**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA AT NAIROBI**
**CIVIL SUIT NO. 85 OF 1992**

**GEORGE ORARO……..….PLAINTIFF/RESPONDENT**

**VERSUS**

**BARAK ESTON MBAJA……..…. DEFENDANT/APPLICANT**

**RULING**

The Defendant filed (on 9th August, 2004) an application by Chamber Summons dated 6th August, 2004 and brought under Orders III rule 9A; IXB rule 8; XXI rule 22 of the Civil Procedure Rules. This matter had earlier, on 9th August, 2003 come before the Honourable ***Mr. Justice Nyamu*** who granted the first three of the five prayers but set down the remaining prayers for hearing, and they were placed before me on 26th October, 2004.

The prayers now due for hearing are as follows:

> (a) THAT, all orders and processes issued in execution proceedings in this suit be set aside.
>
> (b) THAT, the decree issued in this suit dated 29th April, 1993 be set aside and the suit do proceed to full hearing on the merits.

This ruling, however, is not with regard to those prayers, as there was no opportunity to hear the submissions of counsel on the prayers. The hearing of 26th October, 2004 ended up being only on *preliminary issues.* And it is to be recorded in this regard that ***Mr. Kajwang*** was the counsel on record for the Applicant, whereas Mr. Ougo represented the Respondent.

On the 6th of October, 2004 the firm of M/s. Kajwang & Kajwang Advocates had drawn *a Notice of Preliminary Objection to Representation* which was filed in Court on 7th October, 2004. I will set out here the content of the Notice:

> **"1. THAT George Oraro , a principal partner in the firm of Oraro & Company Advocates has, in his past conduct as counsel, been exposed to evidence much of which is a subject matter of this suit or which is so intricately interwoven therewith that it would amount to a professional misconduct on the part of the law firm and its partners and it would be most undesirable were the legal firm to represent the said Plaintiff in this suit.**
>
> **"2. THAT all pleadings filed through the law firm of Oraro & Company Advocates on behalf of the Plaintiff herein ought to be struck out for reasons that they are prejudicial [to the] Defendant's civil rights to a fair and honest trial."**

From the very beginning, the propriety of the Applicant's "Notice of Preliminary Objection to

Representation" was disputed by learned counsel, Mr. Ougo. His first question was: *Is it tenable that one can have a preliminary objection in one's own application* ? And in this case the application was that of the Defendant brought by the Chamber Summons of 6th August, 2004. **Mr. Ougo** contended that a preliminary objection such as the one being brought, was simply not tenable; it was unprocedural, he urged, and wholly unacceptable. To this objection, learned counsel, Mr. Kajwang contended that he was entitled to raise objections to re presentation , at the start, before getting to the Defendant's application. The filing of the said "Notice of Preliminary *Objection to Representatio*n" had been in accordance with a consent order made before the Honourable Lady Justice Mugo on 23rd September, 2004.

At this stage I gave directions in the following terms:

> **"Basically there is a question here as to whether the decreeholder may correctly be represented by the firm of M/s. Oraro & Co. Advocates. It is a preliminary point before the judgementdebtor's substantive application is heard.**
>
> **"I think the correct direction is that the two preliminary objections [*one by the Applicant, and the other by the Respondent* ] both lie at the threshold of the substantive application.**
>
> **"To begin to hear the two preliminaries, the most basic one which is the decree-holder's, is the one that should first be heard; provided that the judgement-debtor should in summary, at the beginning, state the nature of the claim he is making."**

***Mr. Kajwang*** said he objected to the firm of Oraro & Company Advocates representing **Mr. Oraro** the Plaintiff/Respondent, because over the years he has exposed himself to much of the evidence and has had access to such privileged information as will prove prejudicial to the Defendant/Applicant.

***Mr. Ougo*** objected to that submission, by underlining the *pure legal content* – and *not evidence* – that must be the hallmark of what claims to be a *preliminary objection* . In his words: *"If a party wants to bring in evidence, then the objection intended c annot come as a preliminary objection."* The contention that ***Mr. Oraro*** has been exposed to privileged evidence which will work prejudice to the Applicant, counsel submitted, is an assertion founded on evidentiary material – and therefore the objection raised cannot be a *preliminary objection.*

Mr. Ougo buttressed his submission by drawing from the Court of Appeal decision in ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd*** . [1969] E.A. 696. Of preliminary objections, ***Law, JA*** in that case said (p.700):

> ***"I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a 'preliminary objection' which it was not. 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 pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ."***

And to the same effect Newbold, P stated (p.701):

> ***"The first matter relates to the increasing practice of raising points, which should be a rgued 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 the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occ asion, confuse the issues. This improper practice should stop.***

I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, ***Mr. Ougo*** , that "*where a Court needs to investigate facts, a matter cannot be raised as a preliminary point."* This legal principle is beyond dispute, as there are divers weighty authorities carrying the message. In addition to the ones I have cited, Mr. Ougo drew my attention to yet others. In ***El-Busaidy v. Commissioner of Lands & 2 Other***s [2002] 1KLR 508 M***r. Justice Onyancha*** in this Court remarked as follows (pp. 515 – 516):

> **"I have considered the arguments and the legal authorities quoted from both sides. It is my prima facie finding of the Defendant's application basing it on affidavit that the origin of the title known as Mombasa/Block IX/102, needs to be investigated to establish whether or not the title was an absolute title under the Registration of Titles Act. It should be established in evidence whether or not the conversion of the said title to operate under [the] Government Lands Act, Cap. 280 by [the] first Defendant was proper and lawful and therefore effective and not null and void. It is my further finding that until that is done, all the relevant facts thereto are in dispute. Under those circumstances the law applicable in relation to the issue of a preliminary point of objection is that laid in the case of Mukisa *Biscuit Manufacturing Co. Ltd*. v. *West End Distributors Ltd* . [1969] E.A. 696 at page 700…"**

The learned Judge went on to say (p.516):

> **"The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff's pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff's facts as pleaded. Clearly therefore, the Defendant's preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction."**

Another relevant authority in that regard is the Court of Appeal decision in Niazsons (***K) Ltd. v. C hina Road and Bridge Corporation (K)*** [2001] 2 E.A. 502 (CAK), the facts of which need not be set out here.

***Mr. Ougo*** submitted, and quite correctly, with respect, that the effect of the preliminary objection brought by the Applicant in the instant matter is, firstly, that *substantive orders are being sought; and secondly, that all the pleadings filed by M/s. Oraro & Co. Advocates be struck out.*

It is, from the standpoint of Court procedure and practice, an intriguing aspect of the Defendant's preliminary objection that, firstly (as remarked by counsel for the Respondent), it comes not from the Respondent but *from the Applicant himself* ; secondly that it challenges the *Respondent's right to instruct counsel of his own choice*; thirdly, that it calls for the nullification in *limine* of the *Respondent's pleadings* ; and fourthly and most unusually, that it comes accompanied with a detailed "*affidavit in support of preliminary objection."*

As already remarked, anything that purports to be a preliminary objection must not deal with *disputed facts* , and it must not itself *derive its foundation from factual information which stands to be tested by normal rules of evidence* . If the Applicant's instant matter required the affidavit of ***Barak Eston Mbaja*** dated and filed on 7th October, 2004 to give it validity before the Court, then it could not be allowed to stand as a preliminary objection which must be on a pure point of law. The filing of the said affidavit was clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the Respondent's very detailed *"affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest."*

Learned counsel, ***Mr. Kajwang*** had serious objections to the firm of M/s. Oraro & Co. Advocates representing the Respondent. The record shows that M/s. Oraro & Co. Advocates had, on 13th September, 2004 drawn and filed an application by Notice of Motion carrying one substantive prayer: "*THAT, the Plaintiff be granted leave to appoint the firm of Oraro & Company Advocates to act for him in this suit* ." This matter was heard on 15th September, 2004 when ***Mr. Ougo*** of M/s. Oraro & Co. Advocates produced before the Honourable ***Mr. Justice Kihara Kariuki*** a letter of consent from the Plaintiff's former advocates M/s. Wetangula & Co. Advocates, dated 13th September, 2004 whereby those former advocates gave consent that M/s. Oraro & Co. Advocates do come on record for the Plaintiff. The learned judge did grant the prayers in the Notice of Motion of 13th September, 2004.

***Mr. Kajwang*** stated that he had been serving papers upon M/s. Wetangula & Co. Advocates, as representing Mr. ***George Oraro;*** but on 17th September, 2004 his firm was served with papers showing a change of advocates, with M/s. Oraro & Co. Advocates now having the conduct of the Plaintiff's case.

***Mr. Kajwang*** contested the Plaintiff's "*Notice of Objection to the Preliminary Objection*" dated and filed on 21st October, 2004 on the basis that such an objection did not fall within the category of preliminary objections as recognised in case law. This affirmation led learned counsel to the contention that all the authorities relied on by the Plaintiff had no relevance.

***Mr. Kajwang*** appeared to depart from the recognised concept of *"preliminary objection"* when he urged:

> **"When a party raises an objection to representation it is asking the Court to exercise managerial power. What is being invoked is section 3A of the Civil Procedure Act (Cap. 21)."**

Learned counsel went to urge:

> **"We are not creating a new procedure; we are invoking the management powers of the Court; the appearance of unfairness would defeat the process of justice."**

***Mr. Kajwang*** elaborated this argument by pleading that there are matters which the Court would manage on *its own* - and in this regard he cited the sphere of contempt, as an example. He pleaded that the Court has supervisory control over conduct at the Bar, and that the discretion available in this regard should be pressed into service.

Learned counsel's nearly impassioned plea was sought to be substantiated with the English Court of Appeal authority in ***Christie v. Wilson and Others*** [1999] 1 AllER 545. The facts in brief are set out in the headnote (p.545):

> **"The Plaintiff applied to the Court to bar P [a solicitor advocate] from so acting on the ground that there was a conflict of interest on the part of P and that he would be in breach of r.4.1 of the Law Society's Code for Advocacy 1993, which provided that advocates were obliged not to accept any brief if to do so would cause them to be professionally embarrassed '…if they have been responsible for deciding on a course of action and the legality of that action is in dispute in the proceedings'…"**

That matter was heard on appeal, and the judges of the Court of Appeal thus held:

> **"It followed that the judge had been incorrect to hold that P was in breach of his professional duty in accepting instructions to act for the second Defendant. Accordingly, the appeal would be allowed…." (s.545).**

Learned counsel, *Mr. Kajwan*g urged that *"whether counsel has a right of appearance is a fundamental issue";* but it was not made clear that this was a prior question before the Court, before any sort of hearing at all could take place. The essential point here was made by counsel himself:

> "**If Mr. Oraro himself came, this would be in order. But he cannot bring his firm. The whole firm was exposed to certain issues including a note received from some source."**

It would have appeared at this point that ***Mr. Kajwang*** was abandoning the notion of a *preliminary objection* , as a description of his Notice of 7th October, 2004. He said:

> **"It is only by semantics or coincidence that this is called a preliminary objection. But this has nothing to do with preliminary objection."**

***Mr. Ougo*** remarked that although it was now contended by counsel for the Applicant, that the Court was not hearing a preliminary objection in *limine*, the claim was being made that the pleadings filed by the Respondent be struck out; and this would have the effect of bringing the Plaintiff's case to an end. A claim of this sort, counsel submitted was defective and had not been brought in a manner known to law. ***Mr. Ougo*** recalled that Order L of the Civil Procedure Rules was quite clear, that applications are brought before the Court by Notice of Motion. It was not tenable, counsel submitted, that a party may move the Court to strike out pleadings and yet not by ***motion .***

***Mr. Ougo*** submitted that any other counsel would have been instructed in the manner in which the Plaintiff has given instructions in this matter. In his words:

> **"George Oraro is entitled to appoint counsel of his choice, a constitutional right which cannot be denied."**

The instant matter therefore, counsel submitted, was a preliminary one like any other, and in *limine.*

From my analysis of submissions and of case law herein, I have to state clearly that the Applicant's "Not*ice of Preliminary Objection to Representation" d*ated 6th October and filed on 7th October, 2004 cannot pass muster as a procedurally-designed preliminary objection. As already noted, it is accompanied by a*ffidavit evidence* , which means *its evidentiary foundations are not agreed and stand to be tested.* Secondly, the essential claims in the said preliminary objections are *matters of great controversy* , as their factual foundations are the subject of dispute. As a preliminary objection, therefore, I find and determine that the "*Notice of Preliminary Objectio n to Representation "* must be dismissed.

It is to be recalled, however, that learned counsel for the Applicant did retreat into some fall-back position in which he presented his client's gravamen as a fundamental issue of proper conduct of litigation dependent on the Court's discretion exercised by virtue of Section 3A of the Civil Procedure Act (Cap. 21). The Court's *discretion is never exercised just on the basis of propositions of law ;* there must be a *factual situation* of which the Court takes cognisance, and in relation to which its *equitable conscience i*s exercised. If a matter comes before the Court dressed as a "preliminary objection", it will not come to co-exist with such factual scenarios as may lead the Court to exercise its discretion by virtue of Section 3A of the Civil Procedure Act.

More importantly, it has to be appreciated that the Court's discretion exercised by virtue of Section 3A aforesaid is always for the purpose of *upholding the law and so far as possible* ; and this would require preserving the claims of parties so that they may be heard and determined according to law. By contrast, the Applicant's plea is that the Respondent's pleadings be terminated in *limine.* There is no consistency between such a prayer, which belongs to the normal practice attending preliminary objections (matters of law), on the one hand, and the case for ensuring fair trial which the Applicant has also urged, on the other hand.

I am not convinced that the case cited by counsel for the Applicant, ***Christie v. Wilson and Others*** [1999] 1 AllER 545 is particularly helpful to the Applicant; but I think it is possible if he wishes to continue challenging the manner in which the Plaintiff has elected to be represented in Court, to move by a substantive motion in the normal manner.

I will make the following orders:

1. That, the Applicant's "Notice of Preliminary Objection to Representation" be, and is hereby dismissed.

2. That the costs occasioned by the said "Notice of Preliminary Objection to Representation" be borne by the Defendant/Applicant in any event.

DATED and DELIVERED at Nairobi this 4th day of February, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Defendant/Applicant: Mr. Kajwang, instructed by M/s. Kajwang & &**

**Kajwang Advocates**

**For the Plaintiff/Respondent: Mr. Ougo, instructed by M/s. Oraro & Co. Advocates;**