



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 106 of 2006

THE CYCLE IMPORTERS LIMITED..... PLAINTIFF

VERSUS

VIJAYANT KIMJI PATEL.....1ST DEFENDANT

AMRAT VIJAYANT PATEL.....2ND DEFENDANT

R U L I N G

1. The Application for determination is a Notice of Motion dated 11th September 2012 and filed on the 13th September 2012. The Plaintiff has sought to restrain the firm of Taibjee and Bhalla Advocates from acting for the Defendants this matter plus the costs of the application. The grounds of the Application are outlined in the body of the Application and include the fact that a Mr. Anil Joshi Advocate who had previously acted for the Plaintiff in this matter, has since has joined the firm of Taibjee & Bhalla Advocates. That in the foregoing, Mr. Anil Joshi is a potential witness in the instant matter and is in possession of privileged and confidential information that will prejudice the Plaintiff.

2. The Application is supported by the Affidavit of Nadia Kara sworn on 11th September 2012. It is contended that there existed an Advocate Client relationship between Mr. Anil Joshi and the Plaintiff, since Mr. Joshi had previously acted for the Plaintiff in the dispute at hand. That Mr. Joshi is privy to privileged and confidential information with regard to the case at hand. That further, Mr. Joshi now practices under the firm of M/s Taibjee & Bhalla Advocates which firm represents the Defendants in this case. It is also contended that the said advocate wrote letters on the Plaintiff's behalf to the Defendants and their advocates touching on the various issues regarding matters that are in dispute in this case. That the said letters are in evidence and that the Plaintiff intends to have Mr. Anil Joshi testify on their contents. That given Mr. Joshi's move to the aforementioned firm, the Plaintiff contends that he might use the information acquired when acting for the Plaintiff to aid the Defendant's case which would lead to a miscarriage of justice. That further the court is vested with the power and discretion to grant the Plaintiff's request to level the playing field between the parties so that the case may be determined on merit. It is therefore contended that it is unethical and against the professional code of conduct and principles of professionalism for the firm of Taibjee and Bhalla Advocates to continue acting for the defendant's in this matter. The Plaintiff concluded that no prejudice will be suffered by the Defendants if the orders sought are granted. The Plaintiff urged that the application be allowed.

3. For the Defendant, Azim Taibjee, a Partner in the firm of M/s Taibjee and Bhalla Advocates swore a Replying Affidavit on 2nd November 2012 in opposition to the Application. It was admitted that Mr. Anil Joshi is indeed a consultant Advocate in the firm but prior to joining the firm had conduct of the matter by only handling the conveyancing issues involving the Plaintiff with respect sale of L.R. No. 7158/23 Sub Plot M. It is further contended that Mr. Anil Joshi's former law firm did not file this suit on

behalf of the Plaintiff and the same was undertaken by the firm of Rustan Hira Advocates. It was also contended that the firm of Taibjee and Bhalla Advocates assumed conduct of the instant case on behalf of the Defendants in the year 2007 well before Mr. Joshi's entry into the firm in 2010. Conversely, it is the Respondent's contention that Mr. Joshi has never been the Plaintiff's advocate on record in this suit and therefore the allegations of abuse of privilege and unethical professional conduct are unfounded and misguided. The Defendants further aver that there is nothing private or confidential regarding any issues that have been canvassed by the parties in this suit as alleged, given the fact that there has been exchange and filing of all relevant documents.

4. The Defendants further stated that they are not opposed to the Plaintiff calling upon Mr. Joshi to testify on its behalf on the evidentiary elements of his involvement in this matter through the formal communications as particularized in the Plaintiff's list of documents dated 30th May 2012. The Defendants also reiterate that Mr. Joshi has played no advisory role in the framing of the Defence in this suit. It is also contended that there is nothing on record to warrant the court to give such drastic orders as compelling the firm of Taibjee and Bhalla Advocates to cease acting on behalf of the Defendants. It is their contention that the present suit should be determined on its merits and should not be clouded by a manifestation of perceived conflict of interest as claimed by the Plaintiff. The Defendant affirms that the firm has always exhibited professionalism in the conduct of this suit and shall continue to do so as expected. The Application, in their view should therefore be dismissed with costs.

5. I have considered the affidavits on record and the submissions of Counsel. I have also considered the authority relied on by the Plaintiff, namely **Bolkiah V KPMG (1998) UKHL 52**. The main issue for determination in this Application is whether or the firm of Taibjee and Bhalla Advocates should be restrained from acting for the Defendants. The reason advanced by the Plaintiff that one Mr. Anil Joshi-Advocate, is now in the employ of the aforesaid firm and that the said Advocate has been involved in the transaction that is now a subject to this suit on behalf of the Plaintiff. I bear in mind that from the pleadings on records, it would seem that the dispute relates to the implementation of construction works of a house on L.R. No. 7158/23 Sub Plot M. it is contended that given Mr. Joshi's involvement in the said transaction, which is purportedly evidenced by a series of correspondences, the Plaintiff shall be highly prejudiced should the firm of Taibjee and Bhalla advocates continue acting for the Defendants. The Plaintiff is apprehensive that Mr. Joshi might disclose confidential/privileged information acquired during the period in which he acted for the Plaintiff to the latter's detriment. In reply to this assertion, the Defendants' advocates contend that the said Mr. Anil Joshi never dealt with the litigation aspect of this transaction but only on the Conveyance issues for the sale of the villa. That this transaction occurred in 2007 well before Mr. Joshi joined the law firm of Taibjee and Bhalla Advocates. That given the facts presented under the circumstances, the Plaintiff has failed to show any abuse of privilege by Mr. Anil Joshi.

6. The principles of a client –advocate privilege in Kenyan law are well settled. The case of **Delphis Bank Ltd –vs- Channan Singh Chatthe & 6 others CA No. Nai 136 of 2005 (UR)** proves instructive where the Court of Appeal held that :-

“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 interest 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.”

Given the above case, it is imperative to examine whether the fact that Mr. Anil Joshi- Advocate now a consultant/advocate with the firm of Taibjee and Bhalla Advocates and who further acted in the conveyancing aspect of the transaction, will prejudice the Plaintiff's case should the firm of Taibjee and Bhalla Advocates continue acting on behalf of the Defendants.

7. In this regard, it will be instructive to scrutinize what is meant by privileged information. This was dealt with in the case of **Kiambu Service Store –vs- Mbo-I Kamiti Farmers & 3 others Civil Suit 546 of 1998 eklr** where it was held that :-

“Privilege will obviously extend to confidential matters related by a client to his advocate but it is necessary to look at what has been disclosed by the Advocate in order to determine whether it is knowledge acquired as a result of confidential information or facts disclosed to an advocate in the course of his duties....”

8. In context of the above and bearing in mind the facts presented in support of this application, it is not denied that Mr. Anil Joshi-Advocate acted on behalf of the Plaintiff in the transaction involving the dispute at hand. However, it has been contended by the Defendant that the involvement of Mr. Joshi was only in respect to the Conveyancing aspect of the sale of L.R. No. 7158/23 Sub Plot M. The dispute at hand involves issues as to whether the Defendants carried out construction work as expected under their terms of reference. The Plaintiff’s application is hinged on alleged series of letters written by Mr. Anil Joshi on its behalf in this matter, which in its view makes him a potential witness in the matter. The Defendants have contended that the said letters are not of a confidential nature as they comprise the Plaintiff’s list of documents which have been duly exchanged by the parties. I have looked at eh list of documents dated 31st October, 2006 and have noted document Nos. 17 to 23 thereof as being letters by the aforesaid Mr. Anil Joshi. Further, I also note that the Defendants are not opposed to Mr. Joshi tendering evidence on behalf of the Plaintiff as indicted in Paragraph 10 of their Replying Affidavit on matters touching on the said correspondence.

9. In my view, the Plaintiff has failed to demonstrate what confidential and privileged information if any which it might have imparted to Mr. Anil Joshi that might be used by the Defendants’ Advocates that may be prejudicial to its case. The case of **DELPHIS BANK LIMITED (SUPRA)** cited with approval English decisions in **Rukusen –vs- Ellis Munday and Clerke (1912) 1 Ch. 831, RE – A firm of Solicitors (1992) 1 A 11 E.R 353**, and **Supasave Retail Ltd –vs- Coward Chance and others (1991) 1 ALL ER 668** buttresses the issue. The former two cases were applied in the latter, where **Sir Nicolas Browne – Wilkinson – V-C** summed up the general rule as 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 –vs- Ellis, Munday & Clerke (1912) 1 Ch. 831.... 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 act.... As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated.

.....

As is clear from those authorities, each case must turn on its own facts to establish whether real mischief and real prejudice will result.

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We do not know the nature of confidential or privileged information, if any, that may have been imparted on him by either party which may be prejudicial to the other. The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties.” (Emphasis supplied)

In that case, the Court of Appeal declined to restrain Mr. Menezzes, an Advocate, from acting against a former client because the nature of confidential or privileged information that may have been imparted to the Advocate which may have been prejudicial to the former client was not disclosed to the court.

10. From the foregoing, it is clear that there is no general rule that an Advocate cannot act against his client in a subsequent litigation, the test is whether real mischief or real prejudice will in all human probability result if an Advocate is allowed to act as such. The court must therefore turn on the facts of each case to establish whether there is real mischief and real prejudice that will result if the firm of Taibjee and Bhalla Advocates is allowed to act for the Defendants. To my mind, nothing has been provided by the Plaintiff to this Court to show that if the firm of Taibjee and Bhalla Advocates were to continue acting there will be any mischief or prejudice. It is clear that Mr. Anil Joshi only acted on the Conveyancing limb of the transaction and not with regard to the issue of construction as well as the subsequent dispute that followed. I find the Plaintiff's arguments farfetched. I also note that the Defendants are not opposed to Mr. Joshi tendering evidence on the letters he wrote on behalf of the Plaintiff with regard to the sale of L.R. No. 7158/23 Sub Plot M. In any event, the Plaintiff only indicate that it "may" call Mr. Joshi as a witness which illustrates that the Plaintiff is unsure of the position as of this moment. Restraining the firm of Taibjee and Bhalla Advocates at this point to my mind would seem premature.

11. In view of the foregoing, I am not convinced that the Defendant's application dated 11th September, 2012 has any merit and the same is hereby dismissed with costs to the Defendant.

12. Orders accordingly.

DATED and DELIVERED at Nairobi this **11th** day of **February**, 2013.

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A. MABEYA
JUDGE