



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 159 OF 2013**

**ROMANE AGENCIES LIMITED ..... APPELLANT**

**VERSUS**

**TANATHI WATER SERVICES BOARD ..... RESPONDENT**

**RULING**

**APPLICATION**

0. By an application dated 7<sup>th</sup> March 2014, expressed as filed by M/S Nzioka Mutua & Associates as advocates for the Appellant/Plaintiff, it is sought the following specific orders:
  1. *“That the matter be certified as urgent and directions be issued towards the hearing of the undermentioned prayers expeditiously.*
  2. ***That the High Court does find that the Notice of Change of Advocates purportedly filed by Mackenzie & Co. Advocates, purportedly replacing the firm of Nzioki Mutua and Associates for the Appellant/Plaintiff and only served upon the firm of Anthony M. Mulekyo, Advocate to be improper, irregular and illegal.***
  3. *That the court does subsequently find that the firm of Mackenzie & Co. Advocates has no locus or authority to purportedly act and/or enter into consent for and on behalf of the Appellant/Plaintiff herein, Romane Agencies Ltd.*
  4. *That notwithstanding the above the Honourable Court does find that a singular and/or minority Director of a company has no authority to enter into any consent for a company, in this case, the Appellant/Plaintiff without the authority of the other Directors.*
  5. *That the Honourable Court does subsequently find and determine that the consents filed in the High Court matter herein and in the Lower Court matter being CMCC 48 of 2013 (Romane Agencies Ltd –vs- Tanathi Water Services Board) by the firm of Anthony Mulekyo Advocates for the Defendant and Mackenzie & Co. Advocates purportedly for the Appellant/Plaintiff to be unprocedural, irregular, unlawful and illegal and subsequently proceed to vacate the same in addition to declaring any acts or deeds done pursuant to such illegality void, abinitio.*
  6. *That the Honourable Court does, in the interests of justice in the face of the irregularities above committed, and if it so deems fit Order both the firms of Anthony Mulekyo, Advocates and Mackenzie and Company advocates, jointly, to deposit into Court the sums of Kshs. 1,730,00/= paid to them by the Respondent/Defendant in pursuance of the illegality above.*
  7. *That the Honourable Court does find that the firm of Nzioki Mutua & Associates Advocates is still properly and validly on record for the Appellant/Plaintiff and directions be given towards the hearing and expeditious disposal of the appeal herein filed or such other Orders as the Court may deem fit and just to grant.*
  8. *That costs be in the cause.”*

0. The application was based on grounds set out in the application as follows:
  1. *That the firm of Nzioki Mutua and Associates Advocates has been and still on record for the Appellant/Plaintiff.*
  2. *That the firm of Mackenzie and Co. Advocates irregularly and illegally placed themselves on record for the Appellant/Plaintiff with tacit connivance acceptance and consent from the firm of Anthony Mulekyo Advocates in a move endeared towards swindling **the Applicant its just dues and the firm of Nzioki Mutua and Associates Advocates its entitlement and fees paid.***”
0. The respondents filed respective replying affidavits – Replying affidavit for the appellant sworn by Stanislaus Muisyo Kilonzo on 14<sup>th</sup> April 2014 for the appellant and replying affidavit for the respondent sworn by Brenda Kiberenge and filed on 10<sup>th</sup> April 2014, and the parties subsequently filed written submissions and ruling was reserved.
0. The appellant company and the respondent were united in the contention that there was a valid notice of change and that the parties had then entered into negotiations resulting in the settlement recorded in the consent filed in the both the trial court at Kitui and the High Court in Machakos and that the consent had brought the matter to an end.

### **Issue for Determination**

0. From the pleadings, evidence and submissions before the court, the issues for determination in the application are as follows:
  - a. Whether the change of advocate in the matter was lawfully effected; and
  - b. If the change of advocates was ineffective, whether the court will interfere with the orders of the Court made in the trial court subsequent to the purported change of advocate for the appellant company.
0. The court considers that the issue of legal representation of the appellant company must be dealt with at the outset as it determines whether the reliefs sought in Prayers 3-7 of the Notice of Motion are available at the instance of the Counsel who has sought them.

### **Determination**

0. Order 9 rules 5 and 6 of the Civil Procedure Rules are in terms as follows:

***“5. 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.*”**

***6. The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).*”**

0. It was clear that the M/S Nzioka Mutua & Associates advocates who have filed the present application for the appellant were instructed by the same director who instructed M/S Mackenzie and Co Advocates to take over the brief from M/S Nzioka Mutua & Associates. In his supporting affidavit, Mr. Fred Mutua Advocates depones at paragraphs 5-7 that at a meeting with ‘a sister of the Majority shareholder, together with the minority shareholder, Stanislaus Muisyo Kilonzo’:

***“5. That I further informed them that the plaintiff’s fee would be in excess of Ks.70,000/- whereupon they, and in particular, Stanislaus Kilonzo, stated that they had exhausted all their funds, they were broke and requested that I pay for their filing fees in return of an agreement to pay the firm a percentage of the proceeds*”**

upon completion.

6. *That in my personal capacity as a friend to the two directors and feeling sorry for them nonetheless, an agreement was done and executed by the minority director Stanislaus Kilonzo and the sister to the [majority] director Mathew Mutua, with his consent and full knowledge and consent of the minority of the minority shareholder, Stanslous Kilonzo. (Attached hereto and marked FM15 is a duly sealed consent letter).*

7. *subsequent to the necessary demands, the firm filed suit, using my 70,350/- as filing fees whereupon the firm acting for the defendant firm, Mulekyo & Co. Advocates files an application seeking stay of proceedings and that the matter does proceed for arbitration.”*

0. The said Stanslous Kilonzo has sworn an affidavit 5<sup>th</sup> February 2014 deponing to his instructions and subsequent withdrawal of instructions to the firm of Nzioka Mutua Advocates and their replacement by the firm of Mackenzie & Co Advocates after the former allegedly declined to comply with his instructions to accept settlement proposal by the defendant in the lower court suit.
0. Although the advocate deponent of the supporting affidavit claimed that he received instructions from the majority shareholder Mathew Mutua, no evidence of the shareholding of the company was adduced to demonstrate this, and the said majority director did not file any affidavit in support of the application to challenge the appointment or instruction of the firm of advocates, Mackenzie and Co. advocates, to act for the company. In the circumstances, this court is unable to hold as sought by the advocate presenting this application that the appointment of the firm of advocates Mackenzie & Co. Advocates was invalid.

### **Compliance with Order 9 rule 6 of the Civil Procedure Rules**

0. The requirement for service of a Notice of Change must when understood in the context of its purpose and object be taken to require notification rather than validation of the change of advocate. The parties in the suit and previous counsel are notified of the change of advocates by service upon them as required by the rule. Service of the notice of change does not validate the change of advocate. The object of change of advocates is to promote the right of counsel, with the freedom of a litigant to appoint an advocate of his own choice. To hold otherwise would be to subjugate a party's right of counsel to a notification requirement.

### **Notification of the Notice of Change**

0. Indeed, the requirement under Order 9 rule 5 and 6 of the Civil Procedure Rules is for the Notice of Change to be filed in Court first and thereafter service “**on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court.**” Clearly, the purpose of the service on the former advocate is to inform him that a Notice of Change “*has been duly filed in the appropriate court*” and it does not affect the validity of the change of advocates.
0. In his supporting affidavit at paragraph 11, the advocate presenting this application confirmed that he was aware of the Notice of Change as at 8<sup>th</sup> January 2014 and that he wrote a letter thereon to the two firms of advocates, when he said:

*“That on the 8<sup>th</sup> January 2014, a Notice of Change of advocates purporting replacing ourselves with the firm of Mackenzie & Co. Advocates was dropped at our offices, which were still closed (annexture 20) prompting our letter to both the firm of Antony Mulekyo & co Advocates for the defendant and Mackenzie & Co Advocates, dated 21<sup>st</sup> January 2014.”*

0. Once notified of the change the parties in the suit must act on the notification. It is a matter only

of the parties being made aware of the particular party's address of service for purposes of the suit and for the previous counsel to seek payment of fees for work so far done for the instructing client.

### **Right to Counsel**

0. The right to counsel is protected by Article 1 of the **United Nations Basic Principles of the Role of Lawyers, 1990**, which is made part of Kenya law under Article 2 (5) of Constitution of Kenya 2010, in terms that:

*“1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”*

0. Counsel cannot, consistently with the right to counsel, insist on being counsel for an unwilling client.

### **Right of Counsel to advocate-client costs**

0. However, it appears to this court that the present application is motivated by the advocate's pursuit of his instruction fees alleged to have been agreed at 20% of the proceeds of the recovery suit by a consent letter of 25<sup>th</sup> October 2012 attached as FM15 to the supporting affidavit. This aspect of advocate-client costs may be recovered in appropriate proceedings filed in that behalf under the Advocates Act.
0. Rule 13 of the Advocates' Remuneration Order provides therefor as follows:

**“13. Taxation of cost as between advocate and client on application of either party**

*(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.*

*(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.*

*(3) 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.”*

### **Relief sought by Advocate in favour of the appellant company**

0. The present application seeks by motion of Counsel various reliefs in favour of the appellant company. Counsel cannot purport to hold brief for the alleged majority shareholder in the absence of any affidavit by such shareholder or his duly appointed attorney to that effect. Having found that the said advocate was properly replaced through a valid Notice of Change of Advocates, the advocate lacks capacity to move the Court for the reliefs sought in paragraphs 3-7 of the Notice of Motion dated 7<sup>th</sup> March 2014.

### **Orders**

0. Accordingly, for the reasons set out above, the Notice of Motion dated 7<sup>th</sup> March 2014 is

dismissed. Costs should ordinarily follow the event but as the representation of the appellant/applicant company was disputed there will be no order as to costs of the application.

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF MARCH 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

No appearance for the Applicant

Miss Mbuvi for Mr. Mackenzie for the Respondent

Ms. Doreen - Court Assistant.