



Key West Investment Limited v Chase Bank (Kenya) Limited (in Liquidation) & another (Miscellaneous Application E456 of 2022) [2023] KEHC 986 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)

Neutral citation: [2023] KEHC 986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E456 OF 2022
DAS MAJANJA, J
FEBRUARY 17, 2023**

BETWEEN

KEY WEST INVESTMENT LIMITED APPLICANT

AND

CHASE BANK (KENYA) LIMITED (IN LIQUIDATION) 1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION 2ND RESPONDENT

RULING

1. Before the court for determination is the respondents' notice of motion dated July 27, 2022 seeking an order that Sevastone Okalle Makanda, Advocate and all other advocates practicing in the name and style of MNO Advocates LLP be disqualified and removed from representing the applicant. The respondents also seek to strike out the application filed on June 17, 2022 where the applicant prays for an order compelling the respondents to Discharge a Charge in respect of property LR No. MN/V/1810 filed on its behalf by Sevastone Okalle Makanda and the firm of MNO Advocates LLP.
2. The application is supported by the affidavit of John Masega Ombasa, a Resolutions Officer of the 2nd respondent, sworn on July 27, 2022. It is opposed by the applicant through the replying affidavit of Lemmy S. Nyaga, an Associate Advocate of MNO Advocates LLP, the advocates in conduct of this matter for the applicant/respondent. The parties have also filed written submissions to supplement their arguments.
3. It is not in dispute that Mr. Makanda, currently a Senior Partner in the firm of MNO Advocates LLP which firm represents the Applicant in this suit was employed by the 1st respondent between June 2011 and July 2016. It is also not in dispute that the subject charge between the applicant and the 1st respondent is dated and was registered at the time when Mr. Makanda was employed as a Senior Legal



- Officer of the 1st respondent. Under clause 14 of the contract of employment dated June 7, 2011, Mr Makanda was not allowed to disclose any confidential information to the detriment of the employer even after exit from employment which he did on July 12, 2016.
4. The respondents contend that during his time as an employee of the 1st respondent, he had conduct of all conveyancing transactions as in-house legal counsel and that there existed an advocate-client relationship between him and the 1st respondent as well as an employer-employee relationship. That by virtue of his employment, Mr. Makanda was privy to confidential and privileged information relating to the creation of the charge and the disbursement of the loan to the applicant which is now contested and that the information in his knowledge and the firm of MNO Advocates LLP as regards the rights and obligations of the 1st respondent as Chargee is privileged information under section 134 of the Evidence Act (chapter 80 of the Laws of Kenya) that ought not to be directly or indirectly disclosed or utilized by the Advocate notwithstanding his departure from the employ of the 1st respondent.
 5. The respondents are apprehensive that Mr. Makanda is likely to use; or has already used that knowledge against the 1st respondent in aid of the applicant. Additionally, that they have had difficulty in tracing the supporting documents in aid of their response to the application and that Mr. Makanda is a compellable witness as regards the whereabouts of the said documents. Therefore, the Respondents assert that Mr. Makanda is therefore prohibited from acting in this matter by dint of his former employment as he may be called upon to give evidence on the contested facts of this case and that since he is also the Senior Partner at MNO Advocates LLP, the information in his knowledge is deemed to be within the knowledge of his firm and his disqualification extends to the entire firm of advocates.
 6. The respondents accuse the applicant of failing to disclose that he had privileged information from the 1st respondent and without consent of the respondents and the application is therefore tainted with illegality. That a conflict of interest also exists as Mr. Makanda is now purporting to act against the 1st respondent having previously advised it as in-house legal counsel in the transactions involving the applicant among other customers.
 7. The respondents urge that the only recourse that guarantees them a fair trial is striking out the entire application as mere disqualification cannot undo the information that has already been shared with the applicant by Mr. Makanda and his firm. That no prejudice will be suffered by the Applicant if the orders sought herein are granted as it was complicit in the retainer of Mr. Makanda and the firm of MNO Advocates LLP despite actual and/or constructive knowledge of his former employment at the 1st respondent and that it is at liberty to file a fresh suit through a neutral firm of advocates.
 8. The applicant opposes the application. The thrust of its case is that the respondents have not made out a case for either Mr Makanda or MNO Advocates LLP to be barred from acting for the applicant. The applicant's deponent Mr. Nyaga states that he filed this matter on behalf of the applicant as is evident on the face of the pleadings and not Mr. Makanda and that he always appeared before court on this matter on behalf of the applicant. The Applicant contends that there is no conflict of interest evident and there is no reason to bar MNO Advocates LLP or any advocate from that firm from representing it. That the entire substratum of the applicant's case is that there was no banking relationship between it and the 1st respondent and in the absence of proof of the existence of a banking relationship, the respondents have no basis to claim that there is a conflict of interest. Moreover, the applicant asserts that while alleging that Mr. Makanda prepared charge documents on behalf of the now defunct bank and predecessor of the 1st respondent, the Respondent have annexed the subject charge showing that it was prepared by the firm of Igeria & Ngugi Advocates.
 9. According to the applicant, prior to the filing the application dated June 17, 2022, Mr. Makanda was in constant communication with Mr Ombasa demanding that the respondents execute the discharge of



the charge dated March 29, 2016 hence Mr. Ombasa cannot turn around and allege a possible conflict of interest. The applicant contends that the respondents have not disclosed the alleged privileged information that is supposedly in possession of the firm of MNO Advocates LLP/Mr. Makanda and any prejudice or mischief that they are likely to suffer if the application is refused.

Analysis and Determination

10. The respondents' case as to whether the firm of MNO Advocates LLP and/or Mr. Makanda should be barred from acting for the applicant in this matter and the application of June 17, 2022 should be struck out is grounded on a potential conflict of interest and breach of confidentiality.
11. Whether and under what circumstances an advocate should be barred from representing a party was discussed in detail by the Court of Appeal in *Delphis Bank Limited v Channan Singh Chatthe and 6 others* NRB CA Civil Appl. No. 136 of 2005 [2005] eKLR as follows:

The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are *King Woolen Mills Ltd & anor v M/S Kaplan & Stratton* [1993] LLR 2170 (CAK), (CA 55/93) and *Uburu Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2)*, [2002] 2 EA 654.

12. In addition to the principle I have set out above, an Advocate, is bound by the professional regulations issued from time to time by the Law Society of Kenya. In this case the applicant's case is grounded on the The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016 ("the Code") which defines 'conflict of interest' in Rule 6 para. 96 as follows:

A conflicting interest is an interest which gives rise to substantial risk that the Advocate's representation of the client will be materially and adversely affected by the Advocate's own interests or by the Advocate's duties to another current client, former client or a third person.

Rule 6 para. 99 of the Code enumerates instances in which a conflict of interest might arise. They include:

- (a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;
- (b) Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.
- (c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.



13. What is clear from the authorities and the Code is that the rule against representing a former client is not absolute. It must be demonstrated that there is a risk that information obtained from one client may be used to the disadvantage of the other client. Ultimately and the courts have emphasized that each case must turn on its own facts in order to establish whether real mischief and prejudice would result.
14. While it is not in dispute that Mr. Makanda was an in house counsel for the for 1st Respondent, it is not contended and there is no evidence that Mr Makanda had exclusive control over all conveyancing transactions or he was involved in the transaction that led to the creation of the subject charge as alleged. Moreover, the subject charge was prepared by Igeria and Ngugi Advocates who have not furnished any evidence that Mr Makanda was involved in the transaction. In any case, even if Mr. Makanda drew up the charge, that alone is not necessarily a confidential matter between the parties because such documents would ordinarily be exchanged in the first instance, and in the second instance they would also have information common to all parties (see *Jopa Vilas LLC v Overseas Private Investment Corp & 2 others* NKR CA Civil Appeal No. 201 of 2011 [2014] eKLR).
15. The respondents have also not informed the court what privileged information is it that Mr. Makanda or his firm hold that might prejudice the respondents' case. There is also no evidence that Mr. Makanda left the 1st respondent with vital, sensitive or confidential information that is still in his possession and which might have been shared with the Applicant to the detriment of the respondents as alleged.
16. As to whether Mr. Makanda might be a compellable witness, I hold that no basis has been laid before the court at this stage to require the court to bar him. Apart from the bare allegation that he was an employee of the 1st respondent, there is no evidence that he was connected to or dealt with the subject transaction or that there are circumstances that would point to him as having the respondents' information in his possession.
17. From the totality of the evidence, I find and hold that the Respondents have not discharged the burden of proving that they would suffer real mischief or prejudice if the firm of MNO Advocates LLP and/ or its senior partner Mr. Sevastone Okalle Makande continues representing the applicant.

Disposition

18. The respondent's application dated July 27, 2022 is dismissed with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Njeru instructed by MNO Advocates LLP for the Plaintiff.

Mr Kiplangat instructed by Oundo Muriuki and Company Advocates for the Defendant.

