



IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Election Petition 87 of 2008
SAMUEL MWANGI KANUBI..... PLAINTIFF

VERSUS

BANK OF INDIA & 3 OTHERS.....DEFENDANT

RULING

On a Preliminary Objection on the Locus of the
advocate of the advocate for respondents 1 & 2

I Background

1. I believe the relationship of the parties is that of employee/employer between the plaintiff Samuel Mwangi Kanubi and the defendant No 1 Bank of India. It is alleged that the plaintiff/applicant took a loan from the 1st defendant/respondent. He was unable to pay this loan and subsequently the plaintiff/applicant property being land reference LR Ngong/Ngong/16891 was auctioned.
2. The plaintiff filed suit and prayed for an injunction to restrain the defendants from selling, auctioning, disposing his goods. He asked that the goods be returned and reinstate the property to him. In his main suit he prayed that this court declare the said auction as illegal, null and void.
3. When the application for injunction dated 6 March, 2008 came up for inter parties hearing on 9 April, 2008 the advocate for the plaintiff raised a Preliminary Objection on the locus of the advocate for defendant 1 & 2 not to act in this matter.

II Preliminary Objection

4. A Preliminary Objection can be raised at any time. The advocate for the plaintiff did not inform this court what his objection would be or prior to the hearing of it. No notice was given.
5. In his arguments he stated that the advocate for 1st and 2nd defendant had acted for both parties. There was therefore a conflict of interest as the said advocate may possibly be called as a witness to describe the transaction for and or other action he took over the conduct of this matter.
6. He relied on the case law of **Uhuru Highway Development Ltd v Central Bank of Kenya & Others CA 286/01 Tunoi, Lakha, Okubasi, JJA**

A case in which the advocate was disqualified from acting for the respondents because they also acted for the appellants. Rule 9 of the advocate act was relied on.

7. Another case to support this argument was that of **Francis Mugo & 22 Others V James Bress**

Muthee & 3 others (2005) Hccc 1221/05 Nakuru Musinga J.

which case ruled that an advocate for the plaintiff be barred and disqualified from acting for the plaintiff in that the said advocate once acted for the defendant 1 & 2 and would possibly be called as a witness.

8. The advocate for the plaintiff/applicant prays that I declare the advocate for defendant 1 & 2 to be so disqualified to represents his clients on grounds of this conflict of being possibly be called as a witness.

ii) In reply by advocate for defendant 1 & 2

This application by way of Preliminary Objection was objected to. The grounds being that a Preliminary Objection is raised on a pure point of law only. He relied on the case law of **UUnet Kenya Ltd V Telkom Kenya Ltd & Another** Hccc 811/03 Njagi J and **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696**

9. The gist of this above cases that a Preliminary

Objection should be raised on a pure point of law, the effect once raised would dispose of the suit entirely. As it stands the points raised required to be manufactured by facts. There was therefore nothing before the court to confirm that the advocate for defendant 1& 2 would be possibly be called as a witness in this case.

ii) In reply by defendant No 3's Advocate

10. To support the advocate for defendant 1 & 2, the advocate for defendant No 3 further stated that the advocate for the plaintiff can be distinguished namely, the issue in the **Uhuru Highway Development Case (supra)** dealt with threats by the advocate. Nonetheless a formal application had been filed seeking for such disqualification.

III Opinion

11. I am persuaded by the case law of **Mukisa Biscuit Manufacture Co Ltd** (Supra) that a Preliminary Objection should consist of a pure point of law that if raised would dispose of the case in its entirety. I am also satisfied that the plaintiff/applicant was required to have brought a formal application stating the facts he relies on under rule 9 of the Advocate Act Cap 16 Laws of Kenya.

12. I therefore hereby dismiss this Preliminary Objection on grounds that it does not fall under what constitute a Preliminary Objection.

13. I would award costs to the respondents who are present during the arguments of the Preliminary Objection.

DATED THIS 10TH DAY OF APRIL 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

T.K. Rutto instructed by T.K. Rutto & Co. Advocates for the plaintiff/applicant – present

P.O. Ongori holding brief for J.N. Mbugua instructed by Mbugua & Mbugua Co. Advocates for the 1st and 2nd defendant/Respondents – present for the ruling only.

K. Ombati instructed by Kefa Obati & Co Advocates for the 3rd defendant/respondent - present