REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2070 OF 2000 (O.S)

PHILIP KILU MENZE & 42 OTHERS …… PLAINTIFFS

VERSUS

CONS MATATA T/A CONS

MATATA & CO ADVOCATES……..…….. DEFENDANT

RULING

Forty three persons who claim to be clients of Cons Matata Advocate have taken out an originating summons in which they seek orders for a cash account amongst others. The summons is expressed to be brought under order 36 rules 11 and 12; order LII rule 4; section 3A of the Civil Procedure Act; section 56 of the Advocates Act and all other enabling provisions of the law. The originating summons is intituled as follows-

Republic of Kenya

In the High Court of kenya at Nairobi

Milimani Commercial Courts

Civil Case No 2070 of 2000 (OS)

1. Philip Kilu Menze and 42 others ..... Plaintiffs

versus

Cons Matata t/a Cons Matata & Co Advocates ...

Defendant

Originating Summons

At the hearing of the summons on 5th July, 2001, Mr Wandago, counsel for the defendant, took a preliminary objection to the suit on three grounds. The first ground was that the summons did not comply with order 52 rule 4(2) and order 36 rule 7 of the Civil Procedure Rules. The second ground was that the Court had no jurisdiction to grant prayers 7 and 8 in the summons. And the third ground was that the applicants had no *locus standi* to institute the subject matter of the proceedings since they were not clients

of the defendant.

In support of the first ground counsel invoked the provisions of section 51 (1) of the Advocates Act which requires that proceedings against an advocate shall be instituted "in the matter of the advocate". He also invoked order 52 which provides for the procedure to be adopted in respect of certain matters specified in the Advocates Act. He relied in particular on rule 4 (2) which provides that an application by a client for an advocate to deliver a cash account, securities or papers and documents shall be made by way of originating summons supported by an affidavit. He then submitted that order 36 rule 7 provided for the form of an originating summons. The rule requires the summons to be in form 13 or 13A of appendix B. In form 13 (which is the form to be employed where the originating summons is *inter-partes*), the proceedings are required to be intituled as follows:-

In the …….....….Court

at…….....

In the matter of …….....

between

A B……...….Plaintiff

and

C D……Defendant

So counsel's complaint was that in the heading of the summons taken out by the plaintiffs the words "In the matter of Cons Matata Advocate" were omitted. That omission was a breach of the mandatory provisions of section 51 (1) of the Advocates Act and order 36 rule 7 of the Civil Procedure Rules. He submitted it was a very important requirement which is made to protect the integrity of a law firm in which the advocate whose conduct is brought into question practices. He further submitted that the requirement does that by making the members of the public know that it is the particular advocate in his personal professional capacity rather than the law firm which is under inquiry. He argued that in the instant matter the law firm of Cons Matata & Co Advocates had been gravely prejudiced by that omission which gave the misleading impression that it was on trial.

On the issue of Court's want of jurisdiction with respect to prayers 7 and 8 of the originating summons, I think it is convenient to set out prayers objected to. They read:-

"7. The defendant be suspended after the expiry of fourteen (14) days from the date of such findings from the right to practice as an advocate of this Honourable

Court until the defendant does:

(a) render the cash account aforesaid;

(b) pay the sums found to be due to the plaintiffs;

and,

(c) pay the costs plus interest as above.

8. That in default of compliance with each and every item of the order within 14 days, this Honourable Court do order the defendant to appear before it personally on such date as may be ordered to show cause:

(i) Why this Honourable Court should not discipline the defendant under section 56 of the Advocates Act

for professional misconduct in not accounting to the plaintiffs or otherwise as this Honourable Court thinks fit.

(ii) Why this Honourable Court should not hold the defendant in contempt of Court and punish him in terms of section 5 Judicature Act for failure to comply with this Honourable Court's orders."

Mr Wandago submitted that only the disciplinary committee can discipline an advocate. In his view, the High Court which was an appellate tribunal with respect to decisions of the disciplinary committee could not suspend an advocate as prayed. And as regards the envisaged punishment for contempt, counsel submitted that the same was premature as no order had been issued against the advocate with a penal notice which he had disobeyed to warrant committal for contempt of Court.

On the third ground of objection, counsel submitted that there was no client/advocate relationship between the plaintiffs and Cons Matata Advocate. He argued that Cons Matata was instructed by Mr Satish

Gautama Advocate and was accountable only to the said Satish Gautama. In those premises, he argued, the applicants had no *locus standi* to institute proceedings against Mr Matata under order 52.

Mr Gautama for his part submitted that there was nothing wrong with the format of the originating summons. He said it was made under order 52 which, unlike order 36, did not prescribe the form of the summons. In his view, as order 52 is the specific one under which matters involving advocates should be brought, it should in the event of conflict with order 36 which was the general procedure prevail over it. In the premises, he argued, the originating summons herein had not violated any prescribed procedure. In the alternative he argued that the omission of the words "in the matter of ……..an advocate" in the heading of the summons was a minor procedural matter which did not render the proceedings a nullity and which also did not prejudice the defendant. He pointed out that a firm had no legal existence and there could be no confusion in the instant matter as to who was under inquiry for Cons Matata Advocate was a sole practitioner running a one man firm. He cited section 72 of the interpretation and General Provisions Act, cap 2 of the Laws of Kenya which saves documents which deviate from prescribed forms. The section reads:-

"72. Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead."

On prayers 7 and 8, Mr Gautama pointed out that the two were dependent on findings to be made in respect of the preceding six prayers which were not objected to and accordingly the objection was premature. On the existence of a client/advocate relationship, Mr Gautama submitted that the issue was one of fact and it could not form a basis of a preliminary objection. In his view the correspondence exhibited in the affidavits showed that he himself in his dealings with Cons Matata Advocate was acting as the agent of the plaintiffs. They were his principals and there was thus a relationship of advocate/client between Mr Matata and the plaintiffs.

Having considered the rival submissions I have come to the following view of the matter. Mr Wandago's submission that the originating summons is wrongly intituled for the reason that it omits the words "In the matter of Cons Matata Advocate" is well founded and Mr Gautama's attempt to wriggle away from the fact is futile. Section 51 (1) of the Advocates Act requires that every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivery up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate. The Advocates Act does not prescribe the form of that application. The form is prescribed by order 52 rule 4(2) which provides that applications of that nature shall be by originating summons supported by an affidavit. So even assuming, without deciding, that order 36 does not apply to an originating summons taken out pursuant to the provisions of order 51 rule 4, it would appear to me that an originating summons taken out under the latter order should be expressed to be in the matter of the advocate concerned. That was not

done here. Furthermore, even the plaintiffs themselves appear to have assumed that order XXXVI was applicable to their application for indeed one of the provisions of law under which their application is expressed to be brought is that order.

Under that order it is patent from form 13 of appendix B which I set out at beginning of this ruling that the summons should be expressed to be taken out in the matter of an advocate. Indeed, contrary to the submissions of Mr Gautama there is no conflict between the provisions of order XXXVI and LII in that respect and the issue of resolving any conflict in favour of order LII is a misconceived moot point. So the only issue is whether I should strike out the summons herein for deviation from the prescribed form. In that regard I accept the submissions of Mr Gautama that the deviation is a procedural omission which should not nullify the proceedings. I take the view that lapses and omissions in respect of matters of form and procedure whether those procedures and forms be mandatory or not are not fatal unless they go to the jurisdiction of the Court or materially prejudice the adversary. They are curable. Indeed in so far as forms are concerned, that is the conclusion which a consideration of section 72 of the Interpretation and General Provisions Act impels. The deviation in form here neither goes to jurisdiction of the Court nor prejudices the defendant. The defendant is very much aware that the summons is taken out against himself as an advocate. And of course his firm has no legal personality distinct and separate from himself. In the result, this ground of preliminary objection is overruled.

On whether the summons should be struck out for containing prayers 7 and 8, I agree with Mr Gautama that the objection is premature and accordingly this ground of preliminary objection is also overruled. On whether the relationship of advocate/client subsisted between the plaintiffs and the defendants, I find that this is a mixed issue of law and fact which is not undisputed and as such it cannot be the basis of a preliminary objection *stricto-sensu.* A preliminary objection is a point of law taken on the basis of agreed or uncontested averments or findings of fact which if successful would dispose of the entire suit in which the objection is taken. That is not the position here and accordingly this ground of preliminary objection is without merit.

In the result, the preliminary objection is overruled. I do however order that the originating summons be amended in its format to express the fact that it is in the matter of Cons Matata Advocate. The costs of the preliminary objection shall be costs in the originating summons. I further order that fresh hearing dates be taken in the registry after the amendment and the granting of such directions as to the mode of trial as the parties may apply for.

Dated and delivered at Nairobi this 30th day of July, 2001

A.G. RINGERA

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JUDGE