



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL, HUMAN RIGHTS AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 366 OF 2014

GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

JIMMY KIAMBA, TREASURER NAIROBI

COUNTY GOVERNMENT.....1ST RESPONDENT

LILIAN NDEGWA, SECRETARY NAIROBI

COUNTY GOVERNMENT.....2ND RESPONDENT

NAIROBI COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

Introduction

1. On 11th June, 2015, this Court issued an order of *mandamus* compelling the Respondents to implement the Decree/Order emanating from the Judgment given by this Honourable Court in HCCC 890 of 2002 on 20th February, 2009.
2. Thereafter followed a series of applications as well as an application for contempt leading to warrants of arrest being issued. The parties herein also entered into negotiations with a view to settling the matter. However those negotiations seem to have taken a bit of some time though some payments seem to have been made.
3. However, on 21st September, 2017, a Notice of Change of Advocates dated the same day was filed by the firm of **Coulson Harney LLP** (hereinafter referred to as “the Respondent” or “the ex parte applicant’s advocates”), which firm indicated that it had been appointed by **Sanlam general Insurance Limited** (formerly **Gateway Insurance Company Limited**) (hereinafter referred to as “the ex parte applicant”) to act for it in this place of **Njiru Boniface & Company Advocates** (hereinafter referred to as “the Applicant” or “the former ex parte applicant’s advocates”).
4. The said Notice did not indicate the legal provision under which it was filed.
5. The firm of **Njiru Boniface & Company Advocates** was however not amused by this turn of events.

By a Notice of Motion dated 5th October, 2017, the said firm sought the following orders:

1. **This application be certified urgent and orders be issued ex parte in the first instance**
2. **This honourable court be pleased to strike out and expunge from the court record the notice of change of advocate filed herein on 21/9/2017 by M/s Coulson Harney Advocates.**
3. **Pending the hearing and determination of prayer No. 3 the law firm of Coulson Harney LLP be stopped and restrained from addressing this honourable court on any matter involving this case or filing any documents in court file in reference to this matter or addressing letter to any of the parties in this case or their advocates purporting to act for the applicant.**
4. **Costs of this application be provided for.**

Applicant's Case

6. According to the applicant, on 21st September, 2017 the Respondent filed a Notice of change of advocate purporting to act for **M/S Sanlam General Insurance Ltd** which is not a party in the suit. The applicant firm averred that there were past correspondence between the said Law firm and the Respondent in which the applicant firm informed the Respondent that the applicant was not consenting to the change of the advocate and therefore the procedure of taking over a matter from another advocate required the leave of the Judge under Order 9 Rule 9 & 10 of the **Civil Procedure Rules** where judgment has been delivered as in this case where judgment in this case was delivered in 11th June, 2016.

7. According to the applicant firm, since it did not receive instructions to act for **Sanlam General Insurance Ltd.** the company has no locus to change him and appoint another advocate and neither have they applied to become party to the suit. The applicant averred that its instructions to act in this matter are drawn from **M/s Njomuki Agencies** who were appointed debt collectors by **Gateway Insurance Co. Ltd** sometimes back in the year 2013 with authority to file court proceedings and that all affidavits in this matter have been sworn by **David Munga**.

8. It was further deposed that the applicant's instructions are that the shareholders of **Gateway Insurance Co. Ltd.** sold their shares to a company known as **Pan African Insurance Holding Ltd** by a tripartite Share, Sale and Subscription Agreement dated 31st October 2014 and the purchasing company expressly excluded the pursuit of this claim and any benefits thereof should the same be recovered from the purchasing company.

9. It was therefore averred that in the circumstances there are other interested parties involved in the matter who ought to be heard before **Sanlam General Agencies Ltd.** can enter into the case by way of notice of change of advocates.

10. It was therefore the applicant's case that the notice of change of advocates was filed in bad faith and is intended to enter as non party into these proceedings without the question of legal fees, agents fees and other costs in the process of collecting of debt being settled.

The Respondent's Case

11. The Respondent opposed the application.

12. According to the Respondent, on 9th August 2016 the ex parte applicant herein Applicant changed its name from **Gateway Insurance Company Limited** to **Sanlam General Insurance Limited** and until 21st September 2017, the Applicant was represented in these proceedings by the law firm of **Messrs Boniface Njiru & Company Advocates**. However, the Applicant terminated the services of the said firm of advocates and the Applicant is currently represented in these proceedings by the law firm of **Coulson**

Harney LLP having been formally appointed to act as such by the ex parte Applicant's Board of Directors.

13. It was the Respondent's case that following the aforesaid appointment, on 21st September 2017, the Applicant's Advocate filed a Notice of Change of Advocates formally coming on record and replacing the Applicant's erstwhile advocates. It was disclosed that before the ex parte Applicant's Advocates filed their Notice of Change of Advocates, the ex parte Applicant had engaged its former advocates and instructed them to hand over the matter to its new advocates but the ex parte Applicant's former advocates declined to voluntarily hand over the matter to the Applicant's Advocates despite clear instructions from their erstwhile client.

14. It was averred that by a letter dated 17th July 2017, the ex parte Applicant's Advocates wrote to their Client's former advocates requesting the latter handover the conduct of the matter to them but the ex parte Applicant's former advocates declined to hand over the matter to the Applicant's Advocates as requested.

15. It was the Respondent's case that the engagements that the ex parte Applicant and its current advocates had with the ex parte Applicant's former advocates was purely out of courtesy and not out of any legal obligation. Therefore the Application is totally unfounded and mischievous for the following reasons-

- a. it is not contested that the Applicant in these proceedings is **Sanlam General Insurance Limited** (formerly **Gateway Insurance Company Limited**). Basic logic would have it that only ex parte Applicant can appoint advocates to appear for it;
- b. **Njomuki Agencies**, which ex parte Applicant's former advocates concedes (at paragraph 5 of the Supporting Affidavit) is an agent of the Applicant, cannot oppose ex parte Applicant's choice of an advocate to act for it in these proceedings;
- c. this Honourable Court is not the forum for resolving disputes regarding pending legal fees as such disputes ought to be canvassed before a taxing master;
- d. there is absolutely no legal basis for ex parte Applicant's Advocates to file an application for leave before coming on record as these proceedings relate to judicial review for which provisions of the **Civil Procedure Rules** do not apply; and
- e. ex parte Applicant's corporate structure is completely irrelevant to the issue of its legal representation.

16. For the foregoing reasons, the Respondent maintained that the Application is unmerited and should therefore be dismissed with costs.

Determination

17. I have considered the application, the affidavit in support of and in opposition thereof and the submissions made by the parties.

18. In my view the issue for determination by this Court is simply whether the Respondent herein, the firm of **Coulson Harney LLP**, is properly on record on behalf of the ex parte applicant herein. Therefore I will not deal with some of the issues which were raised before me as it is my view that they are largely irrelevant to the determination of the present application.

19. The general rule is that it is not the duty of the Court to decide for the parties by whom they are to be represented in legal proceedings. That was the position adopted in **William Audi Ododa & Another vs. John Yier & Another Civil Application No. Nai. 360 of 2004** where **Okubasu, JA** while citing **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**, **King Woolen Mills Ltd & Anor vs.**

M/S Kaplan & Stratton Civil Appeal No. 55 of 1993 and Uhuru Highway Development Ltd & Others vs. Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654 expressed himself as hereunder:

“It is not the business of the Courts to tell litigants which advocate should or should not act 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...Each case must be decided purely on its facts and for a Court to deprive a litigant of his right under section 70(a) of the Constitution which guarantees citizens protection of the law, there must be clear and valid reasons for doing so.”

20. Therefore as long as parties to a suit have procedurally replaced their advocates, such issues as fees due and payable to the advocates belong a different forum, save or the instances were section 52 of the *Advocates Act* could be invoked. The said section provides that:

Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate:

Provided that no order shall be made if the right to recover the costs is barred by limitation.

21. That however is a relief that can only be invoked when the Court has been properly moved.

22. In this case, the main ground upon which the application is brought is that the provisions of Order 9 Rule 9 & 10 of the *Civil Procedure Rules* were not complied with by the firm of **Coulson Harney LLP** before coming on record. That provision provides as hereunder:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

23. That the said provision is mandatory was appreciated in Magasin Moderne Sari vs. Jennifer Shamalla & Co. Advocates Nairobi (Milimani) H.C.Misc. Application No. 39 of 1998 where Mwera, J (as he then was) held that:

“It is the law that a party can present and proceed with a cause in court by itself or through its duly appointed agent or by counsel. Such a party has a constitutional right to change the party, the agent or the lawyer conducting its cause...Order 3 of the Civil Procedure Rules does not state what form of application should be used and in that cause it is safe to say that Order 50 rule 1 Civil Procedure Rules should fall to be applied-filing of a notice of motion. The law to change an advocate or act in person after judgement has been issued does not admit of any other course save by an application to the Court and with notice to the advocate who a party wishes to withdraw instructions from. And that court must sanction by its order that either the party continues from that point in person or by its new advocate and since the requirement is couched in mandatory style it may not be considered as a mere technicality as it is a firm and clear course set out in law and does not admit to changing counsel by consent filed between two lawyers unless the consent follows an application.”

24. The Respondent has however contended that the said provision does not apply to judicial review application. It is generally accepted that being special, proceedings under Order 53 of the **Civil Procedure Rules** derive their force of law from the **Law Reform Act**. Basically, the accepted legal position is that **Civil Procedure Rules** and the **Civil Procedure Act** do not apply to judicial review and by comparison the entire civil procedure. The only part of the **Civil Procedure Rules** applicable to Judicial Review is Order 53 enacted pursuant to powers donated under section 9 of the **Law Reform Act**, which is the law behind Order 53 of the **Civil Procedure Rules** such that proceedings under Order 53 are special proceedings. Being special in nature, Order 53 of the **Civil Procedure Rules** stands on its own with its own rules and **Civil Procedure Rules** do not apply to judicial review, a special jurisdiction recognised by section 3A of the **Civil Procedure Act**. See **Welamondi vs. The Chairman Electoral Commission of Kenya [2002] 1 KLR 486**.

25. However, as was appreciated by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72** while citing with approval *The Discipline of Law* 1979 London Butterworth at page 12 by Lord Denning:

“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

26. The provisions of Order 9 rule 9 of the **Civil Procedure Rules** were given meaning to by Koome, J (as she then was) in **Ahamed Mohamud Adam vs. Jimmy Tomino & 2 Others Nakuru HCCC No. 244 of 1998**, where the Learned Judge expressed herself as hereunder:

“The mischief that was intended to be cured by the provisions of Order 3 rule 9A was to ensure that after judgement, a change of advocates was not effected without notifying the advocate who was on record. In other words it was meant to secure the interest of the advocate who acted for the party up to the judgement.”

27. It is therefore clear that the said rule is not just like any other procedural rule but seeks to protect the interests of the advocates in the suit rather than the interests of their clients. In my view such a rule ought to be interpreted in such a way as to achieve its real purpose rather than strictly. Just like other provisions of the **Civil Procedure Rules** subsequent to judgement such as the execution proceedings may be applied to judgements in judicial review where appropriate it is my view that since Order 9 rule 9 of the **Civil Procedure Rules** transcend the interests of the parties to the suit, the same may where the circumstances warrant be invoked in judicial review proceedings subsequent to the delivery of the judgement.

28. It must also be noted that there is no provision either under sections 8 and 9 of the **Law Reform Act** or Order 53 of the **Civil Procedure Rules** that provide for the filing of a Notice of Change of Advocates. The only provision that provide for the same is Order 9 rule 5 of the **Civil Procedure Rules** which provide that:

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

29. By giving a Notice of Change of Advocates, the firm of **Coulson Harney LLP** must have appreciated

the importance of the above provision. In my view it ought to have complied with rule 9 of the same Order as well.

30. Before concluding this matter, I must remind the parties herein that these are judicial review proceedings and they ought not to be transmuted to proceedings in which the rights of the shareholders of a corporation or the agents of the corporation in respect of the proceeds of a suit are to be determined. Such matters ought to be dealt with in a normal civil suit in which the merits of the respective rights of the parties may be properly addressed and determined.

31. Having considered the facts and the law relevant to the present application, it is my view and I hold that the instant application is merited.

Order

32. Consequently, the Notice of Change of Advocates filed herein on 21st September, 2017 by **M/s Coulson Harney Advocates** is hereby struck out from the court record.

33. In the circumstances of this case, there will be no order as to costs.

34. It is so ordered.

Dated at Nairobi this 20th day December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njiru for the Applicant

Miss Mwangi for the Respondent

CA Ooko