



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1619 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

BANKING INSURANCE AND FINANCE UNION (KENYA) CLAIMANT

VERSUS

KCB BANK (KENYA) LIMITED R ESPONDENT

AND

DISHON OCHIENG ACHIRO AND 70 OTHERS INTERESTED PARTIES

RULING

The firm of Odinga Oboge Advocates filed the Advocate-Client Bill of Costs dated 25th January 2019 seeking to have the Claimant pay their legal fees and incidental costs thereto. Aggrieved by the Bill of Costs, the Claimant filed a Notice of Preliminary Objection dated 26th July 2019 objecting to the said Bill of Costs. The Claimant later filed the Supporting Affidavit of Isaiah Munoru which reiterated the averments made in the Notice of Preliminary Objection. The Claimant seeks the following orders from this Court—

- a. That the preliminary objection be allowed as the Claimant would suffer loss since it is not the instructing party.
- b. That this Court be pleased to issue a declaration that the Claimant has no nexus between it and the firm of Odinga Oboge Advocates as they were retained and paid legal services rendered to the KCB Central Staff Committee.
- c. That the Bill of Costs be dismissed with costs.

The preliminary objection has been opposed by the Replying Affidavits of Edward Oboge, Erick Pudha and Gabriel Odhiambo, sworn on 20th August 2019.

The Claimant's Case

The Claimant avers that the Advocate-Client Bill of Costs is misconceived, misdirected and an abuse of the Court process. It is the Claimant's position that the Bill of Costs is fatally and incurably defective having been instituted against the wrong party. It is the Claimant's further position that it will be prejudiced for being irregularly and illegally taxed.

The Claimant avers that there was no retainer agreement between it and the firm of Odinga Oboge Advocates who were solely instructed and retained by the KCB Central Staff Committee to act for them in this suit. The Committee also undertook to remunerate the Advocates from monetary collections from KCB's unionisable employees.

On 18th September 2017, the Claimant received a Notice to Act in person in this suit, from the KCB Central Staff Committee demanding the Claimant to cease acting for them as they had instructed the firm of Odinga Oboge Advocates to prosecute the case. Additionally, the Committee filed an Application to remove the Claimant from acting for them in the matter and the Claimant was substituted with the firm of Odinga Oboge Advocates.

It is averred that on 14th September 2018, the Advocates filed a Notice of Change of Advocates indicating that the change of representatives was through KCB unionisable employees. On 18th September 2018, the KCB Central Staff Committee made an Application seeking to remove the Claimant from prosecuting the matter and in its place the Advocates were to take over the conduct of the suit.

It is averred that the Court advised the parties to find another way of taking over the case in accordance with the wishes of the Committee

since removing the Claimant would have collapsed the case. It is further averred that the Committee officials collected the file from the Applicant's office. That the Applicant has never retained the firm of Odinga Oboge to act on its behalf in this matter. The Application prays that the application be granted as prayed.

The Advocates' Case

The 1st Affiant, Edward Oboge, admits that his firm filed a Notice of Change dated 13th September 2018 but contends that the term KCB unionisable employees was used for purposes of the proceedings and does not mention KCB Central Staff Committee Members.

The Affiant avers that his firm stopped acting in the matter after the Miscellaneous Application dated 18th September 2018 was dismissed on the ground that the Claimant had the authority to act for its members even without instructions by members. The Affiant further avers the Claimant appointed his firm as the lead counsel in this suit pursuant to the meeting held on 25th September 2018. As a result, the same was communicated to the Respondent and documents relating to the matter were sent to the firm.

The Affiant avers that he received the minutes of the meeting held on 25th September 2018 to sign. The minutes reflected that the Claimant's secretary general had agreed to his appointment as the lead counsel in this suit. Consequently, the union sent him an appointment letter. As a result, his firm filed the Notice of Change of Advocates dated 3rd October 2018 which related to the instructions issued to his firm by the Claimant. Pursuant to the appointment, the Affiant avers that the Claimant was updated on the progress of the case.

It is the Affiant's position that the Committee members are bonafide members of the union and were duly elected by the members of the union as the Claimant's representative at the Respondent bank.

It is the 1st Affiant's position that only parties to proceedings can be taxed and that he acted with the authority of the union.

The 2nd Affiant, Erick Pudha, reiterates the 1st Affiant's averments. Additionally, he avers that the Claimant has delegated authority to Central Staff Committees to handle minor disputes between employees and the employer which are reported to the Claimant for further action. As such, members of the central staff committees are junior leaders of the union answerable to the Claimant.

It is the 2nd Affiant's averment that some members of the union resolved to be represented by the 1st Affiant's firm after the Claimant entered into a consent which had adverse effects to its members. It is his position that the Advocates were instructed to challenge the consent and seek orders to substitute the Claimant.

The 2nd Affiant asserts that when the matter was called on 20th September 2018 the Advocates indicated that they were appearing for the Claimant and not the Committee.

The 3rd Affiant contends that the Central Staff Committee did not appoint the 1st Affiant to act for the union as he was appointed by the union vide the meeting held on 25th September 2018. It is his position that the Central Staff Committee does not have the capacity to appoint an advocate and is answerable to the Claimant and the union.

He avers that apart from the Interested Parties, another faction of the union also needed representation in Court and instructed the firm of Odinga Oboge Advocates to act for them. He further avers that the meeting of 25th September 2018 was as a result of the deliberations between the Claimant and its members concerning the existing wrangles. It is his position that the appointment of the 1st Affiant was a strategy adopted by the union leadership to calm the rising dissents by the members.

The 3rd Affiant avers that the Central Staff Committee only undertakes delegated functions by the Claimant at the institutional level and collates issues affecting members at the bank for further action by the union. He contends that the Central Staff Committee was never a party to this suit and that the Claimant represented the six Central Staff Committee members in the same capacity as the rest of the members with the only dissenting members being the interested parties in the matter.

The preliminary objection was disposed of by way of written submissions with both parties making their submissions in the matter.

The Claimant's Submissions

The Claimant submits that it was not the instructing party and never retained the said Advocates who were appointed by the Central Committee of KCB. It further submits that there is no agreement between the Claimant and the Advocates which is contrary to section 45 of the Advocates Act. It is also the Applicant's submission that the Union was compelled to pave way for the Advocates which decision was made by the members. As such, the Advocates are taxing the wrong person.

The Claimant also submitted that the preliminary objection raised a pure point of law since filing a Bill of Costs against the Claimant was contrary to the law.

The Respondent's Submissions

The Respondent submits that the relationship between the Claimant and the Respondent existed in writing and by conduct pursuant to the meeting held on 25th September 2018 and as recorded in the minutes of the meeting. It is also submitted that the Respondent acted under the authority of the Claimant which events underpin Section 2 of the Advocates Act. The respondent relies on the case of **Zakhem**

Construction (Kenya) Limited v Mereka & Company Advocates; Civil Appeal 365 of 2014 where the Court observed that it was not necessary for an advocate to obtain a written authority from a client before commencing a matter and that authority could be implied.

It is the Respondent's position that the Claimant is estopped from denying the existence of a retainer as it benefitted from the Advocate's services. They rely on the case of **Ochieng, Onyango, Kibet & Ohaga Advocates v Akiba Bank Limited [2007] eKLR** where the Court held that the Court cannot aid a litigant who primarily through his choice and implication benefitted from the labour of an advocate.

The Respondent submits that the Application by the Claimant fell short of the legal threshold required in the nature of a preliminary objection. That such an application must purely be grounded on points of law with the assumption that facts as pleaded are undisputed. It is the Respondent's position that the Claimant's attempt to christen the preliminary objection as an ordinary application should fail. The Respondent relies on the cases of **Esther Nyambura Waweru v Andrew Waiganjo Mweri [2017] eKLR**, **Wilmot Mwadilo & 3 Others v Eliud Timothy Mwamunga & Another [2017] eKLR**, **Accredo AG & 3 Others v Stefano Ucelli & Another [2018] eKLR** and **Samuel Waweru v Geoffrey Mwangi [2013] eKLR** to support their position that a preliminary objection must be based on a pure point of law.

The Respondent submits that the preliminary objection should be dismissed with costs and relies on the case of **Joseph Oduor Anode v Kenya Red Cross Society [2009] eKLR** where it was held that costs follows the event unless the Court is satisfied otherwise.

Analysis and Determination

I have carefully considered the preliminary objection, the Affidavits filed in the matter as well as parties' submissions and find that the issue for submissions before this Court is whether the preliminary

objection is merited.

The threshold to be met by a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696**.

"So far as I'm aware, 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."

This was followed up by the judgment of Sir Charles Newbold in the same case—

"The first matter relates to the 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had 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 the issue. The improper practice should stop"

While making his oral submissions, the Claimant's Secretary General maintained that the preliminary objection raised pure points of law.

It is clear from the foregoing that the preliminary objection does not meet the test set out in Mukisa Biscuit Case (supra). The issues raised in the preliminary objection are however valid. Having filed an affidavit in support of the preliminary objection, it is clear that the objection cannot be treated as a preliminary objection but rather, as an objection to the bill of costs filed by Odinga Oboge Advocates. Under the powers of this court donated by Article 159 of the Constitution, I will deal with the substance of the application rather than the technicalities.

From the submissions by the parties, it is clear that the firm of Odinga Oboge Advocates came on Board these proceedings through instructions by members of the Kenya Commercial Bank Unionisable Employees and not by the Claimant/Applicant. Counsel indeed filed a notice of appointment dated 14th September 2018. It is the court that rejected the same pointing out that the union was the claimant in the suit and no advocate could come on record for the claimant without being instructed by the claimant union.

From the unanimous evidence on record, it is apparent that there was a joint meeting at which the claimant union agreed to allow the Advocates to take over the case. However, there was no discussion at the meeting about who would pay the Advocate.

At appendix 8, page 49 of the Applicant's bundle is a letter whose title and first paragraph is as follows: -

"SUBJECT MATTER: HAND OVER OF ELR COURT DOCUMENTS PERTAINING TO CAUSE NO. 1619/2017 – BANKING INSURANCE AND FINANCE UNION (KENYA) -VS- KCB BANK KENYA LTD AND ANOTHER ON THE ISSUE OF BALANCE SCORE CARD AND APPRAISALS ON THE KCB UNIONISABLE MEMBERS OF STAFF FILED ON 18TH AUGUST 2017 FOR ONWARD TRANSMISSION TO THE LEAD COUNSEL OF YOUR CHOICE EDWARD OBOGE OF ODINGA AND OBOGE ADVOCATE.

As prevailed on us and having obliged to your wishes, we hearing forward all the court document in respect of cause 1619/2017 for onward transmissions to the said lead counsel."

The documents handed over are listed under items 1 to 14 in the document and each item is signed for by the recipient whose name is not stated on the documents.

Further, at Appendix 9(a) to (e) at page 42 to 46 of the Applicant's

bundle are receipts from Odinga Oboge Advocates as follows –

	NAME OF PAYEE	AMOUNT PAID (Kshs.)	PURPOSE	DATE PAID
9(a)	Joseph Nyakondo	10,000	Facilitation fee	12 th October 2018
9(b)	Joseph Nyakondo	60,000	Fees deposit	2 nd October 2018
9(c)	Gabriel Odhiambo Okomo	50,000	Facilitation fee, court attendance fee and extraction of orders	14 th September 2018
9(d)	Eric Pudha	50,000	Pay fee and court attendances	22 nd October 2018
9(e)	Gabriel Odhiambo Okomo	30,000	Filing fees for applications, court attendance and process server's fee	19 th September 2018

All these payments were made in cash. The first two payments were

made on 14th and 19th September 2018 before the meeting of 25th September 2018 at which the Advocates allege they were instructed by the Applicant while the other payments were made in October 2018 after the meeting.

By letter dated 1st October 2018, the Applicant addressed the Deputy Registrar as follows –

“1st October 2018

The Deputy Registrar

Employment and Labour Relations Court

Milirmani Commercial Courts

Nairobi

Dear Madam

NOTICE OF APPOINTMENT COUNSEL IN CAUSE 1619/2017 COMING UP FOR HEARING ON 2/10/2018

We have been prevailed upon by the officials of the KCB Central

Staff Committee and we have obliged to pave way for a lead counsel of their choice advocate Edward Oboge of Odinga and Oboge Advocates.

This is therefore to notify you that in all future proceedings and correspondences advocate Edward Oboge will be the lead counsel and all future correspondence will be directed to him at Odinga & Oboge Advocates, Uchumi House, Opposite, Kenya Re-Plaza, Nairobi.

Yours Sincerely

SIGNED

ISAIAH KUBAI MBS,

ADVOCATE/GENERAL SECRETARY, BANKING, INSURANCE AND FINANCE UNION”

There is another letter dated 18th September 2018 from the Applicant addressed to **CSC** which I presume to be **Central Staff Committee** whose names are given as –

1. Gabriel Okomo
2. Eric Pudha
3. Joseph Omenya Nyakondo
4. Joy Imali
5. Nina Nandaa
6. Gordon Osege
7. Raduk Ochando

In the letter, the Applicant wrote: -

“Date: September 18, 2018

1. Gabriel Okomo
2. Eric Pudha
3. Joseph Omenya Nyakondo
4. Joy Imali
5. Nina Nandaa
6. Gordon Osege
7. Raduk Ochando

Dear CSC

I am not opposed to your representation in court who I understand has an application which I will support.

You have to note that I have already filed a notice to raise a Preliminary point of law regarding the manner that application was filed and the foundation of the so called "consent agreement".

Under these circumstances I will be moving my P.O. in court on 20th September 2018 before Hon. Lady Justice Maureen Onyango and I am sure your Counsel will also be prosecuting his application on the same day before the same judge and I will support that application the way I expect him to support my Preliminary Objection.

I would like to assure your goodselves and your colleagues that I will abide by your ultimatum to personally cease representing your bank in this case after 20th September 2018 and I expect you to also advise me on the representation on the appointment letters case which comes up for case management in December 2018 before Lady Justice Maureen Onyango.

On the other case involving the shares employees, I will discuss with those employees and if they feel my representation is wanting, they will also advise me to hand over the same to yourselves.

I will not comment on the other issues raised until an appropriate moment presents itself.

Yours Faithfully

SIGNED

ISIAIAH KUBAI MBS,

GENERAL SECRETARY”

Further, in the minutes of the KCB Bank Limited Unionisable Members meeting held on 11th September 2018, the agenda and discussions on item 1 of the agenda are reproduced below –

KCB BANK KENYA LTD UNIONISABLE MEMBERS MEETING

11 September 2018

PRESENT

As per the attached list

1. Agendas

1. Confirmation of Joseph Nyakondo as the Vice chairman of KCB CSC.
2. Collection of signatures for change of lawyers from BIFU- Isaiah Kubai for consent to case No 1619 of 2017 to another lawyer
3. AOB

2. Discussion

1. Collection of signatures for change of representation from BIFU – Isaiah Kubai for consent to case No 1619 of 2017 to another lawyer

There was lengthy discussions and deliberations about the court order for case 1619 of 2017 where the lawyer representing us got into a consent the authority of the client, KCB unionisable members under the leadership of the Central Staff Committee KCB chapter. (sic)

After the deliberations all present members signed a petition allowing CSC to engage a different representative in the case. It was therefore agreed that the new lawyers on case

1619 of 2017 will be;

ODINGA OBOGE ADVOCATES

UCHUMI HOUSE,

8TH FLOOR SUITE 88,

AGA KHAN WALK

P. O BOX 73519 – 00200

NAIROBI. ...”

In an undated letter addressed to The Secretary General, Banking Insurance and Finance Union which is date stamped 18th September 2018, the unionisable members resolved as follows –

KCB BANK KENYA LTD UNIONISABLE MEMBERS MEETING

TO:

SECRETARY GENERAL

BANKING INSURANCE AND FINANCE UNION

SONALUX HOUSE, 6TH FLOOR

MOI AVENUE

NAIROBI

DEAR SIR,

REF: NOTICE TO ACT IN PERSON IN CIVIL CASE NO. 1619 OF 2017

The above matter refers,

It is within your knowledge that the Kenya Commercial Bank

Limited Unionisable employees who have been suffering under the weight of unfair score cards subjected nil us by the employer instructed you as our union to prosecute the above claim for us. We did that believing that you were in a better position to represent our interest well in court. Contrary to such belief in you, we were surprised when you entered into a consent with our employer to settle the claim at the interlocutory stage without our instructions despite there being an interlocutory appeal being regarding same issue. The consent you entered into is prejudicial to us because it subjects us to the unfair performance management reviews which was the foundation of the claim.

We have resolved as members who form the majority of the Union through the minutes dated 11th September, 2018 (attached) that we do not want to be represented by the Union henceforth in that matter. We have decided to prosecute the issues underlying the claim by ourselves through the firm of ODINGA OBOGE ADVOCATES as we contemplate on the next action which is leaving the union because we have reasonable cause to believe that it is compromised.

You must therefore cease acting for us in the above claim immediately.

We have also instructed our employer to suspend the monthly remittance by our members to the Union until further notice.

Yours Faithfully

CHAIRMAN Signed

VICE CHAIRMAN Signed

SECRETARY GENERAL Signed

ASSISTANT SECRETARY Signed

TREASURER Signed

LADIES REPRESENTATIVE Signed

YOUTH REPRESENTATIVE Signed”

[Emphasis]

Further, by an application dated 18th September 2018, and filed by Odinga Oboge Advocates as advocates for the applicants, the applicants sought the following orders –

- 1. That the Court be pleased to strike out Banking, Insurance and Financed Union (K) [BIFU] as the claimant in this matter*
- 2. That the court do issue an order substituting the claimant herein “Banking, Insurance and Financed Union (K)” with the “Kenya Commercial Bank Unionisable Members”.*
- 3. That the Court be pleased to issue any order that deems fit.*
- 4. That the Court do award costs in favour of the Applicants.*

From the foregoing, it is clear that there was no agreement that the applicant would pay the Advocates fees for Odinga Oboge Advocates. It is further clear that the fees of the Advocates were paid by the instructing clients who were the **unionisable staff of KCB** as clearly set out in the notice of appointment dated 13th September and filed on 14th September 2018.

For the foregoing reasons the objection succeeds and I accordingly find that the Bill of Costs dated 26th June 2019 is filed against the wrong party. The same is struck out with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE