REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

Cause 1589 of 2010

SETH PANYAKO.....CLAIMANT

Vs

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

RULING

The initial submissions were made on 7th November 2011 before Judge Kosgey. He has since stopped sitting and the proceedings herein went on before the appointment of the Industrial Court Judges in terms of Section 33 of the Industrial Court Act 2010. Upon the swearing in of 11 judges of the Industrial Court on 13th July 2012, this Court was properly constituted in terms of Article 162 of the Constitution. After notifying parties of the development, the two sides by consent agreed to proceed from where the former judge had left the matter. I proceeded to hear the response by Miss Brenda Kamau (hereafter Miss Kamau) and the reprise by Mr. Seth Panyako (hereafter Mr. Panyako).

In the main, the Claimant Mr. Panyako has made comprehensive submission on the party represented by M/s Ndirangu Kamau Advocates – Kenyatta National Hospital (hereafter KNH). He has stated that KNH lacks standing as the correct party, in his view, is Kenyatta National Hospital Board (hereafter KNH Board). He has further submitted that the Advocate for the Respondent Miss Kamau should not appear since she is not properly instructed as no authority under seal from the KNH Board has been exhibited. He has revisited an issue which had been determined against him as regards the filing of documents out of time.

The nature of submissions made before Judge Kosgey were stated to be preliminary on points of law. The same was made without any notice to the opposite party at a scheduled hearing date.

Let me at the onset, restate the oft recited refrain on Preliminary objections. A preliminary objection is in the nature of what used to be a *demurrer*. It raises a pure point of law and no more. A preliminary objection consists of a point of law which has been pleaded or which arises by very clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the matter once and for all. Examples of preliminary objections are such as objection to the jurisdiction of the court, or a plea of *res judicata*, 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 and the like.

The aim of a preliminary objection is to save the court time and ensure the parties do not needlessly go into the merits of an application because there is a point of law that will dispose of the matter *in limine* (at the start). It cannot be raised if any fact has to be ascertained or if the exercise of judicial discretion is

sought.

A preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. I am emboldened by the finding in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696.** 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."

In view of the above what was argued was NOT a Preliminary Objection. It cannot and is not by any stretch of the imagination a Preliminary objection. This Court is being invited to ascertain whether the counsel for the Respondent is properly instructed. This is a matter that clearly requires the ascertainment of facts.

Submissions were made on the inadmissibility of documents as they were allegedly drawn by an unqualified person. It was stated by the Claimant that they were in contravention of Advocates Act Sections 33, 34 and 35. The Claimant submitted that Section 2(b) of the Labour Relations Act 2007 sets out who the authorized representatives are and it was his submission that the deponents of the affidavits filed by the Respondent were NOT authorized representatives as per the law. He stated that the depositions contravened the law and in particular offended the provisions of Section 22 of the Industrial Court Act 2010. The documents objected to had alterations and white out etc. rendering them inadmissible.

Counsel for the Respondent having been taken by surprise was not able to respond and sought time to prepare a response. The matter was adjourned to 7th December 2011. On 7th December 2011 Counsel for the Respondent was unwell and the Court in declining to hear the Claimant *ex parte* noted that a medical certificate had been produced to confirm the inability of Counsel to attend. Matter was put off to 24th January 2012 and on that day Counsel was not well having taken ill and admitted to hospital. The case was rescheduled to 26th July 2012 and it was listed before me on that day hence the continuation of the matter to this point.

When the matter was called out on 26th July 2012, the Claimant made serious allegations regarding the non-payment of costs ordered on 24th January 2012. The Court was able to establish that there was correspondence between the parties contrary to allegation by the Claimant. As there was no order for payment before the hearing, the Court did not accede to the demand that payment must precede the further hearing of the Preliminary Objection. The Court then proceeded to hear the Counsel for the the Respondent.

Miss Kamau submitted that the firm on record Ndirangu Kamau & Co. Advocates was competent to file documents. She stated that she is a partner in the said firm and she is duly qualified to act as an advocate. As regards the party sued, she conceded that the Claimant has sued the Kenyatta National Hospital Board. Her response was that the Board of Directors of Kenyatta National Hospital is the respondents to the claim but it has not been described as such in the Statement of Claim and admittedly so in the Memorandum of Reply.

The Memorandum of Claim filed contemporaneously with the Certificate of Urgency Application on 17th

December 2010 was against Kenyatta National Hospital. It was NOT against the Kenyatta National Hospital Board. An amended Memorandum of Claim was filed 16th February 2011 inserting the word Board in the Claim as well as the other portions. No formal application is on the file for this amendment but the Court will not say more at this stage. The Respondent did not file an amended Response to Claim.

A major portion of the submissions by the Claimant was on the allegations that the Advocate for the Respondent is unqualified.

It is instructive to establish what the law states in respect to unqualified persons.

Sections 33, 34 and 35 of the Advocates Act, cap 16 Laws of Kenya provide as follows:-

33. Any unqualified person who wilfully pretends to be, or takes or uses any name, title, addition or description implying that he is, qualified or recognized by law as qualified to act as an advocate shall be guilty of an offence.

34. (1) No unqualified person shall, either directly or indirectly, Unqualified person take instructions or draw or prepare any document or instrument – not to prepare

(a) relating to the conveyancing of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to–

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or certain documents or instruments.

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to–

(a) a will or other testamentary instrument; or

(b) a transfer of stock or shares containing no trust or limitation thereof.

35. (1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34 (1) shall at the same time endorse or cause to be endorsed thereon his

name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate:

Provided that, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm.

(2) The Registrar, the Registrar of Titles, the Principal Registrar of Government Lands, the Registrar-General, the Registrar of Companies and any other registering authority shall refuse to accept or recognize any document or instrument referred to in section 34 (1) unless such document or instrument is endorsed in accordance with this section.

The Counsel who has appeared for the Respondent is Brenda Kamau Advocate. She is stated as per the LSK website to be as follows:

Name Kamau Brenda Njoki P105 Number P.105/3395/97 **Status Active ABA Status Life Work Place** NDIRANGU KAMAU ADVOCATES **Physical Address** JUBILEE INS. EX. BLDG., 5TH FLR., DR. NO.530, KAUNDA ST. **Postal Address** 47529-00100 **Town** NAIROBI

The sections above cannot fully apply to a duly admitted advocate of the High Court of Kenya who has not been struck off the roll or joined the bench. This Court therefore finds no merit in the submissions made about Brenda Kamau being an unqualified person. The Court holds that Brenda Kamau is duly qualified as an advocate and has, to boot, a current practicing certificate issued by the Chief Registrar of the Judiciary for this year 2012.

The submission on the document drawn places the issue of the applicability of Section 35. In this case there is a document whose place of drawing and the person drawing it is unknown. This is not acceptable in law. Section 35 is explicit.

35. (1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34 (1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate.....

No authorities were cited in support or opposition of the submissions relating to the provisions of Section 35. The Court however did some research and there is a plethora of cases emanating from the High Court – courts of equal jurisdiction as mine and thus persuasive.

In the case of **Geology Investments Ltd v. Rogonyo Njuguna & 2 Others t/a Turuti Service Station – Milimani HCC 1067 of 2002 (unreported)** the Hon. Mr. Justice F. Azangalala on 3rd March 2004 cited with approval the decision of Ringera J. (as he then was) in **Microsoft Corporation v. Mitsumi Computer Garage Ltd and Anor Nairobi HCCC 810 of 2001 (unreported)** where at page 15 the learned and eloquent judge stated thus:

"In my opinion, where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards it would be to elevate form and procedure to a fetish to strike out the suit."

In my opinion, this is the crux of the matter. Are we to elevate form to a fetish or do we allow the handmaidens of justice serve? When reflected against Article 159 (d) of the Constitution which provides as follows:

159. (d) justice shall be administered without undue regard to technicalities.

To my mind this is a clear echo of the finding of Ringera J. (as he then was) in the Microsoft case above.

Azangalala J. in the case cited above held thus:

"From the authorities I see a trend to sustain suits rather than strike them out. This is as it should be as courts should lean in favour of doing substantial justice to the parties rather than straight jacket adherence to rules of procedure. In the present suit there is a verifying affidavit save that the Advocates who drew the same did not state their names and their place of address. An omission of this nature should not lead to striking out of the Plaint as such an action would not serve the ends of justice."

I am persuaded by the findings of my learned brother Judges in the cited cases. In this case, the best course that meets the ends of justice is to strike out the offending Affidavit and require the Respondent to file the correctly drawn affidavit within 7 days.

The documentation filed by the Respondent was a bit untidy with plenty of whiteout. This was not *per se* unconscionable but is a practice to be avoided. The clumsy alterations though not on the body of the documents make them unsightly and detract from the focus which is the content on the document. In the premises, the party in breach should ensure better copies are annexed while complying with the order of the Court.

In parting, it is clear that the parties have spent a great deal of time on dealing with peripheral matters and have skirted the deeper issues for determination. The balance of the claim will abide a full hearing on the merits on a date to be fixed at the Registry at a convenient date between the parties.

As the Claimant has succeeded in part, he shall have the costs of this application.

Dated and **Delivered** at Nairobi this 25th day of September, 2012

Nzioki Wa Makau
JUDGE