



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 422 of 2009

EPCO BUILDERS LIMITED..... PLAINTIFF

VERSUS

KABUITO CONTRACTORS LIMITED..... DEFENDANT

RULING

The ruling relates to the preliminary objection that was raised by Mr. Kinyanjui, the respondent's counsel. In his submissions he brought the attention of the court the fact that in both chamber summons, reliance was put on the supporting affidavit of Joe Wandago. Further to the above, the also took issue with the fact that the deponent described himself as an advocate of the High Court, whereas rule 9 f the Advocate's practice Rules, it is forbidden for an advocate acting for a party to sink into the arena of litigation. According to Mr. Kinyanjui, by dint of the above rule, the deposition by his learned friend automatically bars him from representing the plaintiff/applicant. Further to the above, he also submitted that since the application is contentious, the proviso in Rule No. 9 cannot assist his learned friend. In support of his submission, Mr. Kinyanjui has relied on the following authority – **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya – Civil Case No. 532 of 2004.**

In the above case, the trial Judge held that one Mr. Ohaga could not continue to appear in the matter after filing an affidavit.

On the other hand, Mr. Okwach who appeared for the plaintiff/applicant submitted that an advocate is not forbidden from swearing an affidavit in a matter that he is acting on. As far as Rule No. 9 of the Advocates (Practice) Rules is concerned, he pointed out that the same is using the word "may". According to him, it means that the same vests the court with discretion. He was of the opinion that where the Legislature prohibits any action, then normally it uses the word "shall". To support his submissions, he quoted the case of **Pattni vs. Alia Others (2005) E.A. page 339** in which the Court of Appeal stated as follows;

"There is no prohibition against an advocate who of his own knowledge can prove some facts to state them in an affidavit on behalf of his client."

While terming the submissions of his colleague as totally erroneous, he observed that he never attacked the contents of his affidavit. On that score, he urged the court to dismiss the preliminary objection with costs.

This court has carefully considered the submissions by the two learned counsels. According to Rule 9 of the Advocates (Practice) Rules, it states:

“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.”

No doubt, the above rule gives the court the discretion to restrain any advocate from representing a client where he has deponed an affidavit. However, that discretion must be exercised judiciously. Further to the above the said provision allows an advocate to swear an affidavit in a non-contentious matter. Having gone through the affidavit of Mr. Okwach, I find nothing offensive nor prejudicial against the respondent. Besides the above, the respondent’s counsel himself has not complained at all about any portion of the affidavit. In view of the above, I hereby dismiss the preliminary objection raised by the respondent’s counsel. Costs to the applicant in any event. Parties to be granted a date on a priority basis in the registry.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of:

Mr. Ouma for Okwach - Plaintiff’s Counsel

N/A for Defendant’s Counsel

MUGA APONDI

JUDGE

18TH NOVEMBER, 2009