



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CRIMINAL APPLICATION NO.60 OF 2001

1.MOHAMED TWAHIRI MOHAMED

2.MOHALMED ALI.....APPLICANTS

=V E R S U S=

THE REPUBLIC THRO'

1.THE KENYA REVENUE AUTHORITY

2.THE COMMISSIONER OF POLICE

3.THE HONOURABLE THE ATTORNEY GENERAL.....RESPONDENTS

R U L I N G

The application before me was dated the 14th March, 2002. It was brought by the Attorney-General on behalf of Respondents of the original Misc. Criminal Application No.60 of 2001. The applicants seek for orders that :

- a) The orders obtained by the Respondents therein on 18th July, 2001 be vacated, and
- b) That the Applicants herein be at liberty to deal with the Respondents in the original application aforementioned as required by law to do.

This application was based upon the grounds enumerated in the Notice of Motion and upon the affidavits of one John Maritim (SSP) annexed to the application.

As the court was ready to hear the main application herein, the applicant was allowed to argue an interim application raising what the applicant stated was a preliminary point. Adequate notice to that effect had been served upon the Respondents in good time as required by law.

The thrust of the "preliminary point" was that the Respondents' counsel, Mr. Taib A. Taib, is a director of a company known as Planet International Limited which company according to the Applicants represented by Mr. Ogoti, State Counsel Mombasa, is subject of investigations of a criminal nature. The investigations are according to the material on the record, being conducted by both the Kenya Revenue Authority and by the Criminal Investigations Department of the Kenya Police. The applicants accordingly argued that Mr. Taib A. Taib should not legally represent the above mentioned company which is a company in which he owns shares and in which he is a company director. The conclusion that Mr. Taib

A. Taib is such director, is deponed in John Maritim's affidavit and is based on a copy of a letter dated 13th September, 2001 written on behalf of the Registrar of Companies to the Director of Criminal Investigations, Nairobi. It was further argued by the applicant that the said Taib A. Taib as such director, is a potential suspect in the on-going criminal investigations. Applicants concluded that for the said two reasons the learned counsel Mr. Taib A. Taib should under an exercise of this court's judicial discretion, be disqualified by this court from representing the Respondents.

Mr. Taib A. Taib responded by stating that he is not a director or a shareholder of Planet International Ltd. He further stated that one Mohamed Ali who is a director and shareholder of the said company has sworn a replying affidavit categorically stating that he Taib A. Taib is neither a shareholder nor a director of the company. He argued further that supposing the facts deponed by John Maritim (SSP) were true, nevertheless, they alone raised no legal bar against him to stop him defending the company so long as the company had properly instructed him to represent it in the matter in issue or in any other matters; that even if he were found to be a director or shareholder of the said Planet International Ltd., which he vehemently denied, he saw no reason not to continue defending the same. He added that if he were a director he then would even have a greater reason to defend it apart from being merely instructed to do so in his capacity as an advocate. He also informed this court that the correct facts are that he was instructed by individuals to represent them in respect of possible criminal charges intended to be brought against them and not by Planet International Ltd.

Claiming to have put the record straight in matters of fact, Mr. Taib then proceeded to attack this application on the following grounds:- That the letter under reference from the Registrar of Companies to the Director of Criminal Investigations is inadmissible in evidence; that no request for an extract of the Company Register has been shown to have been made in the manner provided under S.384 of the Companies Act by the Director of Criminal Investigations and that therefore no extract obtained otherwise can be used in evidence; that no certificate or certified extract under the hand of the Registrar of Companies has been shown to have been issued to confirm the authenticity of the information purported to be used herein that under the above circumstances, the said uncertified copy of the letter aforementioned is nothing but trash and should be disregarded by this court; that it is common knowledge that the Company's Registry at Nairobi is most disorganized and may not show the correct situation of things at any given time, a fact this court was requested to take a judicial notice of; that if the Registrar examined the file of Planet International Ltd., currently, he would certify that he Mr. Taib A. Taib is neither a director nor a shareholder.

Mr. Taib, then turned his arsenal against the applicant's preliminary objection on the law itself. He argued that what Mr. Ogoti raised is not a point of law but a point of fact; that a point of fact especially a disputed point of fact cannot form the basis of a preliminary objection; that a preliminary point of law must first have been previously pleaded in the pleadings before the court which was not done here; that a preliminary point of law must be such one that when positively determined by the court will bring the whole matter into a final determination; that the point whether or not he is a director or shareholder of the company under discussion is merely a matter of fact not law; that this preliminary objection is nothing but a flagrant abuse of the process of court and accordingly he requested that this application should be so found and be dismissed.

The question then arose as to whether or not the matter argued before the court is a preliminary point of law and if so whether the applicant has made a case deserving the remedy sought. That is to say, is the fact whether or not the learned counsel Taib A. Taib is a director or shareholder of Planet International ltd., an issue that can be raised as a preliminary objection?

It has been held in many cases now that 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. The examples given 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 suit to arbitration. This was the definition given in the case of **Mukisa Biscuit Co. -vs- Westend Distributors**, [1969] E.A. at page 200. It was further stated by this court in the case of **Abbeybarn Ltd. - vs- Infinity Gemstones Ltd**, in Mombasa HCCC No.326 of 1999, that a preliminary point of law can only

be raised when there is no dispute on the facts. *“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. It was also stated in the same case that the improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasions, confuse issues. This improper practice should stop.”* – **Mukisa** case on page 701.

Applying the above principle to this case, can it be said that if this court concludes that Taib A. Taib is a director in Planet International Ltd., that fact will finally determine the application before the court? The answer, of course, is in the negative. Can it be said that whether or not the said Taib A. Taib is a director of the said company, is a matter of law? Of course not. It is clearly a matter of fact. Furthermore, the issue as to whether or not Taib A. Taib is a director of the company, is a matter which is clearly being disputed. SSP. John Maritim has sworn that the information contained in the copy of the Registrar’s letter herein marked as “JKM.1” shows that Mr. Taib A. Taib is a director of Planet International. But Taib A. Taib himself denied from the bar that he is such director and dared the applicant to produce a current official search certificate obtained from the Registry of Companies. He argued that as an advocate, and many advocates do so, he formed the company in his day-to-day legal practice and passed it over to clients who happen to be the present directors of the company in question. The point here is that there is a serious dispute over the fact as to whether or not the said Taib A. Taib is a director or not. It is a matter which needs to be ascertained by evidence to be adduced.

What about the letter from the Registrar of Companies aforesaid? I have examined the letter carefully. I find that the letter as is in the court file, is a mere photocopy. It is not certified as the true copy of the original letter by any qualified person who under Kenya Law has authority and qualification to do so. It is not in any way authenticated as it should have been, before the applicant herein would expect this court to accept and rely on it. The letter does not show the official in the Registrar of the Companies Registry who signed it except to state that it was signed for the Registrar. No one can say who signed it. As it is, it could possibly without the knowledge or authority of the Registrar of Companies, have been deliberately and fraudulently made up for the purpose of this case. Furthermore, it is an accepted and unchallenged legal position that any extract from any file in the Registrar of Companies Office, if it purports to be a true extract therefrom, has to be lawfully applied for, paid for, and also properly executed by the said Registrar or any officer authorized to so do, before it can be accepted as a true extract therefrom. Annexure “JKM.1” does not satisfy the above conditions. For the above various reasons the said extract is totally unreliable, ordinarily unacceptable, and legally unacceptable under Section 384 of the Companies Act. It follows that it is not admissible in evidence.

Having said what I have said above, I now hold that the issue which Mr. Ogoti raised as a preliminary point of law, is completely nothing of the sort, on the following grounds:-

- a) If it succeeds it will not finally determine the application which is to be argued.
- b) The facts that the preliminary point is based on are not undisputed and will need to be ascertained by additional investigations.
- c) The issue is not a point of law but actually a point of fact.
- d) It was not pleaded in the substantive application nor can it be implied from the totality of the applicants pleadings.
- e) What is sought is purely on the judicial discretion.

Under the said circumstances it is my view and I so finally hold that the preliminary objection raised is merely a point of fact and not a point of law and must fail. It will be noted that Mr. Ogoti’s exercise was an exercise in futility. It would appear to have been taken up on instigations and encouragement of SSP. J. K. Maritim. I term it an afterthought, and find it mala fides. I will say no further to that end except to quote the Senior Judges in the afore-quoted case of **Mukisa Biscuit Manufacturing Co. Ltd –vs West**

End Distributors, at page 701 –

“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasions, confuse issues. This improper practice should stop.”

Before I conclude this ruling, I should touch on the issue which was the really center bolt of Mr. Ogoti’s purported preliminary objection – i.e. whether or not this court has the jurisdiction to disqualify an advocate who is legally qualified to practice law and who currently holds a current practicing license, from appearing and representing a company in which he is a director! In this case the applicant failed to prove that Mr. Taib A. Taib is a director in the company called Planet International Ltd. I do not therefore find it necessary to decide this issue in this application. I will only indicate that Mr. Taib’s argument was that there is no law known to him, and Mr. Ogoti quoted none, that would bar him (Taib) from defending a company in which he is a director if called upon to do so. He expressed his belief that a person, any person including an advocate, would have no higher duty or obligation than that of defending himself or his company or his property. He suggested that even the Constitution recognizes and protects such a right. He also suggested that as an advocate of the High Court of Kenya, he took oath to defend his clients without fear or favour and concluded that even if he were personally arrested and charged with any offence his right to defend himself would still remain. Mr. Ogoti did not wish to respond to these propositions. As I have said above, I was not under obligation at the end of the day to decide the said issue since the issues before me were disposed of conclusively on the finding that the preliminary objection was not a preliminary point of law and need not have been raised at all.

The upshot therefore is that the applicant’s preliminary objection is hereby rejected and dismissed with costs.

Dated and delivered at Mombasa on the 11th day of April, 2002.

**D.A. ONYANCHA
J U D G E**

Delivered in the presence of:-

Mr. Obara – for Ogoti -for Applicant

Mohamed - for Taib -for Respondent