



Hatima Limited v Omwanza Ombati t/a Nchogu Omwanza & Nyasimi Advocates (Civil Suit E061 of 2021) [2021] KEHC 373 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)

Neutral citation: [2021] KEHC 373 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E061 OF 2021
A MABEYA, J
DECEMBER 17, 2021

BETWEEN

HATIMA LIMITED PLAINTIFF

AND

**OMWANZA OMBATI T/A NCHOGU OMWANZA & NYASIMI
ADVOCATES DEFENDANT**

RULING

1. The application for consideration is the defendant's Motion on Notice dated 25/5/2021 brought under Order 2 Rule 15(1) (d) & Order 4 Rule 1(2), (4) & (6) of the *Civil Procedure Rules* and Sections 9, 12, 13, 24, 31, 32A, 33, 24, 39, 43 of the *Advocates Act* it seeks that the plaintiff's suit be struck out and/or dismissed with costs.
2. It is supported by the Supporting Affidavit and Further Affidavit of Omwanza Ombati Advocate, the defendant herein.
3. It is averred that contrary to the provisions of Order 4 Rule 1(2) & (4) of the Civil Procedure Rules, the Verifying Affidavit to the Plaintiff filed herein was deposed and sworn by Alice Muthoni who is an officer of a different company known as Janus Continental Group Ltd (hereafter "Janus"). He states that a search on the two companies conducted on 8/2/2021 revealed that no subsidiary or parent company relationship exists between the said two companies.
4. That for the said reason, the mere existence of a Service Level Agreement between the said two companies for provision of support services such as legal services by Janus, it does not give its officer Alice Muthoni the authority to swear any Affidavit on behalf of the plaintiff.



5. Mr. Omwanza averred that the provision of legal services by Janus is an ex facie violation of sections 9, 12, 13, 21, 24, 31 of the [Advocates Act](#). That by dint of section 32A of the [Advocates Act](#), Alice Muthoni, being an in-house Counsel, is only an independent professional legal adviser to her employer Janus and not the plaintiff.
6. He asserted that Janus, being a body corporate; it is an unqualified person within the meaning of section 43(2) of the [Advocates Act](#) and thus cannot offer legal services to anybody as that is a preserve of qualified advocates. In his view, Janus officious interference in the matter amounts to an action in champerty and maintenance which is expressly prohibited by statute and common law.
7. He further asserted that the issues raised by the plaintiff in this suit had previously been raised by it in ELC Misc 21 of 2020: Omwanza Ombati T/A Nchogu, Omwanza & Nyasimi Advocates v Hatima Ltd. In the premises, this suit is an abuse of court process and violates section 6 of the [Civil Procedure Act](#). Lastly, he stated that this application was made at the earliest possible opportunity and is in the interests of fairness and justice.
8. In opposition, the plaintiff filed a replying affidavit sworn on 10/6/2021 by one Alice Muthoni who is the Legal Counsel - Petroleum Business, at Janus Continental Group Limited. She deposed that she is a qualified advocate of the High Court of Kenya and a member of the in-house legal department at Janus. That the role of the department is to provide legal advice and support to Janus and its affiliates companies including the Plaintiff (hereafter “the Group”) in all commercial transactions. This was meant to safeguard the interests of the Group and its shareholders and ensure compliance in the Group’s engagement with its stakeholders.
9. That she was the advocate within the Group who has been tasked with the responsibility of supervising and advising on the conduct of the portfolio litigation matters that affect the Group such as the instant suit. That she is duly authorized by the Plaintiff, through the court authorization dated 15/1/2021 as well as the board’s resolution dated 1/10/2020, to swear and execute affidavits and any other relevant court documents pertaining to this suit and make any application authorized by law on the plaintiff’s behalf.
10. She further stated that the relationship between Janus and the plaintiff is contractual based on the Service Level Agreement (“SLA”) between the two companies. That due to the nature and geographical scope of the Groups’ operations, Janus as a shared services company or centre employs a pool of experts in various areas including legal professionals who provide specialized services to the Group as a shared resource. That this is a common concept within large corporations or multinationals due to its cost efficiency.
11. That it centralizes back-office operations that are used by multiple divisions of the same company or multiple entities within a group structure to eliminate redundancy so as to allow each business to focus its limited resources on activities that support its core/strategic goals. Further, that the shared services are provided in accordance with the provisions of the SLA on a transfer pricing model within the provisions of the [Income Tax Act](#), Cap 470 of the Laws of Kenya.
12. That in this matter, the plaintiff is represented by Messrs MW & Company Advocates LLP who are rendering the legal services he wrongly ascribes to Janus. That Janus does not provide legal services akin to a law firm or as contemplated under the [Advocates Act](#) but employs in house legal experts who are seconded to provide legal support and advice to the Group in accordance with the Service Level Agreement. In this regard, she stated that her role was merely to oversee the said firm on record and represent the plaintiff in the documentation to be filed in the matter.



13. That at the commencement of the subject transaction which involved the sale and purchase of four properties namely L.R. No. 7158/361, L.R. No. 7158/362, L.R. No. 7158/363 and L.R. No. 7158/364, the defendant received instructions from Susan Waitthaka and Phillippe Cauviere, who were representatives of the Directors of the Plaintiff, then operating under the name and style of Belgravia Services Limited. The defendant proceeded to execute the instructions without raising any objection to the manner in which the same were issued nor seeking any clarification on the relationship between Belgravia and the plaintiff and in fact received compensation for the same. For that reason, she was of the view that a ruling in favour of the defendant would be akin to aiding an injustice to the plaintiff and encouraging similar acts from other Advocates.
14. In conclusion, she stated that the defendant had not denied owing the plaintiff the sum of Kshs. 17,000,000/= which the latter is seeking to recover in the main suit and thus it would be unjust to deprive the plaintiff an opportunity to recover the same. That it was imperative that the suit be heard fully. That any finding by the Court to the contrary would have the effect of usurping the powers of the plaintiff's directors, who gave her authority as stated above, to act in the best interests of the company.
15. The application was canvassed by way of written submissions. The defendant submitted that since there is no single reference to Janus in the plaint by the plaintiff, its involvement in this matter is on the Plaintiff's unlawful invitation for litigation assistance by an arrangement that can only be described as champertous and unlawful.
16. That the provision of legal services by Janus as an independent contractor under the Service Level Agreement amounts to practicing law which is contra statute. Citing the case of *Richmond Association of Credit Men, Inc v Bar Association 167 Va. 327 (VA 1937)*, it was submitted that the practice of law by corporate bodies has been illegal even at common law from time immemorial.
17. It was further submitted that the arrangement under the SLA, which entitles Janus to a consideration in the form of fees equal to the total cost of providing the legal services plus a mark-up calculated at 8%, falls within the classical description of champerty and maintenance which essentially connotes the assistance of a party in his litigation. In support of this, submission, the case of *Trendtex Trading v Corporation and Another Vs Credit Suisse [1981] 3 ALL ER 520*, was cited wherein the English House of Lords termed actions similar to those of Janus' as 'litigation trafficking' and declared such conduct to be contrary to the public policy under English Law.
18. Further, it was submitted that Janus' deployment of an illegal scheme towards the conception, filing and prosecution of the present suit amounts to abuse of the process of the Court. That the illegality must be purged from this Court and that the Court in fact has inherent jurisdiction to countermand such abuse of its process as was held in the case of *Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others Nairobi HCCC No. 363 of 2009*.
19. That the plaintiff's complicity in the illegality is evident from the fact that it passed resolutions unlawfully allowing Janus (through its legal officer) to appear as its witness in support of its suit on the basis of an illegal SLA agreement. In addition, the defendant took issue with the fact that section 55 of the *Advocates Act* designates an advocate as an officer of the Court, yet a qualified advocate (Alice Muthoni) was party to the illegalities highlighted above.
20. In conclusion, the defendant urged that the application be allowed and, that upon the grant of the orders sought, the disclosed illegalities and contraventions of statute be reported to the Law Society of Kenya for action.
21. On its part, the plaintiff maintained that it met the requirements of Order 4 Rule 1(4) of the Civil Procedure Rules as Alice Muthoni was duly authorized vide a resolution of its Board of Directors to



swear the Verifying Affidavit. In support of this position, the plaintiff cited various cases where courts have addressed the issue of what amounts to an authorized officer under the said provision. These were *Spire Bank Limited v Land Registrar & 2 others [2019] eKLR*; *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another [2015] eKLR*; and *The Presbyterian Foundation & Another v East Africa Partnership Limited & Another [2012] eKLR*.

22. It was submitted that the defendant had not demonstrated that either the board had no authority to grant authorization to the deponent in this suit or that Alice Muthoni was an imposter who brought the proceedings on behalf of the plaintiff without authorization. It contended that in any event, an authorized officer of a company has not been defined by the said provision. In the Plaintiff's view therefore, the Defendant's intention is merely to cause a delay in the matter and subvert the course of justice by bringing the suit to a screeching halt on a mere procedural technicality which is contrary to Article 159(2) of the *Constitution*.
23. That since the defendant had not contended that there exists no cause of action in the suit, the Court should issue orders that lean towards sustaining the suit rather than resorting to the draconian step of striking it out which can only be taken in the most hopeless cases. In support thereof the cases of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR* and *Kenya Commercial Finance Company Limited v Richard Akwesera Onditi Nairobi Civil Application No. 329 of 2009* were cited.
24. It was submitted that the SLA agreement between the plaintiff and Janus was merely to share resources between the group of companies and not to create a champertous relationship as alleged by the defendant. It thus urged that the instant application be struck out with costs and the main suit be fixed for hearing at the earliest convenient date.
25. Order 4, Rule 1(2) & (4) of the Civil Procedure Rules requires that where the plaintiff is a corporation, the Verifying Affidavit accompanying a plaint has to be sworn by an officer of the company duly authorized under the seal of the company to do so. This requirement is backed up by the provisions of Order 9 Rule 2(c) of the Rules which stipulates that a recognized agent in the case of a corporation is an officer of the corporation duly authorized under the corporation seal.
26. In the instant case, it appears that Alice Muthoni who swore the Verifying Affidavit was authorized by the plaintiff to swear the document. She produced a board resolution passed on 1/10/2020 by the plaintiff's Board of Directors authorizing her to do so. She also filed an authorization dated 15/1/2021 by a company known as Dalbit Petroleum Limited authorizing her to swear and execute Affidavits and any other relevant court documents pertaining to a suit filed by the said company in the subordinate court and not the instant suit as claimed. The latter document is useless to the extent that it is not applicable to this case.
27. The question however is whether Alice Muthoni is an officer of the plaintiff company who can be authorized to verify the contents of a claim by the plaintiff. To begin with, she has described herself both in the impugned verifying affidavit and her replying affidavit as a legal counsel - Petroleum Business at Janus Continental Group Limited. The said entity is further described as a shared service company which provides legal services to its affiliate companies including the plaintiff herein.
28. Notably however, no tangible evidence was produced to demonstrate the actual working or operational relationship between the said company and the plaintiff that creates the alleged affiliation. The purported bare structure produced by the plaintiff as annexure "AM-5" is of no effect as its origin, purpose and maker were not disclosed.



29. What is clear however, is that the plaintiff and Janus are two independent and/or separate legal entities whose relationship is based on the SLA. The official searches dated 8/2/2021 prove this fact.
30. The question to be answered is whether the SLA conferred upon the deponent of the Verifying Affidavit the status of an officer of the plaintiff Company. Under the SLA, Janus was appointed by the plaintiff to provide it with various services under Clause 3.1 thereof which include legal services. In the Agreement, Janus is deemed as an independent contractor who has no authority to act on behalf of or represent the Plaintiff in any way or be deemed as its agent unless otherwise authorised in writing.
31. A plain reading of the terms of engagement reveals that by providing legal services to the plaintiff, Janus which is a body corporate is essentially practising law. The practise of law in Kenya is governed by the *Advocates Act* Cap 16 of the Laws of Kenya which preserves the same for advocates whose qualifications have been expressly provided for. Section 9 of the Act provides as follows in that regard:
- “No person shall be qualified to act as an advocate unless—
- (a) He has been admitted as an advocate; and
- (b) His name is for the time being on the Roll; and
- (c) He has in force a practising certificate;”
32. Further, Section 43 of the *Advocates Act* prohibits a body corporate from practicing law. It provides thus:-
- “ 43. Offences by bodies corporate
- (1) If any act is done by a body corporate or by any director, officer or servant thereof, of such a nature or in such a manner as to be calculated to imply that the body corporate is qualified, or recognized by law as qualified, to act as an advocate, the body corporate shall be guilty of an offence and liable to a fine not exceeding fifty thousand shillings for each such offence, and, in the case of an act done by any director, officer or servant of the corporation, he shall, without prejudice to the liability of the corporation, be guilty of an offence and liable to a fine not exceeding twenty-five thousand shillings for each such offence.
- (2) In this Part, references to unqualified persons and to persons include references to bodies corporate”.
33. The above provision is further backed up by Section 31 of the *Advocates Act* which stipulates that:-
- “ 31. Unqualified person not to act as advocate
- (1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.”



34. In *Patel v Singh (No. 2)* [1987] KLR 585, the Court of Appeal quoting with approval from Lord Devlin in *Archbalds (Freightage) Ltd v Spanglett Ltd* [1961] 1 Q.B. 374 at 388 held as follows regarding the effect of an illegality on contract:-

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having the intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent the plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”

35. Bearing the above in mind, the logical conclusion to be made is that a contract in which parties agree to undertake an illegal act or an act prohibited by statute cannot be enforced. Any consequences therefrom is illegal, against public policy and unenforceable.
36. In this regard, in so far as the SLA allows a body corporate to provide legal services contrary to the express provisions of a statute the same is a nullity to that extent. In addition the Court holds that the SLA was a champerty agreement in as far that the parties expressly agreed in Clause 4 thereof that Janus, who has no interest in the present suit, would provide the plaintiff with legal services in consideration of fees, agreed as an amount equal to the total costs of providing the service(s) plus a mark-up of 8% or in accordance with the provider’s transfer pricing policy.
37. Accordingly, the SLA is unenforceable on the area of provision of legal services and any subsequent steps taken in the matter on that basis is tainted with the illegality and is indeed in furtherance thereof. This means therefore, that the said agreement did not and could not confer upon Alice Muthoni the status of an officer of the plaintiff company. She is a stranger in the proceedings and had no capacity to depone and swear the verifying affidavit filed herein or any other document pertaining to the suit on behalf of the Plaintiff, with or without authorization from the company. The same ought to have been sworn by an officer holding a position of authority or decision making in the plaintiff Company.
38. More importantly, to the extent that Alice Muthoni’s authorization to swear the verifying affidavit was pursuant to the SLA which, as far as provision of legal services to the plaintiff is illegal, the same was unlawful and of no legal effect. If the court allows her position to stand it will be to rubber stamp an illegality.
39. This is not a mere technicality that can be cured by Article 159(2) (d) of the Constitution as suggested by the plaintiff. Saving the suit will amount to sanitizing the illegal contract between the plaintiff and Janus which cannot be entertained by a Court of law.
40. The court having found that the SLA is illegal to the extent that a corporation purports to practice law by offering legal services to the other (Janus and the plaintiff), that is a criminal offence under the *Advocates Act*.
41. In *Standard Chartered Bank Kenya Ltd vs Intercom Services Ltd & 4 Others* [2004] eKLR, the Court of Appeal held that no Court in this Country should aid a party who is guilty of an illegality. Further, in *Scot vs Brown Doering McNAB & Co* [1892] 2QB 724, the English Court of Appeal held that an action



founded on an illegal contract could not be maintained. In the present case, the verifying affidavit is founded on an illegal contract for provision of legal services by Janus to the plaintiff.

42. In *Kenya Pipeline vs Glencore Energy (UK) Ltd [2015] eKLR* the Court of Appeal held:-

“It must also follow that the respondent’s plea that a rejection of its claim would be tantamount to an unconstitutional deprivation of property is also untenable. The constitution cannot possibly protect rights supposedly acquired through violation of law. It espouses commands a respect of the rule of law and enjoins courts to do justice in accordance with the law. The argument is thus for rejection.”

43. In this regard and having found that the verifying affidavit was not sworn by an officer of the plaintiff company and was in furtherance of an illegality, ie provision of legal services by a corporation Janus to the plaintiff, it follows that the suit is tainted with the same illegality and is for striking out. It is an illegal suit. A corporation cannot purport to offer legal services to any entity.

44. Having found that there has been a breach of the law, to wit, the *Advocates Act*; and this being a court of law bound to enforce the rule of law, the Court directs that the Deputy Registrar refers this matter to the Council of law Society of Kenya. That council is to interrogate the SLA and see to what extent the *Advocates Act* has been breached and taken such action as is per the law is provided.

45. The application is allowed as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

