plaintiff filed a Notice of Motion seeking injunction orders.
2. The application was heard *ex parte* and a temporary injunction issued restraining the defendant, his agents, servants and/or employees from selling, offering for sale, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property L.R No. 22957/4 pending the *Inter-parties* hearing of the application set down for hearing on 11<sup>th</sup> September, 2013.
3. The defendant's counsel filed his Memorandum of Appearance on 10<sup>th</sup> September, 2013 and grounds of opposition of even date. It is this Memorandum of Appearance that is being challenged by the Notice of Preliminary Objection dated 17<sup>th</sup> September, 2013 by the plaintiff.
4. This court directed on 20<sup>th</sup> September, 2013 that the Preliminary Objection be heard first, before the pending motion for injunction.
5. The Notice of Preliminary Objection raised what it described as a point of law in seeking to have P.K Njoroge, counsel for defendant recuse himself from appearing for the defendant in this suit and gave the following reasons:-

**" a. That P.K Njoroge Advocate is an expert witness having represented both the plaintiff and the defendant in the subject matter of the suit in his professional capacity as an Advocate of the High Court of Kenya.**

**b. That in the above appointment P.K Njoroge received payments and drew documents forming the basis of the suit.**

**c. That as an Advocate and thus an expert it is not necessary under the provisions of Order 11 of the Civil Procedure Rules 2010 to file his statement."**

6. Both parties filed Written Submissions which I have carefully perused and considered.
7. The main issue raised in the Preliminary Objection relates to the defendant's counsel conflict of

interest in this matter.

8. The plaintiff submitted that P.K Njoroge having occupied a professional position for both the plaintiff and defendant should not be allowed to act for one party in this suit. He was privy to official information which went to the core of this dispute obtained when he acted for both parties and such information should not be used selectively against the plaintiff. He further submitted that the real test was whether real mischief or prejudice in all human probability will result if an advocate is allowed to act. He relied on the case of **Strathmore Research Centre and Consulting Centre vs Paul Maina Gacari HCCC No.484 of 2011** where the court discussed conflict of interest by an advocate.
9. In response, the Defendant/ Respondent submitted that the plaintiff's counsel had not quoted any legal provision to warrant or support the Preliminary Objection. He maintained that the Preliminary Objection should be in the form of a demurrer which should settle all issues leaving nothing as held in the case of Mukisa Biscuits.
10. 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."**

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

**"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"**

11. This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I have perused the reasons by the applicant in his Preliminary Objection. I have not seen a single point of law that has been raised. What has been raised are purely matters of fact which the defendant's counsel ought to have a chance to respond to. I hold the view that by filing such an objection, the plaintiff has denied the defendant the opportunity to respond factually to the Preliminary Objection. As a matter of Law, a party upon whom a Preliminary Objection is served, does not have a right to respond factually and can only place before the court the law applicable. What the plaintiff should have done was to raise matters in relation to conflict by filing a formal application.

See the case of **National Bank of Kenya Limited vs Peter Kipkoech Korat and another (2005) eKLR** where **Gacheche J.** had detailed:

**"Mr Kuloba, learned Counsel for the bank was however of the view that the Preliminary Objection is not sustainable, as the issues of conflict of interest cannot be raised by way of a Preliminary Objection. I am inclined to agree with him as the legal position regarding Preliminary Objection was well laid down in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696, in which Law JA, stated that '*...a Preliminary objection consists of a point of law argued as a preliminary point may dispose of the suit...*' It is clear to me that the issue raised by the defendants pertaining to representation of these parties, would require evidence and in which case they cannot be entertained by way of Preliminary Objection as relations cannot be inferred and on that ground alone, this**

**objection cannot be sustained.”**

12. For the court to be satisfied that there is no mischief on the part of counsel who had acted for both parties and is now acting for one party, that counsel must be given an opportunity to show whether or not there was a conflict of interest or otherwise. Had this objection been raised by way of a formal application supported by an affidavit, that would have given the defendant an opportunity to annex supporting documents and in extension allow court to satisfy itself. This was stated by **Emukule J** on the duty of advocates in the case of **H.F Fire Africa** case. Quoting the English Court of Appeal in **Rakusen vs Ellis Munday & Clarke (1912) 1 Ch.831** the learned Judge had this to say:

**“That there is no general rule that a solicitor who acted for some person either before or after litigation began could in no case act for the opposite side. The court must be satisfied in each case that no mischief would result from his so acting; that there could be no danger of any breach of confidence if the solicitor acted for the company and that the injunction must be refused.”**

13. In my view, and I so hold that the issues raised in the notice of preliminary objection dated 17<sup>th</sup> September, 2013 have no merit and the same is hereby dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of February 2014.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

- Mr. P. K. Njoroge for the Defendant/Respondent.
- N/A for Plaintiff.
- Court clerk: Kennedy.