



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 728 of 2006**

**CHARTERHOUSE BANK ..... PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WILFRED KIBORO ..... 2<sup>ND</sup> DEFENDANT**

**WANGETHI MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**BERNARD NAMUNANE ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

On 7<sup>th</sup> July, 2006 the Plaintiff instituted this suit against the four named defendants, by way of a Plaint, seeking mainly general damages for defamation and a permanent injunction restraining the defendants from publishing defamatory material against the Plaintiff. The Plaint is drawn and filed by Odera Obar & Company, Advocates and the Verifying Affidavit is sworn by Sanjay Shah, who claims to be “director” of the Plaintiff Company, and “authorized” as such to swear the said affidavit by the Plaintiff Company.

However, on the 23<sup>rd</sup> June, 2006, almost two weeks before this suit was filed, the Plaintiff bank was placed under statutory management by the Central Bank of Kenya, pursuant to Section 34 (6) of the Banking Act, Cap 488 of the Laws of Kenya. This important fact is not in dispute. The gazette notices appointing Rose Detho as the Statutory Manager (Gazette Notice No. 4936), and revoking Powers of the Directors (Gazette Notice No. 4937) are not in dispute.

The issue before this court is whether the Verifying Affidavit, having been sworn by a person other than the Statutory Manager, is valid and sustainable. This issue has been raised before me by way of a Preliminary Objection filed by the Defendants. Their Counsel, Ms Jan Mohamed, argued before this Court that the Plaintiff having been placed in statutory management, a former director had no authority to commence litigation, or swear the Verifying Affidavit as Section 34 (2) of the Banking Act vests all such powers in the Statutory Manager. She urged that the suit be struck out. She also argued that in any event Mr Shah had not shown that the Plaintiff Company had passed a Board Resolution authorizing this litigation. She referred to the cases of *Bugerere Coffee Growers Ltd vs Sebaduka (1970) E A 147* and *Trade Bank Ltd vs LZ Engineering Construction Ltd (2000) 1 E A 266*.

I agree with Mr Odera that the question whether there is or is not a Board Resolution authorizing this

litigation, is a question of fact and cannot be raised as a Preliminary Objection, in accordance with the test laid down in ***Mukisa Biscuit Company vs Westend Distributors Ltd (1969) E A 696***.

The only issue, therefore, is whether the Banking Act allows former directors or persons other than the Statutory Manager (or persons authorized by the Statutory Manager) to commence litigation on behalf of the Bank already placed in Statutory Management.

Relying on the cases of ***Anspar Beverages Ltd vs Development Bank of Kenya & Others (HCCC 1155 of 2002 – Milimani)***, and ***Newhart Development Ltd vs Co-operative Commercial Bank (1978) I QB 814***, Mr Odera argued that the appointment of a Receiver did not divest the directors of a company of their power to pursue a right of action that was not prejudicial to the Company.

Having read these cases, I am satisfied that they are inapplicable to the facts before this Court. In the case of ***Anspar*** (supra) the Company sought to challenge the validity of the appointment of a receiver/manager, and the Court held that the company could do so. This is clearly not the case here. This is a claim for defamation. There is no challenge to the authority of the Statutory Manager. The facts in the ***Newhart*** case are also completely different – What is applicable and relevant here is the statute – the Banking Act, Cap 488.

Sections 34 (2) (a), (c) and (d) are relevant, and reproduced here:

***“34 (2) In any case to which this section applies, the Central Bank may with the approval of the Minister -***

***(a) appoint any person (in this Act referred to as “manager”) to assume the management, control and conduct of the affairs and business of an institution to exercise all the powers of the institution to the exclusion of its board of directors including the use of its corporate seal;***

***(c) appoint a competent person familiar with the business of institutions to its board of directors to hold office as a director who shall not be capable of being removed from office without the approval of the Central Bank; and***

***(d) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by the institution in favour of any officer or employee or any other person.”***

This Section is fairly clear and emphatic. Section 34 (2) (a) talks of the Statutory Manager assuming management and control of the bank **“to the exclusion of its board of directors including the use of its corporate seal”**.

Now, if the board of directors are unable to even use the corporate seal, how will they pass the important resolution to institute legal action against anyone? Sub-sections (c) and (d) of Section 34 (2) aforesaid empowers the Central Bank to appoint a director to the Board, and revoke or cancel existing authority. All this has been done. There is no dispute about that. I must, therefore, find that the Verifying Affidavit, sworn by a director whose power and authority had been revoked by a Gazette Notice no. 4937, was not a competent person to swear that affidavit, and accordingly the affidavit is invalid and hereby struck out. However, I do not see the need to strike out the entire suit as long as a proper affidavit can be filed within the next 21 days. The Statutory Manager ought to have the option of doing so, and I will give the Plaintiff 21 days to do so, failing which this suit shall stand struck out, with costs to the defendants. The costs of this application are awarded to the defendants.

Dated and delivered at Nairobi this 8<sup>th</sup> day of August, 2006.

**ALNASHIR VISRAM**

**JUDGE**