



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 513 OF 2001

1. FISHERMAN'S LEISURE INN LTD.

2. LEISURE TRADING

&

3. LEISURE CAR HIRE & TOURS PLAINTIFFS

V E R S U S

1. GIRO COMMERCIAL BANK LTD

&

2. G.A. DATOO & CO. LTD DEFENDANTS

REASONS FOR DISMISSING PRELIMINARY OBJECTION

On 11.6.2002 the applicant came to court with application dated 15.10.2001. His counsel Mr. Sifuna had served a Notice of Preliminary point upon the counsel for the respondent, Mr. Okongo.

The Preliminary point to be argued is that the firm of Kapila Anjarwalla & Khanna advocates having acted for the plaintiff in respect of the charges subject of the suit ought to disqualify itself from conducting this suit for the defendants against the plaintiff. Counsel relied on Advocates Act Cap. 16 rule 9 which states "No advocate may appear as such before any court or tribunal in any matter in which he has reasons to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit" Counsel states he intends to challenge the charge and will call as witness advocates of the said firm. He also relied on the authority in the case of KING WOOLEN MILLS LTD AND ANOTHER –vs- M/s. KAPLAN & STRITTON ADVOCATES Court of Appeal no. 55 of 1993. The advocate from the firm of Kapila Anjarwalla & Khanna resisted the objection saying that that issue is not a Preliminary point. He relied on the case of MUKISA BISCUIT (Man) Co. Ltd. –vs- WESTEND DISTRIBUTOR LTD. Where the court of appeal said that a Preliminary point consists of a point of law which is pleaded and which if argued may dispose of the suit such as objection to the jurisdiction of the court.Or a pleas of limitation. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct."

Mr. Okanga submitted that there are many facts here to be ascertained for example had instruction been given to act for applicant, did they pay fees (retainer).

Upon considering both arguments I find that by the Preliminary Objection the court is being asked to restrain the said advocates from acting for a party who has instructed them to act. The court is not able to

make such a restraining order without hearing necessary evidence on both sides to reach such a decision.

In the case of Kings Woolen Mills (Manufactures) Ltd a full suit was filed being HCC. No. 279/93 in which the appellants prayed for declarations that advocates/respondents were not entitled to act in the suit and prayed to restrain the respondents from breaching the contract of retainer entered into by the appellants and the advocates. The court of appeal investigated all the circumstances and came to the conclusion “that real prejudice on real mischief are anticipated if the respondents are permitted to act for the defendants in the main suit.”

The court proceeded to grant an order for injunction against the advocates from acting in the matter. In the present case the Preliminary Objection raised is not pleaded and determination of the same does not finalize the suit. And most seriously the procedure adopted by the applicant does not avail the court evidence to enable the court to restrain the advocates from continuing to act. These advocate resist the matter by alluding to the fact that they were never instructed in the matter by the applicants. Facts have to be ascertained to come to the conclusion that the advocates can indeed be restraining from serving the present client.

For these reasons the court is unable to uphold the objection under the procedure adopted by the applicant and the same is dismissed.

Dated this 14th day of June, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Read in presence of Mr. Sifuna and Mr. Okanga.

Mr. Sifuna – I apply for certified copies of the ruling.

Court – Let the copies of proceedings be supplied upon payment of copying charges.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Court – By consent hearing of the application is fixed for 27.6.2002.

Interim orders are extended in the meantime.

J. KHAMINWA

COMMISSIONER OF ASSIZE