REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 454 of 2004

BELGO HOLDINGS LIMITED …… PLAINTIFF
VERSUS

WILSON BIRIR ……... DEFENDANT

R U L I N G

By a notice of motion dated 11th March, 2010 and brought pursuant to the inherent powers of the Court, the Plaintiff prays for orders that the purported notices of appointment of Advocates herein both dated 4th March, 2010 and filed by Sisule Munyi Kilonzo & Associates, and Oyugi & Co., respectively be struck out and the costs of and incidental to this application be borne by the said two firms of Advocates. The application is made on the grounds that the said purported notices of appointment are an abuse of the process of the Court and are also not compliant with the provisions of the **Civil Procedure Rules**.

Each of the two firms which filed the said notices filed grounds of opposition. The firm of Sisule Munyi Kilonzo & Associates stated in the grounds of opposition, *inter alia*, that -

(1) The said application is not supported by any affidavit setting out the facts upon which it is based and is therefore utterly misconceived and bad in law

(2) The said application has no statutory or other legal grounding and is therefore bad in law

(3) There is no justification given by the Plaintiff for the prayer for costs on the said application to be borne by the Advocates on record for the Defendants

(4) Every party is entitled to representation by Counsel of his choice

(5) There is no bar to a Defendant appointing more than one firm of Advocates to appear for it in any matter

(6) There is no evidence of conflict of instructions given to the Advocates appearing on record for the Defendant

(7) ***The said application is misconceived and bad in law***.

On their part, Oyugi & Co. Advocates, filed the following grounds of opposition –

(a) The application is misconceived and amounts to an outright abuse of the Court process

(b) The application is brought in bad faith and meant to intimidate the Defendant

(c) The application lacks merit and is meant to cause confusion and further delay for trial of the main case

(d) The Plaintiff has no right at all to appoint Counsel for the Defendants.

Arguing his application, Mr. Ochieng Oduol for the Applicants referred to **Order III Rules 1** and **8** of the **Civil Procedure Rules** and submitted that the Defendants had not given notice of appointment of both Counsel under their hands. He further emphasized that **Order III Rule 1** allows for appointment of one firm and not two firms. He therefore submitted that to allow two firms of Advocates to come on record for a Defendant simultaneously would only serve to create confusion and frustrate the orderly conduct of judicial proceedings. He further submitted the Court has inherent power to prevent abuse of its proceedings and that this was one case in which the Court should invoke that power. He finally submitted that the Defendants were breaching the overriding principle in the administration of justice as evinced in **Section 1A** of the **Civil Procedure Act,** and urged the Court to strike out their notices of appointment.

In his response, Mr. Oyugi submitted that the application was misconceived and an abuse of the Court process as the Plaintiff was seeking to determine representation for the Defendants. Each party, he said, is entitled to representation and the Plaintiff is merely seeking to deny the Defendants that right. He further contended that Mr. Ochieng Oduol's submissions were made from the bar and there was no affidavit to which the Defendants could reply. Otherwise, **Order III Rule 1** of the **Civil Procedure Rules** recognizes the right of representation by an Advocate. Finally, he asked the Court to dismiss the application and allow the Defendants to exercise their right of representation since justice is for both sides.

Mr. Kilonzo associated himself with the submissions of Mr. Oyugi and stated that the notices of

appointment were filed on behalf of the Defendants thereby complying with the provisions of **Order III Rule 8** of the **Civil Procedure Rules.** Secondly, he submitted that no prejudice would be caused to the Plaintiff whether the notice of appointment is filed by the Defendants in person or by the Advocates. Finally he submitted that the effect of allowing this application would be to deny the Defendants representation and posed the rhetorical question whether that is how justice should be administered, to which he answered in the negative. He also said that he failed to understand why the Applicant should ask that the Defendants pay the costs of the application and asked the Court to dismiss the application with costs.

In his reply, Mr. Ochieng Oduol reiterated that the Plaintiffs were not trying to choose an Advocate for the Defendants at all, but were concerned that they should not appoint two firms of Advocates as this would interrupt the orderly conduct of Court proceedings. The Plaintiffs had given reasons for the application and therefore, no affidavit was required. He finally, submitted that **Section 3A** of the **Civil Procedure Act** was very clear and urged the Court to strike out the notices.

I have considered the pleadings and the submissions of Counsel. Having done so I take the view that main issue to determine in this matter is not whether the Defendants are entitled to representation but whether they should have representation by two firms of Advocates at the same time. It cannot be doubted that every litigant is entitled to representation by Counsel of his own choice. The issue as to whether one can be represented by two firms of Advocates at the same time does not have an express answer from the written law. **Order III Rule 1** of the **Civil Procedure Rules** however is clear to the effect that appearances in Court may be made either in person, by a party's recognized agent, or by an Advocate duly appointed to act on that party's behalf. Under **Rule 8** thereof, where a party after having sued or defended in person appoints an Advocate to act in the cause or matter on his behalf, he should give notice of the appointment and the provisions of this Order relating to a change of Advocate applies to a notice of appointment of an Advocate *mutatis mutandis*.

A litigant is entitled to representation by an Advocate of his choice. It is clear that **Order III Rules 1** and **8** each speak of "an Advocate". In my view, however, it is possible for a party to be represented in Court by more than one Advocate. This view derives its force and effect from **Rule 7 (1)** of **The Advocates (Practice) Rules** which states as follows –

> ***"An Advocate may act for a client in a matter in which he knows or has reason to believe that another Advocate is then acting for that client only with the consent of that other Advocate" (emphasis added).***

In the absence of such consent the second Advocate would have no locus to act for such a client. It would appear from **Rules 1** and **8 of Order III** as well as **Rule 7** of **The Advocates (Practice) Rules** that the law envisages the appointment of one Advocate but allows such an Advocate to be joined by another Advocate with the consent of the former.

What I understood Mr. Ochieng Oduol to be complaining about was the fact that there are two firms on record for the Defendants without any indication as to who was being joined by whom. Indeed, the point he raises makes sense since when there are two or more independent Advocates on record, one may not know which of those Advocates should be referred to as the Advocate for the litigant. It makes sense when one of the Advocates is the one on record as the litigant's leading Advocate and the others can only join him with his consent. Such an Advocate then becomes the point of reference whenever the issue of the litigant's Advocate arises.

In this matter there are two Advocates on record at the same time. Does this mean that any time some communication was to issue to the Defendant's Advocate the two firms have to be served? The same question arises in similar fashion if there were more that two firms on record for the same litigant. This would certainly make litigation more expensive to all the parties involved including those that have only one firm of Advocates representing them, which would be prejudicial to the latter both in terms of time and money.

For the above reasons, it is my considered opinion that a litigant should have one firm of Advocates on record, but these can be joined by others in terms of **Rule 7 (1)** of **The Advocates (Practice) Rules.** I therefore direct that the Defendants' Advocates in this matter do consult with their clients to determine which of them should be the leading Counsel on record, to whom reference concerning this case should be made, and who will be responsible for taxing the Party and Party costs, and which of them would be regarded as assisting Counsel. Upon failure to do so within 7 days, the notices of appointment filed in Court on 16th March and 17th March, 2010 shall stand struck out. I make no order as to costs.

Dated and **delivered** at **Nairobi** this 29th day of April, 2010.

L. NJAGI
JUDGE