



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO 388 OF 2017**

**IWAY AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**INFONET AFRICA LIMITED.....DEFENDANT**

**AND**

**STANDARD CHARTERED BANK KENYA LIMITED.....GARBUSGEE/APPLICANT**

**RULING**

1. The Garnishee/Applicant through the firm of M/s Hamilton Harrison & Mathews Advocates preferred two applications dated 12<sup>th</sup> October 2018 and 16<sup>th</sup> October 2010 seeking pending *inter-partes* hearing there be a stay of execution of Garnishee order Absolute made on 4<sup>th</sup> October 2018 and of any order of execution made against the Garnishee and further that the warrants of attachment issued on 9<sup>th</sup> October 2018 be stayed amongst many other orders.

2. That before *inter-partes* hearing and determination of the two applications on merits, the Plaintiff/Respondent filed a Preliminary objection dated 18<sup>th</sup> October 2018 setting out the following preliminary objections:-

a) THAT the applications dated 12<sup>th</sup> October 2018 and 16<sup>th</sup> October 2018, the request letter dated 16<sup>th</sup> October 2018, the proceedings of 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> October 2018, and the order given on 17<sup>th</sup> October 2018 all violate the provisions of Order 9 Rule 1 Civil Procedure Rules 2010 as they were lodged and urged by persons with no lawful authority and or evidence of lawful authority to represent the garnishee, who never disclosed that fact to the Court, and are otherwise irregular.

b) THAT M/s Hamilton Harrison & Mathews and its Advocates failed to disclose and or concealed the material fact that they were not lawfully on record pursuant to Order 9 Rule 1 Civil Procedure Rules 2010 so as to lodge the subject applications in Court, urge the Court on the 15<sup>th</sup>, 16<sup>th</sup> and personally on the 17<sup>th</sup> October 2018, and are not entitled to the benefit of their inequitable action being the Order given on 17<sup>th</sup> October 2018 by which the Court differed from its previous orders.

3. The court on 22/10/2018 in absence of parties and Advocates in view of the nature of the subject matter, on its own motion ordered the hearing of the matter to remain as earlier on set, thus on 23/0/2018. On 23/10/2018 in presence of parties' Advocates, this court directed the preliminary objection dated 18<sup>th</sup> October 2018 be determined first by way of written submissions and extended interim orders which were in force. That Mr. Ombwayo, learned Advocate for the Plaintiff/Respondent filed his submissions on 26<sup>th</sup> October 2018. Whereas Mr. Frazer, learned Advocate for the Garnishee/Applicant filed his submissions, on 3<sup>rd</sup> November 2018; Mr. Gathaia learned Advocate for the Judgment-debtor opted not to file any submissions.

4. I have considered the preliminary objection dated 18<sup>th</sup> October 2018 and the issues arising for consideration are as follows:-

**a) Whether the applications dated 12<sup>th</sup> October 2018 and 16<sup>th</sup> October 2018, and the proceedings subsequent thereto violates the provisions of order 9 Rule 1 Civil Procedure Rules 2010?**

**b) Whether M/s Hamilton Harrison & Mathews Advocates and its Advocates failed to disclose and/or concealed the material facts that they were not lawfully on record pursuant to order 9 Rule 1 Civil Procedure Rules 2010 as to lodge the subject applications in court, urge the court on 15<sup>th</sup>, 16<sup>th</sup> and on 17<sup>th</sup> October 2018 and whether they were entitled to the benefit of their equitable action being the order given on 17<sup>th</sup> October 2018?**

**A) Whether the applications dated 12<sup>th</sup> October 2018 and 16<sup>th</sup> October 2018, and the proceedings subsequent thereto violates the provisions of order 9 Rule 1 Civil Procedure Rules 2010?**

5. The Plaintiff/Applicant contention is that the applications dated 12<sup>th</sup> October 2018 and 16<sup>th</sup> October 2018, the request letter dated 16<sup>th</sup> October 2018, the proceedings subsequent thereto and order given on 17<sup>th</sup> October, all violates the provisions of order 9 Rule 1 of Civil Procedure Rules 2010 as they were lodged and urged by persons with no legal authority and/or evidence of lawful authority to represent the garnishee; who never disclosed that fact to the court and are otherwise irregular.

6. The Plaintiff/Applicant further contend upon perusal of the court record, it realized that M/s Hamilton Harrison & Mathews Advocates were strangers in the suit, which fact they had not revealed to the court, by misrepresenting themselves as Advocates on record for the garnishee pursuant to the two lodged applications; the letter dated 16<sup>th</sup> October 2018 and by appearing in court before Judge on 17<sup>th</sup> October 2018, on the basis of which they were given the order dated 17<sup>th</sup> October 2018. On that basis the Plaintiff/Applicant urges the pleadings, orders and proceedings before the said firm of Advocates lodged their Notice of Appointment on 22<sup>nd</sup> October 2018, thus between 15<sup>th</sup> and 21<sup>st</sup> October 2018 were null and void and should be set aside and expunged from the court record for being invalid.

7. In the instant application, this court gave directions that the application dated 12<sup>th</sup> and 16<sup>th</sup> October 2018 by the garnishee be dealt with after determination of the preliminary objection and as such the court shall be restricted to dealing with the issues related to preliminary objections for now.

8. The Plaintiff/Applicant preliminary objection is primarily hinged on the provisions of order 9 Rule 1 of the Civil Procedure Rules which provides:-

**"9 (1) Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf: Provided that—**

**(a) any such appearance shall, if the court so directs, be made by the party in person; and**

**(b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney- General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act."**

9. From the reading of order 9 Rule 1 of the Civil Procedure Rules, and my tunderstanding of the said provision, there is nothing that requires a formal Notice of Appointment of an Advocate.

10. The order that requires a Notice of appointment of an Advocate is required to expressly state so: for example under **Order 9 Rule 7 of the Civil Procedure Rules** it is provided:-

**"Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."**

11. The above order is clear that it is only in a situation where a party after suing or defending a suit in person, appoints an Advocate to act in the case or matter on his behalf, he/she shall give notice of appointment of an advocate or notice of change of an advocate as the case may be. This is because there are situations in which Notice of Appointment of an Advocate is not necessary or required such as where an Advocate files a plaint for the plaintiff; petition; originating summons; or filing memorandum of appearance and defence. In view of this, I find order 9 rule 1 of Civil Procedure Rules having no express provision or having no specific provision requiring a filing of a document entitled "Notice of Appointment of an Advocate" there is no basis for requiring a party, such as the garnishee in the instant case, to file a document that is not mandatorily required to be filed before taking part in the already filed proceedings.

12. The most important, consideration to be had in a matter is for a party to given its description and provide full details of address for easy of service; and once that is done and its clear where to serve the party and who is representing the party, a Notice of Appointment of Advocates which would give the same information would add no value to the matter nor change anything as far as the representation of the party and address of same is concerned. The application dated 12<sup>th</sup> and 16<sup>th</sup> October 2018 clearly state that M/s Hamilton Harrison & Mathews is the Advocate for the garnishee and provides full details and the address for service. There is further affidavit filed in support of the applications sworn by an officer of the garnishee who has expressly stated his authority to make the affidavit in support of the applications filed by the garnishee through M/s Hamilton Harrison & Mathews. From the aforesaid affidavit there is no doubt that the garnishee has approved and authorized the named firm of Advocates to act on its behalf in making the application. It would in view of the above serve no better purpose in such a situation to insist an Advocate appearing on record for the first time for the party, who has served such documents giving full details to be demanded of him to file a Notice of Appointment of Advocate in addition to the applications which have all details of the authorized Advocate.

13. The Plaintiff/Applicant referred the court to the case in **Kenya Building, Construction, Timber & Furniture Industries Employees Union Vs Ms. Newline Furniture Ltd [2017] eKLR**, in which the Employment and Labour Relations Court found that the applications filed by an Advocate who had not yet lodged a Notice of Appointment of Advocates were irregular and invalid as they had been taken by a stranger to the proceedings.

14. I have considered the above-mentioned authority and I find that the same is distinguishable from the instant case. The case of **Kenya**

**Building, Construction, Timber & Furniture Industries Union Vs M/s Newline Furniture Ltd [2017] eKLR** which is distinguishable from this case on the basis; that in that case the advocates for the respondent had specifically asked for time to file a notice of appointment and had been directed to file a notice of appointment within 7 days which the advocate failed to do. Further Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 Legal Notice 146/2016 specifically requires a Memorandum of Appearance separate from the Response and there is no equivalent of Order 6 rule 2(4) of the Civil Procedure Rules, 2010.

This is because under Order 6 Rule 1 of Civil Procedure Rules once a defendant is served with summons to enter appearance is required unless an order is made by the court, to file his appearance and further under Order 6 Rule 2(4) is specifically provided that defence will suffice without Memorandum of Appearance so long as the defence contains the address and service.

15. The Plaintiff/Applicant further referred to **Sunrise Properties Ltd Vs Fifty Investments Limited & Another [2007] eKLR**, where the High Court upheld a preliminary objection that was raised against pleadings that had been lodged by a new advocate who had not filed a Notice of Appointment of Advocates. The Court held that applications filed, and action taken, before the lodgment of such a Notice of Appointment of Advocates were invalid and proceeded to expunge them from the record.

The order applied in the above case was order III Rule 1 Civil Procedure Rules (*repealed*) and order 8 of Civil Procedure Rules (*repealed*) which is in similar terms with order 9 rule 1 of Civil Procedure Rule 2010. Order III Rule 1 of Civil Procedure Rules (*repealed*) did not require the filing of notice of appointment of an Advocate as filing of a notice of appointment only applies where a party appoints an advocate having previously acted in person or having sued or defended in person as clearly provided for under order 9 Rule 7 of the Civil Procedure Rules 2010.

16. In the case of **Kazungu Ngari Yaa Vs Mistry Vs Narani Mulji & Co. Ltd [2014] eKLR** claimant raised a preliminary objection on the grounds that a firm of advocates had come on record post judgment by filing an application for stay of execution without filing a notice of appointment. The court held that as the advocates were coming on record for the first time where no appearance or defence had been filed there was no requirement to file a notice for appointment.

17. In the instant matter, the court cannot come into a conclusion without considering the provisions of Article 159 2(d) of the Constitution of Kenya 2010 and sections 1A of the Civil Procedure Act.

**Article 159 (2) (d)** of the Constitution of Kenya 2010 provides as follows:-

**"Justice shall be administered without undue regard to procedural technicalities."**

Whereas section 1A of the Civil Procedure Act provides:-

**"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."**

18. In the case of **Abdirahman Abdi also known as Abdirmahman Mohamed Abdi Vs Safi Petroleum Product Ltd & 6 others (2011) eKLR** the Court of Appeal stated:-

**"The enactment of sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offering document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."**

19. Similarly in the case of **Richard Ncharpi Leiyagu Vs IEBC & 2 Others (2013) eKLR** the Court of Appeal stated as follows:-

**"Raising the issue at the hearing cannot aid the respondents because nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities."**

20. In the case of **Kamlesh Mansukhlal Damji Pattni Vs Nasir Ibrahim Ali & 2 others [2005] eKLR** the court when faced with an application to strike out applications filed by an advocate who had not properly filed a notice of change of advocate held that:-

**"Such an extreme order would not serve the cause of justice" as the respondents in that case would "merely ensure that their current or new advocates filed appropriate Notices of Appointment and would refile the same application. Justice**

**would not have been achieved but rather time, delay and a little expense would have been sacrificed."**

21. Having stated the above, I am of the considered view that even if I were to find that the notice of appointment ought to have been filed, which I have not, proceeding to strike out the applications dated 12<sup>th</sup> and 16<sup>th</sup> October 2018 as well as the proceeding, of 17<sup>th</sup> October 2018 would amount to giving due regard to technicalities of procedure contrary to Article 159 (2) (d) of the Constitution of Kenya 2010, and would in my view defeat the overriding objectives as set out under section 1A of the Civil Procedure Act, whose purpose is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes. This court is alive to the fact, that it is required to do substantive justice and that it should stand to see justice is not defeated due to application of technicalities in the law but instead should stand for a spirited commitment to the constitutional obligations to ensure justice is served without undue regard to technicalities and doing substantive justice should guide the court's decision. The alleged failure by the garnishee's Advocate to file a Notice of Appointment, which I have found otherwise; within the dates alleged is in my view a procedural technicality, that should not be allowed to hinder justice as the courts are nowadays concerned with doing substantive justice rather than sticking to procedural technicalities which result to injustice rather than justice to litigants.

**B) Whether M/s Hamilton Harrison & Mathews Advocates and its Advocates failed to disclose and/or concealed the material facts that they were not lawfully on record pursuant to order 9 Rule 1 Civil Procedure Rules 2010 as to lodge the subject applications in court, urged the court on 15<sup>th</sup>, 16<sup>th</sup> and on 17<sup>th</sup> October 2018 and whether they were entitled to the benefit of their inequitable action being the order given on 17<sup>th</sup> October 2018?**

23. It is contended by the Plaintiff/Applicant that Senior Counsel Mr. Fraser, instructed by M/s HHM Advocates, appeared before the court, and moved the court ex-parte which prompted the court to change its earlier stance and order a stay of execution.

24. It is further contended by the Plaintiff/Applicant, that upon perusal of the court record, the Plaintiff's counsel realized that M/s HHM Advocates were strangers in the suit, which fact they had not revealed to the court, and had misrepresented themselves as Advocates on record for the garnishee pursuant to which they lodged the two applications, the letter dated 17<sup>th</sup> October 2018 and appeared in court before the Judge on the 17<sup>th</sup> October 2018, on the basis of which they were given the order dated 17<sup>th</sup> October 2018.

25. On perusal of the Garnishee's two applications dated 12<sup>th</sup> and 16<sup>th</sup> October 2018, it is clearly stated that M/s Hamilton Harrison & Mathews is the Advocate for garnishee and full details of the address of service is provided. The affidavit in support of the applications sworn by the officer of the garnishee expressly states his authority to make the affidavit, in support of the applications filed by the garnishee through the firm of M/s Hamilton Harrison & Mathews Advocates. In view of foregoing I find the Plaintiff/Applicant has failed to demonstrate that the firm of M/s Hamilton Harrison & Mathews Advocates failed to disclose or concealed the material fact that they were not lawfully on record pursuant to order 9 Rule 1 of Civil Procedure Rules 2010. I find M/s Hamilton Harrison & Mathews Advocates, disclosed that they were Advocates for the garnishee in the two applications and did not conceal any material facts as regards their representation of the garnishee in these proceedings and as such; I find and hold the firm of the aforesaid Advocates were entitled to the benefit of their action being the order given on 17<sup>th</sup> October 2018. I find no grounds to proceed to strike out, the applications dated 12<sup>th</sup> October, 2018 and 16<sup>th</sup> October 2018 nor the proceedings of 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> October 2018. I decline to expunge from the court record the applications or any orders made thereto or set aside any orders issued thereto.

26. The upshot is that the Plaintiff/Applicant preliminary objection dated 18<sup>th</sup> October 2018 is without merit and is accordingly dismissed with costs to the garnishee.

**Dated, signed and delivered at Nairobi this 17<sup>th</sup> day of January, 2019.**

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**J .A. MAKAU**

**JUDGE**