



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 159 OF 2019**

**AFRICABS LIMITED ..... APPELLANT**

**VERSUS**

**TONY KARIMI T/A SPERO AFRICA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of a preliminary objection dated 3<sup>rd</sup> April 2019 which was taken out by the respondent challenging the competence of the appellant's appeal on grounds that the appeal was lodged by the firm of Stanley Henry & Company Advocates which did not have instructions from the appellant to institute and prosecute the appeal. The respondent contends that the appeal amounts to an abuse of the court process and ought to be struck out.

2. The preliminary objection was prosecuted orally before me on 29<sup>th</sup> July 2019. Learned counsel *Mr. Njunge* who represented the respondent urged the court to find that the firm of Stanley Henry & Company Advocates which lodged the appeal is not properly on record for the appellant and does not have audience before the court; that in the proceedings before the lower court, the appellant served the respondent with a notice to act in person on 20<sup>th</sup> April 2018 and that subsequently, a consent was executed between the appellant and the respondent which settled the matter in the lower court fully; that it was after that consent was recorded that the advocates purporting to represent the appellant filed the current appeal.

3. To further buttress his position, the respondent claimed that the said firm of Stanley Henry & Company Advocates (hereinafter the advocates) had already filed a bill of costs for taxation which proves that the relationship of advocate/client has already been terminated.

4. In response to the preliminary objection, learned counsel *Mr. Maina* who appeared for the appellant submitted that the appeal was filed to challenge the lower court's ruling delivered on 2<sup>nd</sup> March 2018 which determined an application which had attacked the validity of the notice to act in person filed by the appellant and the consent subsequently executed by him and the respondent; that the preliminary objection is incompetent since it does not raise pure points of law and that although the issue of *locus* of the firm of the advocates has been raised which is a point of law, the advocates were adversely affected by the lower court's decision and therefore had *locus* to be heard on appeal.

5. I have carefully considered the preliminary objection and the rival oral submissions made by learned counsel for the parties. The appellant has argued that the preliminary objection as filed is incompetent since it does not raise pure points of law. To address this issue, it is important to establish what in law constitutes a preliminary objection. In the celebrated case of *Mukhisa Biscuit Manufacturing Company Limited V West End Distributors Company Limited, (1969) E.A. 696*, *Sir Charles Newbold P* at page 701 defined a preliminary objection in the following terms:

***“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.”***

6. The above definition was expounded by *Ojwang J (as he then was)* in *George Oraro V Barak Eston Mbaja, Civil Suit No. 85 Of 1992 [2005] eKLR* when he opined that:

***“A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point”.***

7. Applying the above principles to the present objection, I find that the respondent's main objection to the appeal is that it is incompetent as

it had allegedly been filed by a firm of advocates which was not properly on record for the appellant. This claim is vehemently denied by the advocates. In my view, whether or not an advocate is properly on record for a party is a factual issue which can only be determined by way of evidence. In this case for instance, the court would require to examine the documentation filed in the lower court to ascertain whether or not the firm of Stanley Henry & Company Advocates had filed a notice of appointment of advocates or a notice of change of advocates and if indeed the appellant had filed a notice to act in person as alleged and if so, at what point in time.

**8.** It is thus my finding that though the contention by the respondent in a sense amounts to a point of law, it is a point of law which is blurred by factual details which are contested. As illustrated earlier, a preliminary objection should be based on a pure point of law or points of law which are raised on the basis of uncontested facts which do not require to be ascertained by calling evidence.

**9.** In view of the foregoing, I am satisfied that the preliminary objection raised in this appeal does not meet the threshold of a preliminary objection as defined by the law. In the premises, it is my finding that the preliminary objection dated 3<sup>rd</sup> April 2019 is devoid of merit and it is hereby dismissed with costs to the appellant.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of November, 2019.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Wachira holding brief for Mr. Kabugu for the respondent

No appearance for the applicant

Mr. Salach: Court Assistant