



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 183 OF 2018

CALEDONIA SUPERMARKETS LIMITED.....PLAINTIFF

-VERSUS-

ANASTACIA WAGICIENGO.....1ST DEFENDANT

EZEKIEL WAFULA T/A

WAFULA & ASSOCIATES ADVOCATES.....2ND DEFENDANT

RULING

1. This ruling is the product of the 2nd defendant's notice of preliminary objection dated 18th September, 2018 raised in respect to the plaint and Notice of Motion dated 31st July, 2018 brought forth by the plaintiff in this instance. The preliminary objection rides on the following grounds:

(i) THAT the entire suit and application are frivolous, vexatious and otherwise an abuse of the court process as the same are an attempt at forum shopping as there exists a similar application with similar parties being Nairobi High Court Misc. Application No. 236 of 2018 pending ruling before Honourable Lady Justice Kamau on 20th November, 2018.

(ii) THAT the supporting affidavit to the application as well as the verifying affidavit to the plaint have been executed by a person who is not the deponent (namely Martha Nyambura Wagiciengo) and therefore the application and suit are unsupported and unverified.

(iii) THAT the entire suit against the 2nd defendant is incurably and fatally flawed as it ought to be brought under the mandatory provisions of Sections 45(2) and (2A) of the Advocates Act as read together with Order 52, Rule 3(1) of the Civil Procedure Rules.

(iv) THAT the suit against the 2nd defendant is time barred under the provisions of Section 45(2) and (2A) of the Advocates Act.

(v) THAT due to the foregoing grounds, the suit cannot be sustained and ought to be struck out with costs in favour of the 2nd defendant.

2. The preliminary objection was disposed of through written submissions which were later highlighted before this court. The 2nd defendant in his written submissions abandoned ground (ii) of the preliminary objection for purposes of this ruling. As concerns ground (i), the 2nd defendant argued that the 1st defendant had previously filed an application under Nairobi High Court Misc. Application No. 236 of 2018 and which application was on 20th November, 2018 dismissed by Honourable Lady Justice Kamau on a preliminary objection, hence the present suit and application are a mere attempt to salvage the 1st defendant's pleadings in the abovementioned suit. The 2nd defendant also contended that the 1st defendant lied under oath to having not executed the letter of engagement in question, hence the need to have the corporate veil of the plaintiff lifted.

3. In respect to grounds (iii) and (iv), the 2nd defendant took the position that an application intending to have a retainer set aside such as the one in this instance can only be brought under the provisions set out under those grounds, which is by way of Chamber Summons and within one (1) year of the date of making the agreement or within three (3) months after demand for payment by the relevant advocate.

4. Mr. Wachika counsel for the 2nd defendant in reiterating the contents of the filed submissions, argued that the suit is defective for failure to comply with the provisions set out under Sections 45(2) and (2A) of the Advocates Act as read together with Order 52, Rule 3(1) of the Civil Procedure Rules. He went ahead to submit that the orders sought in the plaint do not coincide with the subject matter.

5. The plaintiff on its part submitted that the suit is properly before this court since the parties in the present instance are not the same as those in Nairobi High Court Misc. Application No. 236 of 2018 since the plaintiff was not a party therein. The plaintiff went further to contend that no advocate-client relationship existed between itself and the 2nd defendant for Sections 45(2) and (2A) of the Advocates Act to apply since the plaintiff at no point instructed the 2nd respondent to pursue funds on its behalf. Consequently, the plaintiff urged this court to dismiss the preliminary objection.

6. Its submissions were orally highlighted by *Mr. Ikuu* advocate who argued that the suit does not fall within the purview of Section 45 of the Advocates Act as alluded to by the 2nd defendant, restating that the 1st defendant had no authority to engage the professional services of the 2nd defendant or enter into any retainer agreement with him. The counsel was careful to reiterate that the *sub judice* rule cannot apply in the present instance.

7. Through her submissions, the 1st defendant supported the plaintiff's position that there is no co-relation between the present matter and Nairobi High Court Misc. Application No. 236 of 2018, hence the *sub judice* rule has no place here by virtue of the fact that the plaintiff was not a party to the earlier case.

8. *Mr. Okatch* counsel for the 1st defendant essentially relied on the filed submissions save to add that the alleged defect of the plaint was not at all explained in the preliminary objection.

9. I have cautiously considered the grounds presented in the preliminary objection and the rival submissions. It is worth noting that a preliminary objection is premised purely on points of law. The court in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* appreciated this when it held thus:

“A Preliminary Objection is in the nature of what used to be a demurrer. 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.”

10. Having taken the above into account, I will first address ground (i) of the preliminary objection. Therein, the 2nd defendant has challenged the validity of the suit and application based on the reasons summed up hereinabove. It is noteworthy that the applicability of the *sub judice* rule has been controverted by both the plaintiff and 1st defendant. In a bid to ascertain the correct position, this court would be required to delve into the substance of both the present case and Nairobi High Court Misc. Application No. 236 of 2018 to ascertain whether the same involve the same parties and subject matter. That being the case, I am doubtful that this ground would constitute a preliminary objection in the definition of the term. The said ground cannot therefore stand.

11. As earlier indicated, ground (ii) was abandoned by the 2nd defendant and I will therefore not seek to address it in this forum.

12. I am now left with grounds (iii) and (iv) of the preliminary objection. Without going into the merits of the application and opposing arguments, I am able to ascertain that the issue of retainer has been brought to question, as has the applicability of the cited provisions. It is thus obvious that the court would have to dig deeper into the substance of the application and suit as well as investigate the relevant evidence adduced in order to determine the true position. In the premises, I find that the said grounds cannot be raised as a preliminary objection and automatically fail.

13. Consequently, the preliminary objection is hereby dismissed with no order as to costs.

Dated, signed and delivered at NAIROBI this 2ND day of OCTOBER, 2019

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant