



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

Misc Appli 479 of 2001

OWINO OKEYO & COMPANY ADVOCATES APPLICANT

VERSUS

VALENTINE GROWERS COMPANY.....1ST RESPONDENT

FUELEX KENYA LIMITED2ND RESPONDENT

RULING

The applicant, Stephen Omondi Owino Advocate, has brought this application pursuant to the provisions of Section 51 (2) of the Advocates Act. Primarily, he seeks judgement for the taxed costs.

In response to the application, the respondent's first step was to raise a preliminary objection. The said objection was grounded on the provisions of Sections 9 and 31 of the Advocates Act. In essence, the respondent was contending that the applicant was not entitled to sustain this application because as at the date when he rendered services to the respondent, the said applicant did not hold a valid practicing certificate. Accordingly, the applicant is said to have been an unqualified person, who therefore had no capacity to act as an advocate.

In answer to the objection, the applicant points out that the alleged facts upon which the preliminary objection is founded, are in dispute. For instance, he states that there was a dispute about whether or not he held a valid practicing certificate in 1999. Also he states that there was a dispute as to whether or not the respondent had instructed him personally, as opposed to instructing the firm of Owino Okeyo & Company Advocates.

Thirdly, the applicant points out that there is a dispute as to whether all the work in relation to which the costs have been taxed herein, was carried out in 1999. His position is that some of the work was carried out in 1998.

To my mind, it is correct to state that the alleged lack of capacity on the part of the applicant, to act as an advocate in 1999, is a question of law. Therefore, it is the kind of issue which could be properly canvassed as a preliminary objection.

I am fortified in my thinking with the following words of LAW J. A. in **MUKISA BISCUIT MANUFACTURING CO. LIMITED –VS- WEST END DISTRIBUTORS LIMITED [1969] E.A. 696**, at page 700;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit."

However, in this instance, it is obvious that the said point of law has been founded on "facts" which have been disputed. That being the position, I find that this case falls within the ambit of matters such as those aptly described by SIR CHARLES NEWBOLD P. in the **MUKISA BISCUIT** case, at page 701, whereat the learned President of the Court of Appeal said;

"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 exercise of judicial discretion."

In the circumstances, if the court were to assume that the applicant had a valid practicing certificate in 1999; and that some of the work was done in 1998; and that the respondent had instructed the firm of Owino Okeyo Advocates as opposed to Mr. Stephen Owino personally; and that the work was carried out by Mr. Odongo Mark Okeyo, who had a valid practicing certificate; the preliminary objection could not be sustained.

Of course, it is possible that upon a scrutiny of the evidence made available by the parties, the court might ascertain the facts, as asserted by the respondent. However, as the Court of Appeal held in the case of MUKISA BISCUITS (above), if any fact has to be ascertained, a preliminary objection cannot be raised.

Accordingly, the preliminary objection herein is overuled, with costs to the applicant.

Dated and Delivered at Nairobi this 29th day of January 2007.

FRED A OCHIENG

JUDGE