



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO 136 OF 2014

NICHOLAS REUBEN NYAMAI..... PLAINTIFF

VERSUS

TIMOTHY NDUVI MUTUNGI.....DEFENDANT

R U L I N G

1. The Plaintiff's suit herein is for enforcement of some three written agreements for his remuneration with his former client, the Defendant. The Plaintiff is an advocate of this court. The Plaintiff has pleaded that the said agreements for remuneration were made under **section 45** of the **Advocate's Act, Cap 16** (the Act).

2. Together with the plaint the Plaintiff filed **notice of motion dated 20th May 2014** seeking certain injunctive reliefs pending hearing and determination of this suit. The Defendant responded to that application by filing a **notice of preliminary objection dated 28th May 2014**. The following grounds of objection are raised -

- (i) That the Plaintiff's claim is based on professional services and that he has not complied with section 48 of the Act by serving a bill of costs instead of filing suit, and that therefore the suit is incompetent.
- (ii) That no injunction can be issued in a suit for recovery of costs and legal fees unless the applicant for such injunction has a legal lien.
- (iii) That the application is an abuse of the process of the court.

3. The Plaintiff filed grounds of opposition dated 24th June 2014 in response to the notice of preliminary objection. The points taken include –

- (i) That the application is frivolous, mischievous and an abuse of the process of the court.
- (ii) That the preliminary objection does not meet the legal threshold of a

preliminary objection.

(iii) That in any case the application is baseless and has no merit.

(iv) That in any event the Plaintiff claims not only legal fees but also other consultancy fees and that therefore it goes beyond the purview of the Act.

4. I have considered the submissions of the learned counsels appearing, including the two cases cited. Those cases are on the point what constitutes a proper preliminary objection on a point of law and they include the well-known case of *Mukisa Biscuit v West End Distributors [1969] EA 696*. By authority of that case, a preliminary objection must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. A preliminary objection cannot be raised if any fact has to be ascertained first, or if what is sought is the exercise of judicial discretion.

5. The only ground raised in the notice of preliminary objection that I need to consider in this ruling is whether the Plaintiff's suit is incompetent by virtue of the provisions of section 48 of the Act. The other two grounds in the notice go to the merits of the application.

6. Section 45 of the Act makes provision for agreements between advocates and their clients with respect to such advocates' remuneration. The section also makes provision for challenges to such agreements and other related matters. Subsection (6) of the section provides as follows -

“Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation or to section 48.”

And section 48 provides –

“48.(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court's jurisdiction, in which event action may be commenced before expiry of the period of one month.

(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.”

7. The application of section 48 has been expressly excluded by section 45(6) in cases where an agreement for remuneration has been made under section 45. As already observed, the Plaintiffs suit is for recovery of remuneration based on some three written agreements for remuneration which are pleaded in the plaint. It is further pleaded that the three agreements for remuneration were duly signed by the parties. It was thus not necessary for the Plaintiff to first serve a bill of costs upon the Defendant. It will be upon the court to determine, after trial of the action, whether or not any remuneration is due to the Plaintiff from the Defendant upon those agreements.

8. In the event I must reject the preliminary objection. It is hereby overruled with costs to the Plaintiff. The notice of motion dated 20th May 2014 shall be heard and decided on its merits. Those will be the orders of the court.

DATED AT NAIROBI THIS 11TH DAY OF AUGUST 2014

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 13TH DAY OF AUGUST 2014