

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 1051 OF 1996

ISAIAH ODUOR OCHANDAPLAINTIFF

VERSUS

ATTORNEY – GENERAL DEFENDANT

RULING

In this suit the plaintiff claims what he basically describes as his lawful dues from the defendant following his (plaintiff's) discharge from employment with the Department of Defence (DOD) on medical grounds arising out of injuries he sustained in the course of duty.

At the hearing of the suit on 14.02.05 learned plaintiff's counsel, Mr. B.G. Njugi of Khaminwa & Khaminwa Advocates sought to produce through the plaintiff documents numbered 12, 14, 15, 16 and 19 in the plaintiff's list of documents. The documents are letters written by the plaintiff's advocates to the DOD or replies received by the said advocates from the DOD.

Learned counsel for the defendant, Mr. P.K. Rotich objected to production of the documents by the plaintiff, arguing that he is neither the author nor recipient thereof and that the documents were not copied to him. Defendant's counsel submitted that since the documents either emanated from the plaintiff's advocates' firm or were received by the said firm but not copied to the plaintiff, the latter is a stranger thereto and incompetent to produce them. Counsel added that if the documents are to be produced, that should be done by either their author or authors or their recipient or recipients. Further, defendant's counsel contended that if the authors or recipients are from the plaintiff's firm, the said firm should withdraw from acting as the plaintiff's advocates and come as witnesses for the plaintiff. In defendant's counsel's view, if the plaintiff's advocates acted as his witnesses and advocates in the same case, they would get caught up in a situation of conflict of interests.

In answer, plaintiff's counsel confirmed that the documents objected to by defendant's counsel are not just letters from the plaintiff's advocates but they include letters received by the firm in response to the firm's letters proposing out-of-court settlement of the plaintiff's claim. Plaintiff's counsel said the letters from his firm were written by different associates and that none were written by him. He drew attention to paragraph 12 of the plaint filed on 29.04.96 to the effect that the DOD had been given notice of intention to sue and that despite such notice the DOD refused and/or neglected to make good its wrongful acts thereby rendering this suit necessary. Plaintiff's counsel informed the court that the said letters, i.e. documents 12, 14, 15, 16 and 19, which he sought to produce through the plaintiff, formed part of evidence of the plaintiff's intention to settle the matter out of court and that they simultaneously formed part of his intention to sue. Plaintiff's counsel acknowledged that none of the documents written by his firm to the DOD nor replies thereto were copied to the plaintiff and that the plaintiff's lawyers gave them to the plaintiff informally.

Plaintiff's counsel branded defendant's counsel's objection to production of the documents by the plaintiff as being in bad faith as contents of the documents had not been denied by the plaintiff. In plaintiff's counsel's view, the documents should be admitted and defence counsel can cross-examine the plaintiff on the authenticity of their contents, adding that the documents are the plaintiff's evidence through legal representation.

In reply, defendant's counsel submitted that in law there is no such thing as evidence through legal representation and repeated that the person to be cross-examined on the documents should be their author or authors. In defendant's counsel's view, the documents are hearsay coming from the plaintiff and reiterated that if the advocates acting for the plaintiff wish to produce the documents, the said advocates should withdraw from acting for the plaintiff, take the witness stand and subject themselves to cross-examination.

I have given this matter due consideration. If indeed it is intended that the letters in question, i.e. documents 12, 14, 15, 16 and 19, should form part of the plaintiff's evidence of intention to settle the subject matter of the suit out of court or form part of evidence of the plaintiff's intention to sue, then, unless the documents are admitted, their production should follow the normal rules of evidence. None of the documents were copied to the plaintiff. They do not, therefore, form part of his records and I find no valid basis for him to be made to produce documents he never made or was recipient of when the authors or recipients are known and can be availed to produce the documents if they are important to the plaintiff's case. I see no conflict in the individual maker or makers of the documents or their recipients coming forward to produce them while the firm employing them qua firm continues to act for the plaintiff in this suit. It is, of course, open to the plaintiff to give evidence on whether he instructed the firm of Khaminwa & Khaminwa Advocates to act for him in this matter and whether his instructions included authorizing them to explore out-of-court settlement plus giving the DOD notice to sue in case no settlement came forth. The issue whether the advocates explored out-of-court settlement or whether they gave notice to sue if no settlement was reached and the outcome of those actions should, if, important to the plaintiff's case, be testified upon by an appropriate officer or officer in the said and advocates' firm.

The upshot is that, in my respectful view, the plaintiff's advocates can arrange for production of the questioned documents through an appropriate officer or offices in their firm without the firm being disqualified to act for plaintiff. In any event, if the defendant still wishes to pursue the issue of disqualification of the plaintiff's advocates, the defendant must make a formal application: see Court of Appeal Civil Appeal No.286 of 2001 (consolidated with Civil Appeal No.15 of 2002) between Uhuru Highway Development Ltd and 3 others -vs- Central Bank Deposit Protection Fund Board & 3 others. Accordingly, I rule that the plaintiff is incompetent to produce documents 12, 14, 15, 16 and 19 and I uphold defendant's counsel's objection to production of the said documents by the plaintiff. Orders accordingly.

Delivered at Nairobi this 15th day of February, 2005.

B.P. KUBO

JUDGE