REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Suit 77 of 1997

NATIONAL BANK OF KENYA LIMITED .... PLAINTIFF

VERSUS

PETER KIPKOECH KORAT)
JOSEPH SERONEI) .... DEFENDANTS

RULING

National Bank of Kenya Limited (hereinafter called 'the bank') instituted this suit against Peter Kipkoech Korat and Joseph Seronei in March 1997. It claims the sum of K.Shs. 2,590,499.85 from both the defendants as well as interest at the rate of 32% p.a. from 23/10/1996 till payment in full. It would appear from the pleadings that Korat was the principal borrower in a loan whose repayment was guaranteed by Seronei, who I shall now refer to as 'the defendants'.

The bank is represented by the firm of Nyairo & Company Advocates.

The two who have denied the indebtedness, claim to have repaid the loan in full and aver that the plaint is bad in law and should be struck off.

In September 2001, the bank moved this court in an application for summary judgment against the two, who have now raised a preliminary objection to the whole suit. It is their prayer that the suit be struck off for being incompetent, and though their preliminary objection was originally based on nine grounds, their learned counsel, Mr. Karira, decided to abandon all except two which he would combine and urge as one, these being that the suit is not maintainable on account of conflict of interest between the plaintiffs advocates and the defendants and secondly that the suit contravenes section 134 of the Evidence Act and based on the two grounds it ought to be struck out.

The aforementioned section 134 stipulates that:

"(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure-

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

(2) The protection given by subsection (1) shall continue after the employment of the advocate has ceased."

Mr. Kuloba, learned Counsel for the bank was however of the view that the preliminary objection is not sustainable, as the issues of conflict of interest cannot be raised by way of a preliminary objection. I am inclined to agree with him as the legal position regarding preliminary objections was well laid down in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors [1969] EA 696, in which Law J.A stated that "..... *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* .....". It is clear to me that the issues raised by the defendants pertaining to representation of these parties, would require evidence and in which case they can not be entertained by way of a preliminary objection as relations cannot be inferred and on that ground alone, this objection cannot be sustained.

But I could be wrong in the above finding, and I have therefore taken the above submissions and the cited provisions of the law into account. I have also had to look at the pleadings on record with a view to establishing whether this preliminary objection could otherwise be sustained.

Admittedly the application for summary judgment was also filed by the firm of Nyairo & Co. Advocate. To the supporting affidavit by the Bank's Branch Manager at Eldoret, is

attached several correspondence and agreements around which this preliminary objection revolves.

The letter of 14/5/1990, by the Bank to the 1st defendant was copied the firm of Nyairo and Company, whose A.M. Nyairo also witnessed the execution of the two Deeds of Guarantee of June and October 1990, by the 2nd defendant. The same firm of advocates issued a demand letter of 23/10/1996, to the 2nd defendant, which clearly stated that the said firm was acting on behalf of its client the bank. There are also letters of 13/3/92, 10/9/1992 and 4/12/1992 by the 1st defendant to Nyairo & Co, in which the said defendant pleaded to be given extra time within which he could redeem his loan with the bank. It is clear from the above correspondence that the said firm of advocates acted for the bank. There is no indication whatsoever that it represented the defendants too, and on this ground alone preliminary objection cannot be sustained.

The other issue which also arises from this objection is that the aforementioned A.M. Nyairo may be called as a witness in this suit and for which reason his firm should not act for the bank in this suit, and in this connection the defendants plead Rule 9 of Advocate's Practice Rules in support of their preliminary objection. The same stipulates that "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."

Granted, he may be called as a witness, but as well put by Mr. Kuloba, he is just one of the advocates in the firm and in my mind, though he can be called to give evidence in this suit, it would not require the disqualification of the whole firm of advocates. It is clear that it is Mr. Kuloba who is handling this matter and I see no prejudice caused to the defendants.

In view of the above, I find that this preliminary objection is lacking in merit and the same is hereby dismissed with costs.

Dated and delivered at Eldoret this 11th day of October 2005.

JEANNE GACHECHE