



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 543 OF 2007

HOUSING COMPANY OF EAST AFRICA LTD.....PLAINTIFF

VERSUS

BOARD OF TRUSTEES OF NATIONAL

SOCIAL SECURITY FUND.....1ST DEFENDANT

KISIMA MANAGEMENT LTD.....2ND DEFENDANT

RULING

1. The subject of this ruling is a notice of motion application dated 12th October 2018, filed by the firm of Kinyanjui Njuguna & Company Advocates. The application is filed pursuant to the provisions of Section 1A (1)(2)(3), 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It is based on the grounds on the face of it and an affidavit dated 12th October 2018, sworn by Kinyanjui Theuri, a partner in the firm of the Applicant.

2. The Applicant prays for orders that:-

- (a) That this Honourable court be pleased to set aside and/or review the orders allowing the firm of Wetangula Adan & Co. Advocates to come on record for the 1st Defendant;*
- (b) That the notice of change of Advocates filed by the firm of Wetangula Adan & Co. Advocates be expunged from the records;*
- (c) That such other and further orders be made as this Honourable court deems fit and just; and*
- (d) That the costs of the application be provided for.*

3. The Applicant avers that, they are on record in this matter on behalf of the Board of Trustees of National Social Securities Fund(NSSF) the 1st Defendant, together with the firm of; M/s Kajwang & Kajwang Advocates. That the two firms entered into a consent, with the firm of Wetangula Adan & Company Advocates allowing the said firm of; Wetangula Adan & Company Advocates to come on record for the 1st Defendant. However the firm of; Wetangula Adan & Company Advocates would only come on record subject to the 1st Defendant settling all dues and/or outstanding fees for legal work done by the Applicants and the firm of; M/s Kajwang & Kajwang Advocates. However, to the date the 1st Defendant has never fully paid the said fees as per the consent and/or as ordered by the court pursuant to taxation done in HCCC Misc. Application No. 182 of 2017.

4. The Applicant therefore argues that as the 1st Defendant is in breach of the consent, the Applicant has a right to repudiate the consent. That the consent was drafted wholly by the firm of Wetangula Adan & Company Advocates, as such they cannot escape liability from the consent which is a sole agreement as between the parties who have consented to it on their own free will.

5. That, in the given circumstances the order which granted the firm of Wetangula Adan & Company Advocates authority to come on record was obtained by non-disclosure of material facts, hence the notice of change of Advocates herein ought to be expunged until full compliance with the consent is met.

6. The Application was supported by law firm of; M/s Kajwang & Kajwang Advocates and fully associated itself with the arguments advanced by the Applicant, inviting the court that the subject consent dated 23rd August 2017, is signed by all the parties and that although

the firm of M/S Wetangula Adan & Company Advocates, filed an application dated 9th April 2018, to come on record, there is no notice of change, that was served upon the applicants or the firm of M/s Kajwang & Kajwang Advocates.

7. The Court was also invited to consider, the preliminary objection filed by firm of M/s Kajwang & Kajwang Advocates on jurisdiction and that as there is a judgment in this matter, the firm of M/S Wetangula Adan & Company Advocates need to demonstrate that, it has complied with the law. Finally, the learned counsel Mr. Kajwang representing argued that, there is an ethical issue herein, as his firm released its file to the firm of M/s Wetangula Adan & Advocates on an undertaking to pay, but the same has not been honoured, therefore, the liability to pay the legal fees shifted from the 1st Defendant to that law firm to pay.

8. However, the learned counsel Mr. Ngaca, representing the 1st Defendant and the firm of Wetangula Adan & Company Advocates opposed both the applications by the firm of Kinyanjui Njuguna & Company Advocates and the preliminary objection by Kajwang & Kajwang Advocates. the opposition was supported by the Replying affidavit dated 4th March 2019, sworn by Hellen Koech, Ag/ Legal Manager with the 1st Defendant.

9. She deposed that, the subject consent was informed by the fact that, the 1st Defendant needed to file a taxation reference against the party and party taxation, which was prosecuted by the firm of Kinyanjui Njuguna & Company Advocates, and to avoid conflict of interest, the firm of Wetangula Adan & Company Advocates was appointed, and the two law firm on record consented to incoming law firm in fulfillment of the provisions of Order 9 of the Civil Procedure Rules. The 1st Defendant argued that, leave of the court under Order 9 of the Civil Procedure Rules was then granted by the court in terms of prayer (2) of the Chamber summons application dated 6th April 2018, Therefore, the firm of Wetangula Adan & Company Advocates, is without any legal or factual doubt, the firm on record for NSSF.

10. The 1st Defendant argued that, if the outgoing Advocates wish to participate in the hearing of the chamber summons application dated 6th April 2018, they ought to apply to be enjoined herein as interested parties rather than purported to represent it. Thus, the application herein is only intent to delaying the hearing of the chamber summons application dated 6th April 2018.

11. The Learned Counsel Mr. Ngaca argued that, the preliminary objection is incompetent as it has no pure point of law on the face of it and that to resolve the issue of representation of the 1st Defendant, the court will have to deal with facts. Therefore, the preliminary objection should be struck out.

12. However, the Learned counsel Mr. Kinyanjui responded that, the letter dated 6th September 2017, which the 1st Defendant has referred to, was written after the consent was entered into.

13. On the 2nd day of April 2019, the parties disposed of the application by tendering oral submissions mainly on the issue of the subject consent. I have considered the same and I find that, several issues arise namely:-

(a) Whether there is a competent preliminary objection on record;

(b) Whether the firm of Kinyanjui Njuguna & Company Advocates are properly on record herein for the 1st Defendant; and/or

(c) Whether the consent entered herein should be set aside and/or varied; and/or

(d) Whether the said consent was entered into subject to the conditions set out in the letter dated 6th September 2017.

14. As regard the issue of the preliminary objection I find that, it is not the subject of the application under consideration. It was not filed pursuant thereto or in support or opposition thereto. Therefore, I shall not delve into any arguments in relation to the same.

15. The issue as to whether the firm of Kinyanjui Njuguna & Co Advocates is properly on record will be determined by the finding of the court as to whether the consent has been fully satisfied or not.

16. I have considered the subject consent(s) and I find that the spirit thereof is that, it was given pursuant to and in compliance with the requirement of order 9 of the Civil Procedure Rules. This is informed by the fact that, the provisions thereof require that, if a law firm wants to come on record after judgment, then it must seek for the leave of the court with notice to the outgoing law firm. In that regard, there can be no argument that the provisions of order 9 of the Civil Procedure Rules have been complied with herein.

17. Further, the consent(s) clearly indicate that both firms of M/S Kajwang & Kajwang Advocates and Kinyanjui Njuguna & Company Advocate consented to the firm of Wetangula Adan & Company Advocates coming on record. Therefore, the consent(s) were executed voluntarily, without coercion, duress and/or undue influence. In addition, the consent(s) clearly indicate that, the firm of; Wetangula Adan & Company Advocates were coming on record on behalf of the 1st Defendant, (the Board of Trustees National Social Security Fund) to replace the two outgoing firms. In that regard, the firm of Wetangula Adan & Company Advocates became the legal representative of the 1st Defendant.

18. However, it suffices to note that, there was a condition set in the consent that, the firm of Wetangula Adan & Company Advocates would only come on record for the 1st Defendant "subject to settlement of all due and/or outstanding fees for legal work done up to the date of the consents.". The work done by the two outgoing firms. Therefore, the plain reading, of the consent(s) is that, so long as the said fees have not been settled, the consent cannot take effect. It has thus not been fully satisfied or executed.

19. However, the 1st Defendant and the firm of Wetangula Adan & Company Advocates, urge that, the consent was subject to the conditions set out in the letter dated 6th September 2017, in that, at the time of executing the consent, the legal fees that was outstanding had not been ascertained. However, I note that the consent(s) were drawn on 23rd August 2017, and filed in court on 2nd November 2017 and the notice of change of Advocates as per the copy produced herein was filed on the same date, It therefore follows that, the letter of 6th September 2017 was written after the consent(s) on 23rd August 2017. If indeed the letter of 6th September 2017, set any conditions then the same could only take effect after the consent(s) and/or was meant to facilitate the settlement of the consent(s).

20. Further, it is noteworthy that, the subject consents do not make reference to the letter and/or conditions set in the letter dated 6th September 2017, obviously, for the simple reason that, that letter was written after the consent(s). Therefore, the argument advanced by the 1st Defendant and/or the firm of Wetangula Adan & Company Advocates that, the consent(s) were subject to the clarification on the outstanding legal fees and interest accrued, and after hearing the Reference under the chamber summons application dated 6th April 2018, is neither here or there. That argument is not supported by any factual evidence.

21. It is also noteworthy that, the consent(s) were executed on 23rd August 2017 and the subject Reference filed on 6th April 2018 almost eight (8) months after the consent(s), the 1st Defendant and/or the firm of Wetangula Adan & Company Advocates certainly did not expect the two law firms to have sat back and waited for them to move at their own pace to ascertain the legal fees payable to them.

22. Be that as it were, it follows that, until the consent(s) are executed to the letter, then the firm of Wetangula Adan & Company Advocates is not properly on record. However, the question that arises is whether, the setting aside of the consent(s), will serve the interest of justice, in the given circumstances. This is informed by the fact that, the subject two law firms have had their bill of costs filed and taxed. Accordingly, each one has a certificate of taxation which they intent to have adopted as an order of the court, and judgment entered thereto.

23. If the court were to rule that the law firm of Wetangula Adan & Company Advocates are not properly on record as is the case, then it follows that, the entire record of proceedings where that firm represented the 1st Defendant will be expunged from the record and will affect the certificate of taxation in favour of the two law firms. It will also delay the expeditious disposal of this matter and in that case, I find that it will be in the interest of justice to allow the 1st Defendant limited time to fully comply with the consent(s). This is further informed by the fact that the two bills of costs have been taxed and may be considered against the pending Reference. I therefore grant the 1st Respondent seven (7) days to comply with the terms of the subject consent(s). The same stand set aside due to non-compliance and all the documents filed by the firm of Wetangula Adan & Co Advocates stands expunged from record forthwith.

24. It is so ordered.

25. Dated, signed and delivered on this 8th day of April 2019 in an open court in Nairobi.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Kinyanjui for Kinyanjui Njuguna & Co Advocates/Applicant

Mr. Kajwang for Kajwang & Kajwang Advooates

Mr. Ngaca for Wetangula Adan & Co Advocates/respondent

Dennis -----Court Assistant