



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 366 OF 2014

BETWEEN

GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

JIMMY KIAMBA, TREASURER

NAIROBI COUNTY GOVERNMENT.....1ST RESPONDENT

LILIAN NDEGWA, SECRETARY

NAIROBI COUNTY GOVERNMENT.....2ND RESPONDENT

NAIROBI COUNTY GOVERNMENT.....3RD RESPONDENT

RULING

The Application

1. The Applicant herein, Gateway Insurance Company Limited, has filed an application by way of a Notice of Motion dated 7th February 2018 seeking orders that the firm of Coulson Harney LLP comes on record as its advocates, in place of Boniface Njiru & Company Advocates. This application was filed consequent to a ruling delivered herein on 20th December 2017 by Odunga J., wherein the learned Judge struck out a Notice of Change of Advocates filed on 21st September 2017 by M/S Coulson Harney Advocates for being non-compliant with Order 9 of the Civil Procedure Rules.

2. The Applicant's motion is supported by affidavits sworn on 7th February 2018 and 14th March 2018 respectively by Emma Wachira, the Applicant's company secretary. The grounds for the application are that the Applicant wishes to engage the firm of Coulson Harney LLP to pursue the present judicial review proceedings on its behalf. Further, that the said judicial review proceedings were instituted by the Applicant seeking the prerogative order of mandamus, to compel the Respondents to pay the sums to it under a decree issued on 10th March 2009 in **High Court Civil Cause No 890 of 2002 -Gateway Insurance Limited vs Nairobi City Council**. Judgment was subsequently entered herein on 11th June 2015 by which the Respondents were compelled to make payment of the decretal sum arising from the decree.

3. While a number of payments have been made in settlement of the decretal sum under the decree, a substantial amount remains unpaid, and the Applicant is desirous to continue its recovery of the decretal outstanding amount from the 3rd Respondent, which continues to accrue interest. The Applicant thus intends to change its legal representation from Boniface Njiru and Company Advocates to Coulson Harney LLP, in the prosecution of this matter, and that the rules of procedure of this Court require that an order must be made before effecting a change of advocate in the circumstances, and as the firm of Boniface Njiru and Company Advocates are not agreed on a consensual handover

4. The Applicant contended that the firm of Boniface Njiru and Company Advocates had failed to account for the payments made to it by the 3rd Respondent. In addition, that Njomuki Agencies had previously acted for the Applicant as an agent to recover the debt from the 3rd Respondent, and in turn appointed Boniface Njiru and Company Advocates to represent the Applicant in the recovery of the decretal amount. However, that the relationship between the Applicant and Njomuki Agencies had since been terminated, and a copy of the Applicant's letter with the termination notice dated 14th July 2017 was attached .

5. The Applicant therefore urged that any claim that Njomuki Agencies may have against the Applicant would relate only to its agency fees, rather than for the balance of the decretal sum due from the 3rd Respondent under the decree, and that any claim for legal fees that Boniface Njiru and Company Advocates may have against the Applicant is to be resolved in taxation proceedings. Further, that the issues in dispute

between the various parties as relates to the interpretation of the Share Sale And Subscription Agreement dated 31st October 2014 are to be resolved by arbitration under the terms therein rather than through this judicial proceedings.

6. The application was opposed by Boniface Njiru and Company Advocates, through a replying affidavit sworn on 13th February 2018 by Boniface Njiru, the Advocate who had conduct of this matter. Another replying affidavit sworn on 27th February 2018 by David Munga, the proprietor of Njomuki Agencies, was also filed in opposition to the application.

7. Boniface Njiru Advocate averred that although he was not appointed by Applicant, he acted for it, having been appointed by Njomuki Agencies Ltd to do so, and also prosecuted the proceedings herein and filed all affidavits on the matter. He attached a copy of his letter of appointment by Njomuki Agencies, and stated that he was also given powers to institute legal proceedings for and on behalf of the Applicant in his appointment, and that this position was communicated to the Applicant. It was his case therefore that the Applicant has no direct authority to terminate his representation under Order 9 Rule 9 of the Civil Procedure Rules, and that the only person who can terminate his legal services is Njomuki Agencies.

8. Mr. Njiru refuted the allegation that he has failed to account for monies that have been received from Nairobi City Government in liquidation of the debt as alleged, and that he informed the Applicant how much money had been collected, and that any such queries ought to be directed to its agent, Njomuki Agencies, who was the one responsible. He further averred that he is aware that there is a tripartite agreement between the Applicant, Pan Africa Insurance Holdings Co. Ltd and certain shareholders of the Applicant who have an interest in whatever money is collected on the particular debt in HCCC No 890 of 2002.

9. David Munga on his part averred that his company has an interest in the application before court, as they appointed Boniface Njiru and Company Advocates to file the current proceedings. He contended that on the 18th September 2014, the Applicant appointed Njomuki Agencies to be their agent, and expressly granted it power to institute legal proceedings as necessary to recover the amount of the decree that was given in **High Court Civil Cause No 890 of 2002 -Gateway Insurance Limited vs Nairobi City Council**, and to negotiate settlement of the debt. Further, that the decree was for Kshs 111,776,014.28 with accruing interest at the rate of 24% per annum.

10. Mr. Munga further averred that the Nairobi City County Government declined to honour the decree, and he then sought the services of the law firm Boniface Njiru and Company Advocates, who advised on the institution of the current proceedings for an order of mandamus to compel the Respondents to pay the amount of the decree of the court. It was his case that together with the firm of Boniface Njiru and Company Advocates, they have diligently and arduously pursued the Respondents successfully both before this Court and the Court of Appeal. Further, that he has in the process paid the lawyers on record and other professionals, which costs were to be deducted from the proceeds of the court award, as had been agreed with the Applicant. In addition, that he has diligently consulted the officials of the Applicant and continues reporting to them.

11. Mr. Munga refuted the allegation by the Applicant that the firm of Boniface Njiru and Company Advocates has failed to account to it, terming the accusation misguided as the law firm reports to him and strictly follows his instructions in the performance of their legal duties. He further refuted the allegation by the Applicant that the agency agreement has been lawfully terminated, adding that an agency agreement such as his, which includes a power granting the interest in the subject matter, is irrevocable.

12. It was his case that the relationship between him and the Applicant creates a contractual interest, as it specifically grants him power to institute legal proceedings at his cost, and it cannot be terminated unilaterally by the Applicant filing a notice of change of advocates and appointing another firm of advocates, which in his view was abusing the court process to cause a breach of contract. According to Mr. Munga, should the Applicant feel obliged to terminate his agency, it should hold a meeting with him so that he is fully paid his agency charges, costs incurred and compensated for the loss of expected earnings pursuant to the premature termination of the contract.

13. In closing, Mr. Munga also averred that from his knowledge of this matter there is a dispute involving Sanlam General insurance Ltd, its shareholders and certain shareholders, following a Share Sale and Subscription Agreement dated 31st October 2014 between Gateway Insurance and Co Ltd, Pan Africa Insurance Holdings Ltd and Certain Shareholders of Gateway Insurance, which he annexed. He averred that he believed that the agreement required careful adjudication as to its meaning and the rights it conferred to parties concerned in the suit, and the mere filling of a notice of change of advocates by the Applicant in this suit is not only a simplistic approach, but is a dishonest act intended to steal a match over the shareholders.

14. In rejoinder, the Applicant averred that the party who gave Mr. Boniface Njiru Advocate instructions to act is Njomuki Agencies, and that it is not in dispute that the Applicant terminated the contractual services of Njomuki Agencies by the letter dated 14th July 2017. Therefore that Njomuki Agencies has no legal or factual right, authority, or basis to act for, represent, initiate and continue proceedings for and on behalf of the Applicant in the present proceedings or in any other proceedings. Further, that by virtue of the termination of the agreement, Mr. Njiru has no legal basis to continue representing the Applicant in the present proceedings.

15. The Applicant added that the appointment of Njomuki Agencies was never made to be an irrevocable appointment, and it is entitled to revoke such appointment. Furthermore, that any claim of breach of contract or on the supposed agency fees, costs and compensation for the loss of expected earnings lie in a separate suit, and cannot prevent the Applicant from appointing another firm of advocates to continue protecting its interests. Lastly, that neither Mr Njiru nor his principal were party to the Share Sale and Subscription Agreement dated 31st October 2014 between the Applicant, Pan Africa Insurance Holdings Limited and certain shareholders of the Applicant, and as such they cannot derive any rights, obligations and or benefits from it as relates to the representations of the Applicant in these proceedings.

The Determination

16. What is before the court is essentially an application in which the applicant seeks to change its firm of Advocates currently on record. Order 9 rule 9 of the Civil Procedure Rules provide as follows in this regard:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

17. The general rule is that a client may retain an advocate of his or her choice or change that advocate whenever the need arises. The client may also terminate a retainer of an advocate at any time. This is provided for in Order 9 Rule 5 of the Civil Procedure Rules. The only applicable restrictions under the law are that one has to file a notice of appointment or change of advocate with the court, and the leave of the court has to be sought after judgment has been entered for one to change an advocates pursuant to the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The reasons why leave of the court is required for a change of advocate after judgment, is for the court to confirm that the respective rights and duties between the advocate on record and the client have been settled.

18. Odunga J. in the case of George Miyare t/a Miyare & Company Advocates v Nyando Power Techniques Limited , (2017) eKLR observed as follows in this respect:

“2. The general rule is that it is not the business of the courts to tell litigants which advocates should or should not act for them in a particular matter as each party to a litigation has the right to choose his or her own advocate and unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel. See William Audi Ododa & Another vs. John Yier & Another Civil Application No. Nai. 360 of 2004; Delphis Bank Ltd vs. Channan Singh Chatthe & 6 Others Civil Application No. Nai. 136 of 2005; Geveran Trading Co. Ltd vs. Skjevesland [2003] 1 ALL ER 1”

19. Likewise, Mabeya J. in the case of Ritesh Nandlal Pamnani & Another vs Dhanwanti Hitendra Hirani & 2 Others (2012) eKLR observed that is a party’s fundamental and constitutional right to have an advocate of his choice, and that for a Court to deprive a litigant his right to representation of his choice there must be a clear and valid reason for so doing , and each case must turn on its own facts to establish whether real mischief and real prejudice will result.

20. Therefore, a party has the right to engage an advocate of his choice and there must be a clear and valid reason why he should be deprived of that right. The parties canvassed the issues arising in this respect by oral submissions made in court. Mr Kuyo appeared for the Applicant, and Mr. Boniface Njiru appeared for Boniface Njiru & Company Advocates and Njomuki Agencies Ltd. Mr. Kuyo urged that the only issue in the application was whether leave should be granted to the Applicant’s proposed Advocate to come on record. He relied on Order 9 Rule 9 of the Civil Procedure Rules, and stated that the leave is sought as the Applicant had not been able to agree on a seamless handover with the Advocate on record.

21. He deposed that the advocates on record object to the leave being granted on the ground that they were appointed by Njomuki Agencies, which appointment is irrevocable. Mr. Kuyo urged that there is no such irrevocability with respect to the debt owing from the Respondent as any agency is always revocable. He relied on Bowstead and Reynolds on Agency, 19th Edition at page 665. Furthermore, that the sub agency relationship between the Advocates on record and Njomuki Agencies was terminated with the termination of the main agency between the Applicant and Njomuki Agencies.

22. Mr. Kuyo contended further that the application also raises the constitutional issue of the right to legal representation, and that the right to a fair hearing extends to a citizen’s right to designate an advocate of his or her choice to represent them, which cannot be limited subject to payment of instruction fees, which the advocate on record can pursue with Njomuki Agencies or tax its bill. Further, that the Applicant has not refused to pay any legal fees or charges that are due, and Njomuki Agencies can also file a separate claim for its debt collection services. Reliance was in this respect placed on the decision in Re Belles Savage Ltd (2015) e KLR.

23. He therefore urged that the Applicant’s application is not in abuse of the court process, as the opportunity available to the advocate on record to tax his bill of costs has not been taken away, and the fees due to the advocate cannot therefore be a power coupled with an interest. In addition, that the dispute resolution method provided in the Share Sale and Subscription Agreement is arbitration, and the issues therein cannot be brought before the court.

24. Lastly, Mr. Kuyo distinguished the authorities relied by the advocates on record, which he submitted are not binding but persuasive, on the grounds that an assurance that one will be paid a portion of the money collected by an agent is not a power coupled with an interest, and that the terms of the engagement between Njomuki Agencies and the advocates on record were unknown.

25. Mr. Njiru on his part pointed to the appointment letter by the Applicant dated the 18th September 2014 addressed to Njomuki Agencies, where the latter was given power to institute proceedings in court on behalf of the Applicant which included the power to appoint an advocate. He contended that Applicant’s agent is the one who has been giving the advocates on record instructions and paying their fees. It was his case that the proceedings have been very successful, and there is no reason why the Applicant should now want to engage new counsel after the suit has been finalized, and all that is remaining is to enforce the decree and collect the debt.

26. The real motive, according to Mr. Njiru, was not to change counsel, but to defraud the agents and enable the Applicant to evade its obligation in a contractual relationship and obligations as regards payment of collection fees. Further, that the letter terminating the agency of Njomuki Agencies Ltd by the Applicant was not sufficient and did not deal with the necessary details such as payment, and should be subjected to further proceedings.

27. It was further urged by Mr. Njiru that even though a principal may terminate an agency, where the authority to act is coupled with an interest the agency cannot be revoked. Reliance was placed on the cases of O'Connell vs Superior Court for the City and County of San Francisco, S.F. 15245; Republic of Phillipines vs Hon Victorino Evangelista and Another, GR No. 156015 and CCB vs MIB Kibale (2014) e KLR for this position. He contended that the agency Njomuki Agencies received is irrevocable, as it was paying its subagents and its lawyers from its pockets.

28. Lastly, Mr. Njiru urged that the Applicant and proposed advocate should have first settled the claims by the agent and other third parties who have an interest in the collection of its debt as shown in the Share Sale and Subscription Agreement, and stated that this is thus not an ordinary application under Order 9 Rule 9 of the Civil Procedure Rules.

29. After considering the arguments made by the parties, this Court notes that it is not in dispute that the firm of Boniface Njiru Advocates have been acting in this matter on behalf of the Applicant, having been appointed to do so by Njomuki Agencies, who had been instructed by the Applicant to pursue the debt on their behalf. It is also not disputed that the Applicant did give Njomuki Agencies the authority to appoint an advocate to institute proceedings for recovery of the said debt, as shown in its letter dated 18th September 2014 which was annexed as Annexure "DM2" to Mr. Munga's replying affidavit.

30. What is disputed is whether the Applicant can, and did lawfully terminate the agency and sub-agency of Njomuki Agencies and Boniface Njiru Advocates respectively. The dispute in this regard turns on the issue whether the said agency and sub-agency were irrevocable.

31. Mr. Njiru in his submissions relied on a number of judicial authorities to argue that the agency and sub-agency were irrevocable, as they were coupled with an interest. In O'Connell vs Superior Court for the City and County of San Francisco (supra) the Court held that the rule that a client may discharge his attorney at any time is subject to an exception where the attorney has an interest in the subject matter of the litigation. This position was also reiterated in Republic of Phillipines vs Hon Victorino Evangelista and Another and CCB vs MIB Kibale (supra) which were all cited by Mr. Njiru .

32. Black's Law Dictionary Ninth Edition defines an agency coupled with an interest at page 71 as follows:

"An agency in which the agent is granted not only the power to act on behalf of the principal but also a legal interest in the estate or property involved. This type of agency is irrevocable before the interest expires, unless the parties agree otherwise when creating the interest."

33. This definition was relied on in CCB vs MIB Kibale (supra) wherein the Court found that the power of attorney donated by the Plaintiff to the Defendant therein was revocable, as the Defendant had no interest in the suit property. The decision in Republic of Phillipines vs Hon Victorino Evangelista and Another (supra) was on the other hand made at an interlocutory stage, and did not determine the issue whether the power of attorney granted by one of the Defendants to his advocate was irrevocable.

34. In O'Connell vs Superior Court for the City and County of San Francisco (supra), the Supreme Court of California elaborated on the character of the interest in the subject matter of an agency that can result in an agency being irrevocable as follows:

"The leading definition of the character of 'interest' essential, when coupled with a power, to make the latter irrevocable, appears in the early and leading case of Hunt v. Rousmanier, 8 Wheat. (21 U. S.) 174, 203, 5 L. Ed. 589, wherein, Chief Justice Marshall writing the opinion, it is declared: 'Is it an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it."

35. In that particular case the client had agreed to pay her attorney one-half of all that he may collect or recover by suit or compromise, and gave the attorney full power to compromise. The Court found that the interest in the proceeds that may be collected was not a beneficial interest in the subject matter of the agency, and a revocation of the agency did not deprive the attorney of any right as he would still be entitled to be reimbursed or compensated for any sums expended or services rendered.

36. In the present application, the agreement between Njomuki Agencies and the Applicant was contained in a series of correspondence between the two parties annexed as "Annexure DM6" to the replying affidavit filed by Mr. David Munga. The gist of the correspondence was that Njomuki Agencies was granted authority by the Applicant to collect its debt from the Respondent, and upon debt collection, would be paid 15% of the amount received by the Applicant. In a letter dated 26th October 2013, the Applicant adjusted the collection commission to 25% of the amount collected from the judgment debtor. The Applicant in that letter specifically stated as follows:

" We take this opportunity to let you know and understand that payment of your commission will only be from the payment proceeds received by Gateway Insurance Company from the Judgment/Debtor, and under no circumstance will you demand from Gateway any payments whatsoever for uncollected payment"

37. It is thus evident that the only interest that was due to Njomuki Agencies and by extension to its sub-agents was a commission after collection of the debt, and no interest was granted in the debt itself. In addition, Njomuki Agencies did not provide evidence of any other authority granted to it other than that of collection of the Applicant's debt, and it or its sub-agents were not parties to the the Share Sale and

Subscription Agreement they relied on in argument.

38. It is thus the finding of this Court that the interest of Njomuki Agencies and by extension its sub-agent, Boniface Njiru Advocates, in the payment of their commission and fees was separate and distinct from the debt that was the subject matter of the agency. It is also my view that refusal of leave for a new advocate to come on record is not an appropriate remedy to Boniface Njiru and Company Advocates in this regard. This is for the reason that advocates are officers of the court, and are obliged to assist the court meet the overriding objectives set out in sections 1A and 1B of the Civil Procedure Act of ensuring just, expeditious, proportionate and affordable resolution of civil disputes.

39. In my view, the appropriate remedy in the circumstances arising in this application is a separate action by Boniface Njiru and Company Advocates and/or Njomuki Agencies to enforce any agreement entered into on fees, or for the commission due, or for orders for the delivery of a bill of costs.

40. I accordingly allow the Notice of Motion dated 7th February 2018 for the foregoing reasons, and hereby grant leave to the firm of Coulson Harney LLP to come on record as advocates for the Applicant in place of Boniface Njiru & Company Advocates. The costs of the said Notice of Motion shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JULY 2018

P. NYAMWEYA

JUDGE