



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO 559 OF 1999 (OS)**

**VIRJEE AND KASSAM (JOINT RECEIVERS AND MANAGERS AFRICAN  
BANKING CORPORATION LTD) & ANOTHER.....PLAINTIFFS**

**VERSUS**

**GLORY PROPERTIES LTD .....DEFENDANT**

**RULING**

This suit herein started off by way of originating summons dated 7th May, 1999. A number of advocates were involved on behalf of the Receivers and African Banking Corporation Limited (herein referred to as the Bank).

Currently Musyoka & Wambua Advocates appear for the Bank and Waruhiu, Ngaga & K'owade for the Receivers until 5th May, 2000 Makhecha & Co Advocates were on record for Glory Properties (herein after referred to as the Company).

On 29th March, 2000 Justice Mbaluto granted the firm of Makhecha & Co Advocates leave to withdraw pursuant to an application by way of Chamber Summons dated 18th February, 2000.

On 5th May, 2000 Kilonzo & Co Advocates filed a Notice of Appointment pursuant to the provisions of order III rule 8 of the Civil Procedure Rules.

On 9th May, 2000 Kilonzo & Co Advocates, on realizing several mistakes in the purported Notice of Appointment dated 8th May, 2000. That amendment was done without leave of the Court.

On 6th October, 2000 Kilonzo & Co Advocates filed a Notice of Motion of even date in which they seek *inter-alia* a number of orders:-

1. Original originating summons filed on 7th May, 2000 be struck out;
2. The appointment of managers and receivers and of indemnity to be deemed null and void.
3. Suit No 559/99 (OS) be struck out under order VI rules 13 (1) (b) (c) and (d) of the Civil Procedure Rules or alternatively the suit be consolidated with HCCC No 1418/97.

On 20th November, 2000 the Bank through Musyoka & Wambua Advocates filed a preliminary objection in the following terms:-

“The mandatory provisions of order III of the Civil Procedure Rules and in particular rules 1, 6, 7, 8 and 12 have not been complied with”.

Kilonzo & Co Advocates have not reacted to the Notice of Preliminary Objection to-date.

By way of submission Mr Salim Dhanji and Mr Maitisi on behalf of the bank relied on the provisions of order III rules 1, 6, 7, 8 and 12 of the Civil Procedure Rules. In their view the firm of Makhecha & Co Advocates are still Advocates for the Company in terms of provisions of order III rule 12 of the Civil Procedure Rules.

It was further argued by the said counsels that in those circumstances the Notice of Appointment filed by Kilonzo & Co Advocates is irregularly on record as Makhecha & Co Advocates are still on record. The Notice of Motion dated 6th October, 2000 filed by Kilonzo and Advocate is therefore filed by an advocate without *locus-standi*/authority and should be struck out. In law, they contended, Kilonzo & Co Advocates must file a Notice of Change before taking any step in the matter. After filing Notice of Change Kilonzo & Co Advocates must *inter-alia* serve it upon all parties concerned in terms of the provisions of Order III Rule 7.

Mr Kilonzo Jr drew the attention of the Court to the proceedings of 29th march, 2000. On that day, he submitted, Mbaluto, J granted the orders giving leave to Makhecha & Co Advocates to withdraw from acting for the company.

In the circumstances, Mr Kilonzo contended, the filing of the Notice of Appointment was in order then it follows that the application by the way of Notice of Motion dated 6th October, 2000 is equally in order. The preliminary objection is thus misconceived and should be dismissed.

I have persuaded the proceedings of 29th march, 2000. it is clear that the application for leave to withdraw by Makhecha & Co Advocates was granted. However Makhecha & Co Advocates have not, according to the records fully complied with the provision of order III rule 12 which provides:

“12. (1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last known place of address, unless the Court otherwise directs, apply to the Court by summons in chamber for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause of the matter, and the Court may make an order accordingly:

Provided that, unless and until the advocate has

- i. Served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the Court may direct a copy of the said order; and
- ii. Procured the order to be entered in the appropriate court; and
- iii. Left at the said court a certificate signed by him that the order has been duly served as aforesaid; He shall (subject to this order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal”.

It is clear, to me, from the record that Makhecha & Co Advocates have not:-

- i. Served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the Court may direct a copy of the said order; and
- ii. Procured the order to be entered in the appropriate court; and
- iii. Left at the said court a certificate signed by him that the order has been duly served as aforesaid.

In terms of the provisions of order III rule 12 (2):

“(2) from and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives

such an address for service as is required of a party acting in person, and also complies with this order relating to notice of appointment of an advocate or notice of intention to act in person”.

In view of the provision of the foregoing (order III rule 12) it is my considered view that Makhecha & Co Advocates are still on record for the Company, I find and so hold.

The issue of representation is so important in litigation and should not be trivialised as Mr Kilonzo Jr seems to suggest by his submission.

On this point I subscribe to the sentiments of Waki J in *Kobo Safaris Ltd v About Africa Ltd & Others*: Mombasa High Court Civil Suit No 681 of 1995 at page 5 [unreported].

“The manner of acting in such a matter is provided for under order 3 of the Civil Procedure Rules. The order contains 12 elaborate rules spelling out the manner of participating in court proceedings through agents and advocates where parties to the suit so choose. The provisions are not mere niceties but necessary provisions to leave no doubt in the mind of the Court, the parties to the suit and the world at large- as to who *inter-alia* takes responsibility for the various orders made by the Court in those proceedings and where documents may be validly served. That is why, in my view, some of the rules in that order are couched on mandatory language”.

From the foregoing the importance of representation cannot be gainsaid. The preliminary objection thereby succeeds.

Makhecha & Co Advocates are still on record to the final conclusion of this matter including review or appeal until and unless the provisions of order III rule 12 are complied with fully.

The upshot is that the Notice of Motion dated 6th October, 2000 and filed on the same day is hereby struck out with costs.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of May, 2002**

**N R O OMBIJA**

**JUDGE**