



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 365 OF 2014**

**ODERA OBAR & COMPANY ADVOCATES.....APPLICANT**

**VERSUS**

**CHARTERHOUSE BANK LIMITED.....RESPONDENT**

**RULING**

1. The issues before me stem from an Advocate/Client Bill of Costs. The said Bill of Costs was filed by the Law Firm of **ODERA OBAR & COMPANY ADVOCATES** against **CHARTERHOUSE BANK LIMITED**.
2. It is common ground that the said Bill of Costs arises from services which the Advocates rendered the case of **CHARTERHOUSE BANK LIMITED VS CENTRAL BANK OF KENYA & 2 OTHERS, MILIMANI HCCC NO. 329 OF 2006**.
3. Upon being served with the Bill of Costs, **KENNEDY KAUNDA ABUGA**, a Director at the Central Bank of Kenya, who also doubles up as the Bank Secretary, swore an affidavit. Through his said affidavit Abuga told the court that the Central Bank of Kenya placed Charterhouse Bank Limited under Statutory Management in the year 2006.
4. The said appointment of the Statutory Manager was challenge by the Directors of Charterhouse Bank Limited; and that was Milimani HCCC No. 329 of 2006 was about.
5. In the circumstances, the Statutory Manager categorically denied ever having instructed the firm of Odera Obar & Company Advocates.
6. In the light of that development, before the Bill of Costs could be taxed, it became necessary for the court to determine whether or not the firm of Odera Obar & Company Advocates could tax their Bill of Costs against Charterhouse Bank Limited.
7. Both parties acknowledged that pursuant to Rule 11 of the Advocates (Remuneration) Order, the objection to the Bill should first have been raised before the Taxing Officer. That position is buttressed by the decision of Khamoni J. in **WILSON NYENDE t/a NYENDE & CO. ADVOCATES VS KARIUKI & GATHECHA RESOURCES LTD MILIMANI, MISC. CAUSE NO. 377 OF 2008**, wherein the Judge said;

*“...the question whether the Applicant Advocate is entitled to those costs is a question which properly should start before the Taxing Officer for a decision by the Taxing Officer in order to be one of the issues in an objection which may be raised under paragraph 11 of the Advocates (Remuneration) Order, and ought to be raised before the Taxing Officer if the retainer is being disputed”.*

8. Notwithstanding that position, both parties made a choice to canvass the issue before me, “so as to save time”.

9. Mr. Chacha Odera, the learned advocate for the defendant, submitted that the plaintiff could only seek to recover his legal fees from the client who had given him instructions. And the defendant insisted that it did not give instructions to the Law Firm of Odera Obar & Company Advocates. Therefore, in so far as the Bill of Costs in this case was being raised against the defendant, Mr. Chacha Odera said that that wrong, because the effect of the appointment of the Statutory Manager was to exclude the Board of Directors from making decisions or giving instructions on behalf of the company.
10. According to the defendant, the only person who had the requisite legal authority to instruct advocates was the Statutory Manager.
11. In the case which was handled by the Law Firm of Odera Obar & Company Advocates, the Directors of the Bank were challenging the appointment of the Statutory Manager. Therefore, the defendant made it clear that it could not instruct the plaintiff herein to file a suit to challenge the appointment of the Statutory Manager.
12. In answer to the submissions of the defendant, Mr. Odera Obar, the learned advocate for the plaintiff, submitted that the plaintiff was instructed by Charterhouse Bank Limited, the plaintiff. That was the reason why he then raised a Bill of Costs against the said client.
13. As far as the plaintiff was concerned, if the Statutory Manager was ready and willing to pay a lawyer for defending the Bank, she should also be obliged to pay the costs for the Bank.
14. It was the understanding of the plaintiff that because it was the statutory manager who was mandated to defend the bank which was under her statutory management, the said statutory manager ought to pay the advocates who acted so as to offer protection to the bank.
15. The plaintiff acknowledged that in **KENYA COMMERCIAL BANK LIMITED VS CHATERHOUSE BANK LIMITED, HCCC NO. 626/2006**, Waweru J. held as follows;

*“I have already held that the management, control and conduct of the affairs and business, and exercise of all the powers of the Defendant, to the exclusion of its board of directors, must include defending any court proceedings that may be brought against the Defendant, including the present proceedings. In other words, the Statutory Manager is the proper person to defend the present proceedings, and not the directors of the Defendant”.*

16. In that case, the learned Judge noted that Mr. Odera had told the court that he was the advocate for Charterhouse Bank Limited. Mr. Odera had been instructed by the directors of the bank.
17. Waweru J. observed thus;

*“The issues raised by the directors of the Defendant in the present application, in essence, amount to a challenge of the action of Central Bank of Kenya in placing the Defendant under statutory management and the conduct of the statutory manager”.*

18. In effect, the directors of the bank were challenging the statutory manager’s appointment. It is inconceivable that the statutory manager, who had been vested with all the powers and control over the conduct of affairs and business of the defendant, would have given instructions to an advocate to challenge her said position.
19. On 17<sup>th</sup> May 2007, Warsame J. (as he then was) expressed himself thus, in a Ruling in the case of **KENYA COMMERCIAL BANK LIMITED VS CHARTERHOUSE BANK LIMITED CIVIL CASE NO. 626 OF 2006 (O.S)**;

*“The powers and responsibilities to be exercised by the statutory manager are all the powers of the institution (Charterhouse Bank Limited), to the exclusion of its board directors, including the right to appoint and fire an Advocate to act on behalf of the bank”.*

20. The learned Judge emphasized that the statutory manager had the exclusive rights to appoint an advocate of her own choice. I am in full agreement with the learned Judge.
21. Of course, as was stated by the plaintiff, the appointment of a receiver does not destroy the corporate existence of a company. That position was well stated by Ringera J. (as he then was) in **OMONDI & ANOTHER VS NATIONAL BANK OF KENYA LIMITED & 2 OTHERS [2001] KLR 579**, at page 587, when he said;

*“And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors functus officio, it does not destroy the corporate existence and personality of the company. The appointment makes the directors unable to act in the name of the company, but as I understand the law, it does not make them, in their capacity as members, equally disabled”.*

22. Although a statutory manager was not the same as a receiver manager, I do concur with Ringera J. that when a receiver manager was appointed, the directors ceased to have any legal authority to act as directors of the company.
23. Effectively, therefore, even by the authority cited by the plaintiff, the directors had no legal authority to act in their capacity as directors. The role and functions of the directors had been taken away from them, and had been vested exclusively on the statutory manager.
24. For that reason, if any person other than the statutory manager gave instructions, he cannot be deemed to have done so on behalf of the company.
25. The fact that the Bank had a right to challenge the appointment of the statutory manager is not in doubt.
26. But the question that then arises is how that challenge can be mounted.
27. As far as the plaintiff was concerned;

*“When the Directors challenged the action against the bank, they did so for the benefit of the bank. They could only do so in the bank’s name”.*

28. From that assertion it became clear that the persons who instructed the plaintiff were the directors of the bank. That confirms what the statutory manager had said; that she never instructed the plaintiff to act for and on behalf of the bank.
29. By purporting to give instructions to a Law Firm on behalf of the bank, the directors were clawing back to themselves powers which had been vested wholly and exclusively upon the statutory manager. And they were doing that without the consent or authority of the said statutory manager.
30. I find that their attempt did not have the backing of the law.
31. It is clear that the plaintiff was instructed by directors of the bank at a time when such directors did not have lawful authority to act as directors. Therefore, the actions of the said directors cannot be deemed to be the actions of the company.
32. If the plaintiff had a client who had instructed the Law Firm, then that client is the directors who gave him instructions. By so saying, I am not suggesting that the corporate entity of the bank had ceased to exist. The said corporate entity and personality of the bank is still intact. It was only the Board of Directors who had been effectively removed from their roles as directors.
33. If ultimately, the statutory manager was removed, and the company reverted to the Board of Directors, the said Board could, possibly, resolve to indemnify those who they perceive to have acted for the benefit of the company whilst the company was under statutory management.
34. But for as long as the statutory manager remains in place, she is the only person who may instruct an advocate to act for and on behalf of the company. As she did not give instructions to the Law Firm of Odera Obar & Company Advocates, that firm cannot tax its Advocate/Client Bill against the Charterhouse Bank Limited. Accordingly, I uphold the objection by the defendant to have the Bill against them taxed. The said Bill of Costs, in so far as it cites the bank as the client, is hereby struck out.
35. The plaintiff will pay to the defendant the costs pertaining to the proceedings in relation to the Bill of Costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>th</sup> day of December 2014.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Oriema Okoth for the Applicant

Kiragu for the Respondent.

Collins Odhiambo – Court clerk.