



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISCELLANEOUS CAUSES NOS. 467, 458 & 466 OF 2015**

**KITTONY MAINA KARANJA ADVOCATES.....ADVOCATES**

**VERSUS**

**BELL INDUSTRIES LIMITED.....CLIENT**

**RULING**

1. There are three files to which this ruling relate. Those are Miscellaneous Civil Case No.. 458 of 2015, 466 of 2015 and 467 of 2015. In all these files the parties are the same.

2. In all those files Kittony Maina Karanja Advocates (herein after the Advocate) filed an Advocate/Client Bills of Costs. The Client is Bell Industries Limited. Those Bills of Costs are pending taxation. Those Bills of Costs relate to the sale transaction of offices known as suite numbers 8A, 8B and 8C. The suites were purchased by the Client. The Advocate's claim, and hence the Advocates/Client Bills of Costs, that it represented the Client in the sale transaction.

3. The Client has raised Preliminary Objection in respect of the Bills of Costs in the aforesaid three files. The Preliminary Objection dated 12<sup>th</sup> July 2016 is as follows:

***“The Bill of Costs is bad in law and violates the principle of and right to independent counsel and independent counsel and independent legal advice and the same should be dismissed with costs.”***

4. Parties filed their written submissions in respect to the above objection.

**CLIENT'S SUBMISSIONS**

5. The Client began in its submissions by setting out the issue the Court should determine when considering the Preliminary Objection. That issue in the words of the Client is:

***“Is the Advocate/Applicant herein guilty of violating the principle of and right to independent counsel and independent legal advise against the Respondent.”***

6. The Client set out, in its submissions, the chronology of events between it and the Advocate. The Client confirmed it was given the letter of offer. That Letter of Offer, according to the Client, was designed by the developer, of the project, in collusion with the Advocate so as to impose the Advocate as the Advocate for the Client. That the Client was faced by undue pressure of losing the chance to purchase the property unless it agreed to be represented by the Advocate. That under that pressure it signed a sale agreement and the letter of offer. That however on paying the full purchase price, and on obtaining independent Legal Counsel, the Client revoked its instructions with the Advocate. That the Advocate refused to honour the Client's said instructions and refused to release, a (and to-date has not released,) the completion document of that purchase transaction.

7. It is on the basis of the above facts the Client has based its Preliminary Objection.

**ADVOCATE'S SUBMISSIONS**

8. The Advocate in response to the Client's submission submitted that the Client signed the letter of offer on 20<sup>th</sup> July 2010 and later signed the Agreement for Sale on 15<sup>th</sup> August 2012 and forward those documents back to the Advocate on 23<sup>rd</sup> August 2012. That therefore the time period of seven days for signing letter of offer was sufficient time for the Client to obtain independent Counsel.

9. That the Letter of Offer was later superseded by the formal Agreement for Sale, which the Client took ample time to peruse and even suggested amendments before executing that Agreement for Sale. The Advocate therefore denied that there was application of duress on the Client.

10. The Advocate denied that the Client did revoke his instructions to act, since there was no such a letter of the Client.

**ANALYSIS AND DETERMINATION**

11. As it is seen, above, the facts of what transpired between the Advocate and the Client are highly contested. The Client alleges it was not given freedom to choose of an Advocate to represent it in the sale transaction.

12. The Advocate on his part alleges that the Client had ample time to consider whether to sign the letter of offer and the agreement of sale and that therefore there is no basis of alleging it was under duress.

13. As a Court I am called upon to decide the preliminary objected on those contested facts. The case of **MUKISA BISCUIT CO. LTD V WEST END DISTRIBUTORS [1969] EA 699** settled what is a proper Preliminary Objection. It is one that is raised on pure point of law and it is raised on the assumption that the facts are not contested.

14. The Supreme Court in the case **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION V JANE CHEPERENGER & 2 OTHERS [2015] eKLR** had occasion to restate this, thus:

*“To restate the relevant principle from the precedent-setting case, Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors (1969) EA 696:*

*“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 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 dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pint 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 Supreme Court, in the above case further stated:

*“Thus a Preliminary Objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”*

15. The Client as stated above raised the Preliminary Objection on contested facts, in that regard it is not a proper Preliminary Objection.

16. There is, if one thinks about, good reason why there should not be a Preliminary Objection on contested facts. This is because parties do not file affidavit, or any other, evidence in support of a Preliminary Objection. It is filed on the basis that the facts pleaded re not controverted.

17. The Client’s Preliminary Objection should have been made by way of an application. As it is, it is incompetent.

**18. In the end, the Preliminary Objection dated 12<sup>th</sup> July 2016, in Miscellaneous Civil Nos. 458 of 2015, 466 of 2015 and 467 of 2015, is hereby dismissed, there being no basis for not allowing the costs of that Preliminary Objection to follow the even, I award the costs of that Preliminary Objection to Kittony Maina Karanja Advocates in all those files.**

Orders accordingly.

**DATED, SIGNED and DELIVERED** at NAIROBI this 9<sup>TH</sup> day of MAY, 2019.

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE ADVOCATE

..... FOR THE CLIENT