



**Waswa v Nyongesa (Civil Miscellaneous Application  
98 of 2018) [2024] KEHC 8891 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8891 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL MISCELLANEOUS APPLICATION 98 OF 2018  
SC CHIRCHIR, J  
JULY 18, 2024**

**BETWEEN**

**BEN WASWA ..... APPLICANT**

**AND**

**ANDREW WAFULA NYONGESA ..... RESPONDENT**

**RULING**

1. The applicant filed this suit seeking for stay of the order of the Rent Restrictions tribunal in Rent Restriction's case No. 38 of 2013 and enlargement of time to file an Appeal.
2. On 10<sup>th</sup> of December 2015 this court( Lady justice Njoki Mwangi) gave interim orders for stay and directed the parties to pick a date at the Registry for interpartes hearing.
3. The respondent filed a Replying affidavit through the law firm of J.S Khakula Advocates and later changed to J.O Makali & Co Advocates
4. On 8<sup>th</sup> March 2019, the Applicant filed a the preliminary objection( the objection) objecting to the representation of the respondent by the Law firm of J.O Makali Advocates .
5. The Notice is in the following terms:- “ The Applicant shall raise a preliminary objection against the appearance of M/S J.O.Makali & Co Advocates in so far as they intend to act for the respondent in breach of the Advocate – client fiduciary relationship and confidentiality that subsist between the Applicant herein and the said Law firm which obviously portends conflict of interest more so in Bungoma High court Civil Appeal No. 26 of 2011 still pending for Adjudication”

**The Applicant's case**

6. It is the Applicant's case that underpinning the objection is the need to protect the fiduciary relationship between the Advocate and client . It has relied on the case of *Kings Woolen Ltd vs Kaplan & tratten* ( 1993) KLR 273 where the court of Appeal held that : “ where a retainer is established



the general principle is that an Advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients”

7. The Applicant then referred the court to the Bungoma High court cause list for 11/2/2020 bearing HCCA NO.26 of 2011, and asserts that the firm of J.K Makali had represented the Applicant on that matter. It is further stated that this fact of previous representation has not been denied by the respondent.

### **Respondent’s case**

8. In response the respondents states that the objection is misconceived, in that it does not meet the threshold of a preliminary objection. In this regard he has relied on the case of *Mukbisa Biscuit manufacturing Ltd Vs. West End Distribution* (1969) 696EA and *Oraro vs Mbaja* ( 2005) KLR 141 to emphasize what constitutes a preliminary objection
9. The Respondent submits that applying the test in the current objection does not meet the threshold in that : it is not anchored on pleadings; it is anchored on contested facts , it pleads facts which require proof by way of evidence .
10. On the issue of disqualification of the advocate, it is denied that J.K Makali Advocates have ever represented the respondent in the Rent restriction for the applicant to raise the claim of conflict of interest.
11. It is further submitted that the Applicant has failed to demonstrate that such a conflict of interest does exist. The Respondent has relied on the case of *British African Investments Company Ltd vs. Njomaiha Investments Ltd & another* (2014) eKLR, where it was held that “...where a party asserts that a conflict of interest exists, he must provide sufficient evidence to demonstrate that such a conflict exists .....”
12. The respondent further submits that the applicant had not provided any evidence to warrant the disqualification of the firm of MS J.O. MAKALI & COMPANY ADVOCATES so as to represent the respondent.

### **Determination**

13. The first issue that must be addressed is: if the objection meets the threshold of a preliminary objection.
14. What is a preliminary objection ?
15. In *Mukisa Biscuit Manufacturing Company –vs- West End Distributors Ltd* [1969] E.A 696 cited by the respondent , the court defined preliminary objection as follows: 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. Examples are an objection to jurisdiction of the court , or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the matter to Arbitration”  
  
In the same case Sir Charles Newton added :” It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.....”
16. The same position was restated in the case of *David Karobia Kiiru –vs- Charles Nderitu Gitoi & Ano* [2008]eKLR where the court stated as follows:-

“For a preliminary objection to succeed , the following tests ought to be satisfied ; firstly it should raise a pure point of Law; secondly it is argued on assumption that all the facts



pleaded by the other side are correct; and finally, it can not be raised if any fact has to be ascertained or if what is sought is the exercise of the court's discretion . A valid preliminary objection should, if successful , dispose of the suit” ( Emphasis added)

17. The gist of the preliminary objection herein is that J.O Makali Advocates had acted for the Applicant in another matter, and therefore the fiduciary relationship between the Applicant and the said advocates bars the firm of J.O Makali from representing the respondent in this case.
18. The question of whether there exists or existed an Advocate- client relationship between the Applicant herein and J.O. Makali Advocate is a matter of fact , not law. The Applicant will have to submit evidence in proof of the existence of such relationship and further whether any prejudice will be caused by the representation of the respondent by the firm of JK Makali Advocate. AS held by sir Charles Newbold in *Mukisa Biscuits*( supra : ) , a matter cannot be raised as a preliminary objection if any facts as to be ascertain by tendering evidence .
19. Further the question of such relationship, even if determined, does not dispose of the suit. If for instance the court finds in favour of the Applicant, the respondent will simply move to the “next - door” Advocate. It would not mean the end of this suit. Thus, the objection does not meet the test of “disposing off the suit”.
20. In short the point being raised does not meet the threshold of a preliminary objection. It is hereby struck out.
21. Separately, I have taken note of the fact that this matter has been in court since 2015. There are interim orders which were to subsist the disposal of the suit. It is a scenario that I consider it prejudicial to the respondent, whose benefit which accrued to him in Rent tribunal restrictions case is still beyond his reach.
22. This is a scenario that should not continue and this court will give directions on the date of delivery of this Ruling on the way forward on this matter.
23. Final orders:
  - a). The preliminary objection is hereby struck off.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF JULY 2024**

**S. CHIRCHIR**

**JUDGE**

In the presence of :

Godwin- Court Assistant.

