



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 2533 OF 1997**

**LALCHAND FULCHAND SHAH ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**RAMBHABEN LALCHAND SHAH ..... 2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERUS**

**I & M BANK LTD. ....DEFENDANT/RESPONDENT**

**R U L I N G**

1. For the determination of the Court is the application by the Plaintiffs dated 6<sup>th</sup> March, 2012 brought pursuant to the provisions of **Sections 1A, 1B, 3A and 63(e)** of the *Civil Procedure Act* and **Rule 9** of the *Advocates (Practice) Rules* as well as all other enabling provisions of the law. The Applicants seek the following prayers:

**“1. THAT the firm of Walker Kontos Advocates disqualify themselves and withdraw from acting for the Defendant in this suit;**

**2. THAT the costs of this application be in the cause”.**

2. The application is predicated upon the grounds that the Advocate for the Defendant is barred under the provisions of **Rule 9** of the *Advocates (Practice) Rules* as he may be summoned as a potential witness on the discrepancies arising from alleged fraud on their (the Advocates) part.

3. The application is further supported by the Affidavit of **Lalchand Fulchand Shah** sworn on even date. It is deponed to that the firm of Advocates representing the Defendant and/or the Defendant engaged in fraud. This, it is claimed, was perpetrated by the Defendant and/or its firm of advocates on record presenting two different sets of Charge documents. It is contended that the said firm of advocates, having prepared and registered the said documents, should cease and desist from representing and/or acting for the Defendant/Respondent in this matter.

4. The application is opposed. In the Replying Affidavit of **Amritlal Velj Chavda** sworn on 18<sup>th</sup> April, 2012 it was contended that the Applicant has not shown any real mischief or prejudice and that no conflict of interest has been shown. The right to legal representation of one’s choice is a constitutional right and the complaint is based on secondary evidence that was incomplete.

5. The application is brought pursuant to the provisions of **Rule 9** of the *Advocates (Practice) Rules* which reads:

**“No advocate may appear as such before any Court or tribunal on any matter which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or by affidavit, he shall not continue to appear. Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matters of fact in any matter which he acts or appears”.**

The applicant also relied on the cases of **Uhuru Highway Development Ltd v Central Bank of Kenya (2) [2002] 2 E.A 654** and **Gandesha v Killingi Coffee Estate Ltd & Another [1969] E.A 299** on the issue of disqualification of an advocate. In **Halsbury’s Laws of England, Vol. 3 at para. 102** it states *inter alia*:

**“He (an advocate) should not accept a retainer in a case which he has reason to believe he will be a witness, and if, being engaged in a case it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardizing his client’s interests”.**

6. The applicant’s contention is that the advocates firm representing the Respondent, **Walker Kontos Advocates**, prepared and filed two sets of Charge documents which, according to the Applicant, were highly contentious and hinged on fraud perpetrated on the part of the Respondent and their appointed firm of advocates.

7. The Respondent contends that the Applicant has not shown what injustice would be occasioned if the said firm of advocates does not cease from acting for them, and further that there is no allegation of fraud against the Respondent. They relied on the case of **Tom Kusiinya & Others v Kenya Railways Corporation & Others [2013] eKLR** to support their contention on the constitutional right of a litigant to choose his or her own advocate.

8. *Article 50(2)(g)* provides for the right as enunciated in the case of **Tom Kasiinya & Others v Kenya Railways Corporation & Others** (supra). The aforementioned provision reads:

**“Every accused person has the right to a fair trial, which includes the right-**

**g. to choose, and be represented by, an advocate, and to be informed of this right promptly;”**

However, as provided under **Rule 9** of the *Advocates (Practice) Rules* and **Uhuru Highway Development Ltd v Central Bank of Kenya (2)** (supra) as well as **Gandesha v Killingi Coffee Estate Ltd & Another** (supra) this right may be limited, to the extent of the exceptions reiterated therein.

9. In **Charles Gitonga Kariuki v Akuisi Farmers Co. Ltd (2007) eKLR; Civil Suit No. 97 of 2007**, Kimaru, J in dismissing an application for the withdrawal of an advocate and in relying upon the decision in **Uhuru Highway Development Ltd v Central Bank of Kenya (2)** (supra), reiterated that the Applicant has to present before the Court sufficient evidence that there is a real apprehension of an injustice being occasioned if an advocate is not withdrawn from acting for a party. The learned judge reiterated *inter alia*:

**“The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant. In the present case, apart from stating that Mr. Karanja had acted for it in several matters, the defendant did not present to the court material upon which this court could make a**

**determination that indeed there were grounds upon which this court could reach a determination that there exists a possibility of conflict of interest.”**

10. In Alliance Media (K) Ltd v Monier 2000 Ltd & Another (2007) eKLR referred to in the case of Mumias Sugar Co. Ltd v Mumias Outgrowers Co. (1998) Ltd (2014) eKLR; Civil Application No. 233 of 2013, even though the matter referred to was the withdrawal of an arbitrator, Warsame, J (as he then was) therein reiterated as follows:

**“... no doubt disqualification is a serious matter, which must be taken seriously. The seriousness of seeking disqualification is a true reflection or testimony that one party either by design, default and/or genuinely has no faith in the determination of his case by a particular judicial officer.... In my understanding the issue of disqualification is a very intricate and delicate matter. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice. In my view justice is deeply rooted in the public having confidence and trust in the determination of disputes before court. It is of paramount importance to ensure, that the confidence of the public is not eroded by the refusal of judges to disqualify themselves when an application has been made.”**

11. The reasons advanced by the Applicant, to the mind of the Court, are not cogent or persuasive enough to grant the orders sought. The Applicant alleges fraud although, as correctly stated by the Respondent, no allegations of fraud have been brought against them. The Applicant cannot portend that the advocates firm by acting for the Respondent would be contravening the provisions of **Rule 9** of the *Advocates (Practice) Rules*. Indeed, such would fly in breach of the provisions of *Article 50(2)(g)* of the Constitution on the right to representation. As alluded in Charles Gitonga Kariuki & Akuisi Farmers Co. Ltd (supra), the Applicant has to present sufficient reasons before Court in order for it to issue orders for the withdrawal of an advocate from acting for a party as per **Rule 9** of the *Advocates (Practice) Rules*. In my view, the applicant has not presented such cogent and sufficient reasons as would enable this Court to discern a real apprehension of a miscarriage of justice if the said firm of advocates continues acting for the Respondent.

12. In consideration of the foregoing, taking into account the principles as enunciated in Mumias Sugar Co. Ltd v Mumias Outgrowers Co. (1998) Ltd (supra), the application is without merit and is hereby dismissed with costs to the Respondent.

**DATED and delivered at Nairobi this 19<sup>th</sup> day of June, 2014.**

**J. B. HAVELOCK**

**JUDGE**