



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**WINDING-UP CAUSE NO. 24 OF 2012**

**IN THE MATTER OF PYRETHRUM BOARD OF KENYA STAFF SUPERANNUATION  
SCHEME**

**AND**

**IN THE MATTER OF THE RETIREMENT BENEFITS (MINIMUM FUNDING LEVEL AND  
WINDING UP OF SCHEMES)**

**REGULATION, 2000**

**AND**

**IN THE MATTER OF THE RETIREMENT BENEFITS ACT,**

**NO. 3 OF 1997**

**RULING**

1. The Petition of the Retirement Benefits Authority through its Chief Executive Officer, **Mr Edward O. Odundo** was dated and filed herein on 11th September 2012. The Petition was brought pursuant to **section 5b and 11 (4)** of the *Retirement Benefits Act*, **Regulation 5 (2) (a) and (3)** of the *Retirement Benefits (Minimum Funding Level and Winding-Up of Schemes) Regulations (2000)* and **Rule 5** of the *High Court (Winding-Up) Rules*. The Petition sought prayers that the Pyrethrum Board of Kenya Staff Superannuation Scheme (“the Superannuation Scheme”) be wound up and that one **Mr. Robert Alfred Odongo** be appointed as the Liquidator thereof. The Petition was supported by the Verifying Affidavit of the said Mr. Edward Odundo sworn on 14th September 2012 and filed herein on the same day. The Petition was opposed by the Chairperson and Trustee of the Respondent (being the Trustees of the Superannuation Scheme) **Mrs. Elizabeth G. Kabiru** sworn on the 29th October 2012. In order that the documentation before Court with regard to this matter should be complete, a Supplementary Affidavit was sworn by the Board Secretary of the Petitioner **Mr. David Nyakundi** dated 15th November 2012 (filed with the belated leave of the Court on the same date) to which was annexed the Report on the Actuarial Valuation of the Superannuation Scheme as at 30th June 2011.
2. The Respondent filed a Notice of Preliminary Objection dated 29th October 2012. This Court directed on 23rd November 2012 that the same should be heard first, before the substantive Application. The Preliminary Objection raised what it described as a point of law in seeking to have Messrs. Simba & Simba, Advocates disqualified as the advocates for the Petitioner. In this regard the Respondent gave 5 reasons as follows:

**“1. That the Advocates had actively represented the Respondent in Retirement Benefit Authority Tribunal Appeal No. 6 of 2010, Pyrethrum Board of Kenya Staff Superannuation Scheme vs. The Chief Executive Officer Retirement Benefit Authority on matters that are related to and/or giving rise to the instant Petition.**

**2. That the said Advocates in the course of their representation in the said matters related to and/or giving rise to the petition herein obtained and became privy to confidential information received from the Respondent regarding the issues in the petition herein and their representation of the Petitioner against the Respondent gives rise to serious conflict of interest to the detriment of the Respondent.**

**3. That the said Advocates are on record representing the Respondent in CMCC No. 3366 of 2012 Moyez Sadrudin Bhanji vs. The Registered Trustees Pyrethrum Board of Kenya Staff Superannuation Scheme and Kingsland Court Benefits Services, (Milimani) which matter is yet to be concluded.**

**4. That there is every likelihood the Respondent may summon Simba & Simba Advocates to give evidence in its favour in the instant petition.**

**5. That is only fair and just for purposes of determination of the real issues raised in the petition that Simba & Simba Advocates be disqualified from acting for or representing the Petitioner”.**

3. The Preliminary Objection was further supported by the Affidavit of one of the Trustees of the Superannuation Scheme – **Lucy Komen** sworn on 30th of April 2013. The deponent recorded in the second paragraph thereof that Messrs. Simba & Simba, Advocates had actively represented the Respondent then the *Retirement Benefits Authority Tribunal Appeal No. 6 of 2010* with regard to a claim of some 43 members of the Respondent who had left the employment of the Pyrethrum Board of Kenya. She annexed a copy of a letter from the said firm of Advocates dated 14th June 2012 addressed to the Trustee Secretary, as regards that Appeal. The deponent went on to say that Simba & Simba advocates received from the Respondent confidential information regarding its financial status, its plans for revitalising financially, details that the Government was directly involved in such revitalising and the Respondent’s strategy to inspire farmers to produce more pyrethrum with a view to sustaining the industry. In the opinion of the deponent, Simba & Simba, Advocates ought now not be allowed to represent the Retirement Benefits Authority in the instant petition to wind up the Respondent seeing as how, all along, they have been privy to the viable strategy of the Respondent as aforesaid. The deponent also noted that the same firm was on record defending the Respondent in respect of *CMCC No. 3366 of 2012*, a suit instituted against the Respondent by one Moyezz Sadrudin Bhanji.
4. Mr. Orege for the Respondent, asked for Simba & Simba to be disqualified as representing the Petitioner as they were in conflict pointing to **Rule 9** of the *Advocates (Practice) Rules* which provides as follows:

**“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, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or 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 or noncontentious matter of fact in any matter in which he acts or appears.”**

Counsel also referred to the cases of **King Woollen Mills Ltd v Kaplan & Stratton Advocates (1990 – 1994) EA 244, Uhuru Highway Development Ltd v Central Bank of Kenya (2003) KLR 62, Francis Mugo & 22 Ors. v James B. Muthee & 3 Ors. (2005) eKLR and LTI-Kisii Safaris**

**Inns Ltd & 2 Ors v Deutsche Investitions-Und Entwicklungsgellschaft & 4 Ors (1997) eKLR.** Mr Orege maintained that the Respondent had demonstrated to this Court the reasons why Simba & Simba, Advocates should be disqualified in that they represented the Respondent (as Petitioner) in an Appeal against payment of pensions to 43 members of staff who were members of the Superannuation Scheme. The Respondent in that Appeal was the Petitioner in this matter. Counsel noted that the Appeal had been dismissed and that now, Simba & Simba had filed an Appeal against that decision – such was the conduct of advocates who had instructions to act for the Respondent. In that Appeal, Messrs. Simba & Simba were out to demonstrate that it was against the interest of justice to wind up the Superannuation Scheme. Now they had turned around and were acting for the Petitioner seeking to wind up the Superannuation Scheme. Counsel further noted that there was no objection raised as against the Preliminary Objection and no Replying Affidavit filed. Finally he noted that the firm was still acting for the Respondent in *CMCC No.3366 of 2012* still pending before the Chief Magistrate at Milimani.

5. Mr. Wathuta for the Advocates opposed the Preliminary Objection by the Respondent. What was before Court was not a Preliminary Objection based on a point of law. Counsel maintained that whether an advocate has a conflict of interest or otherwise is a factual issue not a matter of law. By filing such an Objection, the Respondent had denied the Petitioner 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. In counsel's view, the Preliminary Objection raised purely matters of fact which the Petitioner ought to have a chance to respond to before it tackled the issues of conflict raise therein. Mr. Wathuta pointing to the definition of a Preliminary Objection as per **Law JA** in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** viz:

**“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 Judgement 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 has 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. This improper practice should stop.”**

Counsel continued by stating that the **Mukisa Biscuit** case had been followed in a number of cases including **Charles G. Kariuki v Akuisi Farmers Company Ltd (2007) eKLR**, **National Bank of Kenya Ltd v Peter K. Korat & Anor. (2005) eKLR**, **H. F. Fire Africa Ltd v AMR Gharieb HCCC No. 665 of 2003**, **Uhuru Highway Development Ltd & Ors v Central Bank of Kenya (supra)** and **Unnet Kenya Ltd v Telkom Kenya Ltd & Anor. (2004) 1 EA 348**.

6. Continuing with his submissions Mr.Wathuta criticised the authorities to which the Court had been referred to by Mr. Orege involving matters in relation to conflict. What the Respondent should have done was to raise matters in relation to conflict by filing a formal motion. Counsel also maintained that there was inconsistency in the authorities cited in that the particular advocates who were being injuncted from acting for certain parties, had also acted for both parties in certain commercial transactions (see **King Woollen Mills Ltd v Kaplan & Stratton** supra). Further, the **Francis Mugo** case involved an application where an advocate was acting in person. Counsel drew particular attention to the **National Bank of Kenya** case 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 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.....’ It is clear to me that the issues 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.”**

Finally, Mr. Wathuta drew the attention of the Court to the Ruling of **Emukule J.** on the duty of advocates in the **H. F. Fire Africa** case. Quoting the English Court of Appeal in **Rakusen v 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.”**

In counsel’s opinion Simba & Simba had not been given an opportunity to show whether or not there was a conflict of interest or otherwise.

7. Mr. Orege returned to say that by *Article 159 (1) (d)* of the *Constitution* the Court should note that justice should be administered without regard to undue technicalities. He submitted that the decision of the Court of Appeal in the **Uhuru Highway** case superseded the **Mukisa Biscuit** case and urged this Court to make a finding in tandem with that of the Court of Appeal. The evidence had been placed before this Court, upon which the Respondent relied, which was simply that Simba & Simba had acted for the Respondent in this matter and they are in conflict. They had an opportunity to respond but they did not reply to the Replying Affidavit. The Respondent’s case went against the fixed viewpoint that a Preliminary Objection must only be confined to matters of law.
8. In my view, the decision in the **Mukisa Biscuit** case has been followed time and again and remains good law insofar as matters can be raised before Court by way Preliminary Objection. I cannot agree with the learned counsel for the Respondent that the **Uhuru Highway** case marks a departure from that principal. That case certainly did involve an application to restrain a prominent legal firm from acting for the first and second defendants therein. Indeed, the plaintiff’s application in that suit was commenced by way of notice of motion and, in fact, the same was dismissed at first instance. The legal firm was restrained from acting as a result of the finding of the Court of Appeal. However, nowhere in the authority put before Court by the Respondent was there any mention of a Preliminary Objection or indeed of the **Mukisa Biscuit** case. I totally concur with the viewpoint of Mr. Wathuta that what the Respondent should have done is to have filed a formal application to disqualify the firm of Simba & Simba supported by the necessary affidavit which, no doubt, would have taken the same form as the affidavit in support of the Preliminary Objection sworn by the said Lucy Komen dated 30th April 2013. That affidavit deponed to a number of facts regarding the relationship between Simba & Simba and the Respondent. There was no statement as regards any point of law which was applicable in this case.
9. As a result, I disallow the Respondent’s Preliminary Objection dated 29th October 2012. Parties may now take a fresh date at the Registry for the hearing of the Petition dated 11th September 2012. The Petitioner will have the costs of the Preliminary Objection.

**DATED and delivered at Nairobi this 30<sup>th</sup> day of October, 2013.**

**J. B. HAVELOCK**

**JUDGE**