



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E156 OF 2020**

**BETWEEN**

**DAVID MUNGA KINYANJUI T/A NJOMUKI AGENCIES.....PLAINTIFF**

**AND**

**GATEWAY INSURANCE COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**SANLAM GENERAL INSURANCE LIMITED.....2<sup>ND</sup> DEFENDANT**

**M. N. KAMAU & COMPANY ADVOCATES.....1<sup>ST</sup> INTERESTED PARTY**

**BONIFACE NJIRU & COMPANY ADVOCATES....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**Introduction**

1. What is before the court is the Plaintiff's Chamber Summons dated 21<sup>st</sup> August 2020 seeking an order that, "*The firm of Coulson Harney LLP be barred or otherwise disqualified from representing the Defendant herein.*"

2. The application is supported by the Plaintiff's affidavit sworn on 21<sup>st</sup> August 2020. In response, the Defendants rely on the replying affidavit of Emma Wachira, the 2<sup>nd</sup> Defendant's Legal Officer, sworn on 22<sup>nd</sup> September 2020. The application was canvassed by written submissions.

3. Before I deal with the issues raised in the application I will outline the nature of the case as is set out in the pleadings and deposition.

**Background**

4. The 2<sup>nd</sup> Defendant is the predecessor in title to the 1<sup>st</sup> Defendant thus they are one and the same entity hence I shall refer to them as the Defendant for ease of reference unless the context otherwise admits.

5. The Plaintiff's case set out in the Amended Plaintiff dated 2<sup>nd</sup> June 2020 is that he was engaged by the 1<sup>st</sup> Defendant to recover money owed to it by the defunct Nairobi City Council on terms that he would be paid a debt collection commission equivalent to 45% of any amount recovered and paid to the 1<sup>st</sup> Defendant or its advocates. The Plaintiff then engaged the 2<sup>nd</sup> interested party to file proceedings in court to recover the debt. Some of the money recovered was paid over to the 1<sup>st</sup> interested party and some was retained by the 2<sup>nd</sup> interested party.

6. The Plaintiff complains that by a letter dated 14<sup>th</sup> July 2017, the 2<sup>nd</sup> Defendant in its capacity as successor of the 1<sup>st</sup> Defendant terminated the debt collection contract without assigning any reason and to his detriment. The Plaintiff therefore seeks an order directing the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to provide accounts of all sums paid to them by the Nairobi County Government, a quantum meruit order directing the Defendants, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to pay him his accrued commission pro-rata, general and aggravated damages, costs and

interest.

7. In their Statement of Defence, the Defendants deny the allegations against them. As regards the debt due from the Nairobi City Council, it states that it has a decree in its favour dated 20<sup>th</sup> February 2009 in **HCCC No. 890 of 2002, Gateway Insurance Company Limited v Nairobi City Council**. In order to enforce the decree, it filed, through the 2<sup>nd</sup> interested party, **Judicial Review Application No. 366 of 2014, Gateway Insurance Company Limited v Nairobi City Council and Others** seeking an order of mandamus to compel payment of the decretal sum. The 2<sup>nd</sup> interested party admitted receiving Kshs. 90 million from the Nairobi County Government in relation to the decretal sum but failed to remit it to the Defendants.

8. The Defendants avers that the interested parties have failed to account for the amount received from the Nairobi County Government. They also contend that apart from the Judicial Review proceedings cited above, there is also pending **Civil Appeal No. 319 of 2018, David Munga t/a Njomuki Agencies v Sanlam Insurance Agencies Limited**.

9. The Defendants state that the suit is incompetent, the Plaintiff lacks locus standi to prosecute the suit and that the claim is based on an illegal contract and should be dismissed.

#### **Plaintiff's Case**

10. The basis of the Plaintiff's application is that *Coulson Harney LLP* prepared and attested an instrument known as a Share Sale and Subscription Agreement dated 31<sup>st</sup> October 2014 ("the Agreement") which dealt with the issue of recovery of monies forming the basis of the Plaintiff's claim. Clause 4.6 thereof provides:

The parties acknowledge that the Company has a claim against the Nairobi City Council pursuant to Civil Suit Number 890 of 2002 – Gateway Insurance Company Limited v Nairobi City Council (now Nairobi County Government) in the sum of Kenya Shillings KES.329,179,758. If the claim is successful prior to 31<sup>st</sup> December 2016, the company will declare and make payment of a special dividend net of cost and any associated and applicable taxes to the Shareholders of an amount equivalent to the net proceeds of the successful claim, and the Purchaser will assign its right in relation to this special dividend in favour of the Vendors PROVIDED THAT any expense incurred and taxes payable or incurred by the Company in respect of such claims shall be for the account of the Vendors. In the event the claim is not settled in favour of the Company by 31<sup>st</sup> December 2016 no special dividend shall become payable and no payments in respect thereof shall accrue to the vendors. Any attempts to recover this claim in which a cost is incurred must first be approved by the board of the Company and any such cost will be for the account of the Vendors.

11. The Plaintiff contends that the Agreement forms the bedrock of its relationship between it and the Defendants and has been included in his list of documents. That *Coulson Harney LLP* is therefore a potential witness in this case and that there is a direct conflict of interest if the firm continues representing the Defendants.

12. The Plaintiff argues that although he is not party to the Agreement, the decree in **HCCC No. 890 of 2002** is a matter of common concern for the Plaintiff and the Defendants and that at the hearing of the suit, the Agreement will be a contentious document for several reasons. First, the decree provides a contractual nexus between the Plaintiff and the parties sued. Second, the Defendants do not recognise the Plaintiff's contractual rights indirectly arising from the Agreement. Third, the Defendants' Advocates would obviously side with the Defendants in interpretation of the Agreement and will serve as a witness.

13. The Plaintiff submits that taking all the matters into consideration, the firm of *Coulson Harney LLP* being a potential and likely witness at the hearing of the suit ought to be disqualified from acting for the Defendant. The Plaintiff refers to **Riley Falcon Security Services Limited v Samuel Michael Onyango and 5 Others KSM HCCC No.2 of 2017 [2017] eKLR** to support its case that the firm ought to be barred from acting for the Defendants.

#### **Defendants' Case**

14. The Defendants' position is that the Agreement relied by the Plaintiff to make his case does not involve any of the parties to this suit, it is not the subject matter of this suit, nor is the Plaintiff a party to the Agreement. It further contends that *Coulson Harney LLP* is not party to the Agreement hence there is no basis for the allegation that it would be a witness in this suit.

15. Counsel for the Defendants submits that the fact that a firm of advocates may have been involved in the preparation of a document does not disqualify the entire firm, it would, if a potential conflict of interest is made out, only disqualify the Advocate who may be called as a potential witness. Counsel for the Defendants also cited **Riley Falcon Security Services Limited v Samuel Michael Onyango & 5 others (Supra) eKLR**.

16. The Defendants contend that the Plaintiff has not demonstrated that there exists a conflict of interest in having the Defendant represented by *Coulson Harney LLP*. Referring to **Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others ELC No. 21 of 2017 [2017] eKLR**, counsel for the Defendants, submits that an advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which are not compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honours or attempts to honour two or more duties which cannot be honoured compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

17. The Defendants submit that the right to legal representation by counsel of choice in civil matters is implicit in **Articles 48, 50(1) and 159(2)(a)** of the Constitution regarding access to justice, a fair hearing should not be taken away lightly and that the application should be dismissed.

## Determination

18. As the Defendants point out, a party is entitled to counsel of its choice and a party who seeks to interfere with that right must demonstrate exceptional circumstances. One of the exceptional circumstances includes a conflict of interest on the part of the Advocates which of course implicates the right of the other party to have a fair trial. This position was outlined by the Court of Appeal in **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v Kaplan & Stratton Advocates NRB CA Civil Appeal No. 55 of 1993 [1993] eKLR** where it cited with approval the observations of the Sir Nicolas Browne-Wilkinson VC in **Supasave Retail Ltd v Coward Chance and others [1991] 1 All ER 668** follows:

*The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rukusen v Ellis, Munday & Clerke [1912] 1 Ch 831... The law as laid down is that there is no absolute bar on solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the Court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and ..... ) real prejudice to the former client unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusens case itself. Cozens – Hardy MR laid down the test as being that a Court must be satisfied that real mischief and real prejudice will, in all human probability result if the solicitor is allowed to act ..... As a general rule, the Court will not interfere unless there be a case where mischief is rightly anticipated.*

19. In this case, the Plaintiff has not set out an iota of evidence that *Coulson Harney LLP* acted for him at any time. There was therefore no possibility that he would have disclosed to it information in confidence. Simply stated, the Plaintiff was not party to the Agreement, he was not party to the suit against the Nairobi City Council. In short, the mischief or prejudice that would cause the court to intervene in the relationship between the Defendant and its advocates is lacking.

20. The Plaintiff also states that there is a likelihood that *Coulson Harney LLP* may be called as witnesses at the trial. This is unlikely. The firm merely drew the Agreement. Its validity is not in contention in this suit and the cause of action, as I have outlined above, has nothing to do with the Agreement. As counsel for the Defendant points out, the issue in this case is simply whether the Plaintiff is entitled to commission from the Defendant and interested parties. This has nothing to do with *Coulson Harney LLP*.

21. Before I conclude this decision, I would be remiss if I did not deal with the **Riley Falcon Security Services Case (Supra)** cited by both parties. In that case, the 1<sup>st</sup> defendant was a partner in the firm of advocates which the plaintiff sought to restrain from representing the other defendants. The plaintiff contended that the 1<sup>st</sup> defendant had authored the letter alleged to be defamatory and drew certain pleading in another case involving the parties. In resolving the matter, the court relied on the case of **Delphis Bank Ltd v Channan Singh Chatthe and 6 Others NRB CA Civil Appl. No. Nai 36 of 2005 [2005] eKLR** where the Court of Appeal held as follows;

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.

22. Based on the circumstances of the case, the court held that the advocate in question was not handling the case personally and that the plaintiff had not established any real mischief or prejudice that would entitle it to an injunction. The case does not support the Plaintiff's case as the facts are wholly different. The Plaintiff in this case has no relationship real or apparent with the firm of *Coulson Harney LLP*.

## Disposition

23. The Chamber Summons dated 21<sup>st</sup> August 2020 is for dismissal. It is now dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of JANUARY 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Mugo instructed by Solomon Mugo and Company Advocates for the Plaintiff.

Mr Ndung'u instructed by Coulson Harney LLP for the Defendants.

David Munga Kinyanjui t/a Njomuki Agencies v Gateway Insurance Company Limited & ; MN Kamau & Company Advocates & another (Interested Parties)