



Editorial Note

- Advocate's Authority
- No authority to file an application without a notice of change duly filed and served
- Firms authority

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1349 OF 1999

SAKI LIMITED PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES DEFENDANT

RULING

When the application dated 20th November, 2003 came up for hearing before me on 4th February 2004 the learned counsel for the plaintiff drew the court's attention to the filed preliminary objection dated 2nd February 2004. It reads:-

“The plaintiff will at the hearing of the defendant's application dated 20th November 2003 take the preliminary objection that the advocates for the defendant are not on record and will apply that the said application and any other application filed by Okoth & Kiplagat Advocates, in this suit be struck out as provided for under O 111 Rule 6 of the Civil Procedure Rules.”

The applications covered by the objections are dated 2nd November 2001 and 20th November, 2003 respectively.

The thrust of the arguments on the part of the defendant is that the former advocates for the defendants were M/s Kiplagat & Associates of 12th Floor Bruce House Standard Street, P O Box 79510 NAIROBI.

When the respective applications were filed Kiplagat & Associates was the firm on record for the defendant and therefore the firm of Okoth and Kiplagat had no authority of the client to prepare and file the applications since no notice of change was filed and served on the plaintiffs as required under O 3 rule 6. The learned counsel argued that where such a notice is not given the former advocates remain on record. The court was invited to strike out the two applications.

For the defendant the learned counsel submitted that the principal partner in the former firm of Kiplagat & Associates was Kenneth Kiplagat and he is also a partner in the firm of Okoth & Kiplagat. Instructions to advocates were given to the individual advocates and not to the firm as such and similarly the appointed advocate in this case was Kenneth Kiplagat who in turn is also an advocate in the firm of Okoth & Kiplagat. Order 3 rule 6 refers to an advocate and not the firm.

He also submitted that as regards the application dated 2nd November, 2001 he same had been disposed of and an order made by the court and no appeal or review has been instituted by the aggrieved party.

He concluded his submissions by saying that by a notice of change of advocates dated 1st April 2001 but filed on 3rd February 2004 any irregularity must have been rectified. In reply the plaintiff's counsel contended that the notice of change filed on 3rd February 2004 could not operate retrospectively or retroactively and was incapable of rectifying the omission.

It is important to reproduce here the relevant rule. Order 3 rule 6 reads:-

6 “ A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter without an order for that purpose but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall subject to rule 11 and 12 be considered the advocate of the party until the final conclusion of the cause or matter including any review or appeal.”

As regards the application dated 11th April 2001 in view of the fact that the court had already disposed of it the matter cannot be reopened because the court is functus officio. Moreover by failing to raise the objection before the application was heard or when it was being heard the defendant waived his right if any to do so or is deemed to have waived such right. It is estopped from raising the matter now.

The position as regards the application of 20th November, 2003 is in the view of the court different.

Where advocates practice as partners and enter appearance as such on behalf of a party the client's authority is deemed to have been given to the firm because it is the firm which warrants to other parties and the world that they have the authority to do so for example by endorsing the plaint or defence with the firm's name and address. The pleadings and other process having been endorsed with the firm's name it cannot be said that the authority is in the name of a particular advocate in the firm and other advocates and others are entitled to regard the firm as the instructed firm. Supreme Practice 2003 Vol 2 7C – 217 does confirm the above in these words:-

“A clear authority is required to justify a solicitor in issuing a claim or acknowledge service of proceeding. But once retained “The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause”.

It is the firm which warrants that it has authority to act and not the individual advocates. Liability is usually on the firm although partners are individually and severally liable under Partnership Law - see Order 29.

The firm of Kiplagat & Associate is different from that of Okoth & Kiplagat. It follows therefore the firm of Okoth & Kiplagat which failed to file a notice of change did not have authority to file the Chamber summons dated 20th November, 2003.

Without the notice of change other firms dealing with the firm in default are clearly on notice that the firm in default has no authority to act and if this position is known to the other firm any pleadings prepared of an application is without client's authority. Even a compromise entered into with a firm in default is not binding on the client. This position has the backing of HALSBURYS LAWS OF ENGLAND - page 650 para 118 which states:-

“If the limitation of authority is communicated to the other side, consent by counsel outside the limits of his authority will be of no effect.”

Notice of change cannot operate retroactively and consequently the chamber summons dated 20th November, 2003 was prepared without authority and the same is hereby struck out with costs to the plaintiff.

DATED and delivered at Nairobi this 26th day of February, 2004.

J G NYAMU

JUDGE