IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 277 OF 2007

SAMMY THUO KANGEA T/A

KANGEA & ASSOCIATES.....1ST PLAINTIFF

NAKUCHEM (2002) LTD.....2ND PLAINTIFF

MWANGI KANYARI RUORO.....3RD PLAINTIFF

TAYLERS TRAVEL CENTRE LTD.....4TH PLAINTIFF

DOCTOR RICHARD K. MANYARA.....5TH PLAINTIFF

NDEFFO LIMITED.....6TH PLAINTIFF

S. WAMBUGU.....7TH PLAINTIFF

JOSEPH M. INOTI T/A PRIME VALUERS.....8TH PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

INTEGER LIMITED.....2ND DEFENDANT

RULING

The 6th and the 8th plaintiff (hereinafter called “the applicants” brought the motions dated 19th February, 2014 and 15th March, 2013 respectively.

The 6th plaintiff's application dated 19th February, 2014 seeks to stay the execution of the costs ordered against it and to set aside those costs. It also seeks an order of investigations into the circumstances leading to its inclusion in this suit without its consent or authority and an order condemning any person found culpable to pay the costs ordered against it.

The 8th plaintiff's application dated 15th March, 2013, also seeks to stay the execution of the costs ordered against the 8th plaintiff and to review or set aside those costs. In the alternative to the foregoing prayer, the costs assessed against him be paid by the firm of Karanja Mbugua & Company advocates (hereinafter called “the applicants purported advocates), which allegedly instituted the suit without the 8th plaintiff's instructions, consent and/or authority.

The applications herein are premised on the grounds that the applicants did not instruct the firm of Karanja Mbugua advocates to commence the suit herein against the respondents; that the applicants got to know about the existence of the suit during the execution proceedings hereto; and that the signatures appearing in the verifying affidavits in the suit herein and which purport to be theirs are not theirs (were forged).

In view of the foregoing, the applicants contend that it will be a miscarriage of justice if they are condemned to pay costs in respect of proceedings which they were strangers to.

In opposition to the applications herein the 1st and the 2nd respondents filed the grounds of opposition dated 2nd April, 2013; 3/3/2014 and 10th April, 2013; 18/3/2014 (in respect of the application dated 15th March, 2013) and those dated 3/3/2014 and 18/3/2014 in respect of the application dated 19th February, 2014.

In those grounds of opposition, the respondents contend that the applications having been filed way after the dismissal of the suit herein, are lacking in merit and are a gross abuse of the process of court; that since the applicants have neither enjoined their purported advocate in the suit nor made any formal complaint against him, the court cannot investigate the alleged forgery of signatures. Further, that it is highly improbable that the applicants' purported advocate included the applicants in the suit without their consent and/or participation. The respondents have also argued that allowing the applications would set a dangerous precedent as unsuccessful litigants would seek to evade payment of costs by simply claiming that the signature(s) appearing on pleadings is/are not theirs. To avoid such an eventuality, the respondents urged the court to order the applicants to pay the costs ordered against them and file a suit for recovery of the costs from their purported advocate.

The 2nd respondents, in particular, also challenged the 6th plaintiff's application on the ground that it was filed by a firm of advocates who are strangers to the suit. In that regard, it is contended that the applicants' advocate is still on record for the 6th plaintiff and that the appointment of the firm of Waiganjo & Company Advocates after judgment had been entered in favour of the respondents without the leave of the court was in violation of the provisions of Order 9 rule 9 of the Civil Procedure Rules.

Response by the applicants' purported advocate

Although the applicants' purported advocate is not a party to this suit, having been adversely mentioned in this suit, he filed an affidavit in reply to the issues raised in the applications herein and also filed a notice of preliminary objection to the applications.

In the affidavit, Joseph Karanja Mbugua Advocate, has denied all the allegations levelled against his firm and averred that all the 8 plaintiffs listed in the plaint hereto instructed him to file the suit herein against the respondent. Further, that the 8 plaintiffs, the applicants herein included swore the affidavits in verification of the suit before he filed the suit and obtained the reliefs they required.

Contending that the applicants are being economical with the truth in order to avoid paying costs, Mr. Karanja argues that even if the allegations levelled against his firm were true, the applications herein are not the right forum to raise such issues. Further that the issues have been raised too late in the day and that its possible for one to have more than one specimen signature.

Through the notice of preliminary objection dated 1/8/2013, the advocate contends that this court has no jurisdiction to hear and determine the issues raised in the applications; that the applications can not lie as the court is functus officio; that the question as to whether there existed an advocate-client relationship between himself and the applicants cannot be determined in this cause and that as he is not a party to the suit, no orders can be made against him.

Issues for determination

The advocates for the respective parties appeared before me and made oral submissions which I have read

and considered. From the pleadings herein and the submissions by the respective counsel, the issues for determination are:-

1. **Whether this court has jurisdiction to hear and determine the issues raised in the applications herein?**

2. **Whether the applications are incompetent or bad in law?**
3. **Whether the applicants have made up a case for grant the orders sought?**
4. **What orders should the court grant?**

Jurisdiction

The question of this court's jurisdiction to hear and determine the dispute herein having been raised by the purported advocate, in accordance with the decision of the Court of Appeal in ***Owners of the Motor Vessel "Lilian S" V. Caltex Oil (K) Limited*** **[1989] KLR 1,** jurisdiction is everything and without it, a court has no power to make one more step, it behoves me to consider that issue first.

In determining the question of jurisdiction to hear and determine the issues raised in the applications herein, which in my view, relates to the question as to whether the applicants had given their purported advocate instructions to file the suit herein on their behalf, this court will have regard to the duty imposed on this court under Article 159 (2) (d) of the Constitution and Sections 1A and1B of the Civil Procedure Act, and the overriding objective of the Civil Procedure Act and the Rules made thereunder. Those provisions of the law impose an obligation on this court to, inter alia, determine all matters presented before it **for the purposes of attaining the just determination of the proceedings**.

As correctly pointed out by counsel for the purported advocate, where the relationship of advocate and client exists or existed, disputes regarding that relationship are to be dealt with in accordance within the provisions of order 52 of the Civil Procedure Rules. Under Order 52 rule 4 of the Civil Procedure Rules, the court has power to order an advocate to deliver accounts and other documents. However, those provisions can only apply in circumstances where the existence of advocate client relationship is not in dispute. Order 52 rule (4)(1) provides:-

> **"52 (4)(1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for.....**
>
> 2. **An application under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate."**

Clearly, the foregoing provisions of the law contemplates the existence of advocate-client relationship. There being a dispute as to the existence of an advocate client-relationship, I find and hold that the applicants were not bound to move the court under those provisions of the law.

Whether owing to none joinder of the applicants' purported advocate the court cannot grant any orders against him: Although the power of this court to grant the orders sought against the applicants' purported advocate is limited by the fact that the firm of Advocates has not been enjoined in the suit, that firm having replied to the allegations levelled against it and filed a preliminary objection, it brought itself within reach of the court. In my view, nothing can prevent the court from considering the very serious issues raised in the applications herein which touch on alleged professional misconduct and in respect of which the applicants' purported advocate has had the opportunity to respond to. The whole essence of joinder of parties is to ensure that the parties are given an opportunity to respond to the case presented against them and give them an opportunity to defend themselves. The applicants' purported advocate has filed a response to the issues herein and even got an opportunity to present his case on those issues. Therefore, he cannot be heard to say that the court cannot make any orders against him.

In addition to the above, the two plaintiffs having denied having instructed the purported advocate or

having been served with pleadings in the case till the execution process, which issues cannot be determined at this stage, my view is that the plaintiffs would suffer prejudice to pay a debt they were not aware of and justice would be better served if the defendants waited for their judgment a little longer so that the matter is heard and determined exhaustively.

As concerns the contention that the applications cannot be sustained because the applicants did not plead any of the conditions contemplated under order 45 rule 1 of the Civil Procedure Rules, I am of the view that all that is required to sustain a claim under that order is evidence capable of proving any of the conditions contemplated therein. I say so because those conditions do not form part of the matters that must be specifically pleaded under Order 2 Rule 4.

On sustainability of the applicants' purported advocate's notice of preliminary objection: *On allegation that the advocate was never instruted or that the plaintiffs were ever served with pleadings in this case,* evidence will be required to prove whether or not the allegations levelled against the applicants and/or their purported advocate have been proved or disproved, and the evidence adduced before this court being insufficient to conclusively determine these issues, I find that it is not a pure point of law as enunciated by Sir Charles Newbold, President in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696 thus**:-

> ***"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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

In view of the foregoing, I decline to dismiss the applications and proceed to determine them on their merits.

Whether the applicaitons are incompetent or bad in law: The defendatns and purported advocate submitted that the firm of Waiganjo & Co. Advocates is not properly before the court and therefore applications are incompetent. Order 9 rule 9 of the Civil Procedure Rules provides:-

> **"When there is a change of advocate, or when a party decides to act in person after having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without any order of the court-**
>
> **(a)upon an application with notice to 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."**

In my view, Order 9 rule 9 of the Civil Procedure Rules aforementioned, presupposes a situation where there existed an advocate-client relationship. There being a dispute as to whether that relationship existed between the 6th plaintiff and its purported advocate (Karanja Mbugua) and there being no evidence that can conclusively determine the issue of representation of the 6th plaintiff by that advocate, I agree with Mr. Waiganjo's submission that order 9 rule 9 of the Civil Procedure Rules is inapplicable in the circumstances of this case.

I also agree with Mr. Waiganjo that the amendment in his notice of appointment cannot form the basis of dismissing the pleadings filed on behalf of the 6th plaintiff. Article 159 of the Constitution of Kenya, 2010 and Section 1A and 1B of the Civil Procedure Act enjoins the court to determine matters without undue regard to technicalities. It has not been demonstrted that any prejudice whatsoever, will be occasioned on the defendants or advocate by the amendment effected on the 6th plaintiff's notice of appointment.

Whether the applicitons have been made late in the day and whether the court should presume that what ought to have been done was done with the authority of the applicants: The plaintiffs allege

that they became aware of this case when they were threatened with execution. Whether or not they were aware of the case can only be determined at the proper forum. Having already found the evidence adduced in these proceedings incapable of conclusively determining whether an advocate-client relationship existed between the applicants and their purported advocate, I hold the view that such a presumption that the plaintiffs instructed the advocate would be prejudicial to the applicants. It would be grossly unfair to make a party pay a debt they knew nothing about if indeed that is the case. The applicants having moved the court for protection, and the court being satisfied that the applicants have an arguable case, I agree with Mr. Waiganjo that under Section 3A of the Civil procedure Rules, this court has the power to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the court. In the circumstances of this case, I am satisfied that a case has been made for exercise of the power vested in this court to protect the applicants from execution before the issues raised in their application are heard and determined.

Whether issuance of the orders sought by the applicants will set a bad precedent regarding payment of costs: My answer to this question is in the negative. I say so because, some of the orders sought by the applicants have the effect of delaying the payment of the costs pending a legal process, that is investigation of the circumstances that led to the plaintiffs being included in the suit without allegedly instructing the advocate. At the conclusion of that process, those entitled to payment of costs will still have an opportunity to enjoy the fruits of their judgment. Any prejudice occasioned to them, if any, can be compensated by award of costs. On the other hand, seirous prejudice would be suffered if an innocent party was condemned to pay costs they knew nothing about. In addition, the allegation of professional misconduct being so serious, it should be inquired into first and if established, be nibbed in the bud so that other innocent people do not fall prey.

Whether this court is the right forum to determine the dispute between the applicants and their purported advocate: Having already found the evidence adduced in these proceedings to be inadequate to assist the court make a conclusive determination on the issue of representation of the applicants by their purported advocate, I agree with the submissions by the respondents' counsel that this court is not the right forum to hear and determine that dispute. I also take note that in hearing and determining that dispute, additional evidence may need to be taken from say, the other plaintiff's who are not parties to this application; calling process servers who allegedly served the plaintiffs; calling for company resolutions through which the advocate was appointed, consider the document examiner's evidence etc. I also agree with the submissions by the applicants' advocates that this court has power, to intervene and issue directions on how to proceed where injustices is likely would be suffered.

What orders should the court make?

Having found that it would be prejudicial to the applicants to allow the respondents to proceed with the execution when the question of the applicants' representation by their purported advocates has not been heard and determined and being satisfied that a case has been made for exercise of the court's discretion in favour of the applicants, I make the following orders:-

1. That pending investigations into the existence or otherwise of a client advocate relationship between the applicants and their purported advocate, an order be and is hereby issued staying the execution of the taxed bill of costs against the 4th and 8th plalintiff/applicants.
2. That the applicants be and are hereby directed to, within 30 days from the date hereof, take up the dispute between them and their purported advocate to the Advocates Complaints Commission and Disciplinary Committee for hearing and determination of the dispute. In default, the applications shall be deemed to have been automatically dismissed and execution can proceed.
3. That the findings and/ or the report of the Compalaints Commission shall be filed in court, within 30 days of the conclusion of the proceedings before the Commission
4. Costs of this applications to be costs in cause.

DATED and DELIVERED this 9th day of July, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mongeri holding brief for Mr. Ndubi and Mr. Waiganjo for the 4th and 8th plaintiffs

Ms Mugweru holding brief for Mr. Kiburi for the 1st defendant

Mr. Mwangi holding biref for Mr. Githiru for 2nd defendant

Kennedy – Court Assistant