



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 500 & 498 of 2005

IN THE MATTER OF RULE 13 OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF THE ADVOCATE AND CLIENT BILL OF COSTS

BETWEEN

P. K. MUREITHI & COMPANY ADVOCATESAPPLICANT

AND

JAMES W. CHEGE1ST RESPONDENT

JOEL KYALO KAINDI2ND RESPONDENT

DORIS NTINYARI MANYARA 3RD RESPONDENT

NTIKYA ENTERPRISES LIMITED.....4TH RESPONDENT

RULING

This ruling will also relate to the case High Court Misc.498 of 2005 where the parties are exactly the same as in the present case and the application being considered in respect of this ruling is the same in both files. For that reason the court will do one ruling in respect of these two matters.

An application was filed on behalf of the Respondents by way of Chamber Summons dated 26th October, 2006. That application was seeking to set aside judgement entered in favour of the Applicant in respect of taxed costs. Before that application could be argued, the Respondents raised a preliminary objection. The preliminary objection raised in both matters is in the following terms:-

“TAKE NOTICE that the applicant/respondent herein shall raise a preliminary objection that the chamber Summons dated the 26th of October, 2006 is bad in law and fatally defective as it offends mandatory provisions of the Civil Procedure Rules, the Oaths and Statutory Declaration Act and the Advocates Act Cap 16 of the Law of Kenya”.

Although counsel for the Applicant in support of the preliminary objection raised an issue that the Respondent’s counsel had raised matters in the affidavit in support of the aforementioned application,

some of those objections are not on a pure point of law as required by the celebrated case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696**. In particular the objection that fails the test of that case is in regard to the statement that the contents of the affidavit was on issues that the Respondent's advocate could not have known because he was not on record for the Respondent when they occurred. If the court was to entertain that objection it would involve the court in investigating when counsel for the Respondent came on record and whether he had first hand knowledge of those matters. The court cannot do so and therefore, rejects that objection. The other objection raised by the Applicant related to the supporting affidavit of the application. In the affidavit in both the matters being considered by this court the deponent at the beginning stated as follows:-

“I, FRED MUTUA, Advocate, do make oath and state as follows:-

The Applicant's advocate stated that this contravened Order XVIII Rule 4 of the Civil Procedure Rules. That rule provides:-

“Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age”.

The Applicant objected to that paragraph of the affidavit for it failed to show the true place of abode of the deponent. For that reason the applicant was of the view that the affidavit should be struck off from the record. The applicant relied on the case of **Bare & 13 others v Maendeleo ya Wanawake Organization** in the following passage:-

“The deponents' description is an important part of an affidavit the reason being, I presume, the fact that the affidavit, being in itself evidence, must be proven to be the sworn evidence of some real person with legal capacity and not a fictitious one”.

The court finds in favour of the Applicant in regard to this objection for in that paragraph of the affidavit in support of the Respondent's application the deponent ought to have stated his true place of abode and postal address. It is obvious why this is essential as shown in the passage quoted hereinbefore that the court in receiving the affidavit would ensure that it has all the particulars of the deponent since the evidence of an affidavit is evidence under oath. I do also accept the finding of the case relied on by the Applicant that it is important to show the place of abode to ensure that the deponent is not a fictitious person. For that reason the Applicant's objection will be upheld. The Applicant additionally objected to paragraph 9 in Misc.500 of 2005 and in paragraph 8 in Misc. No.498 of 2005 where the deponent relied on information of his court clerk without stating belief and the source of that information as required by Order XVIII Rule 3 of the Civil Procedure Rules. I have looked at those paragraphs and I confirm that they do fail to comply by that rule. Again therefore, the Applicant would succeed in its objection. The court finding therefore, is that it upholds the objection raised by the Applicant and does hereby expunge and strike out from the record the affidavits of Fred Mutua sworn in support of the Chamber Summons dated 26th October, 2006 in respect of High court Misc. No. 500 of 2005 and High Court Misc. 248 of 2005. The costs of the preliminary objection dated 1st November, 2006 in both files are awarded to the Applicant. Having so struck out the said affidavits the applicant had sought that the Chamber Summons which will remain without support of the affidavits be struck out. I am of the view that that would be the consequence of the orders being granted by this court and accordingly the Chamber Summons dated 26th October 2006 in both files stated herein before are hereby struck out with costs to the Applicant. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 11th day of December, 2006.

MARY KASANGO

JUDGE