



**REPUBLIC OF KENYA**

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

**COMERCIAL & ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**HCCC CASE NO 184 OF 2001**

**SEE BOUND LIMITED..... APPLICANT**

**VERSUS**

**LONDON DISTILLERS (K) LIMITED..... RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Notice of Motion application dated 17<sup>th</sup> July 2013 and filed on 18<sup>th</sup> July 2013 was filed under the provisions of Section 1A, 1B, 3A of the Civil Procedure Act, Rules 82 and 83 under the Appellate Jurisdiction Act and Order 42 Rule 6 of the Civil Procedure Rules .It sought the following orders
  - i. **That this court issued a conditional order of stay execution of the decree herein pending intended appeal against the decree herein on 11<sup>th</sup> June 2010 on condition that the judgement debtor provided a security of Kshs 2,000,000/= within 21 days thereof.**
  - ii. **That the Judgment Debtor filed their Notice of Appeal on 13<sup>th</sup> June 2008.**
  - iii. **The said Notice of Appeal was withdrawn on 13<sup>th</sup> August 2008 and hence there was no intended Appeal.**
2. The grounds under which the said application was premised were generally as follows:-
  - a. **That a stay of execution pending appeal was granted in favour of the Judgment Debtor on condition that it deposited a sum of Kshs 2,000,000/= within twenty one (21) days from 11<sup>th</sup> June 2010.**
  - b. **That the Judgment Debtor filed a Notice of Appeal on 13<sup>th</sup> June 2008 which notice was withdrawn on 13<sup>th</sup> August 2008 and hence there was no appeal.**
  - c. **That since the order for stay of execution was granted, the Judgment Debtor had never filed a proper appeal and continued to enjoy the said orders *ad infinitum* to the detriment of the Decree Holder.**
  - d. **That it was in the interests of justice that the said orders be discharged to enable the Decree Holder proceed with execution of the decree.**

**AFFIDAVIT EVIDENCE**

3. The said application was supported by an Affidavit sworn by Alex Gatundu on 17<sup>th</sup> July 2013. He is the advocate having conduct of the suit on behalf of the Decree Holder. He deponed that suit was filed on 13<sup>th</sup> February 2001, amended on 23<sup>rd</sup> February 2001 and judgment entered in favour of the Decree Holder against the Judgment Debtor on 30<sup>th</sup> May 2008 in the sum of Kshs 2,183,700/= with interest at court rates from the date of filing suit. Essentially, he reiterated the grounds on the face of the present application.
4. On its part, on 8<sup>th</sup> August 2013, the Judgment Debtor filed a Replying Affidavit sworn by Mohan Galot on the same date. It also filed Grounds of Objection dated 16<sup>th</sup> December 2013 on same date. Its grounds of Objection were that:-
  1. **The Honourable Court was *functus officio*.**
  2. **The Application was incurably defective in that the purported advocates for the Applicants are not properly on record.**
  3. **The Application was a gross abuse of the court process as the Application sought to procure advantage from the loss of Court file.**
  4. **Unless and until the Court file had been reconstituted the Application dated 17<sup>th</sup> July 2013 was premature.**
  5. In the said Replying Affidavit, Mohan Galot, a director of the Judgment Debtor herein denied that the Judgment Debtor had withdrawn its Notice of Appeal. He contended that the Judgment Debtor had been keenly following the registry to trace the file to enable it file a substantive appeal. He also averred that the Judgment Debtor had also been looking for the file which has since being reconstructed and that it was therefore not true that the Judgment Debtor was enjoying the stay orders as the delay in obtaining the proceedings had also limited its security rating with its bank.

#### **LEGAL SUBMISSIONS BY THE DECREE HOLDER**

6. On 26<sup>th</sup> November 2013, the Decree Holder filed its written submissions dated 21<sup>st</sup> November 2013. It submitted that Sections 1A (I) and 1B (I) (a) of the Civil Procedure Act provided that the overriding objective of the Act and rules made there under was to facilitate just and expeditious resolution of disputes which the courts were joined to ensure. It added that Section 3A of the said Act also recognised the court's inherent powers to make such orders as were necessary for the ends of justice or to prevent abuse of the court process.
7. It was the Decree Holder's argument that the typed proceedings were in the court file as far back as 20<sup>th</sup> January 2010 and that the Judgment Debtor's contention that it had been following up proceedings so as to file its Record of Appeal was a "lame excuse".
8. The Decree Holder submitted that the Judgment Debtor ought to have lodged its appeal by 10<sup>th</sup> August 2008 having filed its Notice of Appeal on 11<sup>th</sup> June 2008 in accordance with Section 81 of the Appellate Jurisdiction Act. It further argued that as was provided in Section 82 (a) of the said Act, failure to lodge the appeal within the stipulated sixty (60) days rendered the notice of appeal as withdrawn effectively on 10<sup>th</sup> August 2010.
9. The Decree Holder also argued that the form of bank guarantee to secure the stay pending appeal was spent and that it was in the interests of justice that the orders for stay of execution be discharged forthwith and the Decree Holder be allowed to execute its five (5) year old decree as the decretal amount continued to accrue interest as aforesaid.

#### **LEGAL SUBMISSIONS BY THE JUDGMENT DEBTOR**

10. The Judgment debtor's written submissions dated 16<sup>th</sup> December 2013 were filed on the same date. It argued that the prayer to discharge the order for stay was premature unless the court file had been reconstructed.
11. It was its argument that this court became *functus officio* the minute it granted the orders to stay the decree on 11<sup>th</sup> June 2010 and that it did not therefore have any jurisdiction to grant the orders sought in the Decree Holder's application.
12. The Judgment Debtor also submitted that the firm of M/S Gatundu & Co Advocates who were

- acting for the Decree Holder could not purport that the Judgment Debtor had withdrawn its Notice of Appeal as the said firm was not previously on record for the Decree Holder.
13. It further submitted that in any event the said firm of advocates could not be said to be properly on record as there was no application that was served on all the parties prior to the filing of the consent which was dated 8<sup>th</sup> December 2011 and filed on 21<sup>st</sup> February 2012.
  14. In his oral submissions, counsel for the Judgment Debtor argued that under Section 82 (I) of the Appellate Jurisdiction Act, the time for preparation of the proceedings was excluded and that the Deputy Registrar had never written to them to advise that the proceedings had been typed. He added that until such time the consent allowing the firm of M/S Gatundu & Co Advocates to come on record was endorsed by the court, they could not be said to be on record at the time they filed the present application.
  15. It was therefore the Judgment Debtor's submission that the Decree Holder's application was an abuse of the court process as the Decree Holder sought to procure unfair advantage caused by the loss of the court file when in fact it was the Judgment Debtor who had suffered greater prejudice as a result of the loss of the court file and that the matter should proceed on merit as was held in the case of **Richard Ncharpi Leiyagu vs IEBC and 2 Others [2013] eKLR**.
  16. In response thereto, counsel for the Decree Holder orally averred that the Judgment Debtor had not provided a Certificate of Delay as was envisaged in Section 81 of the Appellate Jurisdiction Act and that in any event, such a certificate could not be issued with the proceedings having been in the court file.
  17. The Judgment Debtor's counsel countered the Decree Holder's counsel's assertion that the Deputy Registrar notified parties on 22<sup>nd</sup> February 2011 that the proceedings were ready for collection and stated that the said letter was addressed to M/S Masika & Co Advocates and not to his firm.
  18. Counsel for the Decree Holder also submitted that it was sufficient to have filed a consent as could be seen in Order 9 Rule 9(b) of the Civil Procedure Rules, 2010. It was therefore his submission that his firm was properly on record for the Decree Holder herein.

### **LEGAL ANALYSIS**

19. The preliminary issue that came out during the parties' oral and written submissions that needed to be resolved at the outset was whether the firm of M/S Gatundu & Co Advocates was properly on record. The court will therefore deal with the same first as this will determine whether or not it will be necessary to consider the other substantive issues herein.
20. The letter dated 8<sup>th</sup> December 2011 and filed in court on 21<sup>st</sup> February signed by the firms of M/S Gatundu & Co Advocate and M/S Masika & Koross & Co Advocates stipulates as follows:-

**“By consent the firm of GATUNDU & CO ADVOCATES be and is hereby granted leave to come on record in place of MASIKA & KOROSS ADVOCATES for the Plaintiff”.**

21. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides as follows:-

**“Where there is a change of advocate, or where 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”.**

22. Having considered the parties' advocates submission on this issue, the court is more persuaded by submissions by counsel for the Decree Holder that the consent was sufficient for the firm of M/S Gatundu & Co Advocates to have on record for the Decree Holder herein. In this regard, the court therefore rejects the Judgment Debtor's counsel's submissions that it was mandatory that an application be served upon his firm before the said consent could be filed.
23. However, of particular concern in this matter is that save for the said letter granting leave to the firm of M/S Gatundu & Co Advocates coming on record, there does not appear to have been a

Notice of Change of Advocates filed by the Decree Holder's advocates. The granting of leave for an advocate to come on record for a party is totally different from an advocate being on record for such a party.

24. The court's position is fortified by the provisions of Order 9 Rule 5 of the Civil Procedure Rules, 2010 which expressly stipulate as follows:-

**“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 (emphasise mine) in accordance with Rule 6, the former advocate shall subject to rules 12 and 15 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal”.**

25. To further augment this court's holding change must be filed, Order 9 Rule 6 of the Civil Procedure Rules, 2010 provides as follows:-

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

26. The importance of a Notice of Change of Advocates cannot be under estimated. It is there for the purpose of giving all other parties an opportunity to easily effect service of court documents. In this case, in the absence of such notice of change of advocates, irrespective of whether or not there was a consent between the firm or M/S Gatundu & Co Advocates and M/S Masika & Kaross Advocates, the latter firm is for all purposes and intent deemed to be the firm on record for the Decree Holder herein.

27. In the absence of such a duly filed Notice of Change of advocates by the firm of M/S Gatundu & Co Advocates, it is the finding and holding of this court that the present application is incompetent, having been filed by a firm of advocates who are not properly on record for the Decree Holder.

28. However, it must be noted that before such a Notice of Change of Advocates can be filed by the firm of M/S Gatundu & Co Advocates, the consent must first be endorsed as an order of the court. Effect is given to any consent by a court order. Before that is done, the consent only demonstrates the parties intention and has no legal effect. This court therefore agrees with counsel for the Judgment Debtor that until such time the consent herein is endorsed as an order by the court, the firm of M/S Gatundu & Co Advocates cannot be said to be on record for the Decree Holder herein.

29. For the foregoing reasons, this court has come to the conclusion that it cannot consider or determine the Decree Holder's application unless the said application is either filed by the firm of M/S Masika & Koross Advocates or in the alternative, a fresh application seeking the said orders is filed after the firm of M/S Gatundu & Co Advocates has fully complied with Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010.

30. As the prayer for reconstruction of the court file was not opposed, the same is hereby allowed as prayed in the present application.

### **DISPOSITION**

31. The upshot of this ruling is that, the Decree Holder's Notice of Motion application dated 17<sup>th</sup> July 2013 is hereby dismissed with costs to the Judgment Debtor.

32. Orders accordingly.

**DATED and SIGNED at NAIROBI this 27<sup>th</sup> day of February 2014**

**J. KAMAU**

**JUDGE**

**DATED SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of February 2014**

**F. GIKONYO**

**JUDGE**