



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. E052 OF 2019**

**ANDREW MUMA & CHARLES**

**KANJAMA t/a MUMA & KANJAMA ADVOCATES.....1<sup>ST</sup> PLAINTIFFS**

**BISHOP REV. JOSEPH MEMBA SYUMA**

**THOMAS MWANGANGI**

**PHILIP MALONZA**

**BISHOP DR. RAPHAEL NZUKI KITUVA**

**REVEREND BONIFACE MBWANGA**

**DR. WILSON MAILU (suing on behalf of, as members and as**

**Registered Trustees of GOOD NEWS CHURCH OF**

**AFRICA & THE GOSPEL FURTHERING**

**BIBLE CHURCH TRUST.....2<sup>ND</sup> PLAINTIFFS**

**GOSPEL FURTHERING BIBLE CHURCH TRUST**

**REGISTERED TRUSTEES.....3<sup>RD</sup> PLAINTIFF**

**(suing on their own behalf of all depositors & Account holders of**

**Chase Bank Kenya Limited as at 7<sup>th</sup> April 2016)**

**VERSUS**

**DELOITTE & TOUCHE EAST AFRICA.....1<sup>ST</sup> DEFENDANT**

**DELOITTE & TOUCHE TOHMATSU LIMITED.....2<sup>ND</sup> DEFENDANT**

**MOHAMMED ZAFRULLAH KHAN.....3<sup>RD</sup> DEFENDANT**

**DUNCAN KABUL.....4<sup>TH</sup> DEFENDANT**

**THE CENTRAL BANK OF KENYA.....5<sup>TH</sup> DEFENDANT**

**KENYA DEPOSIT INSURANCE CORPORATION.....6<sup>TH</sup> DEFENDANT**

## RULING

1. This ruling relates to a notice of motion application dated 7<sup>th</sup> May 2019, brought under the provisions of Order 6 Rules 1 and 2 of the Civil Procedure Rules 2010 and Sections 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. The 1<sup>st</sup> Defendant/Applicant is seeking for orders that:-
  - (a) *The memorandum of appearance filed by the firm of Hamilton Harrison & Mathews Advocates on 24<sup>th</sup> April 2019, be expunged from the court record;*
  - (b) *The memorandum of appearance dated 6<sup>th</sup> May 2019 filed by the firm of Hamilton Harrison & Mathews Advocates and annexed to this application as "Annexure A" be deemed as properly filed;*
  - (c) *The costs of this application be in the cause.*
3. The application is based on the grounds on the face of it and an affidavit in support dated 7<sup>th</sup> May 2019, sworn by Eddy Owiti, an Advocate of the High Court practicing in the firm of Hamilton Harrison & Mathews Advocates, which firm has the conduct of this matter on behalf of the 1<sup>st</sup> Defendant. He deposed that the Plaintiffs served the 1<sup>st</sup> Defendant with summons to enter appearance and the court papers in relation to this matter on 8<sup>th</sup> April 2019. The 1<sup>st</sup> Defendant forwarded the documents to his employer with instructions to enter appearance on its behalf. That while accepting service of court process the 1<sup>st</sup> Defendant clearly indicated that it had no authority to accept service on behalf of the 2<sup>nd</sup> Defendant and endorsed this information on the papers served.
4. However, the employer inadvertently entered appearance for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants vide a Memorandum of appearance dated 24<sup>th</sup> April 2019, and filed on the same day. Thus the appearance filed on 24<sup>th</sup> April 2019, is erroneous in so far as it indicates that the firm acts for the 2<sup>nd</sup> Defendant. The memorandum of appearance should therefore be expunged from the court record. The correct memorandum of appearance has since been filed and the same be deemed as properly filed and served. That the plaintiff will suffer no prejudice if this application is allowed.
5. However, the Application was opposed through a Replying affidavit dated 12<sup>th</sup> June 2019, sworn by Andrew Muma, an Advocate of the High Court of Kenya, in the firm of Muma & Kanjama Advocates/1<sup>st</sup> Plaintiff in the matter and acting for the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. The application was termed as misconceived and unmerited on the grounds that, under Order 9 Rules 2, 3 and 4 and Order 5 Rule 10 of the Civil Procedure Rules, 2010, the 1<sup>st</sup> Defendant is an agent of the 2<sup>nd</sup> Defendant. That from previous engagements the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants are in regular communication on operational matters and there is a continuous exchange of information and collaboration between the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants.
6. Further, before the application is heard and decided, the Plaintiffs require that the 1<sup>st</sup> Defendant produce information about all communication and correspondence with the 2<sup>nd</sup> Defendant as per the notice to produce filed herewith.
7. The parties disposed of the application through oral arguments in court and basically reiterated the averments in their respective affidavits. The Applicant submitted that, in view of the fact that, the 1<sup>st</sup> Defendant had no capacity or authority to accept service and therefore the 2<sup>nd</sup> Defendant has not been served. That in the absence of proof of service and instructions, then the appropriate order is to expunge the memorandum of appearance and the plaintiff to effect proper service. The firm cannot be forced to remain on record otherwise it will be gross injustice.
8. It was further submitted that, the provisions of Order 9 Rule 2, 3 and 4 which the Plaintiff relies on do not avail the Plaintiff the basis of the service effected as there is no proof that the 1<sup>st</sup> Defendant is an agent of the 2<sup>nd</sup> Defendant and that, Order 9 Rule 2(b), deals with a recognized agent. Finally, the report annexed to the plaint deals with the relationship of the parties and the only common basis is the brand Deloitte
9. However the Plaintiff submitted that, they have filed two applications which require the 1<sup>st</sup> Defendant to produce evidence of any correspondence touching on the matter of Chase Bank Limited and the Audit by the 1<sup>st</sup> Defendant. The evidence is important to demonstrate that, the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants communicate on operational and administrative matters. However there has been no response to the applications. Therefore the court should make the necessary inference. Further, from Deloitte's 2015 Global Report, it is clearly indicated that, the words "Deloitte", "we" "us" and "our" refers to "one or more of Deloitte Touche Tohmatsu Limited, a UK Private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients".
10. The 1<sup>st</sup> Defendant uses the name Deloitte with permission of the 2<sup>nd</sup> Defendant and is thus an agent of the 2<sup>nd</sup> Defendant and the service effected upon it was effective as per the provisions of Order 5 Rule 10 of the Civil Procedure Rules. The Plaintiff relied on the authority of; Cosmas K. Ndambuki t/a Ujuzi Bidii Tailoring vs The Board of Governors & Anot (2011) eKLR. However the Plaintiff conceded that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants are two separate legal entities and that is why they have been sued separately. The Plaintiff prayed that, the court allow the firm to cease acting but the service be recognized.
11. However the Applicant argued that, there is no agency relationship in the pleadings for the service to be deemed to have effected upon the 2<sup>nd</sup> Defendant and that the Applicants are not only seeking to cease acting, but pray the memorandum be expunged.

12. I have considered the application. I have also considered the arguments advanced by the parties and the pleadings as a whole. From paragraph 4 and 5 of the Complaint, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are described as independent firms and it is evidenced by their physical address. It is also clear from the description of the 2<sup>nd</sup> Defendant that, it is incorporated under the laws of the United Kingdom. It is indeed conceded by the Plaintiffs that the two Defendants are independently co-entities. It is also evidenced by the summons to enter appearance that was extracted under Order 6 Rule 1 of the Civil Procedure Rules for service on each of the two Defendants, as independent bodies.

13. It is not in dispute that, upon service of the summons, on the firm of Deloitte Limited, the summons were received “under protest” as indicated thereon to the effect that, “there is no entity registered in Kenya by the name Deloitte Touch East African and that Deloitte Touche Limited have no capacity and authority to accept summons on behalf of Deloitte Touche Tohmatsu Limited.” It is therefore clear from these remarks that the 1<sup>st</sup> Defendant did not intend to be bound as having authority to accept service on behalf of the 2<sup>nd</sup> Defendant.

14. Be that as it may, the firm of Hamilton Harrison & Mathews Advocates subsequently filed a memorandum of appearance dated 24<sup>th</sup> April 2019 on behalf of the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants. They aver that, it was erroneously filed as they did not have instructions to act for the 2<sup>nd</sup> Defendant. The Plaintiff has no objection to the law firm being allowed to cease acting. However, the prayer in the application is to expunge the memorandum of appearance off record. In view of the fact that the law firm cannot be compelled to be on record, I hereby allow prayer (ii) of the subject notice of motion, that the memorandum of appearance filed on 24<sup>th</sup> April 2019 on behalf of the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants be and is hereby expunged from the court record.

15. The Applicant further seeks that, the memorandum of appearance dated 6<sup>th</sup> May 2019 be deemed as properly filed. I find no objection to the same and I allow that prayer as sought. Finally, the Applicant prays that the costs of the application be in the cause. I allow the same. That basically deals with application.

16. However, the Plaintiff has sought that the service effected upon the 1<sup>st</sup> Defendant be deemed to proper and effective in that, the 1<sup>st</sup> Defendant is an agent of the 2<sup>nd</sup> Defendant, I have considered the said prayer and find as follows:-

(a) *there is no application upon which that prayer is founded, the issue arose in the cause of canvassing the subject application herein;*

(b) *as aforesaid, the service of summons to enter appearance upon the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> Defendant was received under protest;*

(c) *as stated herein, the pleadings indicate that the 2<sup>nd</sup> Defendant was incorporated in the United Kingdom and there is no evidence that it is domiciled in Kenya and/or has its presence at the address provided in the Complaint.*

17. Even if the court were to address the Plaintiff’s application on merit on the basis that the 1<sup>st</sup> Defendant is an agent of the 2<sup>nd</sup> Defendant, I find that the provisions of Order generally deal with recognized agents and Advocates and Rule 2 specifically deals with recognized agents and states as follows:-

*“The recognized agents of parties by whom such appearances, applications and acts may be made or done are—*

(a) *subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;*

(b) *persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only,*

*where no other agent is expressly authorized to make and do such appearances, applications and acts;*

(c) *in respect of a corporation, an officer of the corporation duly authorized under the corporate seal”. (emphasis added)*

18. Therefore the Plaintiff has to satisfy the court that, the 1<sup>st</sup> Defendant is carrying on trade or business for and in the names of the 2<sup>nd</sup> Defendant and is not resident within the local limits of the jurisdiction of the Court. The reliance upon the Deloitte Global Report of 2015 is not sufficient proof of authority by the 1<sup>st</sup> Defendant to accept summons on behalf of the 2<sup>nd</sup> Defendant.

19. It is noteworthy that, the provisions of Order 9 Rule 4 deal with Agents who can accept service and states that:-

*“4. (1) Besides the recognized agents described in rule 2, any person residing within the jurisdiction of the court may be appointed an agent to accept service of process.*

*(2) Such appointment may be special or general, and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in court”. (emphasis added)*

20. There is no evidence that the 1<sup>st</sup> Defendant was appointed accordance with these provisions. I have considered the authority cited of; *Cosmas K. Ndambuki* and I find that it is distinguishable in that, the Applicant therein was seeking “orally” to withdraw the memorandum of appearance and defence filed, that is not the case herein.

21. The upshot of all this is that, I find the subject application dated 7<sup>th</sup> May 2019 has merit and I allow it as prayed.

22. Those are the orders of the court.

Dated, delivered and signed in an open court this 29<sup>th</sup> day of July 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr Kanjama.....for the Plaintiff/Respondent

Ms kirimi.....for the 1<sup>st</sup> Defendant/Applicant

No appearance.....for the 2<sup>nd</sup> Defendant

Ms Chikano for Mr Wachira.....for 3<sup>rd</sup> Defendant

Mr Kiunga .....for the 4<sup>th</sup> Defendant

Mr Chege.....for the 5<sup>th</sup> Defendant

Ms Lubano.....for the 6<sup>th</sup> Defendant

Dennis.....Court Assistance