



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 100 OF 2011 (JR)

REPUBLIC

VERSUS

THE CHAIRPERSON,

BUSINESS PREMISES RENT TRIBUNAL.....RESPONDENT

A N D

1.BRIGHT KENIND LIMITED

2.PRIDEINN HOTELS&INVESTMENTS LTD.....INTERESTED PARTIES

EX-PARTE

ALSAI KENYA LIMITED APPLICANT

RULING

The 1st Interested party has asked this court to bar the firm of Kinyua Muyaa & Co. Advocates and in particular Mr. Kinyua Kamundi from acting and conducting these Judicial Review proceedings on behalf of the Exparte applicant. The request is hinged on Rule 9 of the Advocates (Practice) Rules.

When counsel for the 1st interested party rose to address me on the issue he suggested that the application was better presented and prosecuted through a formal application. The court declined any suggestion that the matter be adjourned and directed that it be disposed of by oral argument. This short ruling explains why.

Leave was granted to the Exparte applicant to take out these proceedings on 19th September 2011 and it filed a substantive motion on 21st September 2011. On 6th December 2011 the firm of Nyiha, Mukoma & Co. Advocates filed a Notice of Appointment to act for the 1st interested party. This matter came up for hearing on 7th December 2011 when Mr. Muchiri holding brief for the firm of Nyiha, Mukoma & Co. Advocates sought and was granted an adjournment to allow time for the 1st interested party to file a replying affidavit. The matter was adjourned to 8th February 2012. On that day Mr. Muchiri again holding brief for the firm of Nyiha, Mukoma & Co. requested for more time to file the affidavit. Notwithstanding opposition from Mr. Kinyua the request was granted and the hearing rescheduled to 27th February 2012.

On 24th February 2012 the 1st interested party filed Grounds of Objection instead of a replying affidavit. One would have thought that with this filed, the matter was ready for hearing on 27th February, 2012. It is on that day that the 1st interested party raised the issue of disqualification.

That is the short background.

Rule 9 of The Advocates (Practice) Rules speaks to advocates in these simple terms,

“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 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 non contentious matter of fact in any matter in which he acts or appears.”

Is the conduct of the firm of Kinyua Muyaa running a foul of this rule?

The main motion is based on the statement dated 19th September 2011 and the verifying affidavit sworn by SALIM SULTAN MOLOO a Director of the Exparte Applicant company. The 1st interested party chose to oppose the motion by way of grounds of opposition. If it had desired to reply by way of affidavit evidence then it had sufficient opportunity to do so; from 6th December 2011 when it appointed its advocate to 24th February 2012 when it filed grounds. A period in excess of 60 days. Although I must not touch on matters that will be resolved at the main hearing, I cannot help but observe that the Grounds take on the application on basis of the facts presented by the applicant. See grounds 2, 3 & 4 reproduced below-

(i) That under Clause 19 of the Agreement entered

into between the Applicant and the Interested Party on 30th January 2011 the same would automatically terminate in the event that the Interested Party is incorporated without the Second Party in that Agreement.

(ii) That the applicant has contended that the

Interested Party was incorporated without part of the Second Party in breach of Clause 19 of the agreement entered into on 30th January 2011.

(iii) That in view of the above contentions by the

Applicant the running of the suit premises by the Interested Party was at all material times a protected tenancy as there was no agreement between the parties as the same would have lapsed as per the contentions of the Applicant.”

So upto the point when the request for disqualification was made, the interested party had not controverted the facts as presented by the exparte applicant either in a replying affidavit or in the Grounds of Objection filed on 24th February 2012. That was the position on the day the main application was due to proceed for hearing. On what basis then would Mr. Kinyua be required to give evidence (*here by way of affidavit*)? There was no challenge of or request for explanation/clarification of the facts as presented in the verifying affidavit sworn on behalf of the Exparte applicant. It is, therefore, not apparent to me that Mr. Kinyua is a potential witness in these proceedings.

For the reasons given, the application is declined with costs.

Dated and delivered at Mombasa this 23rd day of March, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Kinyua for Applicant

Muchiri holding brief for Ibrahim for 1st

Interested Party

Court clerk - Moriasi

F. TUIYOTT
JUDGE