



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 5 OF 2018

VICTOR KARANI MKUNZO.....PLAINTIFF

VERSUS

- 1. CHANGAWA SHADRACK MWARO**
- 2. PATTERSON GONA KALAMA**
- 3. MOMBASA CEMENT LIMITED**
- 4. REGISTRAR OF LANDS OFFICE IN KILIFI**
- 5. ATTORNEY GENERAL.....DEFENDANTS**

RULING

1. The Plaintiff filed this suit on 11th January 2018. Upon being served with summons the Defendants entered appearance through different firms of advocates. On 31st January 2018 in particular Messrs Kanyi J & Company Advocates filed a Memorandum of Appearance for Mombasa Cement Ltd, the 3rd Defendant herein. On 9th February 2018 the 3rd Defendants filed their Statement of Defence through the same law firm.

2. Subsequently, on 15th March 2018, the Plaintiff filed a Notice of Preliminary Objection dated the same day stating that he shall raise a Preliminary Objection on a point of law over the representation of the 3rd Defendant by the said Law firm on the ground indicated thereon as follows:-

1) That the Firm of Kanyi Juma (sic) & Company Advocates represented the 2nd and 3rd Defendants/Respondents in executing of the Sale Agreement dated 9th September 2017 and execution and registration of the transfer dated 9th September 2017 in conveyancing of Plot No. Kilifi/Roka/104 and as such representing the 3rd Defendant/Respondent in this suit is against Rule 9 of the Advocates Practice Rules.

3. In submissions filed by the Plaintiff in support of the said Objection, it is argued that the Plot No. Kilifi/Roka/104 which is the subject of this dispute was sold by the 2nd Defendant to the 3rd Defendant vide a Sale Agreement dated 9th September 2017 which Agreement was drawn by the same law firm now representing the 3rd Defendant herein. The Plaintiff contends that such representation is against Rule 8 of the Advocates Practice Rules.

4. The said Rule 8 of the Advocates Practices Rules provides as follows:-

“No Advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

5. Courts in this Country have had numerous occasions in the past to consider and pronounce themselves on the nature of a Preliminary

Objection. In *Hassan Nyanje Charo –vs- Khatib Mwashetani & 5 Others, (Sup Ct. Application No. 23 of 2013)* the Supreme Court endorsed the long-standing jurisprudence set in the oft-cited *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors ltd (1969) EA 693) Case* as follows:-

“...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 suit to arbitration....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.” (Emphasis added).

6. Arising from the foregoing, it is clear that a preliminary objection may only be raised on a pure point of law and if the outcome thereof may dispose of the suit and thus save on judicial time. 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.

7. In the matter before me, it is the Plaintiff who is raising a preliminary objection. He does not claim the Defence raised may prejudice him in any way. Instead he raises the possibility, without any proof whatsoever that, the “law firm” that drafted the defence may be called as a witness in this case. Such an objection is with respect, absolutely misconceived as it has no potential whatsoever of determining the suit.

8. At any rate, the Objection is based on Rule 8 of the Advocates Practice Rules which in itself is not couched in mandatory terms and does not absolutely bar an Advocate who has acted in a conveyancing matter from representing a person in a Court or tribunal. As it is, this Court has no reason at this stage to as it were predict that any advocate from the law firm has or will have reason to believe that he/she may be required as a witness to give evidence.

9. Accordingly, the Notice of Preliminary Objection dated 15th March 2018 has no basis in law. It is misconceived and a waste of time. The same is struck out but as the Defendant did not file any response thereto, I make no order as to costs.

Dated, signed and delivered at Malindi this 28th day of March, 2019.

J.O. OLOLA

JUDGE