



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 9 OF 2010

STEPHEN MBURU WAINAINA.....INTERESTED PARTY

VERSUS

MARJORIE NJERI KARAU.....APPLICANT

RULING

1. The Applicant herein filed a negligence claim against the Interested party through the firm of Messrs. Mburu Mbugua & Co. Advocates (***Respondent***). Subsequently, on 13th March, 2008, the Applicant instructed the Respondent to take over the matter from Messrs. Mburu Mbugua & Company Advocates. Leave to file that claim out of time was obtained vide Kiambu SPMCC Miscellaneous Suit No. 12 of 2007 and on the same title the claim was heard and judgment obtained by the Applicant against the Interested Party. After entry of the judgment, the Interested party filed this appeal. In her judgment dated 12th June, 2012, Judge Ang'awa (as she then was) held the opinion that Applicant's claim was heard on a miscellaneous application file and was therefore not a suit. She held that the proceedings therein were a nullity. She proceeded to order that the Applicant to file a suit in the subordinate court within 90 days from the date of her judgment. Costs were then awarded to the Interested Party.
2. The Applicant has now filed a notice of motion dated 20th February, 2014 seeking order that:-
 - i. ***The firm of Kembi-Gitura & Company Advocates be granted leave to come on record for the Respondent in place of Respondents.***
 - ii. ***The court be pleased to call on the Respondents to show cause why they should not repay the Applicant the costs of the appeal and of the lower court awarded to the Interested Party.***
 - iii. ***The court to call on Respondents to show cause why client/advocate costs in the appeal and lower court matter herein should not be disallowed as between the said advocates and the Applicant.***
3. The motion is premised on the grounds set out on the face of the application and the supporting affidavit of the Applicant sworn on 21st February, 2014. It is the Applicant's contention that the Respondent was under duty to offer him proper legal guidance and representation as he had no knowledge that the claim was proceeding on a wrong file. He stated that it is expected of the Respondents to have known how to proceed with the matter after taking over it. It is the Applicant's gravamen that he has suffered financial loss due to the professional negligence as he has had to file a fresh suit i.e. Kiambu CMCC No. 138 of 2012 and appoint another firm of advocates to act for him. He further laments that subsequent to the judgment, the Respondents have taxed their costs against him in the lower court and in the appeal in the sum of KShs. 109,600/= and KShs. 81,015/= respectively. He stated that at the time of taxation of the bill of costs on the appeal, he had no legal representation and was not aware of how to proceed save for

- his complaint lodged with the Advocate's Complaints Commission. He stated that his attempt to have the Respondents waive their fees and bear the costs of the litigation was fruitless and he thereby sought this court's intervention through this application.
4. The Respondent raised a preliminary objection to the Applicant's application. The grounds upon which the objection was raised were that the application is incompetent and that this court lacks jurisdiction to entertain it. The preliminary objection was canvassed by way of written submissions.
 5. In their submissions the Respondents raised an issue that upon delivery of the judgment on this appeal, the Applicant was advised to appeal to the court of appeal but he was not for the idea and instead instructed the firm of Kembu Gitura & Company Advocates to take over the matter. That it is upon the Respondents' request for their costs that the Applicant lodged a complaint against them at the Advocates Complaints Commission which matter is still pending. The Respondent contends that the only reason given by the court on appeal was that the matter proceeded on a miscellaneous application. But that the court failed to consider that the Applicant had filed his plaint properly. It was submitted that the plaint was received at the registry, assessed and duly paid for. That the failure by the clerks to allocate the suit a number would not render the proceedings a nullity. It was further argued that professional negligence is a cause of action calling for the filing of a suit wherein particulars of negligence should be given and the Respondent given a chance to respond thereto. It was also argued that it is prejudicial to have this application heard while there is pending a matter on the same issue before the Advocate's Complaints Commission. On the second ground, the Respondent argued that the issue raised in this application in respect to the advocates-client bill of costs should have been raised before the taxing master and that the bills having been taxed, the same can only be challenged by way of a reference and it is for that reason that it is argued that this court lacks jurisdiction.
 6. The Applicant contended that the question of competency of the application or otherwise is a question of fact that cannot be dealt with as a point of law since the history of the case will be at variance. The Applicant cited **Kimaiyo Arap Tiony v. Fredrick Kemei & 4 Others (2006) eKLR**. In this case amongst the grounds raised were that the Applicant did not have locus standi in the suit because he was not the legal owner of L.R. No. 10492/2 and that the suit contravened the provisions of the Physical Planning Act, the Land Acquisition Act as well as the Land Disputes Tribunal Act. The first ground was a question of fact which was subject of proof and the second ground called for bringing the Acts into play facts and evidence would have to be laid before the court. For the aforesaid reasons the court found that the purported points of law were in fact not pure points of law since they called for ascertainment of facts by way of evidence. It is the Applicant's contention that the application before court is premised on paragraph 61 of the Advocates (Remuneration) Order, 2009. That the central issue before court is costs improperly incurred by an advocate and that negligence by advocate is auxiliary to the central issue. On the second ground the Applicant contended that jurisdiction is vested on this court pursuant to paragraph 61 (1) of the Advocates (Remuneration) Order, 2009 to inquire into the conduct of an advocate to enable it adjudicate on the issue of costs.
 7. I have considered the depositions by the parties and the relevant law. It is upon this court to determine whether or not the preliminary objection meets the threshold of what constitutes a preliminary objection. The threshold of a preliminary objection was set out in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696** where it was stated inter alia:-

“So far as I am aware, 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold stated in the same judgment that:

“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 in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. It follows therefore that a preliminary objection ought not raise a pure point of law. It cannot be raised if facts have to be ascertained. The Respondent submitted the Applicant was advised by the Respondent to go on appeal but that the Applicant did not buy the idea and proceeded and hired the services of Kembi Gitura & Company Advocates to take over the matter. This submission was made in justification of their entitlement to costs. This clearly is a question of fact that cannot be dealt with as a point of law. To my mind, that is a fact that requires evidence. For the foregoing reasons, I dismiss the Preliminary Objection. The application be fixed for hearing on merit.

Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

Omondi for the Appellant

Wanjiku h/b for Njoki for the Respondents

N/A for Wahito for the Respondent