



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA, NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**Civil Case 418 of 1998**

**KAMLESH MANSUKHLAL DAMJI PATTNI.....PLAINTIFF**

**VERSUS**

**NASIR IBRAHIM ALI.....1ST DEFENDANT**

**DINKY INTERNATIONAL S.A. ....2ND DEFENDANT**

**WORLD DUTY FREE COMPANY LTD.**

**T/a Kenya Duty Free Complex.....3RD DEFENDANT**

**RULING**

By a Notice of Preliminary Point of Law dated 24.02.2005, the Plaintiff herein sought an order that the law firm of D. P Kinyanjui & Co. Advocates are not properly on record for the Defendants/ Respondents and that as such the Defendants/Respondents Counsel had no right either to file any papers in Court, nor the grant of audience by the Court, and that any application filed in Court by the said firm should be struck out.

Mr. Kilonzo, learned Counsel for the Plaintiff took over 1½ hours approximately of submissions that since the firm of Ochieng Oduol & Co. Advocates ceased acting for the Defendants, there had been neither Notice of Appointment of Advocate nor Notice of Change of Advocate as is required by order III rules 6, and 7 of the Civil Procedure Rules. Arising from such default, the firm of D. P. Kinyanjui, had no right to either file any papers in Court, or any right to prosecute any application, or be heard on behalf of the Defendants/Respondents. Counsel therefore concluded that the Chamber Summons dated 28.11.2003 filed by the said firm should be struck out as being incompetent. For his submissions, learned Counsel for the Plaintiff referred the Court to no less than five separate authorities.

In the case of **Delphis Bank Ltd. –vs- Behal & Others [2002] 2 EA**, Ondo J. struck out the Plaintiff because it was signed by an Advocate who had no valid practising certificate.

In **Virginia Wanjiku Njoroge –vs Francis Njoroge** (H.C.C.C. No. 245 of 2000 (O.S) P. J. Kamau J. struck out an Affidavit for failure to comply with the requirements of Section 34 and 35 of the Advocates, that the Affidavit was not signed by a person qualified as an Advocate, and holding a valid practising certificate

Similarly, the Court struck out the suit against the Respondents, for failure to comply with the provisions of Section 55 (2) of the Anti Corruption and Economic Crimes Act 2003, (in HC Misc. Application No. 599 of 2004 – **In the matter of Anti Corruption and Economic Crimes Act 2003, between the Kenya Anti-Corruption Commission –vs- L. Z. Engineering Construction Ltd. & 4 Others**).

In the Tanganyika (then) **case of Alexander Gray Patterson and Mohammedraza Suleiman Versi –vs- Badrudin Mohamed Saleh Kanji** (Civil Appeal No. 83 of 1955) the Court of Appeal for Eastern Africa considered the effect of regulation 3 of the Land Regulation 1926 (Laws of Tanganyika, 1925 Vol. III) which required prior approval before letting of the property under a certificate of occupancy and rejected any argument to the contrary, and held that there can be no estoppel against an act of Parliament. As the other authorities relate to interpretation of statutes, I shall make reference to them after considering submissions by P K Muite, learned Counsel for the Defendants/Respondents. Mr. Muite, Counsel for the Defendants/Respondents largely conceded that the firm of D P Kinyanjui & Co. Advocates had not placed the Advocates themselves on record as required by Order III rule 6 of the Civil Procedure Rules regarding, Notice of Appointment of Advocates. He ventured on the basis of Order III, 12 (2) the view that the purpose of Order III is to enable the other party to know whom to serve documents in the matter, so long as the other party is not misled, the rules are not violated, and hence when the Defendants' Counsel filed the Chamber Summons dated 28.11.2003, the firm of Mugambi Imanyara & Co. Advocates did not object to its filing. By their conduct, the Plaintiff's Counsel and the Plaintiff had waived any objections thereto. They never filed the objection in November 2003. This objection was filed only 15 months after the filing of the Chamber Summons of 28.11.2003. In Mr. Muite's view, this objection was part of a pattern to frustrate the Defendants in this suit. The Plaintiff's Counsel have no doubt upon whom to serve their documents. They have served documents upon the firm of D P Kinyanjui & Co. Advocates who have acted in the matter up to the Court of Appeal. It was too late in the day for the Plaintiff to say that they were misled. They are estopped, it is not open to them to deny service of documents either way.

In the Defendant's view, there is a distinction between the provisions of an Act, and the rules made thereunder. There is no provision of the Act which has been violated. Section 81 (2) of the Civil Procedure Act sets out the purpose of the rules – to provide for purposes of service of summons notices and other processes by post or in any other manner generally or in any special manner. These provisions are not penal.

In conclusion, Mr. Muite submitted that the Court should adopt a broad and non – restrictive approach in interpretation of these provisions. The test in such an approach would include a consideration whether any party is likely to be prejudiced, and if there is no prejudice the Court should reject the Plaintiff's application to strike out Defendants application of 28.11.2003.

For this proposition, Counsel relied upon the cases of

(1) Microsoft Corporation Ltd. –vs- Mistumi Computer Garage Ltd. & another, (Nairobi Commercial Courts HCCC NO. 810 of 2001), and

(2) Priscilla Jemutai Kolongei –vs- Republic (Criminal Appeal No. 84 of 2004

I shall refer to these cases in the subsequent passages of this Ruling.

The Preliminary Objection herein raises difficult question of law and procedure. It is indeed trite law, to say that, a party may raise a preliminary point of law at any time in the cause of the suit. As a matter of procedure, that is, at what point in time, should such Preliminary Objection in law be raised? All authorities that I have come across suggest that the point should be raised at once, or at the earliest possible time upon noticing or identifying the issue giving rise to such preliminary objection. I think this is a cardinal rule in raising preliminary objections. If it is not raised promptly, proceedings will be taken in the matter. Applications will be heard and determined. Occasionally a whole suit may be heard. It is not advisable or even useful to raise the issue of representation well after proceedings in a suit have been heard. It is extremely important that every preliminary objection on a point of law, except only in matters of evidence upon a continuing hearing of a case, be raised at the earliest opportunity possible. For if this is not done ought the Court nullify any previous proceedings and its own decision that an Advocate did not have a practising certificate, or that the Plaintiff was not signed or endorsed by such Advocate, or that the Advocate was not properly on record? If this were to happen, the effect would be both far reaching and highly prejudicial to the litigants and indeed the cause of justice itself.

In the case at hand, the firm of Ochieng Oduol & Co. (as it was then) ceased acting for the Defendants on 8.11.2000. Thereafter the Defendants ought to have appointed another Advocate or firm of Advocates to act for them. They did not, hence the Plaintiff sought and obtained orders to serve the Hearing Notice to the 1st Defendant out of jurisdiction, and subsequently proceeded ex parte and obtained judgement in the matter. The current Counsel for the Defendants appear only in the form of application dated 28.11.2003. They have also appeared and conducted proceedings in this Court and the Court of Appeal, despite the filing of the objection on 24.02.2004

It would in my humble view, not only be wrong, but wholly unjust to all parties to nullify those proceedings undertaken on behalf of the Defendants by the firm of D P Kinyanjui & Co. Advocates or by P K Muite, their lead Counsel. I think this view was shared by Counsel for the Plaintiff in seeking merely an order for striking out the Defendant's Chamber Summons filed on 28.11.2003, and not any other orders.

Upon withdrawal of the firm of Ochieng Oduol & Co. Advocates, (as they were then), the Defendants were unrepresented in terms of Order III rule 12 (2) of the Civil Procedure Rules which reads –

**"12 (1) ..... (2) From and after the time when the order has been entered in the appropriate Court any document may be served on the party to whom the order relates by being filed in the appropriate Court, unless and until, that party either appoints another Advocate or else gives such an address for service as is required of a party acting in person and also complies with this order relating to notice of appointment of an Advocate or notice of intention to act in person.**

My understanding of the said sub-rule (2) of rule 12 of Order III is that where an Advocate has ceased to act for a party (the affected party) pursuant to a Court order under this rule:

(a) the affected party is deemed to be acting in person; unless and until he appoints an Advocate to act on his behalf;

(b) the other party may file any document in the process in the appropriate Court and such filing is deemed to be appropriate service upon the affected party unless and until he files a notice to act in person and giving an appropriate address for service of process;

(c) the affected party must otherwise comply with the requirement of the order with regard to notice of appointment of an Advocate;

Having come to this conclusion on the meaning of the sub rule, I must express my departure from the view advanced Mr. Muite (with respect), that the sub rule is a means by the affected party to effect service process. It is not. It requires the affected party to elect and act promptly on either appointment of another Advocate in place of the one who has ceased to act for him, or notify the Court and the other party by his intention to act in person, and in which case he must give his address for service of process.

In the instant case, it did not serve either the cause of justice or indeed that of the Defendants in failing to appoint another Advocate, or notify the Court of their address after the firm of Ochieng Oduol & Co. Advocates (as they were then) ceased to act for them. Also contrary to the view advanced by Mr. Muite, sub rule 2 of rule 12 aforesaid did not and does not confer upon an Advocate the right to draw and file documents on the cause without simultaneously filing a Notice of Appointment of Advocates in terms of rule 6 of Order III which says: -

**"6. A party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in the Court in which such cause or matter is proceeding and served in accordance with rule 7, the former Advocate shall, subject to rules, 11 and 12 be considered the Advocate of the party until the final**

**conclusion of the cause or matter including review or appeal."**

The Defendants having failed to exercise their rights as so provided in the said rules 6 and 12 (2) of the order III of the Civil Procedures, it is patently obvious that the firm of D P Kinyanjui & Co. Advocates were incompetent in filing the Chamber Summons dated 28.11.2003 and upon strict construction of the applicable rules aforesaid, the same ought to be struck out.

However, as indicated in the earlier passages of this Ruling such extreme order would not serve the cause of justice in this matter, whether for the Plaintiff or the Defendants who would merely ensure that their current or new Advocates filed appropriate Notices of Appointment, and would refile the same application. Justice would not have been achieved but rather time, delay, and a little expense would have been sacrificed.

Mr. P. K. Muite Counsel for the Defendants urged me to take a liberal approach as the Civil Procedure Act and the Rules thereunder are neither tax nor penal statutes which are strictly construed, and adopt the purposive approach given even to the construction of penal statutes. That was the intention in his citation of the case of **Priscilla Jemutai Kolongei –vs- Republic** (supra) a decision of the Court of Appeal made only on 25.01.2005, in which that Court was referred to Lord Denning M. R. speech in the case of – NORTH –VS- BARNET COUNCIL [1978] 1.W.L.R. 220 when he said –

**"It is the voice of the strict constructionists. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, hidless of the consequences. Faced with glaring, provisions the judges are, it is said, impotent, incapable and sterile. Not so with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach,"**

**In all cases now in the interpretation of statutes we adopt such a construction as will "provide the general legislative purpose" underlying the provision. It is no longer necessary for the judges to wring their hands and say –**

**There is nothing we can do about it, whenever the strict interpretation of a statute gives rise to an absurd and unjust situation the judges can and should use their good sense to remedy – by reading words in, if necessary so as to do what Parliament would have done, had they the situation in mind".**

Lord Denning was in that case berating the impotent lament by an Appeals Tribunal that –

**"Clearly someone has a duty to do something about this absurd and unjust situation. It may well be, however that there is nothing we can do about it. We are bound to apply the provisions of an Act of Parliament however absurd, out of date, and unfair they may appear. The duty of making or altering the law is the function of Parliament.**

To my mind however, in every case where a Court is said to place a strict or liberal construction upon a document this has no effect where the words are plain and admit only of one meaning. In such a case the proper meaning must be placed on the words whatever the effect. It is only where there are two possible constructions that the matter of strict or liberal construction can arise. But even then the Court will not and should not indulge in conjecture as to what purposes not stated by the words used, or as to what would have been done in a case which apparently escaped the attention of the legislature. Rules and other regulations made under the authority of a statute when duly made have statutory force and effect. But the fact that the statute has provided that the rules have effect as if enacted in the statute does not prevent the Court from inquiring into their validity. There is of course no question of inquiry into the validity of the Civil Procedure Rules or indeed Order III, rules 6 and 12 (2) of the said order. The Civil Procedure Rules are made by the Rules Committee under Section 81 of the Civil Procedure Act (Cap 21 Laws of Kenya) for the use of the Court, the Advocates and Litigants, and must be construed in light of that circumstance or purpose.

To my mind therefore, whether a judge or Court follows the strict or liberal or "purposive approach" in the construction of the provisions of the statute or the rules or regulations made thereunder is entirely at the discretion of the Court. That seems to have been in my reading the effect of the Court of Appeal's decision in the Jemutai (supra) case, when construing the Drugs and Psychotropic Substances Act (Act No. 4 of 1994) when they said at page 11 of the judgement –

**"We find no ambiguity which we have to resolve in the statute before us. On the other hand the sense and purpose of the statute is clear as reproduced in the preamble to the Act, above. The gravity of the mischief intended to be prevented and punished, and the social conditions giving rise to the Act are also not lost to us and therefore the interpretation that commends itself to us is one that will not bring the law into disrepute and undermine the public confidence in the administration of justice ....."**

Adverting to the matter at hand therefore, the Court must exercise its discretion judicially. I find neither express or intrinsically mandatory provision that would compel me to strike out the Defendants/Respondents' application of 28.11.2003. The rules of Court must however be obeyed for only by adherence and obedience of the Rules of Court shall the Litigant, the Advocate and the Court achieve the totality of the due process of law. A heavy burden is however laid upon the Court as arbiter between the competing rival parties, and their competing interests. The interest of the Court however shall remain constant, that of achieving substantial justice.

This is in conformity with the little referred to provisions of 3 (2) of the Judicature Act (Cap 8 Laws of Kenya) which has been misconstrued by practitioners and scholars alike that it applies merely to civil cases or matters of African common law (mistakenly called African Customary Law) that the High Court, and the Court of Appeal and all subordinate courts .....**shall decide all cases accordingly to substantial justice without undue regard to technicalities of procedure** and without undue delay, (underlining mine). That is the perfect principle and rubric upon which to exercise the Court's discretion

For those reasons, I shall not strike out the Defendants/Respondents application dated 28.11.2003 principally because the Preliminary Objection did not expressly seek that order, and largely for reasons already stated in the body of this Ruling that little will be achieved by Striking it on the grounds that the Advocates thereof are not properly on record. I do therefore direct and order the firm of D P Kinyanjui do properly place themselves on record within the next seven (7) days of the date of this order.

As these proceedings have been occasioned by the lack of attention to detail, as is required of the Advocates handling a matter of this magnitude in financial terms, I also order that the Defendants/Respondents do pay the Plaintiff's Advocate's costs arising from the Preliminary Objection the subject of this Ruling, and such costs be paid before the Hearing of the application dated 28.11.2003. It is so ordered.

Dated and Delivered at Nairobi this 15.04.2005.

**ANYARA EMUKULE**

**JUDGE**