**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 397 OF 2012**

TOM WASIKE NANGUMBA……..……**CLAIMANT/RESPONDENT**

**VERSUS**

THE COCONUT LIMITED……...……..**RESPONDENT/APPLICANT**

**RULING**

1. The Respondent filed an Application on 25th June 2013 seeking various reliefs. The Application was heard *ex parte* in the first instance by my sister the Hon. Lady Justice Linnet Ndolo. It was scheduled for hearing *inter partes* on 2nd July 2013. Just before the case could proceed for hearing of the Notice of Motion Application by the Respondent, Mr. Kimathi for the Applicant sought directions of the Court on a Preliminary Objection he had been served with in Court. Mr. Nyabena for the Claimant/Respondent had filed a Notice of Preliminary Objection after late service on 1st July 2013. The Court gave directions that the Preliminary Objection would be heard first.

2. Mr. Nyabena urged the Court that the Application dated 25th June 2013 was incompetent and a non-starter as the application had been filed by the law firm of Kenyatta Odiwour & Co. Advocates who were not properly on record. He submitted that the Judgment of the Court was delivered on 23rd November 2012 and for the said firm to be on record, it was necessary for the incoming firm to obtain an order of the Court or a duly executed consent from the previous advocates on record. He submitted that when the matter came before this Court *ex parte* in the first Application which precipitated the second Application, a specific order was made that service be effected on the firm of Kwengu & Co. Advocates. Mr. Nyabena submitted that though they were served on 19th June 2013 with the initial Application, the firm of Kwengu & Co. Advocates was not served. He submitted that in addition, the firm of Kenyatta Odiwuor & Co. Advocates filed a Notice of Change of Advocates which purported to replace Mr. Nyabena's firm and not Kwengu & Co. Advocates. He submitted that he had never acted for the Respondent for the firm of Kenyatta Odiwuor & Co. Advocates to replace him. He also submitted that there was late service contrary to Rule 16 of the Industrial Court (Procedure) Rules 2010. He submitted that he did not have ample time due to the late service by the Respondent/Applicant on 1st July 2013 at 3.30pm. He submitted that the late service in this instance was in continuation of a late service and that the Court should decline to grant the advocates audience as they are strangers and have not come on record properly.

3. Mr. Kimathi was opposed to the Preliminary Objection and took offence with the serious assertions made by Mr. Nyabena that the firm of Kwengu & Co. Advocates were not served. He submitted that Mr. Nyabena should desist from saying the firm of Kwengu & Co. was not served and that if the said firm was interested it would come to Court as interested parties or *amicus curiae.* Mr. Kimathi denied that there was a pattern of late service and submitted that the dismissal

of the earlier Application was due to late arrival of Counsel. He submitted that the Notice of Change of Advocates filed on 10th June 2013 seemed to suggest the firm of Kenyatta Odiwuor & Co. Advocates was replacing Nyabena & Co. Advocates. He submitted that was a typographical error and that senior counsel should not pick on such small errors committed by staff of the firm of Kenyatta Odiwuor & Co. Advocates. He submitted that despite the fact that there is a decree and Rules provide that leave should be sought, Notice was filed albeit with typographical error. If Notice of Change filed was insufficient, Mr. Kimathi submitted that the Application which was prior had prayer 2 which sought that the firm of Kenyatta Odiwuor & Co. Advocates be allowed to come on record for the Respondent/Applicant in place of the firm of Kwengu & Co. Advocates. He submitted that when he appeared before the Hon. Lady Justice Ndolo, he obtained orders which were on the Court file and which were an implied fact that the prayer 2 of the Application of 25th June was allowed. The prayer, it was submitted, regularises the fact that he never sought a consent as that was the Application which sought their coming on record. Mr. Kimathi submitted that under the Constitution, the Respondent had a right to counsel of his choice and that Rules are the handmaidens of justice and not fetters. He submitted that the court should ensure there was substantive justice. He submitted that the application was not an abuse of the Court process as it sought to uphold substantive justice. He additionally sought extension of the Orders granted by Lady Justice Ndolo if the Court was to defer the Ruling to another date.

4. Mr. Nyabena in a brief reprise started by stating that he was shocked that there were orders granted on 25th June 2013. He submitted that no orders had been extracted and served upon the Claimant's counsel. He submitted that if there are orders the Court should decline to extend them as to do so would be to visit an injustice on the Claimant who was not served. He submitted that the Respondent/Applicant's Counsel had admitted to the error in the Notice of Appointment and that the error was not typographical but fundamental as it goes to substance and the basis of the Application. He submitted that if the firm of Kwengu & Co. Advocates were not served it was a flagrant disobedience of Court orders. He submitted that if they did not comply the application was for dismissal as it was an abuse of the Court process.

5. Having heard the parties, I reserved Ruling for today and I proceed to render the same.

6. The Preliminary Objection filed by Mr. Nyabena was on three prongs:-
    1. That the Application is incompetent and a non-starter.
    2. The Application was served late contrary to the Industrial Court Rules
    3. The Application is a gross abuse of the Court process.

7. The three points were couched in broad terms and the submissions by Mr. Nyabena crystalised the points of law he was raising. He submitted that the Application was incompetent as the Advocate had not obtained leave of the Court or in the alternative, the consent of the advocate previously on record. Secondly, the Application had been served contrary to the provisions of Rule 16 of the Industrial Court (Procedure) Rules 2010 and finally the Application was an abuse of the Court process.

8. In order to fit the bill of a Preliminary Objection, the principles set out in the oft cited case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696.** It was decided in that case that a preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. In the case before me, the points taken are points of law. I am emboldened in my assertions by the finding in the case of Mukisa Biscuits v. West End Distributors *(supra)*. A preliminary objection per Law J.A. was stated to be thus:-

*"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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

Charles Newbold P. stated in the same judgment:-

*"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."*

9. In this case, the objection taken by Mr. Nyabena arises out of the pleadings filed. The objections made do not seek the exercise of the Court's discretion. It is a well taken preliminary objection. I will proceed to determine whether the objections taken are sufficient to dislodge the Application filed by the Respondent/Applicant.

10. The Respondent has come to Court twice *ex parte* and whereas the main Application which was objected to was the one of 25th June 2013, an attack was mounted on that of 10th June 2013 which is spent having been dismissed. I will therefore concentrate on the current Notice of Motion Application dated 25th June 2013 which sought to re-instate the earlier Application dated 10th June 2013. The Application was filed under Certificate of Urgency and urged before the Hon. Lady Justice L. Ndolo on 25th June 2013. The Learned Judge heard the Application and granted the following Orders:-
    1. That the application be and is hereby certified Urgent.
    2. That the Respondent/Applicant do serve the Claimant forthwith
    3. *Inter partes* hearing on 2nd July 2013 before Hon. Justice Nzioki wa Makau at 9.00 a.m.
    4. That a temporary stay of execution is hereby granted and to lapse on 2nd July 2013 at 9.00 a.m.

11. The Order was extracted on 1st July 2013 as per the Court record. It is submitted that the Claimant is unaware of the existence of this Order. I do not doubt that. The reasons are clear. The Claimant would have been aware that the orders granted by the Hon. Lady Justice L. Ndolo were that the Claimant was to be served forthwith. That would definitely have meant the Claimant ought to have been served at the latest on 26th June 2013 with the Application dated 25th June 2013 upon which some orders had been issued. The Orders granted were specific. The Respondent/Applicant decided not to serve until 1st July 2013 in the late afternoon, this to my mind amounts to sharp practice. It is conduct unbefitting an Advocate of the High Court of Kenya who swore the oath before the Chief Justice which oath states that the Advocate will at all times uphold the rule of law and administration of justice and without fear or favour discharge the duties of an advocate. The failure to serve or even observe an Order of the Court is gross failure to uphold the rule of law and administration of justice. It acts as a feter to the administration of justice when a party comes to Court and gets clear unambiguous orders of the Court and thereafter fails to ensure it obeys the Order. This is worse when the defaulter is the Advocate! Mr. Kimathi is the one who appeared before the Hon. Lady Justice L. Ndolo. He was aware of the pronouncement by the Court. He cannot be heard to say he was not sure of the order of the Court. He sought their extension. It presupposes he knew what Orders were granted. He surely was not being true to his oath when he failed to ensure prompt service as ordered, he also failed to be candid and advise the Court the Orders he sought extension for, and to which I did not consent to extend, were already spent when he appeared before me at 9.30 am.

12. Mr. Nyabena tried to direct the Court to the provisions of the Industrial Court (Procedure) Rules 2010 on service but could not find the particular Rule the Claimant/Respondent wished to rely on for the proposition that the Respondent served the pleadings late.

13. I have scoured the Rules of this Court and find no rule comparable to the Provisions of Order 51(13)(3) of the Civil Procedure Rules 2010 which provides:-

*(3) The Application shall be served on respondent together with the list of authorities, if any not less than seven clear days before the date of hearing.*

In the matter before me, no attempt was made to even come close to this outer limit set by the Civil Procedure Rules 2010. Granted that the Industrial Court (Procdure) Rules 2010 are silent on the issue of service, it is anathemic to the administration of justice to hold off service until 3.20p.m. on the date immediately preceding the hearing. I would not be remiss to hold as I have done above that that is sharp practice in its truest form.

14. The first two objections by Mr. Nyabena while fitting the broad description of Preliminary Objection, and though seemingly merited at first flush are not for grant. It requires more scrutiny of the third limb of his objection. He submits that the Application is an abuse of the Court process. The Respondent/Applicant obtained some relief before the Hon. Lady Justice L. Ndolo. The learned Judge specifically Ordered that the Application be served forthwith. **Black's Law Dictionary Ninth Edition** defines *forthwith* as – **immediately, without delay. Directly ; promptly; within reasonable time under the circumstances.** There is nothing before Court which suggests that the service was done forthwith. It was not done at once, right away or straightaway without delay. The Respondent having failed to serve the Application forthwith or within reasonable time as ordered, I hold that to allow such an Application to proceed would bring the administration of justice into disrepute. It definitely is not right that there would be no sanction at all for failure to serve the Application forthwith as ordered by the Court. The delay by the Respondent in serving amounts to abuse of the Court process.

15. The upshot of the foregoing is that the Preliminary Objection by Mr. Nyabena is upheld on the third limb. The Respondent's Notice of Motion Application dated 25th June 2013 is dismissed with Costs.

It is so ordered.

Dated and delivered at Nairobi this **5th** day of **July** 2013

**Hon. Mr. Justice Nzioki wa Makau**

**Judge**