

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 54 OF 2014

GILLYS SECURITY & INVESTIGATION SERVICES LTD.....APPLICANT

VERSUS

MASENO UNIVERSITY.....RESPONDENT

RULING

By its application dated 6-8-2014 the applicant prays for orders that the firm of Wasuna & Co. Advocates together with its partners and or associates be removed from record as advocates for the respondents or contemnors in the appeal herein. The application is supported by the sworn affidavit of John Walter Owino the appellant's managing director. The basic argument raised by the applicant is that the said firm drew an agreement dated 19-5-2014 between the respondent herein and Bedrock Holdings Ltd which is now a subject of this appeal.

The respondent opposed the same by the grounds of opposition filed on 26-9-2014 arguing that the said agreement is not an issue of contention between the parties and that section 137 of the Evidence Act insulates them.

I have heard the oral submissions by both parties herein. From the record it is evidently clear that this is an appeal emanating from the decision of the Public Procurement Administrative Review Board as per the Memorandum of Appeal filed on 22-5-2014.

It is equally clear that Mr. Francis Wasuna did execute the said agreement between the respondent and Bedrock Security Holdings Ltd. The applicant was never a party to the said agreement.

Rule 9 of the Advocates (Practice) Rules which the parties herein relied on is worth reproducing here:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give whether verbally or by declaration of affidavit, he shall not continue to appear.

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal and non-contentious matter of fact in any matter in which he acts or appears”.

This court's understanding of the above rule is that it applies in particular to matters that are ongoing and in particular where evidence needs to be adduced. The matter before this court is an appeal process. Unless by an application to introduce new matters, all that the appellate court shall be deciding shall be based on the primary evidence adduced as contained in the proceedings at the review board.

In the premises I do not see how the firm of M/S Wasuna & Co. Advocate can be called to the witness box unless by an order of the court. The contentious agreement forms part of the board's decision. Infact from the record of the minutes Mr. Wasuna was a participant and nobody requested that he be disqualified from the proceedings. Perhaps this would have been the appropriate time. The authorities supplied by the parties are all to do with hearings before the high court. None of them applies to a situation at hand, namely appeal process. The same are therefore distinguishable from this matter.

So as not to prejudice the pending application as well as the entire appeal, I shall not be tempted to comment on the other issues raised by Mr. Gachuba. Suffice to state that the application is unmeritorious for the reasons stated above and the same is dismissed with costs.

Dated, signed and delivered at Kisumu this 27th day of October, 2014.

H.K. CHEMITEI

JUDGE