REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 370 OF 2010

REPUBLIC…APPLICANT

VERSUS

HON. LUCAS M. MAITHA CHAIRMAN, BETTING CONTROL AND LICENSING BOARD..1ST RESPONDENT

A.O. KWASI, DIRECTOR, BETTING CONTROL AND LICENSING BOARD….....2ND RESPONDENT

AND

FLINT EAST AFRICA LIMITED…….…….....….....…1ST INTERESTED PARTY

NGATIA & ASSOCIATES…….....….2ND INTERESTED PARTY

MAMA FATUMA CHILDREN'S HOME.…….…….....…… BENEFICIARY

***EX PARTE:* INTERACTIVE GAMING AND LOTTERIES LIMITED**

RULING

1. On 2nd September, 2011 the **Honourable Mr. Justice Musinga** (as he then was) ordered that a sum of Kshs. 50M deposited in court in this matter be transferred and held in a joint interest earning account in the joint names of the Firm and Chief Registrar of Judiciary and this was accordingly done at Chase Bank Ltd, Riverside Mews Branch, Nairobi under A/C No 0152030834007 pending hearing and determination of the several disputes concerning the number of SMS's sent under the *Mzalendo Bora* SMS Lottery Campaign.

2. After protracted litigation in all the cases in court, the matters were resolved as follows:-

i. Total gross proceeds

Received = Kshs. 178,163,548.18

ii. Less 20% administrative

Charge = Kshs. 35,632,709.636

Kshs. 142,530,838.544

iii. 25% thereof payable to

Mama Fatuma **Kshs. 35,632,709.636**

Less paid Kshs. 1,000,000.00

iv. Balance due to

Beneficiary **Kshs. 34,632,709.636**

3. Pursuant to the foregoing, a consent was recorded in this matter on 8/7/2015 to disburse the principal sum of Kshs. 50M as follows:-

i. M/S Kyalo & Associates Advocates – Kshs. 34,632,709.636;

ii. M/S Nganga Mbugua & Company Advocates – Kshs. 15,367,290.364

4. However, there being no agreement on the disbursement of the interest, the parties made their respective submissions thereon and ultimately the court ruled on 30th September, that it be apportioned as above.

5. However, by a Motion on Notice dated 1st December, 2015, the firm of **Ngatia & Associates Advocates**, (hereinafter referred to as "the Firm") applied that it be joined as an interested party to these proceedings and that the orders made herein on 8th July, 2015 and/or consequential orders directing the apportionment and/or distribution of the funds in an account held by the said firm and the Chief Registrar, Judiciary (hereinafter referred to as "the Account") be stayed pending taxation of advocate/client bills of costs between the said firm and the *ex parte* applicant herein in a number of suits between the ex parte applicant and the interested party herein. It was further sought that the same orders be set aside and discharged and substituted with an order that the firm be entitled to offset and/or deduct all taxed costs due and owing from the *ex parte* applicant from the funds in the Account and the balance thereof be apportioned in such manner s may be decreed by the Court. The firm's claim was based on the allegation that the said firm is owed substantial fees by the firm's former client, the applicant herein, for legal fees rendered to the applicant and that the firm has a lien on the said Account.

6. On 22nd day of December, 2015, this Court while reviewing its earlier order confirmed the order of stay in respect of the principal sum due to the *ex parte* applicant herein as well as the interests but ordered that the principal sum due to the beneficiary minus interests will be released to the beneficiary pending the determination of the Firm's application.

7. Subsequently, an issue arose as to the exact amount lying in the joint account in Chase Bank Ltd, Riverside Mews Branch, Nairobi under A/C No 0152030834007. As a result of the uncertainty concerning the exact amount in the said account, this Court on 22nd February, 2016 directed that the said Bank's Manage do appear before the Court to produce the statements in respect of the said account. Subsequently, an affidavit was filed on behalf of the Bank by **Collins Odhiambo** which affidavit provoked an application for cross-examination.

8. By a Notice of Appointment of Advocates dated 21st November, 2016 and filed the same day, **Chase Bank (K) Limited** (in receivership) and the said **Collins Odhiam**bo, appointed the firm of V. A Nyamodi & Co. Advocates to act on their behalf in this matter.

9. Before the deponent of the affidavit sworn on behalf of the Bank could be cross-examined, the ex parte

applicant herein on 6th December, 2016 filed a notice of preliminary objection dated 5th December, 2016 on the seeking that the said Notice of Appointment be struck out on the ground that the firm of V A Nyamodi & Co. Advocates have no right of audience as they represent **Mr Collins Odhiambo** and **Chase Bank** who are not parties to this suit.

10. According to **Mr Mbugua Ng'ang'a** learned counsel for the ex parte applicant, an application for cross-examination of a deponent is made pursuant to Order 19 Rules 2 and 9 of the ***Civil Procedure Rules***. After cross-examination, it was submitted, the Court does not make any adverse order since the purpose of cross-examination is merely to clarify the deposition. In learned counsel's view, once cross-examination is over, the matter ends there.

11. In this case it was contended that the Notice of Appointment was made on behalf of **Collins Odhiambo** as well as Chase Bank, against whom no order was sought. According to learned counsel, in judicial review proceedings the parties are well settled and in this case they are the applicant, the Attorney General and the beneficiary though the firm of Ngatia & Company Advocates also sought joinder in respect of a lien.

12. It was submitted that now we have Chase Bank Limited, which is an entity under receivership which requires the consent of the receiver and the leave of this Court. However there is no formal application for joinder by the receiver and no leave has been granted to that effect. It was therefore submitted that the appearance in these proceedings by the firm of Nyamodi & Co. Advocates on behalf of Chase Bank is irregular and he referred to ***Gower on Company Law*** and **Johnson Mbugua Mugo & 2 Others vs. Dominic Kinuthia Mugo & Another [2004] eKLR.** It was submitted that whereas leave is not necessary where an adverse order is sought, at the moment there is no application seeking any relief against Chase Bank. In the event that there is such a necessity, it was submitted that appropriate proceedings would be filed in the Commercial Division. In this case however the role of **Collins Odhimbo** is limited to being questioned on his affidavit. Reference was made to **Tom Chariga vs. Leonard Rufus Ochieng [2008] eKLR** and the Court was urged to uphold the preliminary objection.

13. The objection was supported by **Mr Kyalo**, learned counsel or the beneficiary herein who associated himself fully with the ex parte applicant's submissions.

14. Miss Mirui, learned counsel for Ngatia & Company Advocates, the matter was left for the decision of the Court.

15. Mr Nyamodi, learned counsel for the Bank and **Collins Odhiambo** opposed the objection. According to him, there has been a lot of water under the bridge in this matter which is emotive. While appreciating that **Collins Odhiambo** is not a party to these proceedings, learned counsel submitted that he is nevertheless subject to the authority of this Court by dint of the order made on 22nd February, 2016.

16. While learned counsel averred that his clients have no interest in the matter the subject of these proceedings and do not seek any substantive relief herein, he however submitted that his clients are entitled to legal representation for the limited purpose for which they have been invited to participate in these proceedings which invitation was made at the instance of the parties to these proceedings. He therefore submitted that no leave of the Court is necessary in those circumstances as no substantive relief is sought by the Bank. He however urged the Court to consider the authorities cited in light of Article 159(2)(d) of the Constitution of Kenya, 2010.

17. He therefore urged the Court to find that **Collins Odhiambo** and Chase Bank Ltd are entitled to legal representation and to dismiss the preliminary objection.

18. In his rejoinder, **Mr Ng'ang'a** argued that Chase Bank and **Collins Odhiambo** were not invited to appear in these proceedings as parties hence the nomenclature that we have substantive and minor parties has no basis. In his view the issue of parties to a suit is not a mere technicality that can be cured under Article 159(2)(d) of the Constitution. He submitted that leave ought to be sought in respect of a company under receivership.

Determination

19. I have considered the foregoing.

20. The first issue I wish to deal with are the circumstances under which a company needs leave of the Court to be a party to legal proceedings. In other words do the circumstances of Chase Bank (K) Ltd (in receivership) require the leave of the Court to participate in these proceedings? It is unfortunate that none of the parties addressed me on the particular provision under which, in the circumstances of this case, leave is required. As far as this Court is concerned the relevant provision would be section 432(2) of the ***Insolvency Act,*** Act No. 18 of 2015 provides as follows:

> ***When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.***

21. Section 228 of the repealed ***Companies Act*** Cap 486 Laws of Kenya provided as follows:

> ***When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.***

22. A clear reading of these provisions seem to suggest that leave of the Court is only necessary where legal proceedings are intended to be begun or continued against the company against which a liquidation order has been made or a provisional liquidator has been appointed and not where it is the company itself that intends to begin or continue with the onslaught.

23. The Third Schedule to the ***Insolvency Act*** provides for the ***Powers of Liquidator in a Liquidation*** and Part 2 thereof deals with *Powers Exercisable Without Approval in Voluntary Liquidation or with Approval in Liquidation by the Court* and one such power is in clause 6 which provides for: "***Power to bring or defend any action or other legal proceeding in the name and on behalf of the company***". Part 3 on the other hand deals with "Powers Exercisable Without Approval in Every Kind of Liquidation" and clause 13 thereof provides for the "***power to appoint an agent to do any business that the liquidator is unable to do personally"***. In this case this Court has no material upon which it can determine whether Chase Bank is under receivership (as the name indicates) or it is under liquidation as contended by the ex parte applicant. I, however, disabuse the ex parte applicant of the notion that the mere appointment of the receivers or managers of the Bank *ipso facto* deprives the Bank of the *locus standi* to institute a suit or legal proceedings. Receivership is not to be equated with liquidation. Receivership does not change the legal status of the company; it only changes the management of the company which is removed from the hands of the directors and placed in the hands of the receivers or managers. In the case of **Omondi & Another vs. National Bank of Kenya Ltd & 2 Others Nairobi HCCC No. 958 of 2001, Ringera, J** (as he then was) held *inter alia* that:

> **"..although it is true that the appointment of a receiver manager has the effect of rendering the board of directors functus officio, it does not destroy the corporate existence and personality of the company. That appointment makes the directors unable to act in the name of the company but, as I understand the law, it does not make them in their capacity as members equally disabled. On that view, it was open to the two plaintiffs in the name of the company, but only in the name of the company, to institute the present proceedings which relate to alleged wrongs against the company qua company. But they definitely lacked legal competence to institute the suit in their own names in their capacities as directors and shareholders".**

24. Even if under liquidation, there is no evidence whether it is voluntary, in which event the Court's approval is unnecessary or whether it is liquidation by the Court which requires such approval. As to whether or not the Bank's liquidator can perform the business of an advocate, is a matter which I cannot determine based on the material placed before me.

25. As was held **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696:**

> **"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".**

26. Also cited was the decision in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** where it was held that:

> **"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."**

27. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

> **"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop…The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence.**

28. The learned Judge continued:

> **Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the**

> **unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"…The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."**

29. Therefore based on the allegation that leave was necessary before the firm of Nyamodi & Company Advocates could come on record in these proceedings, I am unable to uphold the preliminary objection.

30. It was however contended that since **Collins Odhiambo's** presence in these proceedings is for the purposes of cross-examination, and no adverse orders are sought either against him or the Bank, the appointment of the firm of Nyamodi & Co. Advocates by them is irregular. Section 4(3)(e) of the ***Fair Administrative Action, 2015*** provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision, notice of the right to legal representation, where applicable. Section 4(4)(a) on the other hand provides that the administrator shall accord the person against whom administrative action is taken an opportunity to attend proceedings, in person or in the company of an expert of his choice. "Administrative action" is defined under the said Act to include "any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates".

31. In this case, the said **Collins Odhiambo** has sworn an affidavit in these proceedings. Certain matters require clarification. In the course of the said clarification, it may well turn out that some of the averments therein may be untrue in which event he may be exposed to proceedings in the nature of perjury. In other words at this stage the Court cannot find with certainty that in the process of cross-examination, the legal rights and interests of the said **Collins Odhiambo** and by extension, the Bank will not be affected.

32. Apart from that it is my view that Order 19 Rules 2 and 9 of the ***Civil Procedure Rules*** are procedural provisions while the substantive provision is to be found in section 146(4) of the ***Evidence Act***, Cap 80 Laws of Kenya which provides that:

> ***The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.***

33. It is therefore clear that under the substantive law, the deponent is entitled to exercise his right of re-examination after the cross-examination. Whereas, it is not mandatory that in all cases where a person may be subjected to cross-examination he or she must be legally represented in order to exercise his right of re-examination, where the persons seeks legal representation for that purpose, it would be unjust to deny him that opportunity. This Court is however aware of the provision of section 147 of the ***Evidence Act*** which provides as hereunder:

> ***A person called to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross examined unless and until he is called as a witness.***

34. To my mind had the parties herein been satisfied with the statement as earlier on furnished, **Collins Odhiambo** would not have acquired the status of a witness herein but having sworn an affidavit, and the parties having sought his examination thereon, he is a witness based on his deposition hence section 147 of the ***Evidence Act*** nolonger applies.

35. I therefore find that both **Collins Odhiambo** and the Bank are entitled to legal representation in these proceedings for the limited purpose for which their participation is required. I however wish to draw the parties' attention to section 146(3) of the ***Evidence Act*** which provides that unless with leave of the Court, re-examination shall be directed to the explanation of matters referred to in cross-examination.

36. In the premises I find no merit in the preliminary objection taken herein which I hereby dismiss but with no order as to costs.

37. It is so ordered.

Dated at Nairobi this 24th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kyalo for the beneficiary and holds brief for Mr Ng'ang'a for the ex parte applicant

Miss Omuko for Chase Bank

Mr Rapando for Mr Kiragu Kimani for Mr Ngatia

CA Mwangi