REPUBLIC OF KENYA

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

Civil Case 988 of 2002

CENTURY OIL TRADING COMPANY …...PLAINTIFF/1ST RESPONDENT

VERSUS

KENYA SHELL LIMITED…….....….DEFENDANT/2ND RESPONDENT

AND

IN THE MATTE OF BEATRICE KARIUKI & ASSOCIATES ADVOCATES (APPLICANT)

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 52 OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA

RULING

In the Notice of Preliminary Objection dated 19th February, 2007 the Plaintiff has raised 6 grounds of objection to the motion dated 14th February, 2007.

Mr. Nyachoti learned counsel for the Plaintiff submitted that this court has no jurisdiction to entertain the application dated 14th February, 2007 as the Applicant therein was and is not a party to the suit. And there is a consent order on record that transferred the whole matter to arbitration between the parties to the suit. He asserted that since the arbitration is still under way, Order 52 Rule 6 of the Civil Procedure Rules is not applicable in this matter. An application for a charge should be made in the matter. At the moment the matter was transferred from the court to arbitration, hence the court has no jurisdiction, therefore any application to be made under Section 52 of the Advocates Act and as read together with Order 52 of the Civil Procedure Rules can only be made before the arbitration.

Secondly **Mr. Nyachoti** Advocate submitted that the application dated 14th February, 2007 was filed by an Advocate who had no authority to act in the matter. The Advocate had no locus to file since he is not acting for either the Plaintiff or Defendant. He therefore, submitted that the application is contrary to Order 3 Rule 8 of the Civil Procedure Rules. There is no notice of appointment of Advocates to act for any of the parties, hence the application is defective and should be struck out.

The third objection is that the application is premature in so far as it is brought under Section 52 of the Advocates Act. According to **Mr. Nyachoti** Advocate, you can only charge a property, which is capable of being conveyed. And the property must have been the subject matter of the suit, in which the

Advocate now claiming to a charging order was acting. The application intends to charge an anticipated outcome of an award, which is before an arbitrator. No party has been decreed a winner and no award has been delivered. It is too remote to seek the charging order of an anticipated outcome, since the award has not crystallized.

The fourth point raised by **Mr. Nyachoti** Advocate is that the court has not been properly moved under Order 52 Rule 6, since an application of such a nature can only be made by way of Chamber Summons. He submitted that the present application is by way of a Notice of Motion, hence that is a defect, which is incurable.

Lastly **Mr. Nyachoti** Advocate submitted that the bill of costs pursuant to which this application has been made has been stayed generally by a court of competent jurisdiction. In his view the Applicant has no business in bringing this application, when the bill of costs has been stayed generally.

Mr. Okeyo for the Applicant stated that the whole preliminary objection is not based on grounds of law, therefore it is untenable. He submitted that the Applicant is an Advocate who acted for one of the parties in this case. And at some point, the brief was taken away from the Advocate. The parties then referred the dispute to an arbitration. And the Advocate has not rendered any services in that arbitration pending for determination. The Advocate just seeks to enforce the payment of its fees for the services rendered in this case. And such an Advocate cannot be a party in this case, as the only thing they want is protection for their fees for services rendered in this suit.

Mr. Okeyo also stated that an arbitrator has no execution and if a party wants to execute the arbitral award he must come back to this court. The parties have to come back in this same suit to register and execute the award of the arbitrator. He further submitted that the Applicant's application can only be made in this suit, where the Advocate rendered services. A charging order shall be made in this suit and there is no other way open to the Applicant to protect its interest.

The application dated 14th February, 2007 was made by an Advocate who acted for one of the parties to the suit. It appears the Advocates were discharged by the client before the matter was transferred to arbitration. The Advocate wants to protect its interest for the services rendered to the client by charging the award pending before the arbitrator. In essence the Advocate wants to exercise a lien right over any funds or the proceeds of a judgement or the award of the arbitration. The lien is a right, which allows the Advocate to ask the court's intervention for the protection of his fees, having acted for the client in the matter. In short the Advocate wants a security for the costs in the work he did for the client.

The position of the law is that an Advocate has by statute a right to apply to the court for a charging order on property recovered or preserved through his instrumentality in a matter where he defended the client. In this case there was a change of Advocates and the present Applicant wants to protect its interest in the matter by charging the outcome of the arbitration.

Section 52 of Cap 16 states;

"Any court in which an Advocate has been employed to prosecute or defend any suit or matter may at any time declare the Advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter and may make orders for taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit and all conveyances and acts done to defeat or operating to defeat that charge shall except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the Advocate".

The first point for my consideration is whether this court has the jurisdiction to entertain the application dated 14th February, 2007. I appreciate that jurisdiction is everything and without proper jurisdiction, the court has no powers to determine the dispute. The jurisdiction of the court emanates from a statute or charter and any party wanting to oust the jurisdiction of the court must avail proper grounds to do so.

My Nyachoti's view is that the matter having been transferred to arbitration, this court has no

jurisdiction. The Respondent through **Mr**. **James Mwangi Gacheru** has filed a replying affidavit the grounds, which now form the subject of this decision. I appreciate the matter had been referred to an arbitrator but I hasten to add that the parties did not withdraw the suit from the jurisdiction of this court. The matter is still pending before this court and I think the parties are even entitled to make any further application they deem just and fit in order to protect the interest of the parties.

I therefore hold that this court has the jurisdiction to entertain the application dated 14th February, 2007. In any case the consent to transfer the suit was between the Plaintiff and Defendant, while the Applicant is in a unique and peculiar position. I say so because the Applicant wants the court to enforce a statutory right given to an Advocate by Section 52 of Cap 16 Laws of Kenya. The Advocate who acted in the matter is entitled at any time to seek the intervention of the court that he is entitled to a charging order.

I do not think the other points raised by **Mr. Nyachoti** Advocate require my determination at this stage. The main application is pending and any attempt to address the merits of the other grounds would prejudice the outcome of the application. In my view the other points form the substratum of the main application and any endeavour to deal with them would predetermine the pending application. I think it is open to the Respondent to raise those points during the hearing of the application. I do not wish to trespass on the pending application at this juncture. I feel it is unnecessary to address the validity or otherwise of the other grounds.

In the whole the preliminary objection has no basis and it is dismissed with costs to the Applicant.

Dated and delivered at Nairobi this 28th day of March, 2007.

M. A. WARSAME

JUDGE

Court: Ruling delivered in the presence of

Mr. Okeyo for the Applicant and M/s Kariuki for the Respondent

M. A. WARSAME

JUDGE

28.3.2007

M/s Kariuki: I wish to apply for leave to appeal

Court: Leave is granted.

M. A. WARSAME

JUDGE