



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL SUIT NO. 182 OF 2002

MEREKA & COMPANY ADVOCATES.....PLAINTIFF

V E R S U S

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The main suit herein relates to a debit of some K.shs. 1,178,240.35 allegedly effected by the Defendant Bank on the Plaintiff's account without any authority to do so from the account holder. The Plaintiff seeks a reversal of that debit in that suit filed on 1st February, 2002. He also took out a Chamber Summons on the same day seeking an interlocutory mandatory injunction for reversal of the entry pending the hearing of the suit. That application was scheduled for hearing on 14th February, 2002 when Learned Counsel for the Plaintiff/Applicant Mr. Ng'ang'a raised a preliminary objection by Notice filed and served on the same day, stating that:-

“The Plaintiff’Applicant intends to raise a preliminary point and object to the appearance of M/S. Ahmednasir Abdi kadir & Company, Advocates for the Defendant/Respondent in this matter.”

The matter was argued inter partes and is the subject matter of this ruling.

Although the raising of preliminary objection is a procedure known in law, the Courts have time and again stressed that it must be properly invoked otherwise it would cause unnecessary delays and expense. The guiding principles were laid out by the Court of Appeal in **MUKISA BISCUIT MANUFACTURERS CO. LTD –VS- WEST END DISTRIBUTORS LTD** [1969] EA 696 Per Law J.A.

“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.”

Per Sir Charles Newbold P.

“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 occasion confuse the issues. This improper practice must

stop.”

Was the preliminary objection herein properly raised?

The complaint raised by the Applicant is simply this: That the firm of M/S. Ahmednasir, Abdikadir & Company, Advocates gave the advise to the Bank that they should effect the debit complained of in the main suit and they were, therefore potential witnesses in the main suit. As such they cannot double up the as witnesses and legal advisers in the litigation. Mr. Ng’ang’a submitted that there would be a conflict of interest citing for support of that proposition, **Halsburys Laws of England** Vol. 3 at page 626. Referring to occasions when counsel should decline to accept instructions, the author states:-

“Counsel ought not to appear for two clients w hose interests many conflict and should refuse to accept a brief if he has advised another person on the same matter or if he is in possession of confidential information relating to the opposing party or by reason of his relati onship with a party to or a witness in the proceedings, or if it is likely that he will be a witness in the same proceedings.”

He also cited Civil Case No. 168 of 2000 **MUTHUMU FARM LTD & ANOTHER –V-S- NATIONAL BANK OF KENYA & ANOTHER** (UR) where parts of an affidavit sworn by counsel representing one of the parties, were struck out on the basis that the Advocate had stepped from his privileged position in the bar into the witness box. He could not discharge his duty to the Court in that dual capacity.

So too in this matter, Mr. Ng’ang’a, submitted, the Advocates on record for the Defendants would have dual roles and should thus be barred.

Learned Counsel for the Bank Mr. Ahmednasir saw no basis for the objection raised. In the first place it is based on disputed facts and will not dispose of the suit even if it is upheld. In the second place there is no complaint raised in the pleadings against the Advocates on record and there is no basis, therefore, for interfering with the right of a party to instruct Advocates of his choice. They are the same Advocates who represented the Bank before the Taxing Master and in the Court of Appeal but objections were not raised then. As Advocates they merely communicated a decision of the Court to their clients and there was, therefore, no basis for attaching any liability to the Advocates. The objection is, therefore, not made in good faith. I have considered these submissions in the light of the guidelines cited above in the **MUKISA BUSCUIT CASE**.

I am not satisfied that the objection made arises from the pleadings or that the upholding of it would finally dispose of the application or the main suit. The only point raised was that there would be a conflict of interest since the Defendant’s Advocate were instrumental in the cause of action pleaded. The question that goes begging in such event is why the Advocates were not joined as parties in the suit. The defendant’s Advocates have not sworn any affidavit to defend the Bank’s position and all that is exhibited is a letter they wrote in the usual communication between Advocate and client. If such communication would be the basis for disqualification of Advocates from acting for their clients, then I do not think any Advocate would communicate freely with his clients. All persons have a right, whether in criminal or civil proceedings, to be represented by legal counsel of their choice, if they decide to appoint one. It is a right that cannot be interfered with lightly. Whether the Defendant’s Advocates will eventually be summoned as witnesses remains moot and may be raised and considered if and when that happens. I am not satisfied that I should disqualify the Advocates on that ground at this stage.

I largely agree with the submissions of Mr. Ahmednasir and I reject the preliminary objection. Costs of the objection to the Defendants.

DATED at NAIROBI this 6th day of March, 2002.

P.N. WAKI

JUDGE