



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.10 OF 2018

MAGNATE VENTURES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA RAILWAYS GOLF CLUB.....DEFENDANT/RESPONDENT

RULING

This is a ruling on the plaintiff's application dated 12th march 2018. It seeks to restrain and disqualify Nelson Havi, Advocate from appearing, interfering, participating and/or in any way taking part in this suit either as a lead counsel, counsel, and/or Advocate for Magnate Ventures Limited, the plaintiff in this suit against the defendant Kenya Railways Golf Club.

Ground set out on the face of the application is that the said Nelson Havi prior to the inception of this suit, was appointed to act as Advocate for the defendant in several suits including **ELC Case No.605 of 2008 Kenya Railways Golf Club Vs Kenya Railways Corporation Kenya and HCCC No.57 of 2009, Mishak Gakuo M Ambutu & 2 Others Vs John Nduva Mbuqua T/A Jojen Butchery**, both matters still pending in the High court.

That the Advocates Act, Law Society of Kenya Act and Code of Ethics and Conduct of Advocates preclude an Advocate from acting or continuing to Act in matters where there is conflict of interest. That the Code of Ethics outlaw a conflict of interest and disclosure of information of a client by an Advocate as it amount to professional misconduct.

The application is supported by affidavit sworn by Dr.Walter Onyino who is the chairman of the management committee of the defendant herein. He confirmed that Nelson Havi Advocate is handling the above two cases and attached correspondences and details of the appeal case. That **ELC Case No.605 of 2008, Kenya Railways Golf Club Vs Kenya Railways Corporation Kenya** is still pending.

He averred that while the Arbitral tribunal in respect of this matter was being set up, Nelson Havi Advocate wrote to the chartered institute of Arbitrators asking for appointment of a 3rd Arbitrator; that when he learnt from counsel for the defendant that he was also coming in this case as lead counsel, he wrote to Nyaanga Advocate challenging his representation. That Nyaanga response was that Nelson Havi was to act for the plaintiff in the arbitration while Nyaanga would act in this suit.

He averred that the defendant's interests will be compromised if Nelson Havi acts for the plaintiff in this case as he will be in breach of the rule of confidentiality of client's information.

In response Nelson Havi filed a replying affidavit sworn on 15th march 2018. He confirmed that he acts for the defendant in **ELC NO.605 of 2008 (OS), Kenya Railway Golf Club Vs Kenya Railways Corporation** where a declaration is sought to declare that Kenya railway is the registered owner of Land Registration Number 209/11379. He attached a copy of the originating summons. He denied being a witness and the ELC matter and averred that his brief is limited to the prosecution of the case. He also confirmed that he acted for the defendant in Civil Appeal No.57 of 2009.

He further averred that there was no retainer agreement or service contract between him and the defendant in respect of the two matters above barring him from acting in subsequent matters against the defendant.

He submitted that there is no rule or practice which preclude him from acting against the defendant in this claim for the sole reason that he acted for him in the two matters; that the plaintiff has not demonstrated real mischief or real prejudice that will result in him acting as lead counsel for the plaintiff in this matter.

While submitting orally, Mr. Gaturu for the defendant restated the grounds on the face of the application and averments in the supporting affidavit. He submitted that besides him writing a protest to Nyaanga Advocate, the defendant wrote to Nelson Havi objecting to him for the plaintiff in this matter as it would result in a conflict of interest and breach of professional ethics but despite the communications he has declined to abstain from acting defendant not to act for the plaintiff in this suit; and if allowed to act this case will be compromised and miscarriage of justice will be occasioned.

He further argued that Section 16 of the Advocates Act provide that an Advocate shall not act in a matter where there is a conflict of interest and the code of conduct for Advocates outlaw disclosure of communication between client and Advocate thus making it illegal for Nelson Havi to act for the plaintiff against the defendant.

That he raised the objection at the beginning of this matter as required by the Advocates Act; that there is no doubt that Nelson Havi acted for the defendant in the two matters and there is fear the Nelson Havi is likely to disclose information relating to the defendant thus compromising the defendant/applicants case.

In response Nelson Havi submitted that the law on when an Advocate can be disqualified is provided under Section 55 and 56 of the Advocates Act read together with Rule 9 of Practice Rules of 1984; that Section 55 entitles an Advocate to act and in so doing is treated as an officer of the court and shall not cease to act unless an order is made by the court. Section 56 empowers the court to disqualify an Advocate if his acting amount to misconduct or commits an offence during and in the course of the proceedings.

He submitted that it is important to interrogate the matter before court and the matter in which he acted for the defendant. He submitted that the dispute before court is a contract entered between plaintiff and the defendant in September 2012 and that the dispute has been referred to arbitration; that they are before court for interim relief to protect the subject matter pending arbitration. On the other hand the claim in **ELC NO.605/2005** related to a prayer for declaration that property L.R 209/11379 be registered in the name of the plaintiff who is the defendant in this case. He submitted that the two claims are not related. That the defendant has not indicated confidential information imparted on him which may be used prejudicially relating to the dispute hearing. That the second matter was a claim for price of goods supplied and judgment was delivered on 18th December 2014; that there is no information acquired in the case which can be used against the defendant.

Havi further submitted that there is no claim by the defendant that he that he is a witness in this case.

He further submitted that the defence counsel has relied on a draft code of conduct which has not been approved by Law Society of Kenya but even if any value was to be attached to the draft on account of practice, it does not support the application. He pointed out that at page 20 of the draft it refers to representation of both parties but in this case he is representing the plaintiff only on the issue of contract. He added that Clause 22 on page 22 provide that it is not wrong to act against a client in a fresh and independent matter.

Nelson Havi argued that, there is no preclusion for an Advocate to act interchangeably for 2 clients and that there is no evidence that his memory would be used in this particular matter. He referred to the decision in the case **of Delphi Bank Ltd Vs.Channan Singh Chatthe & 6 Others [2005] eKLR**, where the court restated the Court of Appeal decision in **Rukusen Vs. Ellis, Munday & Clerke (1912)1 Ch.831**...as follows:-

The law as laid down there is that there is no absolute bar on a 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 (.....) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusens case itself. Cozens – Hardy M.R. 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 actAs a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated”.

From the foregoing there is no general rule that an Advocate cannot act against a client; the onus is for the client to say this is the information we have given to the Advocate or that he is likely to use it and if he uses it there will be real mischief on his part. He also referred to **HCCC NO. 392 OF 2016 Imperial Bank Limited (In Receivership) & 2 others v Alnashir Popat & 17 others [2017] eKLR** where the court held that the applicant should demonstrate mischief and information must be revealed; that the court should not presume conflict. That the test of reasonability of mischief is not of a layman but judicial officer. He added that even if he is in a panel for a client there must be an agreement in the retainer that the Advocate should act for the other party.

Mr. Gaturu refuted Nelson Havi's interpretation to the effect that the applicant should produce evidence showing that the two cases are related. He argued that all the client is required to do is to prove that Havi is the defendants Advocate in some cases. He said ELC case is about land and it is the land is where the billboards are installed. On code of conduct, he said it has not a draft but is being applied. He said what matters is whether Havi acts for his client and there has been communication; that it does not matter if it is related to this matter. He submitted that court should not rely on authority cited by Havi as it was decided 116 years ago and that circumstances have now changed. He prayed that Havi be barred from acting for the plaintiff.

I have considered rival by counsels herein. There is no dispute that Nelson Havi Advocate has acted for the defendant in **ELC Case No.605 of 2008 Kenya Railways Golf Club Vs Kenya Railways Corporation Kenya and HCCC No.57 of 2009, Mishak Gakuo M Ambutu & 2 Others vs John Nduva Mbugua T/A Jojen Butchery**. The question that arise is whether the two matters have any relation or connection with the matter herein and whether the applicant has demonstrated that there is confidential information conveyed in the two cases which the Advocate is likely to be use to compromise the applicant's case.

It is not disputed that the ELC matter sought to have land registered for the defendant/applicant. Beside Mr. Gaturu saying that the billboards which are the subject matter of the contract herein are installed on the defendants land, he never went further to explain the connection of land dispute and the contract between plaintiff and the defendant herein. He also never explained the relationship of case relating to supply of

goods with the contract herein.

Mr. Gaturu filed copy of conduct Gazette code on 5th of April 2018. I have perused it and note that paragraph 96 provide circumstances under which conflict of interest may arise. Paragraph 96 (c) provide as follows:-

“Conflict of interest can arise when in the course of representing a client, there is risk of using, wittingly or unwittingly, the information obtained from a current or former client to the disadvantage of that other client or former client.”

I however note that the applicant herein has failed to demonstrate that there is information conveyed to Havi Advocate in the two previous matters that relate to the dispute herein and the said information is likely to be used against the applicant. Mr. Gaturu submitted that it is enough to say an Advocate acted for a party. I am of the view that it was not enough for Mr. Gaturu to say that billboards are on the land which was a subject matter in the ELC matter. He should have gone further explain how the land dispute is connected to the contract between the applicant and the plaintiff herein and if there is any information conveyed in the land matter that may be used against the applicant in this matter.

I also note that the applicant has failed to prove there is a contract or agreement between the applicant and Nelson Advocate precluding him from acting against the applicant. In the absence of such agreement the court will consider test of probability of mischief or prejudice to result if the Advocate is not precluded from acting for a party.

An Advocate can also be precluded from acting for a party if the applicant demonstrate that he will be called as a witness. The plaintiff herein is before court seeking interim relief to preserve the subject matter awaiting arbitral process. No evidence is to be adduced and therefore no possibility of calling the applicant’s former Advocate to adduce evidence.

I do agree with the decision in **HCC NO.392/2016** that the applicant should demonstrate mischief that is likely to be occasioned by allowing an Advocate to act against his client. It is upon the applicant to prove connection in the matters and probability of mischief. There can never be a possibility of mischief and prejudice in a new matter unrelated to the matter previously handled by an advocate.

The onus was on the applicant to demonstrate that two matters aforementioned have a bearing in this matter. The applicant has failed to demonstrate that mischief or prejudice is likely to result if Nelson Havi Advocate is not restrained from acting as the lead counsel in this matter. I have no reason to bar him. The application lack merit; I do dismiss it with costs to the respondent.

Dated and Delivered at Nairobi this 11th day of April, 2018

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR PLAINTIFF/RESPONDENT

.....COUNSEL FOR DEFENDANTS/APPLICANTS