**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL CAUSE NO. 12 OF 2016**

**IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE & CLIENT**

**BETWEEN**

**GEORGE MIYARE T/A MIYARE**

**& COMPANY ADVOCATES…….....ADVOCATE/APPLICANT**

**VERSUS**

**NYANDO POWER TECHNIQUES LIMITED ……CLIENT/RESPONDENT**

**RULING**

1. The genesis of these proceedings was Miscellaneous Application No. 408 of 2015 between **Republic vs. Nairobi City County & Another ex parte Nyando Power Techniques Limited** which was commenced through the Applicant herein on behalf of the Respondent.

2. According to the applicant herein, sometimes in November 2015 the Respondent instituted them to institute the said proceedings and pursuant thereto the said proceedings were commenced, Following the grant of leave the substantive Motion was filed as directed. However according to the Applicant, thereafter the Respondent became unresponsive and uncooperative thereby making it difficult for the applicant to continue acting for them and their relationship broke down. Thereafter a Notice of Change of advocates was filed replacing the applicants with the firm of Owang & Associates, the Respondent's Advocates herein based on instructions from the Respondent which firm represented the Respondent till delivery of judgement.

3. As a result of the foregoing the applicants prepared their bill of costs and served the same upon which service the Respondent despite enjoying the orders issued in the said proceedings took a preliminary objection to the said bill on the ground that it did not instruct the Applicants in the matter. It was the Applicant's contention that the issue of retainer ought to have been raised before the said court and that the said objection does not raise pure points of law but raises evidentiary issues.

4. It was the Applicant's position that the objection was replete with juristic shortcomings, was incompetent, misconceived, bad in law and merely intended to frustrate and delay the conclusion of the taxation proceedings hence an abuse of the process of the Court and they urged the Court to dismiss the same.

5. On the Respondent's part it was contended that the Respondent did not at any given time instruct the

Applicant to institute the said proceedings and challenged the applicant to disclose the Respondent's representative who issued the said instructions.

6. It was averred that there was no resolution by the Respondent instructing the applicant to act for the Respondent in the said proceedings and that mere filing of proceedings without instructions did not create advocate/client relationship between the two parties. The Respondent however admitted that it had contemplated instituting proceedings in the nature of the judicial proceedings commenced.

7. According to the Respondent its officers were informed to go to the applicant's offices to sign an affidavit but that none of the directors had instructed the applicant firm to institute the said proceedings. It was at this point that the Respondent instructed its current advocates to take over the matter and act. According to the Respondent the alleged signatory of the verifying affidavit was not the person it was purported to have done so and that the applicant did not object to the matter being taken over by the new advocate.

8. The Respondent took the position that instructions to a firm of advocates can only be by way of a properly executed instruction note and/or company resolution from the Directors. It was averred that the authority to plead was ever obtained hence the instructions were not obtained from the Respondent.

9. The Respondent therefore asserted that there was no advocate/client relationship between the applicant and the Respondent hence the subject bill of costs is inconsequential and ought to be struck out with costs.

10. The procedure for determining disputes relating to retainer in his country is rather blurred. That the Taxation Officer has no jurisdiction to determine issues of retainer was appreciated by **Azangalala, J** (as he then was) in **City Finance Bank Limited vs. Samuel Maina Karanja T/A Maina Karanja & Co. Advocates Nairobi (Milimani) HCCC No. 132 of 2004** in which the learned Judge expressed himself as follows:

> **"In my view the Advocates Remuneration Order is a complete code in itself if instructions are admitted to have been given where the dispute is between the client and his or her advocate. However, where it is alleged that an Advocate acted without instructions, different principles apply and the Advocates Remuneration Order is not adequate in the circumstances. The Plaintiff in the present case alleges that it never instructed the Defendant to provide certain services. If it turns out to be true then the dispute goes beyond the Advocates Remuneration Order."**

11. The procedure in such matters was explained by this Court in **Evans Thiga Gaturu, Advocate vs. Kenya Commercial Bank Limited Nairobi High Court (Commercial Division) Miscellaneous Application No. 343 of 2011** in which I expressed myself as follows:

> **"In my considered view, it would be sensible, to apply and obtain leave. It is at that stage that the issue of retainership would be disposed of so that after the taxation of the costs, judgement would thereby entered on the issuance of the certificate of costs without having to determine whether or not there is a retainer. It would save judicial time by having the issue of the retainer determined early in the taxation proceedings instead of running the risk of having to go through the elaborate process of taxation only for the process to come to nought on the ground of lack of a retainer at the end. However, as current state of the law seems to have no quarrel with taxation without leave, I wish to say no more on the issue…In my view, where an advocates costs have been taxed and a certificate issued, the only bar to the entry of judgement is if there is a dispute as to the retainer. That issue, as already stated, would be appropriately dealt with if the leave was sought. However, there is no bar to the same being raised before the taxing master in which case the taxation may be adjourned pending the determination of the issue before a Judge."**

12. The general rule is that it is not the business of the courts to tell litigants which advocates should or

should not act for them in a particular matter as each party to a litigation has the right to choose his or her own advocate and unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel. See **William Audi Ododa & Another vs. John Yier & Another Civil Application No. Nai. 360 of 2004; Delphis Bank Ltd vs. Channan Singh Chatthe & 6 Others Civil Application No. Nai. 136 of 2005; Geveran Trading Co. Ltd vs. Skjevesland [2003] 1 ALL ER 1.**

13. It is however clear that advocates can only act in a matter where they have been instructed either expressly or by implication. Where there is a general retainer given to an advocate by a client, it does not fall in the mouth of the client to argue that there were no instructions given to the advocate in respect of a particular matter falling within the series in which there was a general retainer unless it is shown that there were express instructions given to the advocate not to act in that particular matter. In that event the onus of proving lack of instruction would be on the person alleging the same. It is also trite that an incorporated person is but just a legal person in the eyes of the law. It is therefore axiomatic that an incorporated body has of necessity to act through agents who are usually its Board of Directors by way of resolutions passed thereby. Where for example it is proved to the satisfaction of the Court that legal proceedings were commenced by or on behalf of an incorporation by an advocate contrary to or in the absence of the instructions of an incorporation it is trite in this jurisdiction that such proceedings are liable to be struck out with costs being borne by the advocate concerned. This was the position in **Tavuli Clearing & Forwarding Limited vs. Charles Kalujjee Lwanga Nairobi (Milimani) HCCC No. 585 of 2004.**

14. It follows that if the applicant had no instructions to commence legal proceedings on behalf of the Respondent, not only would the firm not be entitled to seek costs but it would be liable to pay the costs of such proceedings. It is however to be noted that an action commenced without authority is capable of being ratified. As was held by **Hewett, J** in **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000:**

> **"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect……As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."**

15. Under section 109 of the ***Evidence Act***, the law as I understand it is that whereas under section 107 of the ***Evidence Act***, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. In this case, it is the Respondent who wishes the Court to believe in the fact of non-existence of an authority given by the Respondent to the applicant firm. The burden was upon the Respondent to adduce material before this court which would prove this point. In this case the Respondent did not terminate the proceedings it alleged to have been commenced without its authority. Instead it simply changed counsel and proceeded with the proceedings. According to it, it was in fact intending to commence the same. In effect the Respondent by its action, assuming it had not authorised the commencement of the said proceedings, subsequently ratified the same. In other words the Respondent ratified the actions taken by the applicant as if it had in fact authorised the commencement thereof. The mere fact that a party substitutes its legal representatives does not deprive the latter of its fees.

16. It is my view that a party who alleges that it did not instruct a firm of advocates to act for it ought not to take advantage of the proceedings commenced on its behalf. If it does so, it cannot be heard to complain since the law does not permit such a party to only reap the benefit accruing from the said

proceedings without being liable for the adverse consequences therefrom. The Respondent having by its conduct failed to disown the applicant's authority at the earliest opportunity but instead conducted itself as if it had instructed the applicant cannot now be heard to deny knowledge of the applicant's source of authority. Section 120 of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.***

17. Having considered the issues raised herein, it is my view and I hold that the Respondent has failed to satisfy me that it never instructed the applicant to represent it in the proceedings that provoked the instant legal proceedings. Its contention that the signature appearing in the verifying affidavit did not belong to its officers cannot possibly be determined on affidavit evidence particularly considering that the Respondent had the chance to disown the proceedings but instead chose to adopt the same. In my view, and it is trite that with respect to the credibility of a witness or a deponent of an affidavit, a person upon whose evidence it is proposed to rely "should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence". See **Ndung'u Kimanyi vs. Republic [1979] KLR 282.**

18. In this case, based on the material on record this court is unable to find whether or not the firm was instructed by the 1st interested party and as was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001** it is a "fundamental rule of evidence, which is codified in Section 3 of the ***Evidence Act*** Cap 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved".

19. In the premises the objections raised by the Respondent regarding the applicant's retainer fails and is dismissed with costs. The Taxing Master is at liberty to proceed with the taxation in the usual manner.

20. Orders accordingly.

**Dated at Nairobi this 29th day of May, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Asemba for Mr Owang for the Respondent**

**CA Mwangi**