



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CAUSE NO. 114 OF 2017

MOHAMED SALIM BALALA.....ADVOCATE/RESPONDENT

VERSUS

TSS INVESTMENT LTD.....CLIENT/RESPONDENT

RULING

1. Before me is an Application dated 16/4/2019 by the Applicant seeking the following orders:

- (a) The bill of costs dated 27th April 2017 be struck out for lack of retainer.
- (b) The costs of this Application and of the struck out Bill of Costs be awarded to the Client/ Applicant.

2. The Application is premised on the ten (10) grounds on the face of the Application and is supported by the affidavit sworn on 16/4/2019 by the Applicant's director, **Nurein Tahir Sheikh Said** and is premised on the grounds that: -

1. That the Applicant has never instructed the Advocate /Respondent herein to Act for it in Mombasa HCC No. 86 of 2016 which is the subject matter of the Bill of costs dated 27.4.2017, since hitherto, the Applicant was represented by the firms of Kimani Muriithi & Company Advocates and Biko Adera & Company advocates in various matters.

2. That the Applicant learnt of the existence of the taxation proceedings when its current advocate on record noted the same on the cause list for 26.6.2018 and the Applicant had to write to the Respondent/Advocate to get the details of the matter where the Bill of Costs emanated from. Further, the Applicant stated that vide letter dated 23.3.2017, it informed the Respondent that it had not instructed them to Act on its behalf. However, despite the communication the Respondent went ahead prepare and file documents on behalf of the Applicant and a meeting with the Advocate/Respondent to understand the genesis of the instruction was unsuccessful.

3. That the Applicant successfully challenged the taxation proceedings, which led to the issuance of order dated 31.10.2018 setting aside the earlier proceedings.

3. The Applicant/Advocate opposed the application through the Replying Affidavit of **Mr. Abed Omar Abed** sworn on 10/5/2019 wherein he avers that sometime in the year 2016, the then Director of the Applicant, **Mohamed Tahir Sheikh Said** instructed the firm of M/S Balala & Abed to institute a suit against National Bank of Kenya Limited. That the instructions were given under authority and seal of the Applicant and the said **Mohamed Tahir Sheikh Said** swore a Verifying Affidavit which accompanied the Plaintiff filed on 17/8/2016.

4. The deponent avers that the representation culminated to an injunction granted by Lady Justice Njoki Mwangi and it is only because of the death of Mr. Tahir Sheikh Said, who was the Applicant's majority director that conflicts between directors to the Applicant began and the firm of M/S Balala & Abed started receiving conflicting instructions, while some directors insisted on the Advocate/Respondent ceasing to act for the Applicant. Consequently, the firm of Balala & Abed ceased acting for the Applicant and filled its bill of costs for the work done and the said bill of costs was served upon the Applicant on 17/5/2017.

5. In rejoinder, the Applicant filed a Supplementary Affidavit sworn on 9/12/2019 by **Fatma Tahir Sheikh Said**, who is one of the Applicant's director. She avers that the Respondent has not annexed a single document to demonstrate that it was ever instructed to represent the Applicant in Mombasa HCC No. 86 of 2016, and in fact the authority to plead dated 17/8/2016 is only signed by **Mohmed Tahir Sheikh Said** who only holds one (1) share out of the one thousand (1000) allotted shares. Consequently, Mohamed Tahir Sheikh Said cannot make a decision to the detriment of the majority shareholders since he does not have the authority to Act on behalf of the Applicant.

6. The Applicant also avers that it is conspicuous that Tahir Sheikh Ahmed Said who was the Client/Applicant's majority shareholder and who was alive as at the time of filing the suit never signed a single document or there is no communication under his hand.

Analysis and Determination

7. I have perused the annexures presented by both parties in their respective pleadings. I note that it is not disputed that the Applicant's Director, **Mr. Mohamed Tahir Sheikh Said**, instructed the Respondent/Advocate law firm on certain dates in 2016. The point of departure, however, is that the Applicant avers that the said director did not have an authority from the Applicant to Act on behalf of the other directors who are the majority in making a decision to instruct the Respondent advocate.

8. I have considered the annexed authority to Act dated 17/8/2016 which is authored under the Applicant's letter head and seal, and find that the same authorizes, **Mr. Mohamed Tahir Sheikh Said** to Act and execute all documents necessary and on behalf of the Applicant in a suit to be filed against National Bank of Kenya. It is noteworthy that the same Mr. Mohamed Tahir Sheikh Said who the authority seeks to authorize to Act on behalf of the Applicant signed the said authority under Order 4 rule 1(4) of the Civil Procedure Rules, 2010.

9. It is not in dispute that the Applicant is a limited liability company. It is axiomatic that a company being an artificial person acts through its Board of Directors but within the confines of the Articles and Memorandum of Association. In this case, however, the Articles and Memorandum of Association are silent on decision making of the Applicant. Nevertheless, in determining whether instructions were issued to the Respondent/Advocate herein to act in **HCC No. 86 of 2016**, and draft the subject documents, this Court is minded to consider the law on how such instructions ought to be issued.

10. **Halsbury's Laws of England/Fourth Edition at page 429** at paragraph 715 stipulated that:

"A company not being a physical person, can only act either by resolution of its members in general meeting, or by its agents. It is not the agent of its member and a member as such is not the agent of the company, the company being a separate entity or legal person apart from its member, who are not even collectively, the company."

11. In the case of **Bugerere Coffee Growers Limited v Sebaduka & Another [1970] 1EA 147** the Court in that case held:

"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

12. The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the **Bugerere case** was no longer good law as it had been overturned in the case of **United Assurance Company Limited v Attorney General: SCCA No. 1 of 1998. Gikonyo J.** in the case of **Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR** while adopting the reasoning in the case of **United Assurance Company Limited v Attorney General (supra)** held as follows:

"It was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company unless the contrary is shown, has the powers of the board to act on behalf of that Company. In the case before me, Caroline Wairimu Kimemia is a director of the Defendant Company and she duly authorized the Advocates on record to commence this Application."

13. In the present case, it is not disputed that the Respondent/Advocate was instructed by a director to the Applicant herein, and the said instructions were made under the authority of the Applicant vide Authority under **Order 4 Rule 1(4) of the Civil Procedure Rules** dated 17/8/2016. The Applicant/Client through the other Directors have averred that they did not authorize the filing of the suit and that Mohamed Tahir Sheikh Said was on a frolic of his own when he authorized the firm of M/S Balala & Abed to Act on behalf of the Applicant client.

14. I have considered the arguments by both parties and it is the finding of this Court that the Applicant has failed to demonstrate to this Court that **Mohamed Tahir Sheikh Said** who is a director of the Applicant was not authorized to Act on behalf of the Applicant. The Articles and Memorandum of Association of the Applicant, which have been annexed and marked as FT-2, are silent on the issue of the authority to Act on behalf of the Applicant, and it is in the view of this Court immaterial whether **Mohamed Tahir Sheikh Said** is the minority and the other directors are the majority. Therefore, the challenge on **Mohamed Tahir Sheikh Said's** authority to authorize the filing of **HCC No. 86 of 2016** fails.

15. Consequently, this Court finds and holds that the Respondent/Advocate was duly retained by the Applicant/Client since the contrary has not been proved.

16. For the above reasons, the Application dated 16/4/2019 fails and is hereby dismissed with cost to the Respondent/Advocate.

Dated, Signed and Delivered at Mombasa this 8th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY