



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**MISC. APPLICATION NO. 237 OF 2019**

**IN THE MATTER OF TAXATION OF COSTS**

**BETWEEN**

**NYACHOTI & COMPANY ADVOCATE.....APPLICANT**

**VERSUS**

**GIRIAMA RANCHING COMPANY LIMITED.....RESPONDENT**

**RULING**

**NOTICE OF MOTION APPLICATION**

The Applicant filed a Notice of Motion Application dated **24<sup>th</sup> September 2019** for orders; -

- a. Stay of Taxation of the Applicant's Bill of Costs scheduled for Taxation until further orders.
- b. The Application be placed before the Judge for directions and/or determine whether a Retainer existed between the firm of Nyachoti and Company Advocates and the Applicant and grant appropriate orders.
- c. Directions be given to determine whether retainer existed between the firm of Nyachoti & Company Advocates and the Applicant.
- d. Court to dismiss the Application for Taxation dated and filed on **18<sup>th</sup> July 2019** by the firm of Nyachoti & Company Advocates.

Which Application was supported by the sworn affidavit of **Rajab Menza Shikari** dated **24<sup>th</sup> September 2019** on the grounds that;

1. The Respondent/Applicant herein never at any time retained the services of the firm of Nyachoti & Company Advocates to commence a suit **HCCC No. 117 of 2018 formerly HCCC No.304 of 2018 (Nairobi)**.
2. The Respondent/Applicant retained the services of **Kenga & Company Advocates** on **25<sup>th</sup> July 2018** to file a suit stopping or restraining the sale of its property by Auction being **Plot No.12785 at North West of Kilifi Town** which was scheduled for the **6<sup>th</sup> August 2018** at Mombasa to purportedly recover undisclosed loan monies.
3. The aforesaid firm executed the said instructions on **26<sup>th</sup> July 2018** when it filed a suit under Certificate of Urgency, being **HCCC No. 57 of 2018 Mombasa High Court**.
4. On **26<sup>th</sup> July 2018**, the Chairman of Board of Directors of the Respondent/Applicant was informed by Mr. Kazungu Kambi that Mr. Nyachoti, Advocate would assist the Respondent/Applicant through commencement of proceedings to stop the Auction of the suit property and when the Respondent/Applicant through its Chairman informed the said Advocate of another suit already filed in Mombasa **HCCC No.57 of 2018**, the Advocate told the Respondent/Applicant that they could file more than one suit over the same matter, hence fraudulently persuading the Respondent/Applicant to hire him for services that were known to him to be amounting to abuse of the Court process.
5. On **27<sup>th</sup> July 2018**, the Chairman received a phone call from Mr. Kenga, Advocate, the Counsel on record for the

Respondent/Applicant in the Mombasa suit enquiring why the Chairman had hired the services of M/s Nyachoti & Company Advocates to file a similar suit in Nairobi, which action would be an abuse of the court process. The Chairman made a phone call to Mr. Nyachoti and withdrew instructions which otherwise were unnecessary and obtained through fraud, undue influence and/or deceit.

6. The instructions herein were obtained fraudulently as Mr. Nyachoti should not, from the word go, have received the said instructions after having been informed of the existence of the Mombasa suit, whose copies of pleadings were given to him by the Chairman and more so by fraudulently persuading the Chairman to sign plain/blank printing papers which later on were used (**on 30<sup>th</sup> July 2018**) to insert the contents that were unknown to the Respondent/Applicant before they were filed in Court.

7. Despite the firm of Nyachoti & Company Advocates having been informed not to file any suit, they proceeded to file **HCCC No. 304 of 2018 (Nairobi)** which has now been transferred to Mombasa and assigned a new number **HCCC No. 117 of 2018**.

8. The Respondent/Applicant is a stranger to the Bill of Costs filed by the firm of Nyachoti & Company Advocates which acted without instructions, and if it is maintained that instructions were given, then it is for the sole purpose of earning fees on unnecessary proceedings.

9. The Bill of Costs is frivolous and an abuse of the court process and the same ought to be dismissed with costs.

### **RELYING AFFIDAVIT.**

The Application was opposed vide the sworn Replying Affidavit of **Philip Nyachoti (Advocate)** dated **10<sup>th</sup> November 2020** and stated as follows; -

1. The Application is an attempt by the Respondent/Applicant to circumvent and evade payment of legal fees to the Applicant/Respondent in respect of legal services rendered in **Milimani HCCC No. 304 of 2018** (now **Mombasa HCCC No. 117 of 2018**).

2. The Respondent/Applicant duly and properly instructed the Applicant/Respondent firm to file the suit against Development Bank of Kenya Limited for purposes of safeguarding its interests in respect of its property **L.R No. 12785, Kilifi North** which property was on the verge of being auctioned by the bank in exercise of its statutory power of sale.

3. The Respondent/Applicant's decision to instruct the Applicant/Respondent to file suit on its behalf is contained and set out in the Respondent's Board Resolution passed on 25<sup>th</sup> July 2018 in that regard and which Resolution was duly exercised and sealed by the Respondent as required by law.

4. The said Resolution was signed by **Menza** and **Edward Fondo Nodoro** who are Directors of the Respondent/Applicant. Their signatures thereto and the contents therein have never been challenged, controverted and/or disputed in any manner whatsoever by the Respondent and/or the two Directors aforesaid.

5. According to paragraph 2 of the Verifying Affidavit Pg 13, the said Menza made a statement on oath which read as follows; -

***“That I have read and understood the Plaint herein and verify its entire contents to be true and correct.”***

6. In view of the said sworn statement which binds Menza, he cannot now purport that he was handed blank pages by the Applicant to sign without reading any content, including the said Plaint and Verifying Affidavit which Affidavit only consists of one page. As such, it could not have been a blank page at all as alleged.

7. The said Menza further swore an Affidavit in support of an Application for injunction by the Respondent/Applicant filed in the said suit on 30<sup>th</sup> July 2018 by the Applicant/Respondent. The authenticity of the same together with Menza's signature thereto has never been questioned and/or challenged in any manner whatsoever. Menza deponed on oath as follows at paragraph 30 thereof;

***“THAT what is deponed herein above is true to the best of my knowledge, information, sources whereof have been disclosed and matters deponed to on belief whereupon the grounds have been given.”***

8. A close and careful scrutiny of the said Affidavit, Menza confirms that indeed instructions were issued to the Applicant by Menza on behalf of the Respondent/Applicant, which instructions he purportedly sought to withdraw through a phone call as alleged. There is a clear admission and confirmation that the Applicant/Respondent was indeed duly instructed by the Respondent to file the suit.

9. The grounds set out on the face of the Application as well as the averments of Menza in his Supporting Affidavit are untruthful, dishonest and mere fabrications and state as follows;

a. The Applicant/Respondent did not advise Menza that the Respondent/Applicant could file more than one suit over the same subject matter as alleged.

b. The Applicant/Respondent did not fraudulently, deceitfully and/or otherwise persuade Menza to retain the Applicant/Respondent's legal services on behalf of the Respondent/Applicant in filing the said suit as alleged. Allegations of

fraud and deceit require cogent evidence to prove the same and the Respondent/Applicant has not tendered any such evidence in support thereof.

c. Menza did not sign blank printing papers at the office of the Applicant/Respondent as alleged but rather, he signed complete documentation for filing in court as indicated in the pleadings. The pagination and arrangement of the pleadings, the content and the pages on which he appended his signature speak for themselves.

d. Menza did not call the Applicant/Respondent's cell phone to withdraw the instructions given by the Respondent/Applicant as alleged. The instructions given by the Respondent/Applicant have never been withdrawn in any manner whatsoever.

e. The Applicant/Respondent was not informed of the existence of another suit then, being **Mombasa Commercial Case No. 57 of 2018; Giriama Ranching Limited –versus- Development Bank of Kenya**. The Applicant/Respondent could not have filed the suit if such information was availed at the time or any other time during the pendency of the instructions.

10. It is clear that the Applicant/Respondent was properly and duly instructed by the Respondent as regards the suit and is therefore entitled to legal fees which must be borne by the Respondent/Applicant. The Respondent/Applicant's Application is without merit and should be dismissed.

#### **RESPONDENT/APPLICANT'S SUBMISSIONS**

The Respondent/Applicant submitted that whereas the **Advocates Act** and the **Advocates (Remuneration) Order of 2014** provide for payment of Advocates' fees, such fees are only payable upon express instructions. The said instructions should be freely given and that receipt of instructions based on fraud and/or misrepresentation amounts to no instructions or invalid instructions. Further, as stated in their Supplementary Affidavit, they were emailed the last page of the purported Resolution on 29<sup>th</sup> July 2018 by the Applicant/Respondent. The contents of the resolution remained unknown to the Respondent/Applicant at the time of signing. The said Resolution was signed by only two directors when it ironically states that it was a unanimous decision to instruct the Applicant/Respondent.

In the case of **Satya Bhama Gadhi JR Civil Application No. 685 of 2017 (Nairobi)** it was held that the filing of a subsequent suit or proceedings involving same parties and same cause of action is an abuse of the Court process for which Advocates so involved should be punished.

***"It is clear that the issues raised in this application were substantially the same as those determined in the Petition. It is beyond argument that the plea of res judicata succeeds. I am also persuaded that this application is a clear abuse of the Court process. This Court has the power and duty to protect its processes from being abused. I strongly hold that the applicant and his advocate should not go unpunished for abusing this Court processes. Such flagrant abuse of Court processes must be brought to a halt."***

The Respondent/Applicant further submitted that the Applicant/Respondent is not entitled to costs as it had informed the Applicant/Respondent prior that a similar suit involving the same parties and the same cause of action had already been filed. This was also the position in the case of **Kivanga Estates Limited –versus- National Bank of Kenya [2014] eKLR**, where the court stated; -

***"Further, the Advocates for the Plaintiff should note that in following the principle of finality in litigation, they run the risk of being condemned in costs themselves by continuing to advise their client, the Plaintiff, to pursue what amounts to an abuse of the court process."***

The present suit was filed fraudulently by the Applicant/Respondent, if found to be an abuse of the Court process, it should see the Applicant/Respondent paying the entire cost of the said suit.

#### **APPLICANT/RESPONDENT'S SUBMISSIONS**

The Respondent submitted that the decision to instruct the Applicant to file suit on its behalf is contained and set out in the Respondent's Board Resolution passed on 25<sup>th</sup> July 2018 in that regard and which Resolution was duly executed and sealed by the Respondent as required by law. Gacheru LJ. in **Philomena Ndanga Karanja & 2 Others –versus- Edward Kamau Maina** held that; -

***"However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect."***

The said Resolution was signed by Menza and Edward Fondo Ngoro who are both Directors of the Respondent/Applicant and their signatures thereto and the contents therein have never been challenged, controverted and/or disputed in any manner whatsoever by the Respondent/Applicant and/or the two Directors aforesaid. Paragraph 2 of the Resolution read as follows; -

***"The meeting carefully considered and discussed the alternatives available to the Company and IT WAS UNANIMOUSLY RESOLVED THAT; -***

***a. The Company instructs the firm of Nyachoti & Company Advocates, P.O. Box 39252-00623, Nairobi who are sufficiently versed with the facts surrounding the intended sale of the company property as well as the dispute with the Bank regarding the same and to generally act for and on behalf of the Company and represent it in the intended suit as***

well as in all other matters and proceedings appurtenant thereto with the view of stopping the sale.

***b. Rajab Menza Shikari, a director of the Company is hereby granted authority to swear any Affidavits and Documents relating to the suit to be filed and to further act in the interests of and on behalf of the Company in all Court processes and/or transactions relating to the matters resolved hereinabove.***

It was the Applicant/Respondent's further submission that in order to fulfil the said Resolution, the said Menza duly signed the Verifying Affidavit to the Plaintiff in the suit on **30<sup>th</sup> July 2018**. According to paragraph 2 of the Verifying Affidavit the said Menza made a statement on oath which read; -

***“That I have read and understood the Plaintiff herein and verify its entire contents to be true and correct.”***

The said sworn statement bound the said Menza therefore, the Respondent/Applicant cannot now purport that he was handed blank pages by the Applicant/Respondent to sign without reading any content. Further, the said Menza swore an Affidavit in support of an Application for injunction by the Respondent/Applicant filed in the said suit on **30<sup>th</sup> July 2018**. Menza deponed on oath as follows; -

***“That what is deponed to herein above is true and correct to the best of my knowledge, information sources whereof have been disclosed and matters deponed to on belief whereupon grounds have been given.”***

The pagination of the entire Application and the appended signature thereon by Menza cannot be said to be a signature on a blank page with no content at all as alleged by Menza.

The Applicant/Respondent also submitted that no instructions were issued thereafter to withdraw the suit and the law is clear on the manner of withdrawal of instructions previously issued by a Board Resolution. The Respondent/Applicant did not take any steps to have the said suit withdrawn if at all it had no interest in it at all. In the case of **Ochieng Onyango and Kibet & Ohaga Advocates –versus- Akiba Bank Limited as cited in Merka & Company Advocates –versus- Zakhem Construction (Kenya) [2014] eKLR** the court held that; -

***“It is not the law that an advocate must obtain a written authority from a client before he commences a matter. The participation and authority of an advocate in a matter can be implied or discerned from the conduct of the client. In my view retainer is no more than an authority given to an advocate to act in a particular matter and manner. It may be restrictive, it may be wide. And nevertheless it can be implied from the conduct of the Client/Advocate ‘relationship’.”***

It was the Applicant/Respondent's submission that it could not have filed the suit if it had been informed of the existence of another suit then being **Mombasa Commercial Case No. 57 of 2018; Giriama Ranching Limited –versus- Development Bank of Kenya**. There was no proof of this produced. Therefore, the Respondent/Applicant's Application lacks any merit and ought to be dismissed.

## **DETERMINATION**

The Court considered the pleadings and submissions by Counsel for parties and the issue for determination is;

1. Did the Respondents/Applicants instruct the Applicant Respondent to file suit ***Nairobi HCCC 304 of 2018 Giriama Ranching Ltd vs Development Bank of Kenya?***

In the instant case, the Applicant in this instant Application posited that the Respondent filed ***Nairobi HCC 304 of 2018*** 4 days after the other similar case was ***filed in Mombasa HCC No 57 of 2018***.

The Applicant contests that the Respondent was instructed by the Plaintiff to file and pursue the Plaintiff's claim.

The instructions allegedly given were obtained fraudulently as he was forced to issue instructions upon persuasion that filing various cases involving the same parties and subject-matter was/is not against the law.

The Applicant alleged that despite showing the Respondent pleadings filed in /of the Mombasa case, the Respondent herein ignored allegedly to make money. The Applicant alleged that he called the Respondent Advocate to withdraw instructions. The Applicant opposed the value of the subject-matter pegged at ***Kshs 13,000,000/-*** a figure said to be plugged from the air.

The Applicant further submitted that the Hon. Kazungu Kambi facilitated the Applicant to travel to Nairobi and thereafter introduced the Respondent Advocate to pursue their claim. The Applicant alleged that Hon. Kazungu Kambi and the Respondent Advocate colluded to extract instructions from the Applicant and through the Chairman forced, through persuasion and misrepresentation, the signing of plain print papers which were later filled with words that were strange and unknown to the Applicant. The Applicant also claimed to have been emailed the last page of the purported resolution of ***29<sup>th</sup> July 2018*** by the Respondent.

The Respondent confirmed facts as follows; that the Respondent Advocate was instructed vide the Applicant/Respondent's ***Board Resolution of 25<sup>th</sup> July 2018*** annexed to the Affidavit and Plaintiff, and outlined in part above.

The Respondent Advocate filed ***HCC 304 of 2018*** vide Plaintiff annexed dated ***30<sup>th</sup> July 2018***, Verifying Affidavit sworn by Rajab Menza Shikari as; -

**‘Director of Plaintiff Company fully conversant surrounding/pertaining to this matter and duly authorized to swear this Affidavit on behalf of the Plaintiff Company.’**

Further, that

**‘he read and understood the Plaint herein and verified its entire contents to be true and correct’.**

The Respondent Advocate also filed Certificate of Urgency Application, Notice of Motion also annexed to the Replying affidavit,

Rajab Menza Shikaru also deposed the Supporting Affidavit to the Notice of Motion. The suit/matter was then transferred for hearing and determination with the earlier suit filed and is now Mombasa **HCC 117 of 2018**.

**The Applicant relied on Satya Bhama Gadhi JR Civil Application No. 685 of 2017 (Nairobi) which observed that; -**

***‘It is beyond argument that the plea of res judicata succeeds. I am also persuaded that this application is a clear abuse of the Court process.’***

In **James Ambisi Muchelle & Anor –versus- General of the Salvation Army & 2 Others [2017] eKLR** it was held to be abuse of the Court process to file 2 suits; namely **Kakamega No 7 of 2015** in the High Court which lacked jurisdiction and the present case in Employment & Labour Court instead of transferring one case to the relevant Court.

**Kivanga Estates Limited –versus- National Bank of Kenya [2014] eKLR,** the Plaintiff who defaulted in loan repayments and filed multiple suits to stop the sale of property, the Court observed that;

***“The Plaintiff did not mitigate the loss and filed multiple suits over the years with only 1 claim to frustrate and/or prevent the Defendant from exercising statutory power of sale. These suits were heard and determined and/or dismissed and therefore Section 7 of CPA res judicata was applicable.”***

The situation of this case is different from the cited cases as follows;

The Company through its Directors (including the Chairman) instructed the Respondent Advocate at the time in the beginning as demonstrated by physical meeting of the Advocate Mr. Nyachoti with Mr.Rajab Menza Shikaru facilitated by Hon. Kazungu Kambi and whilst admitting that the Advocate was instructed he attributes the same to coercion, fraud and misrepresentation. The Applicants did not prove the allegations as shown hereunder.

In **Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Ltd (2007)eKLR,** Osiemo J. (as he then was), observed that:-

***“Justice L. Njagi pointed out as follows in HCCC No. 416 of 2004, Nyakundi & Company Advocates- vs- Kenyatta National Hospital Board (unreported) and gave the definition and form of retainer from Halsbury’s Laws of England, 4<sup>th</sup> Edition, at paragraph 99, page 83 where it stated:***

***“the act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor’s retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor’s employment...”***

***Njagi J. pointed out that in the same work, it is further explained that a retainer need not be in writing, unless under the general law of contract, the terms of the retainer or the disability of a party to it makes writing requisite. It is then further stated, the Judge added, at paragraph 103:***

***“Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case...”***

**OMULELE & TOLLO ADVOCATES vs MOUNT HOLDINGS LTD C.A.75 of 2015 which held;**

***“A retainer means the instruction, employment or engagement of an advocate by his client.***

***On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship.....”***

***See also; Ochieng Onyango and Kibet & Ohaga Advocates –versus- Akiba Bank Limited (supra) on determining instructions.***

These principles applied to the instant case are as follows, the Advocate filed pleadings in Nairobi High Court **304 of 2018** and annexed all relevant legal and complied with requisite standards and procedure. The Advocate annexed the Company Resolution of **25<sup>th</sup> July 2018** of a meeting held in Mombasa and is annexed to the Advocate’s pleadings’/Plaint. The Directors who unanimously agreed are;

- a) Rajab Menza Shikari
- b) Edward Fondo Ngoro
- c) Franklin Furaha Kalume
- d) Rodgers Mudzomba Unda
- e) Joseph Karisa Ngozi

Strangely, on the same date, 25<sup>th</sup> July 2018, another Resolution was agreed by directors of the Company now instructing & appointing Kenga Advocates to pursue the Plaintiff's Company's claim, hence the **Mombasa High Court 57 of 2018**. The Resolution is on the letter head Giriama Ranching Company Limited P.O.Box 13 Bamba, this time by 4 of the other directors save for Joseph Karisa Ngozi who was absent.

After the Advocate filed the case in Nairobi, the Directors by another Resolution of **23<sup>rd</sup> September 2019** asked Kenga & Company Advocates to take over the matter **HCC117 of 2016** formerly **HCCC 304 of 2018 in Nairobi** now transferred to Mombasa High Court.

Before the unfolding events going by the pleadings filed and Board Resolution annexed *prima facie* the Respondent Advocate was duly instructed to conduct the matter by the Applicant through R. M. Shikari. The pleadings and submissions disclose sufficient authority and participation of the Respondent/Advocate to have obtained instructions to prepare pleadings and file the suit in Court.

If the Board Resolution of 25<sup>th</sup> July 2018 was/is forged or a fraud, then in the absence of evidence led to show that the Advocate Respondent was in Mombasa where and when the Company meeting was held to pass the resolution, he cannot be subjected to confirm its validity or veracity. Secondly, the Applicants have not challenged the authorship of the Resolution as being by the Advocate Respondent. The Applicants have not dwelt on how the Respondent Advocate obtained the company resolution.

The Applicant alleged that the last page of the purported resolution was sent to them on 29<sup>th</sup> July 2018, it is not deposed by who? If that was the case, from 29<sup>th</sup> July 2018 to the time they learnt of the case filed in Nairobi, since the new advocates were on record, why was the Notice of Withdrawal by the Company through Directors not filed in Nairobi High Court **304 of 2018** and instead they waited for the case file to be transferred to Mombasa? Why did the Advocates on record not file application to strike off the suit as an abuse of Court process as another matter was filed on similar subject-matter in Mombasa?

The Applicant explicitly described meeting the Advocate through Hon. Kambi Kazungu and they were introduced and thereafter, the Advocate was instructed on the matter. If the Advocate misrepresented that it was lawful to file similar cases at the same time to illicit instructions, then Hon. Kazungu Kambi ought to have filed an affidavit to confirm or deny the same. The fact he has not, and he has been adversely referred to, strongly suggests that the Chairman and Directors broke ranks and disagreed after the Respondent /Advocate was instructed on the matter. If it is true that at the first meeting the Respondent Advocate was made aware of the matter filed in Mombasa High Court and said it was fine to file another matter in Nairobi High Court, then when and why did the Chairman hand over to Respondent Advocate the pleadings which he signed and call him to stop filing the matter in Nairobi High Court?

Surely, if documents were emailed for the Directors to sign or endorse, who was on the other receiving end to coerce, mispresent facts to the Directors so as to sign the documents? What of the Verifying Affidavit and Supporting Affidavit signed by the Director?

Mr.Rajab Menza Shikaru, were they also emailed and was he again coerced on the receiving end to sign? These allegations by are by any stretch of imagination farfetched.

Allegations of fraud, misrepresentation, deceit and coercion must be specifically pleaded and specifically proved not on a balance of probabilities but lower than beyond reasonable doubt. In civil matters he who alleges must prove. In the instant case that burden has not been discharged by the Applicants. This Court finds the Directors of Giriama Ranching Co. Limited gave instructions to 2 law firms to conduct the same case and therefore the Respondent Advocate was instructed in the matter.

#### **DISPOSITION.**

- 1. The Application of 24<sup>th</sup> September 2019 is dismissed.**
- 2. A Retainer existed between the firm of Nyachoti and Company Advocates and the Applicant Company through its Directors.**
- 3. The Taxation of Bill of Costs may proceed strictly with regard to the legal services the Respondent Advocate rendered to the Plaintiff Company through its Directors up to the time it was transferred to Mombasa High Court.**
- 4. Each Party to bear its own Costs**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 21<sup>st</sup> JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17<sup>TH</sup> APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**M/S NYACHOTI & CO. ADVOCATES FOR RESPONDENT**

**M/S KENGA & CO. ADVOCATES FOR APPLICANT**

**COURT ASSISTANT: TUPET**