



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HIGH COURT CIVIL APPEAL NO. 102 OF 2018

S K M.....APPELLANT

VERSUS

L M W..... RESPONDENT

RULING

1. Through a Notice of Motion dated and filed in court on 25th September 2018, the Applicant/Appellant herein sought orders staying orders made in Milimani Magistrate Children's court Case No. 160/2018 on 7th September 2018 as well as stay of proceedings thereof pending hearing and determination of the application and appeal.
2. Upon Service of the said application, the respondent filed a replying affidavit sworn on 4th October 2018 by the respondent together with a Notice of preliminary objection of even date and filed the same day challenging the legal representation of the appellant by the firm of Ongincho citing conflict of interest.
3. When the matter came for hearing, Mr. Kamau appearing for the respondent urged the court to first dispose of the preliminary objection as it will determine on whether the firm of Ongincho and Co. Advocates is properly on record as appearing for the appellant. The crux of the preliminary objection although not succinctly set out is that, Mr. Ongincho was familiar and privy to confidential information touching on the facts of the suit herein having been instructed by the appellant to represent her before the lower court on the same subject matter.
4. That having disclosed so much information relating to the case to Mr. Ongincho who eventually never represented her after she withdrew instructions owing to undue familiarity between Ongincho and the appellant, it would be unfair for the firm of Mr. Ongincho to appear for the rival party (appellant) while seized of confidential information she had divulged to him. Mr. Kamau argued that the firm of Ongincho should not appear for the appellant against the respondent who was his former client, hence the suit (appeal and application) should be dismissed on account of conflict of interest.
5. In response, Mr. Kingoina appearing for the respondent vehemently opposed the application terming it malicious, unfounded and an abuse of the court process. Counsel stated that for a suit to be dismissed on a preliminary objection, the same must raise a pure point of law which if upheld will determine the entire suit.
6. In support of his argument, counsel relied on the case of **Kenya Union of Commercial, Food and Allied Workers vs Water Resource Management Authority and Another (2015 eKLR)**. Mr. Kingoina further asserted that there was no proof that the respondent had at any one time instructed the firm of Ongincho to represent her in any case.
7. That an attempt to instruct counsel which terminates prematurely is not a brief to stop a counsel from representing any other person in a related matter. Counsel contended that the fact that Mr. Ongincho never represented the respondent before the lower court is enough proof that he had not known the appellant before. Learned counsel urged the court to dismiss the preliminary objection.
8. I have considered the preliminary objection herein and oral submissions by both counsels. It is the respondent's contention that at one time she had intended to instruct the firm of Ongincho & Co. Advocates to represent her in filing a children's case against the appellant but later discovered that Mr. Ongincho Advocate was in constant communication with the appellant then the intended defendant. That by the time the instructions were withdrawn, a lot of confidential information had been disclosed to Mr. Ongincho. That his appearance for the appellant at this stage amounts to conflict of interest hence prejudicial to the respondent.
9. The allegation of conflict of interest in the manner stated is a matter of fact which requires interrogation by way of affidavits and proof. What is before me is an allegation from the bar by counsel without any supporting evidence or proof. There were no receipts issued or any

form of communication between the respondent and the firm of Ongincho to show that at one point the respondent had instructed him to appear for her.

10. A mere attempt or intention if any which is not proved, to be represented by a counsel in a contemplated suit does not perse amount to giving instructions. For a court to dismiss a suit on a preliminary objection, there must be a point of law which is argued on the assumption that all the facts pleaded by either side are correct **(See Mukhisa Bisquit Manufacturing Co. Ltd. vs West End Distributors Ltd (1969) ELA 696)**. I am further guided by the Supreme Court holding in the case of **Hassan Ali Joho and Another vs Suleiman Said Shabal & 2 Others (2014) eKLR** where the court stated that:

“...a Preliminary Objection consists 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”.

11. After examining the grounds upon which the preliminary objection is anchored and the oral submissions by Mr. Kamau, I do not find any merit to warrant dismissal of the suit. A preliminary objection should not be used as a necessary evil to try and curtail due process in litigation. It is not a weapon applied on trial and error method and at the same time a short cut to delay expeditious delivery of justice thus usurping the letter and spirit of Article 50 (2) of the Constitution.

12. Accordingly, it is my finding that the preliminary objection dated 4th October 2018 lacks merit and the same is dismissed with costs to the appellant.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2018.

J.N. ONYIEGO

JUDGE