REPUBLIC OF KENYA

IN THE HIGH COURT OFKENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

MISCELLANEOUS APPLICATION NO. 835 OF 2010

KIMANI KABUCHO KARUGA & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

SUNDOWNER LODGE LIMITED.....RESPONDENT/ APPLICANT

RULING

The respondent's application dated 4th October, 2010 seeks an order to strike out the applicant's bill of costs filed on 17th August, 2010. The application was supported by an affidavit sworn by **Samuel Warugu Kimotho**, a director of Sundowner Lodge Limited, the respondent. The respondent was the plaintiff in **HCCC No. 481 of 2003** before this court. It was initially represented by the firm of Lumumba & Mumma Advocates. Mr. Kimotho stated that the respondent did not at any time appoint Messrs Kimani, Kabucho, Karuga & Company Advocates, the applicant, to represent them in that case. The respondent was therefore surprised when it was informed by **Mr. Oyugi** of Oyugi & Company Advocates, who are on record for the respondent, that his firm had been served by the applicant with a bill of costs in respect of the aforesaid HCCC No. 481 of 2003.

In paragraph 10 of his supporting affidavit, Mr. Kimani deposed as follows:

"10. That, I and my co-directors are advised by Mr. Oyugi Advocate which advice I and my co-directors verily believe to be true and correct that even if the court was to find that the applicant/respondent had instructions to act then his bill of costs is premature and must await the conclusion of the suit pursuant to the provisions of the Advocates Remuneration Order."

The applicant filed a replying affidavit that was sworn by **Eric Kariuki Kimani**, an advocate practicing in the name and style of Kimani, Kabucho, Karuga & Company Advocates. He stated, *inter alia*, that the applicant was duly appointed by the respondent and the bill of costs filed herein is proper and is not premature as alleged. He further stated that the applicant, having been duly instructed to take over the conduct of the plaintiff's suit in HCCC No. 481 of 2003 from the respondent's former advocates, Lumumba, Mumma & Kaluma Advocates, a notice of change of advocates was filed on 21st October, 2009. A copy of the said notice was annexed to Mr. Kimani's affidavit.

At the time of receiving the instructions, an application had been made by the defendant in that case to dismiss the suit for want of prosecution by the respondent. The respondent instructed the applicant to draw a response to the said application and the replying affidavit was sworn by the self same Samuel Warugu Kimotho, who has now sworn an affidavit stating that the respondent never instructed the applicant. A copy of the replying affidavit was annexed to Mr. Kimani's affidavit. It is appropriate that I reproduce a few paragraphs of that affidavit as hereunder:

"CIVIL SUIT NO. 481 OF 2003

SUNDOWNER LODGE LIMITED.....PLAINTIFF

VERSUS

KENYA TOURIST DEVELOPMENT CORPORATION.....DEFENDANT

REPLYING AFFIDAVIT

I, Samuel Warugu Kimotho of Post Office Box Number 561 Nakuru do hereby make oath and state as follows.

1. That I am the Managing Director of the plaintiff/respondent herein duly authorized by the plaintiff to swear this affidavit on its behalf.

2. That I am aware of the facts in this matter as they appear in the plaintiff's records and I am therefore competent to swear this affidavit.

3. ……..

4. ……

5. ……

6. That the defendant did indeed write to the plaintiff's advocates Messrs Lumumba, Mumma & Kaluma Advocates requesting them to initiate dialogue for the amicable settlement of this matter and further requested a withdrawal of the present suit.

7. ……..

8. ……..

9. ……..

10. ……..

11. ……..

12. ……..

13. ……..

14. That indeed it is only on 13th October, 2009 that the advocates for the plaintiff then on record (Messrs Lumumba, Mumma & Kaluma Advocates) wrote to the plaintiff informing them that the matter was coming up in court for the consideration of the application for dismissal of the suit for want of prosecution.

15. ……..

16. ……..

17. ……..

18. That what is deponed herein is true and within my knowledge save for matters deponed to on information and belief the sources whereof are clearly stated."

The aforesaid affidavit was drawn and filed by Kimani, Kabucho, Karuga & Company Advocates.

Mr. Kimani further stated that the applicant wrote to the respondent on two separate occasions requesting for a meeting to discuss the issue of legal fees but the applicant did not receive any response. Copies of letters dated 4th November, 2009 and 11th March, 2010 addressed to the respondent by the applicant were annexed to the applicant's affidavit.

On 3rd August, 2010 Messrs Oyugi & Company Advocates filed a notice of change of advocates in HCCC No. 481 of 2003 indicating that they had taken over the conduct of the plaintiff's suit in place of Messrs Kimani, Kabucho, Karuga & Company Advocates. The applicant therefore proceeded to prepare advocate/client bill of costs which was served upon the respondent. In view of the foregoing, the respondent urged the court to dismiss the respondent's application.

Mr. Oyugi for the respondent submitted that the applicant had not properly explained how he was instructed by the respondent since there was no official letter appointing the firm or resolution to that effect. He sought to rely on the decision of Okwengu, J. in **KYANZAVI FARMERS COMPANY LIMITED vs. MANGU NGOLO HCCC No. 128 of 2008 Milimani Commercial Courts** where the learned Judge held, *inter alia*:

"Where an advocate is appointed to undertake the conduct of any proceedings on behalf of the company as a recognized agent such appointment must be made under the company seal. In this case it had been alleged that there was no such authority to institute these proceedings. It would have been a simple matter for the advocate who has instituted these proceedings to swear an affidavit verifying the source of his authority. However no such affidavit has been availed nor has any resolution of the company appointing him as an agent been availed. The sum total is that no authority to institute these proceedings in the name of the company has been demonstrated to this court and the suit is therefore incompetent."

In that decision the court also cited with approval the decision of Kimaru J. in **GATIMU FARMERS COMPANY LIMITED vs. SOLOMON MBUGUA & ANOTHER [2004] eKLR** where it was held that a company can only act through a resolution passed by its directors.

Mr. Oyugi further submitted that the bill of costs is premature because under **Rule 62(A)** of the **Advocates (Remuneration) Order**, a bill of costs has to be filed by the last advocate on record. The rule states as hereunder:

"Where there has been a change of advocates or more than one change of advocates, the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded."

In response, Mr. Mwendwa for the applicant stated that the authorities cited by Mr. Oyugi are distinguishable in that in those cases there were disputes as to the directorship of the companies involved which was not the case in respect of the respondent herein. He further submitted that there is no dispute that the respondent instructed the applicant to act for it and that is why Mr. Samuel Warugu Kimotho swore an affidavit that was drawn and filed by the applicant as stated hereinabove.

Counsel further sought to rely on the doctrine of "**Indoor Management**" which operates to protect outsiders against a company's internal operations and arrangements. The rule is to the effect that outsiders who have no notice as to how the company's internal machinery is handled by its officers should not be prejudiced by any irregularities that may beset the indoor working of the company.

In **PREMIER INDUSTRIAL BANK LIMITED vs CARLTON MANUFACTURING COMPANY LIMITED, [1909] 1 KB 106**, it was held that:

"If the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do."

Counsel submitted that Mr. Kimotho had due authority from the respondent to depone to the affidavit which was sworn in opposition to the application seeking to dismiss the respondent's suit for want of prosecution.

Regarding the submission that the applicant's bill of costs was premature, Mr. Mwendwa sought to rely on the decision of Ringera J. (as he then was) in **MACHIRA & COMPANY ADVOCATES VS. ARTHUR K. MAGUGU & ANOTHER**, **Miscellaneous Application No 358 of 2001** at Milimani Commercial Courts. In that matter the court held, *inter alia*:

"Paragraph 62A of the Advocates Remuneration Order applies to the taxation of party and party costs and the object thereof is to avoid loading a party against whom an order for costs has been made with excessive fees as a result of change of advocates by the adverse party in the course of litigation. The principle is that no litigant should be unduly burdened with costs incurred as a result of change of advocates by the adverse party. …. I do not read anything in schedule VI or elsewhere in the Remuneration Order compelling a conclusion that advocate/client costs can only be taxed after a party and party costs are taxed. Schedule 6B states that as between an advocate and client the minimum fees shall be the fee prescribed in A increased by one half, or the fee ordered by the court increased by one half, or the fees agreed by the parties under paragraph 57 by one half. To my mind, this provision contemplates that an advocate/client bill of costs can be rendered on the basis of the prescribed party and party costs and not necessarily the taxed party and party costs. To hold otherwise would be to expose an advocate who has ceased to act to the vagaries of the subsequent conduct of litigation and the taxation of costs therein in which he has no control or input."

Having considered the rival arguments as summarized hereinabove, my views on the arguments by counsel are as follows.

Firstly, there is no basis in the respondent's submission that it never instructed the applicant to act for it in HCCC 481 of 2003. There is no denial that the respondent instructed the applicant to take over the conduct of its case from Messrs Lumumba, Mumma & Kaluma Advocates. It is preposterous on the part of Samuel Waruguru Kimotho to make such an allegation when he had sworn an affidavit drawn by the applicant stating that he had been duly authorized by his company, the respondent herein, to swear the affidavit. Equally, Mr. Oyugi's submission on the same point was completely defeated by the notice of change of advocates which his firm filed, having taken over conduct of the respondent's matter from Kimani, Kabucho, Karuga & Company Advocates.

Section 181 of the **Companies Act** states that the acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or disqualification. Even assuming that the respondent's contention was that Mr. Samuel Waruguru Kimotho

had not been duly authorized by the respondent to instruct the applicant, which is not the case, my view would still be that the applicant was properly instructed by the respondent in the aforesaid matter.

Section 34(1) (e) of the **Companies Act** provides that:

"A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied."

Such a contract is effectual in law and binding upon the company and its successors and all other parties thereto.

A retainer need not be in writing. In **OHAGA vs AKIBA BANK LIMITED [2008] 1 EA 300**, it was held that a retainer may be implied where: (i) the client acquiesces in and adopts the proceedings; or (ii) the client is estopped by his conduct from denying the right of the advocate to act or from denying the existence of the retainer; or (iii) the client has by his conduct performed part of the contract; or (iv) the client has consented to a consolidation order. In this application the respondent is estopped from denying that the company did instruct the applicant in view of Mr. Kimani's affidavit as aforesaid.

As regards the issue of the respondent's resolution to instruct the applicant, it is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution by the board of directors to that effect. See **ASSIA PHARMACEUTICALS vs NAIROBI VETERINARY CENTRE LIMITED, Miliamani Commercial Court Civil Case No. 291 of 2000**. The resolution is to authorize commencement of the suit. But once that resolution has been made, the company through a director, manager or any other authorized official may give instructions to a law firm, either orally or in writing, to act for the company. There is no legal requirement that a firm of advocates can only be appointed to represent a company through a resolution passed by the board. Such a resolution may be a requirement within the internal regulations of the company but an outsider, like a law firm, may never be privy to such a requirement in accordance with the doctrine of indoor management. The absence of such a resolution cannot disentitle a law firm to its legal fees where it is demonstrated that the firm was duly instructed to act for the company and actually proceeded to do so.

As regards the provisions of **rule 62A** of the **Advocates (Remuneration) Order**, I am in agreement with the decision of Ringera J, (as he then was) in **MACHIRA & COMPANY ADVOCATES v ARTHUR K. MAGUGU & ANOTHER (supra)**. A client who chooses to withdraw instructions from his advocate without any payment, undertaking or any other appropriate arrangement regarding the advocate's fees must be prepared to pay to the advocate such sum as may be found due and payable upon taxation of advocate/client bill of costs. It would be oppressive to require that advocate to wait until the matter is finalized by other advocates for him to recover his fees.

All in all, I find no merit in the respondent's application and dismiss the same with costs to the applicant. The applicant is at liberty to proceed to list

the advocate/client bill of costs for taxation.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2011.

D. MUSINGA
JUDGE

In the presence of:
Muriithi – Court Clerk
Mr. Moindi for Oyugi for Respondent
Mr. Mwendwa for Applicant