REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT MISC NO. 18 & 19 OF 2011

KAMUNYORI & COMPANY ADVOCATES…….....……APPLICANT

VERSUS

AHMED JAMA…….....……RESPONDENT

RULING

This is a reference brought under paragraph 11 of the Advocates (Remuneration) Order Cap 16 of the Laws of Kenya and sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. In the reference, the applicant Kamunyori & Company Advocates challenges the ruling of the Taxing officer dated 14th March, 2011, in which the Applicants bill of costs dated 17th January, 2011 was struck out and set aside. The Applicant prays for reinstatement of the Bill of costs for taxation. A similar application has been filed under Misc Application No. 19 of 2011 hence this ruling will address both applications.

The applications are supported by eight grounds and by an affidavit sworn on 18th April, 2011 by John Kirk Nyaga Kamunyori. The gist of the grounds supporting the application is that the Taxing Officer erred in finding that the Respondent, Ahmed Jama, could not be held accountable for payment of legal fees due to the Applicant for acting for him for the reason that the instruction letters to the Applicant were issued by Kenya Trust Company Limited, a subsidiary of Tysons Limited, or by either company. The two companies are hereinafter jointly and severally referred to as the "Management Companies". The Applicant contends that although the application letters emanated from the management, the letters were issued on behalf of the Respondent, who had appointed the companies as his real estate managers. The applicant further argues that it is a well established practice for estate management companies to issue instructions to advocates on behalf of landlords of properties over which they have been appointed to manage. Such practice, argues the Applicant, is well within the implied or ostensible authority of the management companies once appointed by property owners.

The application is opposed by the Respondent.

At the hearing of this reference, Mr Kamunyori, learned counsel for the Applicant reiterated the contents of the grounds supporting the application as well as the facts deponed in his affidavit sworn on 18th April, 2011. He emphasized that the instruction letters from the management companies requesting his firm to act in the two matters expressly stated that he was being retained to act for the Respondent in disputes

involving the Respondent as the landlord and his tenant. The management companies, as appointed estate managers of the Respondent merely received summons on his behalf and similarly issued instructions to his law firm in the same capacity as agents for the Respondents. He states that he executed the instructions under this understanding and procured the striking out of RMCC No. 2556 of 2007. Similarly, when the plaintiff in that suit decided to file a fresh suit – RMCC No. 347 of 2009, the firm was again instructed to act for the Respondent, by the same estate management companies. In both matters, the Applicant argues that he was properly instructed by an agent of a known principal as the instruction letters were copied to the Respondent. The Applicant further told the court that there was no doubt that Tysons Limited and its subsidiary Kenya Trust Company Limited were not a party to the suit and neither were they the owners of the property subject of the suits. As agents of the Respondent, the Management Companies had authority not only to get tenants for the properties but also to protect other interests of the landlord such as claims arising from the said tenants. To demonstrate the agency arrangement between the Respondent and the two companies aforesaid, Mr Kamunyori annexed in his supporting affidavit a lease dated 6th December, 2004 in which the Respondent has signed as a landlord and one Thomas N. Makeni as tenant but which is drawn on the paper of Tysons Limited. He also referred the court to paragraph (4) of the lease which stipulates that rent would be payable to Kenya Trust Company Limited. He further argued that the Respondent Mr Ahmed Jama had never disputed that Kenya Trust Company was acting on his behalf as an appointed estate management company. The Respondent had also never argued that the instruction letters from Tysons / Kenya Trust Company Limited were a forgery. Mr Kamunyori referred the court to two authorities; Civil Appeal No 85 of 1985 Mwanza Shirandula Vs Martha Mukhweso and Civil Appeal No 70 of 2001. Mulwet Estate Limited & another Vs Menengai Nursing & Maternity Home to support his arguments.

In opposition to the application, Mr Onyango learned counsel for the Respondent argued that the key question before the court was the determination of who the Applicant's client was in the matter. He told the court that in both cases the Respondent was not the client. He submitted that the relationship between an Advocate and client was governed by the Advocates Act and was different from ordinary business or trade relationships as are governed by the Sale of Goods Act. In that regard, he contended that the Advocates Act does not recognize principal and agent and only recognizes client. Essentially therefore, the Bill of costs should have been filed against the management companies who were the instructing clients. He added that if the legislature had intended it, the Advocates Act would have stated if there can be relationships such as "advocate principal fees " and "advocate agent fees" He concurred with the finding of the Taxing Master that the Blacks Law Dictionary defines "instruct" as the conveying of information as a client to an attorney or to authorize one to appear as advocate. This definition shut out the case before the court as it is only the person who instructs an advocate that can constitute a client hence bear the liability to pay the Advocates Bill. Mr Onyango then distinguished the authorities cited by the Applicant stating that these address a completely different regime of law- the sale of Good Act and the Law of Contract. They would therefore not apply to the present case which is solely governed by the Advocates Act. He concluded that under the Advocates Act, only the instructing party can constitute a client. He therefore prayed that the reference be dismissed with costs.

It is worthy of note that a replying affidavit was sworn by the Respondent on 9th May, 2011 but this was not considered following an objection by Mr Kamunyori as the same had not been served upon him.

In his reply, Mr Kamunyori submitted that Advocates are in business and in trade and that the Advocates Act does not shut out the law of agency. A principal was therefore within his rights to expect an agent to act on his behalf including in the appointment of an advocate to protect the principal's interests. It was therefore appropriate for an advocate to act for a landlord on the instructions issued by the landlord's appointed estate management company. Such principal should therefore bear the responsibility for fees. In that sense, Mr. Ahmed Jama, the Respondent bore the responsibility to pay fees in the two matters i.e HCCC Misc Application Nos 18 & 19 of 2011.

I have considered the arguments of counsel for both the Applicant and the Respondent. I have also read the ruling of the Taxing Master delivered on 14th March, 2011. In my view, a number of facts are not disputed by either party and these can easily be flagged out so that the court can be left to resolve one or two issues that underpin consideration of this reference.

Firstly, it is not disputed the Tyson's Limited and or his subsidiary Kenya Trust Company Limited were at all material times the duly appointed Estate Management Agent of the Respondent. This is discernible from inter alia, the Tenancy Agreement dated 6th December, 2004 between the Respondent and a tenant known as Thomas Makeni; correspondence between the Respondent and Kenya Trust Company Limited and in particular a letter dated 21st July, 2005 in which the Respondent instructs the latter to recover some repair expenses from Mr Makeni and also correspondence between Kenya Trust Company Limited and advocates for Mr Makeni and which are all copied to the Respondent. Not to mention the letters of instructions to the Applicant from Kenya Trust Company to act for the Respondent and which are copied to the Respondent. All these are part of the court record. Secondly, it is not disputed that in both RMCC No. 2556 of 2007 and RMCC No. 347 of 2009, the parties were Thomas Makeni as plaintiff and the Respondent as the defendant. Concomitantly therefore, it is also not disputed that neither Tysons Limited nor Kenya Trust Company Limited was a party to either of the proceedings.

Thirdly, it does not appear to be disputed that in both matters aforesaid the Applicant firm of advocates acted as the advocates for the defendant who in this application is the Respondent. This is because the Advocates for the plaintiff in matter were M/s Modi & Company and there was no more than one defendant in the matter. The Bills of costs the subject of this reference would not have arisen within the purview of RMCC 2556 of 2010 and RMCC No 347 of 2010 had the Applicant firm of advocates not acted for a party therein viz the Respondent.

Finally it is not disputed that the only nexus between the Applicant and the Respondent as resulted in the former acting, as the advocate for the latter are letters of instructions issued to the Applicant by the management companies. Which brings me to the issues in contention that this court should address itself to.

In my view, the disputed issues in this matter are two-fold:-

(i) Whether the management companies possessed authority to issue instructions to the Applicant on behalf of the Respondent and whether such instructions were binding upon the Respondent; and,
(ii) As between the management companies and the Respondent, who was the proper party to the proceedings giving rise to the Bill of Costs hence bearing liability for the fees payable to Applicant.

With regard to the first issue above, the applicant has argued that the instructions from Kenya Trust Company clearly stipulated that the Applicant was to defend the suits on behalf of the Respondent. However, counsel for the Respondent has argued that an Advocate – client relationship cannot be created through an agent and indeed that the law of agency does not apply. The letters from the management companies could not therefore in law create Advocate/Client relationship as between the Applicant and the Respondent. The Taxing Master also makes a similar finding, holding inter alia that "the instruction letter does not state that Kenya Trust Company was appointing the Applicant on behalf of a known principal".

I would resolve the two competing view points under both the law of agency (as relied by the Applicant) and also under the ambit of the Advocates Act (as argued by counsel for the Respondent).

Before I do that however, I do not agree with the Taxing Master that the instruction letters did not indicate that the Applicant was to enter appearance on behalf of the defendant. This is expressly stated in the letters which are exhibited in the Applicant's supporting affidavits. It is therefore not clear to me the basis upon which such finding was premised.

On the applicability of the law of agency in this matter, the point of departure is that there was an express agency agreement as between the management companies and the Applicant in which the former were the duly appointed agents of the latter vis a vis the management of the latter's property. The question before the court should therefore not be whether any agency relationship existed but whether indeed the issuance

of instructions to the Applicant was within the authority delegated to the management companies by the Respondent.

The law on the scope of an agent's authority is fairly well settled. The Jrank Law Encyclopedia (http:law.jrank.org) propounds that an agent's authority may be actual or apparent. Where actual, the agent has express powers to act for the principal. However, where the principal either knowingly or even mistakenly permits the agent or others to assume that the agent has authority to carry out certain actions when in fact such authority does not exist, the principal is liable for such actions of the agent, if other persons believe in good faith that such authority existed. Pertinently, the encyclopedia adds further – "A principal-agent relationship is fiduciary in nature and requires the agent to exercise a duty of loyalty to the principal and to use reasonable care to serve and protect the interests of the principal".

In the present case, although the parties did not exhibit the Agency agreement between the management companies and the Respondent (if any) as would enable the court to determine the scope of delegated authority, it is discernible that within the authority conferred upon the management company to manage the Respondent's property there was apparent authority to protect the interest of the Respondent. Such protection, in my view would include the making of arrangements to defend suits filed against the Respondent of the property over which the company had express authority to manage. I therefore find that the management companies acted diligently within their agency authority in appointing the Applicant to act for the Respondent in the two suits. Not to underline that the instruction letters were copied to the Respondent hence affording him a chance to denounce the instructions if he was dissatisfied with the firm of advocates appointed. This he did not do.

On the second issue, the Advocates Remuneration Order places great emphasis on "parties" to proceedings as a basis for considering Advocates Remuneration.. The term "party" does not appear to have attracted the attention of either the Applicant or the Respondent and certainly escaped that of the Taxing Master. Had any of the three directed their minds to answering the simple question of who the parties of the proceedings were, then it would have been routine to make the finding as to where liability for the Applicant's fees lay. The management companies were obviously not party to the court proceedings hence could not be held liable to pay the fees the subject matter of the Bills of Cost. The mere issuance of instruction letters on behalf of the Respondent did not render them the client in the context of the court proceedings. The proper "party" and "client" as far as the Applicant's appointment as an advocate related is the Respondent as it is his interests that the Applicant was appointed to protect. In the circumstances, there is no room for the Respondent to escape liability for the fees payable to the Applicant in the two matters.

I need not delve into reviewing the authorities cited by counsel as the foregoing analysis provides sufficient basis for deciding this matter. This basis is that I am, for the reasons discussed above, inclined to overrule the Taxing Master's ruling on the preliminary objection and to set it aside, which I hereby do. I therefore order that the Applicants Bill of cost lodged under Misc App No 18 & 19 of 2011 be re-submitted for taxation on a date to be agreed upon by both parties within 14 days from today.

DATED and DELIVERED in open court in NAIROBI this 19th day of OCTOBER, 2011.

J. M. MUTAVA
JUDGE
19th October, 2011

In the presence of

Applicant ……..

Respondent …….