



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 118 OF 2018

THE CHAIRMAN CONSTITUENCY DEVELOPMENT

FUND SUNA EAST CONSTITUENCY (CDF).....1ST APPELLANT

CONSTITUENCY DEVELOPMENT FUND

SUNA EAST CONSTITUENCY (CDF).....2ND APPELLANT

-VERSUS-

JAMBO CONSTRUCTION LIMITED.....RESPONDENT

IN THE MATTER OF THE ADVOCATES ACT CAP 16

IN THE MATTER OF ADVOCATE - CLIENT BILL OF COSTS

BETWEEN

**IN THE MATTER OF GILBERT OUMA OWADE PRACTISING IN THE NAME AND STYLE OF M/S OWADE & COMPANY
ADVOCATES**

VERSUS

THE CHAIRMAN CONSTITUENCY DEVELOPMENT FUND SUNA

EAST CONSTITUENCY (CDF).....1ST APPLICANT

AND

CONSTITUENCY DEVELOPMENT FUND SUNA

EAST CONSTITUENCY (CDF).....2ND APPLICANT

RULING

Before me is the Notice of Motion Application (**the application**) dated 28/4/2021. The application was filed by the firm of Apondi & Company Advocates, seeking the following orders: -

a. That this court issue an order dismissing the advocate - client bill of costs against the 1st and 2nd appellant both dated 22/2/2021 on the ground that the applicant was never instructed by the appellants and further that the same offends the provisions of rule 13 (3) of the Advocates Remuneration Order;

b. That costs of this application be provided for.

The application is based on eight (8) grounds appearing on the face thereof and supported by the Affidavit of **Alphonse Ouma Ombok**, the

1st applicant sworn on his own behalf and on behalf of the 2nd applicant.

The 1st applicant's avers that they did not instruct the firm of Owade & Co. Advocates to lodge the instant appeal on their behalf; that upon request of Counsel to be paid for lodging the appeal, the applicants wrote a letter dated 23/2/2021 and requested to be supplied with written instructions to support his fee note but he failed to supply the same; that Suna East Constituency Fund Office being a public office. In the instant case, there was no evidence of a letter instructing Counsel to lodge an appeal; that in the absence of a letter, the current account manager cannot settle any claims by individuals or companies unless there is tangible documentation to prove that the said individual was engaged by Suna East Constituency Fund Office.

It is further submitted that the instant bill of costs was supposed to be filed by way of miscellaneous application and therefore offends the provisions of Rule 13(3) of the Advocates Remuneration Act. The 1st applicant is seeking an order dismissing the Advocates - Client bill of costs against both the 1st and 2nd applicants, dated 22/2/2021 on the ground that the applicants never instructed the said Counsel and further that the same offends provisions of Rule 13 (3) of the Advocates Remuneration Order.

The application was opposed. Learned Counsel, Gilbert Ouma Owade filed a replying affidavit and annexed documents marked as **"G.O.O - 1 G.O.O-10"** to support his case. Learned Counsel deponed that he was instructed orally via phone by the then 2nd applicant's fund manager to obtain a handwritten copy of the judgement in the lower court to furnish to the legal officer to the Constituency Board for further instructions; that he obtained a handwritten copy of the judgement and furnished the applicants with the same; that the Funds Manager of the 2nd applicant visited his chambers and instructed him to lodge an appeal against the judgement of the lower court and swore an affidavit to that effect; that upon receiving further instructions, Counsel drafted and lodged an appeal before this court.

Further to the foregoing, Counsel submitted that he was instructed to file an application before the trial Magistrate to seek for stay of execution pending appeal which application was granted; that it is the firm of Owade & Co. Advocates who wrote to the applicants informing them of the court's order and asking them to comply with the order to deposit security in a joint interest earning account: that Counsel served the Fund's Accounts Manager with an interim fee note and subsequently he filed copies of the record of appeal; that in the month of May 2019, he realized that the firm of Okoth & Co. Advocates had taken over the conduct of the appeal; that despite several letters to the Funds Manager of the 2nd applicant, he did not raise any issue that Counsel had lodged an appeal without that instructions.

Learned Counsel deponed that there is no hard and fast rule that written instructions have to be obtained; that the argument that instructions ended with the primary suit is bereft of logic having instructed another advocate to take over the conduct of the appeal in question from his firm.

On 29/9/2021, Counsel for the applicants indicated to this court that she had filed submissions on 22/7/2021. Unfortunately, the court cannot trace a copy of the same in the court file. On 25/11/2021 Counsel for the Respondent Mr. Mwita, told the court that the matter was settled but asked for fourteen (14) days to file submissions. None were filed. Since there was no affirmative confirmation of this position from Counsel of the applicants, I shall proceed with the ruling.

The issues for determination are: -

- a) Whether the firm of Gilbert Ouma Owade was instructed to file an appeal on behalf of the 1st and 2nd applicants.**
- b) Whether the advocate - client bill of costs dated 22/2/2021 should be dismissed for offending the provisions of Rule 13 (3) of the Advocates Remuneration Order.**

On whether Counsel was properly instructed, his instructing client is supposed to be the 2nd applicant. The 2nd applicant is established under the National Government and Constituencies Development Funds Act No. 30 of 2015 (**NGCDFA**). The operations of the 2nd applicant are governed by a Board established under Section 14 of the NGCDFA. Section 14 (2) of the NGCDFA describes the Board as follows: -

"(2) The Board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; (c) borrowing money or making investments; and (d) doing or performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate."

For all intents and purposes, the Board takes the nature and form of a Corporate body. What then is the position when instituting suits on behalf of fund? In **Affordable Homes Africa Ltd v Henderson & 2 others [2004] eKLR** Njagi J held as follows:

"The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."

In the Ugandan case of **Bugerere Coffee Growers Ltd v Seraduka & Anor. (1970) EA 147** quoted with approval in the case of **Kenya Commercial Bank Limited v Stagecoach Management Ltd[2014] eKLR**, in dismissing the suit before it, the Court held:-

"When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in this case. The Court held further that where an advocate has brought legal proceedings without authority of

the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

In the absence of proper instructions to commence suit, Njagi J further observed in **Affordable Homes Africa Ltd (supra)** that

“...there would be nothing to prevent a majority shareholder from getting up any morning and undertaking all manner of actions in the company’s name with an utter contempt to the interests of the other shareholders. Even if the minority are certain to be out voted, it is their right to vote.”

Similarly, it is important that Counsel before receiving instructions from a public body, to have clear written instructions to institute proceedings on behalf of their instructing client. Guided by the above cited case, it is clear that the resolution is meant to protect the interest of the company and shareholders. Perhaps the other question that needs to be addressed is whether it is necessary for an Advocate to receive further instructions to institute appeal proceedings.

The Court in **Henry Momanyi Machini v Attorney General & 4 others [2019] eKLR** the court held;

“Ordinarily an Advocate who has been on record in original suit will not file appeal without instructions from his client. Instructions initially given are to file original suit. If a party is aggrieved with court’s determination in original suit, he/she will decide as to whether to appeal or not. An advocate cannot just file an appeal on behalf of his former client without his instructions...The fact that instruction must be given by the client for appeal to be filed and the fact that court makes orders for courts for the appeal, the client should not be barred from instructing a new Advocate for purposes of appeal...The fact that instructions to file suit in original suit and appeal have to be given by the client, it makes them distinct suits; and a party is at liberty to either continue with the Advocate who acted in lower suit or engage another lawyer for the appeal.”

The Court of Appeal in the case of **Wilfred N. Konosi t/a Konosi & Co. Advocates v Flamco Limited [2017] eKLR** upheld a decision this court made in **Miscellaneous Application No. 500 of 2010 (Wilfred Konosi T/A Konosi & Co Advocates versus Flamco Limited)** dismissing the appellant’s application on grounds that they were not properly instructed by the respondent to act on its behalf. The Court of Appeal agreed with this court that because the respondent was a limited liability company whose decisions are made through resolutions, there should have been a resolution made to appoint the appellant as its advocate or written instructions signed by the directors. In that case, thus also reasoned that the appellant could not rely on the part-payment made because there may have been disputes between directors as to whether or not they were appointed to act or not and the appellant should have shown or exhibited written instructions from the respondent.

Even if Counsel received oral instructions to lodge an appeal from the then 2nd applicant’s Funds Manager, in the absence of clear written instructions, it did not give Counsel the right to act on behalf of the 2nd applicant. It was incumbent upon Counsel to verify whether the Board which is the governing body of the 2nd applicant, passed a resolution on lodging of the appeal. It seems the then Funds Manager was acting on his own frolic in the absence of approval by the Board of the 2nd applicant. In as much as I sympathize with Counsel’s position, from the foregoing, it is clear that the firm of Owade & Company Advocates did not have instructions to act on behalf of the 2nd applicant in this appeal and therefore the firm is not properly on record.

To add to my foregone findings, I wish to observe that receiving proper instructions is in the best interest of Counsel especially when lodging a bill of costs as the one before this court. The Taxing Officer’s jurisdiction exists because of the Advocate - Client relationship which is not inferred or implied but springs from instructions given by the client to the advocate. In the absence of such a clear relationship being demonstrated, the Taxing Officer is bereft of jurisdiction and all this, is to the detriment of the Advocate.

Turning to the second issue, the applicants contend that the bill of costs offends the provisions of Rule 13(3) of the Advocates Remuneration Order. It provides as follows: -

“The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.”

It is trite law that applications made pursuant to written or statutory provisions that are mandatory cannot be the subject of discretion. The court must apply written or statutory law as its core function and duty. The Court of Appeal in **M G Sharma v Uhuru Highway Development Limited [2001] eKLR** unanimously held that the correct procedure for assessment or taxation of Advocate/client bill of costs was by way of a miscellaneous application under Rule 13 (3) of the Advocates (Remuneration) Order.

The second issue is now well settled, Learned Counsel ought to have brought his Advocate - Clients Bill of Costs via a miscellaneous cause.

For all the above reasons, I find merit in the application and I therefore allow the application dated 28/4/2021 as prayed with costs to the applicant.

Dated, Delivered and Signed at Migori this 31st day of **March, 2022.**

R. WENDOH

JUDGE

Ruling delivered in the presence of

Mr. Odero holding brief Ms. Apondi for the Applicants.

Mr. Nyangi for the Respondent.

No appearance for Owade & Co. Advocates.

Nyauke Court Assistant.