



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

Civil Case 299 of 2009

**EDWARD KINGS ONYANCHA MAINA T/A
MATRA INTERNATIONAL ASSOCIATES.....PLAINTIFF
VERSUS
1. CHINA JIANGSU IETC CORP.....1ST DEFENDANT
JAMES OCHEING ODUOL T/A
2. OCHIENG ODUOL & CO. ADVO.....2ND DEFENDANT
3. R.P.V. WENDO.....3RD DEFENDANT
4. J. NYAMU.....4TH DEFENDANT
5. M. G. MUGO.....5TH DEFENDANT
6. K. H. RAWAL.....6TH DEFENDANT
7. J. P. RANSLEY.....7TH DEFENDANT
8. THE HON. CHIEF JUSTICE
OF THE REPUBLIC OF KENYA.....8TH DEFENDANT
9. THE HON. A.G. OF KENYA.....9TH DEFENDANT**

RULING

Preliminary objection has been raised by the plaintiff to two applications brought by the 1st and 2nd defendants both dated 26th January, 2010.

The objection relates to four (4) points in respect of:

- (i) the memorandum of appearance dated 29/10/2009 by the 3rd to 8th defendants
- (ii) the defence dated 3/10/2010 by the 3rd to 8th defendants
- (iii) the chamber summons dated 26th January, 2010 by the 1st and 2nd defendants and
- (iv) the chamber summons dated 11th February, 2010 by the 3rd to 9th defendants.

At the hearing of the objection, the plaintiff concentrated his arguments on the two applications dated 26th January, 2010 under (iii) above and this ruling therefore relates only to those two applications. He submitted that the two applications are incompetent for the reasons, that they are in violation of **sections 34 and 35(1)** of the **Advocates Act**, that the applications amount to an abuse of the court process in that the 1st defendant has failed to enter appearance while the 2nd defendant has failed to file a defence and finally that the 1st defendant's application is not supported by affidavit.

Responding to these submissions, learned counsel for the 1st and 2nd defendants argued that the preliminary objection does not relate to pure points of law as required in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd.** (1969) E.A. 696; that it is sufficient to indicate in the pleadings the name of the firm of advocates by whom they are drawn, and finally that there is no mandatory requirement that every application be supported by an affidavit. On the authority of **Mukisa** case (supra) a point qualifies to be raised as a preliminary objection if it is a pure point of law, which, if argued as such may dispose of the suit. It is not a preliminary point of objection if any matter has to be ascertained or if what is sought is the exercise of a judicial discretion.

The first point raised relates to **sections 34 and 35(1)** of the **Advocates Act**. **Section 34** aforesaid provides for the effect of documents prepared by unqualified persons while **section 35(1)** deals with the endorsement of the name and address of the person who has drawn or prepared documents specifically mentioned in **section 34(1)** of the **Act**. Both applications under consideration are endorsed to have been drawn and filed by Ochieng', Onyango, Kibet & Ohaga Advocates.

It is the plaintiff's contention, if I understood it, that the endorsement ought to have been identified by the name of the specific advocate in the firm of Ochieng', Onyango, Kibet and Ohaga Advocates who drew the pleadings as an assurance that the documents have not been prepared by an unqualified person. It is necessary to set out the provisions of **section 35(1)**. It provides:

“35(1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34(1) shall at the same time endorse or cause it to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five hundred shillings in the case of an advocate.

Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm”

(Emphasis supplied)

It is clear that the endorsement can either be by the particular person drawing it or a firm of advocates. Secondly, the sanction provided for failure to comply is only a fine. The application by the

and 2nd defendants are, for these reasons, properly endorsed by the firm of Ochieng', Onyango, Kibet and Ohaga Advocates. That ground must fail and does fail.

The second ground is that the applications amount to an abuse of the court process for the reason that both the 1st and 2nd defendants have failed to respectively enter appearance or file a defence after being duly served. To the extent that the question of service is a question of fact, this ground does not qualify to be argued as a preliminary point. Indeed the question of interlocutory judgments against the two defendants is the subject of their applications. That ground similarly fails.

The third and final point is in respect of the 1st defendant's application. It is common ground that that application is not supported by an affidavit. Learned counsel for the applicant explained that there is no mandatory requirement of the law that every application be accompanied by an affidavit. The general provision governing the procedure for instituting applications under the **Civil Procedure Rules** is **Order 50** which provides that all applications to the court, unless otherwise expressly provided, shall be brought by motion. But if the procedure provided requires chambers summons, as is the case here, **order 50 rule 7** requires that:

“7. Every summons shall state in general terms the grounds of the application being made and shall be heard in chambers and, where any summons is based on evidence by affidavit, a copy of that affidavit shall be served.”

(Emphasis supplied)

There are only two mandatory requirements in the foregoing provision. The summons must, in the first place state generally the grounds upon which it is being made and secondly it must be heard in chambers. It is only when the summons is based on evidence that it must be supported by affidavit. Unlike the application by the 1st defendant which is supported by the affidavit of James Ochieng', the 1st defendant's application is not based on evidence. It is based purely on points of law, for instance, that the learned magistrate had no jurisdiction to enter interlocutory judgment; that the entry of that judgment was premature, a nullity and irregular.

For these reasons, the application came under the first part of **rule 7** as it states on the body in general terms the ground relied on. This point of objection must similarly fail with the result that this notice of preliminary objection is overruled with costs to the 1st and 2nd defendants.

The two applications may be set down for hearing on merit.

Dated, Signed and Delivered at Nakuru this 27th day of May, 2010.

W. OUKO
JUDGE