



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 682 OF 2009**

**KENYA PROGRAMMES FOR**

**SUSTAINABLE DEVELOPMENT ..... APPLICANT**

**VERSUS**

**CFC STANBIC BANK ..... DEFENDANT**

**R U L I N G**

1. At the close of the Plaintiff's case on 7th November 2013, the Defendant took the rather unusual step of filing a Notice of Preliminary Objection dated 19th December 2013. All along the Plaintiff's case had been conducted by Mr. **Leonard Rufus Ochieng** in his capacity as an official of the Plaintiff NGO. Quite why the Defendant waited until the Plaintiff's case was complete to file its Preliminary Objection before Court has not been explained. However, the Defendant took the point that the said Mr. Ochieng is not a qualified person to act under the auspices of the Advocates Act. Further, the Defendant maintained that the Plaintiff's sole witness PW 1 **Francis Kiburi Kamunyu** had testified under Oath when giving his evidence before Court on 7th November 2013 confirmed that Mr. Ochieng was the Plaintiff's counsel and not an employee or the official thereof. As a result, the proceedings as conducted by Mr. Ochieng were in breach of **sections 2 and 9** of the *Advocates Act*. The Defendant further noted that **section 31** of the Act creates an offence for an unqualified person acting as an advocate. The statute was meant to protect the public interest and there was a need to discourage such practice. Finally the Preliminary Objection detailed that to allow such acts to stand was, in effect, a perpetuation of an illegality.
2. The Plaintiff responded to the Preliminary Objection by filing a Replying Affidavit sworn by the said Mr. Ochieng dated 24th December 2013. He annexed to his Replying Affidavit a copy of an Affidavit sworn by the said Mr. Kamunyu, the Court copy of which unfortunately, was undated. Mr. Ochieng detailed in his Replying Affidavit, that he was a representative of the Plaintiff's organisation and had been duly authorised to represent the Plaintiff through a letter of authority dated 1st November 2012. That letter was signed by one **James Njuguna** who was described therein as a Director of the Plaintiff and read:

**“TAKE NOTICE that the plaintiff is hereby authorised Mr. LEONARD RUFUS OCHIENG, the executive officer of the plaintiff to prosecute the suit on its behalf.”**

Further, attached to the said Replying Affidavit was a copy of the Minutes of the Board of Trustees' meeting of the Plaintiff held on 18th November 2008. After detailing the Agenda, the Minutes read:

**“RESOLUTION ON APPOINTMENT. The Board of Trustees resolved that the post of Executive Officer be granted to Leonard Rufus Ochieng for his wide experience and knowledge in diverse Social-economic environments. The appointment will initially be on part-time basis pending availability of resources and new programs.”**

3. Mr. Ochieng’s Replying Affidavit continued by noting that the current dispute before this Court was filed by the law firm of C. K. Chege & Co. Advocates. However, on 28th August 2012 the Plaintiff had filed a Notice of Change of Advocates which had been served upon the Defendant. Mr. Ochieng detailed that the law allowed a party to either appear in person or through an advocate. The Plaintiff was an abstract body and had a corporate membership comprising registered officials and employees. As such, it could only appear in Court through its registered officials or authorised representatives. Mr. Ochieng went on to say that the word “Counsel” was widely used to refer to the receipt of opinions or advice and that was what PW 1 had meant when he gave evidence before this Court 7th November 2013. To my mind, the most significant paragraph of the Replying Affidavit was the deponent’s statement at paragraph 16 in which he details:

**“THAT the conduct of the Defendant speaks volumes as it has operated back and forth to delay in this matter which has been in Court for the last four years.”**

4. For some unexplained reason, Mr. **Greg Karungo**, learned counsel for the Defendant chose to swear an Affidavit in support of the Defendant’s said Preliminary Objection. Such was more or less in response to the Replying Affidavit of Mr. Ochieng. Mr. Karungo’s Affidavit repeated the grounds upon which the Preliminary Objection had been brought before this Court. The deponent went on to say that Mr. Ochieng was incorrect as to the Plaintiff appearing in Court through its registered officials or authorised representatives. Counsel pointed to the provisions of **Order 9 rule 2 (c)** under the heading “Recognise Agents and Advocates”. In my view, counsel’s sentiment in that regard would have been better reserved for his submissions rather than being included in an Affidavit. Mr. Karungo went on to attach to his Affidavit, a copy of an enquiry which his firm had made to the NGO’s Coordination Board which revealed that Mr. Ochieng was not a bona fide official of the Plaintiff NGO and was not authorised by the Plaintiff under seal. Further, Mr. Karungo pointed out that Mr. Kamunyu’s said affidavit had not been filed in this Court and, as such, was not properly on record. He also drew attention to the fact that the Minutes of the Plaintiff annexed to Mr. Ochieng’s Affidavit showed that the letterhead was very faint, as if it was a photocopy and not the original. Further, the date therein had been altered from its original 18th November 2013 to 18th November 2008. Finally, Mr. Karungo attached copies of letters which had been sent to Mr. James Njuguna care of the Plaintiff by registered post at its address in Thika which had been returned unclaimed.
5. Mr. Ochieng for the Plaintiff and Mr. Karungo for the Defendant came before this Court on 10th January 2014 for the purposes of submissions in relation to the Preliminary Objection. This Court was somewhat bemused that in his Replying Affidavit, Mr. Karungo had asked this Court to ignore the Affidavit of PW 1 as not being properly on record, yet in his submissions before this Court, he went on to refer to the same pointing to where PW 1 had admitted referring to Mr. Ochieng as the Plaintiff’s counsel when in fact, he was the Plaintiff’s adviser. In Mr. Karungo’s opinion, Mr. Ochieng was not in any position to render any sort of legal advice to anyone let alone the Plaintiff. In his view, Mr. Ochieng was not fit to represent the Plaintiff. Counsel then referred to **Order 9** of the *Civil Procedure Rules, 2010* as regards recognised agents and advocates appearing before Court. He pointed to the fact that the letter from the NGO’s Coordination Board dated 8th January 2014 clearly indicated that Mr. Ochieng was not an official of the Plaintiff organisation. In his view, the other exhibits annexed to his said Affidavit merely strengthen the position that Mr. Ochieng was acting as an advocate. Counsel referred this Court to his list of Authorities more particularly **High Court Civil Appeal No. 21 of 2013 – Langat v Terer 2 Ors (2013) eKLR** as well as **High Court Election Appeal No. 3 of 2013 Abraham M. Njihia v Boundaries Commission & 2 Ors (as 2013) eKLR**. Counsel went on to say that striking out pleadings that had been filed on behalf on the Plaintiff by Mr. Ochieng would not prejudice it, as it would be perfectly entitled to re-file pleadings presented to Court by its authorised representatives

- or advocates. Counsel asked this Court to bar Mr. Ochieng from further representing the Plaintiff.
6. In his turn, Mr. Ochieng opposed the Preliminary Objection on the grounds that it was not based on any law. Mr. Ochieng detailed to Court that under the law a party is allowed to act in person or through an advocate but not both. The suit had been filed by an advocate and the Plaintiff had thereafter filed a perfectly valid Notice of Change dated 28th August 2012 when it indicated that it would act in person. Mr. Ochieng went on to say that on 1st November 2012, the Plaintiff filed a letter of authority indicating that it would prosecute the case before Court in person through its Executive Officer, which was him. The Defendant was perfectly aware that as from that date, until the present time, the Plaintiff would be acting for itself. All the documents that had been filed by the Plaintiff from 20th December 2012 had been drawn by the Plaintiff itself and not by Mr. Ochieng. The Advocates Act was very clear at **section 9** which detailed the qualifications of an advocate. There was nothing before Court to indicate that Mr. Ochieng had carried himself as an advocate. The Defendant was trying to twist the meaning of PW 1's reference to counsel relying upon the provisions of the Advocates Act. Nowhere in his evidence before this Court had PW 1 stated that Mr. Ochieng was an advocate. The words "advocate" or "counsel" had been used since time immemorial. The Defendant would now have this Court believe that the word "adviser" meant an advocate. Even an engineer could be an adviser, the term was not confined to the legal profession.
  7. In response to the reference by Mr. Karungo to Order 9 of the Civil Procedure Rules, Mr. Ochieng gathered that what counsel was saying was that the Plaintiff herein could only be represented by one or more of its three registered officials being one of the Chairman, the Secretary and the Treasurer. In his view this was incorrect. He had been appointed as the Plaintiff's Executive Officer under rubber stamp and was an authorised representative of the Plaintiff before this Court. In any event, the Plaintiff could not be represented by its registered officials as they were to be the witnesses in the dock. The law applicable was the Advocates Act not the Counsel's Act. Mr. Karungo had seemed to imply that he, Mr. Ochieng, was the Plaintiff's counsel but that is a title which was not relevant under the Advocates Act. Finally, Mr. Ochieng submitted that the Defendant had been aware for some time that the Plaintiff's Executive Officer was conducting the proceedings on its behalf. In his opinion, the estoppel rule applied in this case. He personally had filed no documents on behalf on the Plaintiff and all process had been served by the Defendant upon the Plaintiff not upon him. He pleaded with the Court to allow the case to proceed and let justice be done.
  8. **Order 9 rule 1** as regards recognised agents and advocates is very clear in that it reads:

**"Any application to or appearance or act in any court required or authorised 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 recognised agent, or by an advocate duly appointed to act on his behalf:"** (Emphasis mine).

**Order 9 rule 2** goes on to detail what is meant by the term "recognised agents". That rule reads as follows:

**"The recognised agents of the parties by whom such appearances, applications and acts may be made or done are –**

- a. **subject to approval by the court in any particular suit persons holding powers of attorney authorising them to make such appearances and applications and to such acts on behalf the parties;**
- b. **persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts;**
- c. **in respect of a corporation, an officer of the corporation duly authorised under the company seal."**

9. From the Replying Affidavit sworn by Mr. Ochieng dated 24th December 2013 as well as from the Plaintiff and other documents filed by the Plaintiff in this Court, it is apparent that the Plaintiff is a body corporate. Mr. James Njuguna swearing an affidavit on the 17th February 2010 details that he is the chairman of the Plaintiff Company. However, there is no evidence before this Court as to such incorporation. Mr. Ochieng has not presented to this Court any Power of Attorney that he has been granted in order to prosecute the suit. Neither is he a person carrying on a trade or business for and in the name of the Plaintiff within the local limits of the jurisdiction of this Court as envisaged by **rule 2 (b)** above. Mr. Ochieng has given evidence through the annexures to his Replying Affidavit sworn on 24th December 2013 that he is the Executive Officer of the Plaintiff as per the letter dated 25<sup>th</sup> November 2008 signed by the said Mr. Njuguna. However, does that entitle Mr. Ochieng to prosecute the case before Court on behalf of the Plaintiff? I have no doubt that as the Executive Officer, he was entitled to be and is an officer of the corporation. However, under **Order 9 rule 2 (c)** as above, Mr. Ochieng would need to be authorised to conduct the proceedings before this Court on behalf of the Plaintiff under the corporate seal. From his evidence before this Court, as per the Letter of Authority ostensibly dated 1<sup>st</sup> November 2012, he has been authorised to prosecute the suit on behalf of the Plaintiff under rubber stamp, not under seal. Accordingly and in my view, Mr. Ochieng has not been properly authorised to conduct the suit before this Court. I take the point raised by Mr. Ochieng that the Plaintiff's documents herein have not been drawn and filed by him but by one or other of the Plaintiff's registered officers as per the records of the NGO's Coordination Board. As a result, I see no reason for any of the Plaintiff's documents herein to be struck out as being filed by a non-qualified person.
10. The point that was emphasised repeatedly by Mr. Ochieng in his submissions before Court as regards the Preliminary Objection, was that the Defendant knew, for over a year, that the Plaintiff had selected Mr. Ochieng to prosecute this suit upon its behalf. During that period, no attempt was made by the Defendant to raise its Preliminary Objection as to representation of the Plaintiff before Court. Counsel for the Defendant would have the Court believe that it was only when PW 1 referred to Mr. Ochieng in his evidence as the Plaintiff's "Counsel" that it became aware of Mr. Ochieng was not an advocate and improperly authorised to conduct the proceedings on behalf of the Plaintiff. In my view, such was not the case. I would concur with the viewpoint as expressed by Mr. Ochieng in his said Replying Affidavit that the Preliminary Objection is yet another ploy by the Defendant to drag out this matter before Court unnecessarily. In view of my finding as above, I do not consider it necessary to dwell upon the two cases cited to this Court by the Defendant other than to say that certainly, the Njihia case (supra) was decided in relation to the fact that the advocate for the appellant did not have a valid practising certificate. The major point as covered in the Langat case (supra) was whether the provisions of *Article 159 (2) (d)* of the *Constitution* as to the rendering of justice without undue regard to matters of procedure could excuse the fact that an advocate was acting without a practising certificate. In that regard, I accept with respect, the decision of the Supreme Court in the Raila Odinga & Ors v IEBC & Ors SCK Petition No. 5 of 2013 (2013) eKLR as follows:

**“The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.”**

11. With the above words in mind, I do not consider it pertinent that the evidence of PW 1, based as it was initially on his witness statement and thereafter through cross examination by the Defendant's counsel, needs be struck from the record of this Court, even though Mr. Ochieng was responsible in leading the same. I direct that the parties will now fix a fresh date at the Registry for the hearing of the Defence case in this suit. The Court however will disallow Mr. Ochieng from proceeding to prosecute this case or appearing on behalf of the Plaintiff, until such time as he has regularised his position as properly appointed before this Court. In the alternative, the Plaintiff should consider appointing independent counsel to represent it as regards the hearing and determination of the suit. In all the circumstances, the Preliminary Objection of the Defendant dated 19th December 2013 is

allowed but with no order as to costs.

**DATED and delivered at Nairobi this 14<sup>th</sup> day of May, 2014.**

**J. B. HAVELOCK**

**JUDGE**