



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC MISC. NO. 24 OF 2008**  
**IN THE MATTER OF ADVOCATES ACT**

**BETWEEN**

**DUSAN CONSTRUCTION LIMITED..... PLAINTIFF**

**-VERSUS-**

**S. M. MUNIKAH T/A**

**MUNIKAH & COMPANY ADVOCATES.....DEFENDANT**

**RULING**

1. In a rather uncanny turn of events, the Plaintiff has raised a Preliminary Objection. Briefly and in perspective, the Plaintiff by way of an Originating Summons filed on 24<sup>th</sup> November, 2008 sought to prompt the Court's supervisory jurisdiction over one of its officers, the Defendant.
2. The Plaintiff who was once the Defendant's client sought to have the Defendant pay the Plaintiff's current Advocate the sum of KShs.10,000,000/= to be held by the latter Advocates as stake and in medio pending the completion of the transaction in respect of L. R. No. 209/14475 and 14476. The Plaintiff also sought an account from the Defendant generally, and in the alternative, besides seeking the Court's help in having the Plaintiff's file with the Defendant handed over to the Plaintiff's current Advocates. The Plaintiff's suit was brought under the provisions of the then Order LII of the Civil Procedure Rules.
2. The Defendant subsequently filed a Replying Affidavit on 7<sup>th</sup> January, 2009. The Replying Affidavit did not contest the fact that the Plaintiff was once the Defendant's client but contested the status of the deponent of the Affidavit in support of the Originating Summons. After a brief narration of the good times between the Plaintiff and the Defendant, the Defendant stated that only the sum of KShs.8,000,000/= had been paid to him on account and that a substantial sum had been spent by the Defendant to the Plaintiff's benefit and credit. The Defendant then concluded that he could only furnish a full statement of account once his fees and disbursement were assessed. The Defendant further lay an Advocate's lien claim over the Plaintiff's files with him until full settlement of all his fees.

3. Even though the Originating Summons filed herein was one returnable before a Judge in Chambers and expected to be disposed of in a nippy manner, the Plaintiff on 12<sup>th</sup> January, 2009 asked for the file to be placed before a Judge for directions. The matter was consequently scheduled for directions on 11<sup>th</sup> May, 2009 but it is not clear from the court file what transpired .
4. The court file also seems to have gone missing sometime in 2009. It was reconstructed and the parties prepared the case for trial. Lists of documents were filed. Notices to produce were exchanged. Requests to undertake formal discovery were served. A Statement of Agreed Issues was filed by the Plaintiff. All these preliminaries were undertaken by the parties between 2009 and 2013. And then the Plaintiff filed a Notice of Preliminary Objection to the trial, just before the trial date was fixed.
  4. A close reading of the Notice of Preliminary Objection filed by the Plaintiff and the Submissions filed by the Plaintiff would reveal that what the Plaintiff actually seeks is a striking out of the Defendant's case. The Plaintiff seeks judgment as prayed for in the Originating Summons.
5. In the Plaintiff's Submissions, which I have closely read the Plaintiff holds the view that the line of defences advanced by the Defendant are untenable. Further the Plaintiff holds the view that in the absence of any denial by the Defendant of receipt of the amount of KShs.10,000,000/=, there is an admission with the consequent effect that judgment ought to be entered in favour of the Plaintiff.
6. The Defendant of course has opposed the Preliminary Objection and submits that his defences are tenable. The Defendant also submits that the threshold of Preliminary Objections as set out in the case of **Mukisa Biscuits Manufacturing Limited –vs- West End Distributors Ltd [1969] E. A. 696** has not been met. The Defendant also relied on the case of **Shamsi Hauliers Limited –vs- Kenya Revenue Authority [2012]eKLR** to illustrate the point that the Preliminary Objection by the Plaintiff is not well founded.
7. Two issues arise. Firstly, do the objections raised by the Plaintiff constitute a proper Preliminary Objection. Secondly, is there merit in the Preliminary Objection.
8. In the case of **Mukisa Biscuits Manufacturing Company Limited –vs- West End Distributors Limited [1969] E. A.**, the Court of Appeal was very clear that for a matter to be determined as a preliminary point it must constitute a demurrer. It must not invite the Court's discretion or a determination of rivaling facts. In the Plaintiff asking the Court to find as a preliminary point that the Defendant's points of defence are untenable and constitute abuse of process is basically to prompt the Court's discretionary jurisdiction.
9. Secondly it is now evident that the facts are not entirely without controversy as between the two parties. For instance the Plaintiff insists that the Defendant received Kshs.10,000,000/= from the Purchasers whilst the Defendant quips that he only received KShs.8,000,000/=. The Plaintiff does not produce any irrefutable proof of the allegation as to Kshs.10,000,000/=. That is certainly a matter that cannot constitute a preliminary issue to be determined summarily as it goes to the very crux of the case. Placing reliance on the case of **Omondi –vs- National Bank of Kenya Limited and 2 other [2001] KLR 579** I would hold that the Plaintiff's Preliminary Objection does not meet the threshold of what ought to constitute a Preliminary Objection.
10. The preceding aside, the Plaintiff's Preliminary Objection was intended to lock out the Defendant from the proceedings. It is to be noted that the Preliminary Objection was filed some six or so years after the suit was filed. The delay in filing this Preliminary Objection has not been explained.
11. Umpteen times it has been stated that the power to lock out a party from proceedings should be exercised with extreme reticence. Striking out of pleadings, which effectively is what the Plaintiff

is asking this Court to do when the Plaintiff submits that the Replying Affidavit alongside the lines of defence are not tenable, requires a huge degree of caution from the Court. If the Defendant's case is to be ignored and judgment simply entered as sought by the Plaintiff one might be tempted to claim that the right to and access to justice under the Constitution (Art. 45) is being impeded. In my view and has been stated previously the power to strike out and consequently lock out parties from the judicial process should be exercised only in genuine, serious and obvious cases “: see” **The Joey” [2000] 1 EA 246 .**

12. In the instant case, I view it that the legal position is clear.

13. Any Respondent to an application or suit under Order 52 Rule 4 of the Civil Procedure Rules is entitled to raise the defence of a lien, an Advocate's lien. Sub rule (3) states explicitly that an Advocate impleaded by his client or former client may raise by way of an allegation a claim for costs and the Court may thereafter make an order for the taxation and payment or security the payment thereof and the protection of the Advocates lien, if any, as the Court deems fit. It is evident from a liberal reading of the rule that the Court is enjoined to investigate the facts rather than act draconically and shut out either party as pithy and derisory as the Advocate's claim may be. The subsection, in fewer words, recognizes the supremacy of an Advocate's lien. The Defendant herein has raised the issue of his lien. I do not think it ought to be trifled. The parties should go to trial.

14. I hasten to add that this matter is relatively old. Civil disputes, where resources allow, should be determined expeditiously and fairly. I would consequently direct that the Originating Summons be listed for hearing on a priority basis and in any event not later than sixty days from the date of this ruling.

15. The Preliminary Objection is otherwise hereby dismissed and the costs thereon reserved to abide the outcome of the trial.

16. Orders accordingly.

**Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of January, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

.....for the Defendants/Respondents