



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 626 of 2006 (OS)

KENYA COMMERCIAL BANK LIMITEDPLAINTIFF

VERSUS

CHARTERHOUSE BANK LIMITEDDEFENDANT

RULING

The point for my determination is who should act on behalf of the defendant in this matter. In this case we have the firm of **Odera Obar & co.** Advocates asserting a right to act for the directors of the defendant and the firm of **Ochieng, Onyango, Kibet & Ohaga Advocates**, having been appointed by the Statutory Manager of the defendant Bank.

Mr. Odera Advocate submitted that his firm was appointed and/or instructed by the directors of the defendant bank, while the statutory Manager contended as the legitimate person to represent the defendant. She appointed the firm of **Ochieng, Onyango, Kibet & Ohaga** Advocates. On the other hand, the bank directors are saying that we agree that you can only exercise those powers when you are a manager but the fact that the High Court sitting in **Malindi, Eldoret** and **Kitale** has stayed your appointment, then you cannot be a legitimate manager. And that during the existence of the High Court orders, the act of the manager to appoint another person or any person to act in this matter is an act of compounding contempt.

Mr. Ohaga Advocate submitted that the simple point for determination is whether the defendant bank is under the stewardship of the directors or the manager appointed pursuant to Section 34 of the Banking Act. To the extent that the matters mentioned are not before this court and were not filed by the defendant bank therefore, the bank cannot seek to take the benefit of those orders.

It is also the position of **Mr. Ohaga** Advocate that the whole issue of representation is *res judicata* as this very matter was heard and determined by **Justice Waweru**. And if the directors of the bank were aggrieved by the findings of **Justice Waweru**, it was open for them to either appeal or apply for review. But this matter cannot be re-agitated afresh.

Now let me address this somewhat straightforward issue of representative but which has been blown out of proportion by the respective parties and their Advocates. Let me say that it is undesirable for an Advocate to act as an Advocate in a case he has no proper instructions. It is also clear in my mind that it is no role or business of the court to appoint Advocates for the parties to the litigation before it. As a general rule the right of a client to appoint and change its Advocates is absolute and even most times at the pleasure of the client. By giving acceptance of a retainer the Advocate acquires the authority to act for and bind the client. The appointment puts the Advocate to a position of trustee or fiduciary

relationship with the client. The giving of a retainer is equivalent to the making of a contract for the Advocate's employment and the rights and liability of the parties under the contract will depend partly on any other terms which they have expressly agreed. It is my position that the court cannot prevent and/or hinder the undertaking of that contract by removing the Advocate instructed by the client. And in his place putting another one, who has no instructions, permission, consent and knowledge of the client. That is not permissible and that is no role of the court.

The pertinent and uncontroverted facts in this matter are that **Miss Rose Detho** was appointed by the Central Bank of Kenya to be the Statutory Manager of a bank known as **Charterhouse Bank Limited** through a letter dated 23rd June, 2006, allegedly in order to protect the interests of the bank, its depositors and other creditors. The letter dated 23rd June, 2006 putting the bank under statutory manager was signed by the then acting Central Bank of Kenya Governor, the famous **Jacinta Mwatela**. The letter stated in part;

“In order to protect the interests of Charterhouse Bank Ltd, its depositors and other creditors, the Central Bank of Kenya has today appointed Miss Rose Detho as Statutory Manager for Charterhouse Bank Ltd. Pursuant to Section 34(1) (d) of the Banking Act with effect from 23rd June, 2006.

Miss Rose Detho, will exercise all the powers conferred on her by the Banking Act and shall enjoy the rights and privileges of a manager in accordance with Section 34(2) and 34(6) of the Banking Act. She will assume the management, control and conduct of the affairs and business of the institution to the exclusion of the Board of Directors.”

The above letter gave exclusive rights, powers, duties and responsibilities to the Statutory Manager to assume the management, control and conduct of the affairs and business of the bank to the exclusion of the Board of directors. The powers and responsibilities to be exercised by the statutory manager are all the powers of the institution (**Charterhouse Bank Ltd**) to the exclusion of its board of directors including the right to appoint and fire an Advocate to act on behalf of the bank. It means the statutory manager was appointed in order to protect the interests of the bank, its depositors and other creditors, thus the law allows the statutory manager in protecting such interest to have the full authority and capacity to appoint Advocates to act on her behalf and to act for the institution.

On 31st January, 2007 in her capacity as the statutory manager **Miss Rose Detho** appointed the firm of **Ochieng, Onyango, Kibet and Ohaga Advocates** to appear for the respondent in this case. **Mr. Odera Obar** Advocate says that the statutory manager has no power to appoint the said firm of Advocates since her activities, powers, responsibility and duties were checked and/or suspended by the High Court sitting in **Malindi, Eldoret and Kitale**.

There is no dispute that the bank immediately after the receipt of the letter dated 23rd June, 2006 moved to court challenging the appointment of the Statutory Manager. The basis was that the appointment of the Statutory Manager was without any foundation or statutory blessings as the prerequisite condition found in Section 34(1) of the Banking Act had not occurred in respect of the respondent Bank. That challenge was lost both in the High Court and in the Court of Appeal. As far as this court is concerned the decision of **Azangalala J** and that of the **Court of Appeal** had a conclusive but perhaps an interim *fait accompli* on the rights of the bank allegedly infringed by the Central Bank of Kenya. The respondent bank approached the High Court seeking an order restraining the statutory manager appointed from assuming the management of the bank. The refusal of **Azangalala J** to give an injunction and the sanctioning of the Court of Appeal of the exercise of his discretion clearly meant that on an interim measure, the statutory manager had exclusive rights to manage, control and conduct the affairs and business of the bank without any reference to its board of directors. As was rightly pointed by **Justice Waweru** the exercise of all the powers of the respondent must include defending any legal proceedings instituted against the bank like the present matter.

The sure way of defending the bank in any legal proceedings includes the right to appoint Advocates

of own choice. It is clear that **Mr. Odera Obar** Advocate on 11th December, 2006 made an application seeking leave to issue 3rd party notices against the Central Bank of Kenya and one **Miss Rose Detho**, the Statutory Manager of the respondent bank. He was doing so because the board of directors of the respondent bank was aware and conscious that the bank had been placed under statutory manager. The statutory manager was sought to be introduced simply because she was appointed the statutory manager of the bank. She in essence assumed the management, control and conduct of the affairs of the bank to the exclusion of its Board of directors. That situation has not changed, despite the attempt by **Mr. Odera Obar** Advocate to introduce extraneous matters to this litigation. In my view the experimental and rather exotic arguments of **Mr. Odera Obar** was plainly and perfectly answered by **Justice Waweru** in his ruling dated 5th January, 2007. Faced with the peculiar, ingenious and exoteric submissions of **Mr. Odera** Advocate, the judge had this to say;

“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. The statutory manager is thus already a party in the proceedings and cannot be said to be a person not already a party in the suit....As already observed, it is the duty of the statutory manager to defend the suit, should she be so minded. Equally it will be her duty to abide by any order or decree that may be issued in favour of the plaintiff”.

I think the above sentiments expressed by **Justice Waweru** are exhaustive and comprehensive definition and/or determination of who has the mandate to appoint an Advocate for the respondent bank. The above decision was made after an appraisal of the submissions made by the two combatants and due to his assiduous nature, **Justice Waweru** must have given weight to the decision of **Justice Azangalala** and that of the Court of Appeal. On my part, I am in total agreement with **Justice Waweru** as to who has the authority to appoint and act in this proceedings. It would be fallacious and preposterous for me to disturb that sound analysis and determination of the issues in question.

It is my humble view that the issue of the management, control and conduct of the affairs and business and the exercise of all the powers of the respondent has already been agitated and conclusively determined. It is the Central Bank of Kenya which placed the respondent Bank under statutory management and appointed **Miss Rose Detho** as the statutory manager with all the statutory powers. In discharging her responsibilities, she is empowered to appoint an Advocate in this proceedings to assist and defend in the performance of her mandate and duties. She cannot in my view share that responsibility with the board of directors of the respondent Bank. The powers of the board of directors of Charterhouse Bank Ltd ceased to exist on 23rd June, 2006 when the Central Bank of Kenya placed the bank under statutory management and appointed a statutory manager.

I have no evidence to show that the board of directors of the bank regained the powers taken away from them on 23rd June, 2006 when the Central Bank of Kenya Governor exercised her powers under Section 34(1) (d) and 34(2) of the Banking Act. That decision sealed and/or put in abeyance the rights, powers, duties and responsibilities of the board of directors of the respondent bank. Unless there is evidence to show that the powers of the board was regained then **Mr. Odera Obar Kennedy Advocate** has to give way and look for another client. I am afraid I have to depose him, for the statute says so, with no option for discretion. And when there is no discretion, I am obligated to exercise my powers with fidelity to the law. I have.

In the premises, I hold that the appointment of **M/S Ochieng, Onyango, Kibet and Ohaga** Advocates is proper and legitimate. They are properly on record for the respondent bank. I too hold the statutory manager has properly exercised her powers and responsibilities in employing and/or appointing the firm of **M/S Ochieng, Onyango, Kibet and Ohaga** Advocates. Having been properly appointed by the statutory manager in exercise of her statutory powers conferred by the Banking Act they ought to remain on record. That choice by the statutory manager has to be respected by the court, as it is no business of

the court to appoint Advocates for the parties. Without doubt the firm of **Odera Obar & Company** Advocates must give way.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of May, 2007.

M. A. WARSAME

JUDGE