REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 76 OF 2011

ORIENTAL COMMERCIAL BANK LIMITED..…….…… PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA ……..…..……..DEFENDANT

RULING

By a Notice of Motion dated 13th January, 2012, the Defendant has applied to have Dr. John Khaminwa, Advocate restrained from acting as lead Counsel in the present suit or any related matter and from misusing and/or disclosing the Defendant/Applicant's confidential information which he was privy to in his position as an Assisting Counsel in the Judicial Commission of Inquiry to the Goldenberg Affair.

The application was supported by the Affidavits of Kennedy Abuga sworn on 12th January, and 8th February, 2012, respectively.

The Defendants contention both in the Affidavits, written submissions and oral hi-lights of Counsel were that; that Dr. John Khaminwa was an Assisting Counsel in the Judicial Commission of inquiry into the Goldenberg Affair (hereinafter "the Goldenberg Commission of Inquiry") which rendered its report to the President of the Republic of Kenya on 3rd February, 2006, that the basis of the claim by the Plaintiff is the report of the Goldenberg Commission of Inquiry, that the Plaintiff had indicated that it would rely on the said report and will call the Honourable Mr. Justice Samuel Bosire, the Chairman of the Commission as one of its witnesses, that in the course of his duties as Assisting Counsel for the Commission, Dr. Khaminwa did interview the Defendant's witnesses and thereby gained access to all confidential information belonging to the Defendant.

It was further contended by the Defendant that the terms of reference of the Commission included investigating the Plaintiff for fraud against the Defendant, that in Gazzette Notice No. 1238 of 24th February, 2003, appointing the said Commission the words Government of Kenya and Central Bank of Kenya were being used interchangeably and that therefore, Dr. Khaminwa as Assisting Counsel in the Commission was acting for the Defendant, that the Plaintiff was then known as Delphis Bank Ltd and was a suspect in the Goldenberg Inquiry, that the Consultancy Agreement dated 23rd July, 2004 (hereinafter "the Consultancy Agreement") between the Government of Kenya and Dr. Khaminwa made the Government of Kenya and by extension, the Defendant, Dr. Khaminwa's client, that the Consultancy

Agreement forbade Dr. Khaminwa from acting in conflict with its terms and further obligated him to keep confidentiality for 7 years. In order to connect the Defendant with the Government of Kenya, Mr. Murgor, learned Counsel for the Defendant referred to Section 8 of the CBK Act. Counsel also relied on the Advocates Act, the cases of **King Woolen Mills Ltd & Anor –vs- Kaplan & Stratton Advocates (1990 – 1994) EA, Uhuru Highway Development Ltd –vs- CBK (2002) 2 EA and Halsburys Laws of England Volume 3** in support of the propositions that an Advocate should not disclose confidential material obtained when acting for his client, that an Advocate should not act in a position where there would be a conflict of interest and that the court has a duty to maintain and uphold the administration of justice. Counsel therefore urged that the application be allowed.

For the Plaintiff, Dr. Khaminwa filed a Replying Affidavit sworn on 30th January, 2012 and written submissions dated 22nd February, 2012. It was contended for the Plaintiff that for there to be a conflict of interest as regards an Advocate, there has to be an Advocate-client relationship which prevents an Advocate from acting for the client's adversary, that there was no Advocate-client relationship between Dr. Khaminwa and the Defendant, that Advocate-client relationship MUST be express and not implied.

It was further submitted for the Plaintiff that the mere proof of existence of Advocate-client relationship perse is not an automatic bar to an Advocate being barred from acting against a former client, that the suit before court is on a breach contract between the Defendant and the Plaintiff, that the introduction of the Goldenberg Affair in these proceedings is a red herring being introduced to poison the mind of the court. The Plaintiff relied on the cases of **Delphis Bank Ltd –vs- Channan Singh Chattel & 6 others CA No. Nai 136 of 2005 (UR), Re. A Firms of Solicitors (1992) 1 All ER 353 and Subsave Retail Ltd –vs- Coward Chance & others (1991) 1 All ER 668** on the propositions that the existence of an Advocate-client relationship is not an automatic bar to an advocate acting against his former client, that courts should be reluctant to interfere with a person's choice of an Advocate for legal representation unless there is real mischief. The Plaintiff prayed that the Defendant's application be dismissed.

I have carefully considered the Affidavits on record, the written submissions, oral hi-lights and the authorities relied on.

I propose to consider the law first before delving into the application. In **Halsburys Laws of England 3rd Edition Vol. 3 paragraph 67** the learned writers observe:-

"67. Duty not to disclose or misuse information. The Employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel to his client's detriment (p). This duty continues after the relation of counsel and client has ceased."

In **King Woolen Mills Ltd –vs- Kaplan & Stratton Advocates (1990 – 1994) EA 244** wherein adispute arose as to the validity of security documents prepared by the Defendants, the Court of Appeal held at page 250 that:-

"The fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the Advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the client's consent. That fiduciary relationship exists even after conclusion of the matter for which the retainer was created."

In that case the court restrained the firm of Advocates from continuing to act against its former client.

In **Uhuru Highway Development Ltd –vs- Central Bank Ltd (2002) 2 EA 654** whilst considering an application for injunction against a firm of Advocates that had prepared security documentation that was a subject of challenge, the Court of Appeal observed at page 661 thus:-

"We are satisfied that the real mischief or real prejudice were not rightly anticipated. …… we have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by Counsel in bringing about the first and second Plaintiffs to agree to sign the charge,

he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will no doubt be prejudice."

In that case, the appellants had pleaded duress against the Advocate and had indicated that the advocate was a possible witness in the proceedings. The court restrained the Advocate from continuing to appear against his former client.

In **Delphis Bank Ltd –vs- Channan Singh Chatthe & 6 others CA No. Nai 136 of 2005 (UR)** when considering an objection to Mr. Menezes ADvocate acting for one of the Respondents on the ground that he had prepared the security document, the subject matter of the proceedings in the High Court, the Court of Appeal held thus:-

"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. The authorities we allude to are King Woolen Mills Ltd & Anor –vs- M/s Kaplan & Stratton (1993) LLR 2170 (CAK), (CA 55/93) and Uhuru Highway Development Ltd & others –vs- Central Bank of Kenya Ltd & others (2), (2002) 2 EA 654.

……

In so deciding the court 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. 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.

……..……

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."

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

In the English case of **Gaveran Trading Co. Ltd –vs- Skjevesland (2003) 1 All ER 1** it was held, inter alia, that:-

"Although a party had no right to prevent an advocate from acting based on the code, since its content and enforcement were not matters for the court, the court had the power, under its inherent power to prevent abuse of its procedure, to restrain an advocate from representing a party if it were satisfied that there was a real risk that his continued participation would lead to a situation where the order made at trial would have to be set aside on appeal. In exceptional circumstances, that power could be exercised even if the advocate did not have confidential information. Furthermore, it was not necessary for the party objecting to an advocate to show that unfairness would actually result, and in many cases, it would be sufficient that there was a reasonable lay apprehension that that was the case. The court would have to consider all the circumstances carefully, and should not accede too readily to an application by a party to remove the advocate for the other party. If it acceded to such applications too willingly, advocates would be encouraged to withdraw from cases voluntarily where it was not necessary for them to do so."

This English case was cited with approval by the Court of Appeal in the case of **William Audi Ododa & Another –vs- John Yier & Another CA No. Nai 360 of 2004 (UR)** wherein the Respondents (who were Plaintiffs in the High Court) objected to the appearance of Mr. Odunga Advocate (as he then was) for the appellants on the basis that Mr. Odunga's firm had drawn the plaint and acted for the Respondents at the inception of the suit in the High Court, that when giving Mr. Odunga instructions to file suit, the Respondents had disclosed confidential information which was in the file that Mr. Odunga was now using in the Court of Appeal against them. Dismissing the objection after reviewing various cases on the subject, the court held:-

"What is clear from these authorities is that each case must be decided purely on its facts.

…….

The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters in Section 77(1)(d) but Section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice."

That is therefore the law on the issue of conflict of interest by an Advocate. The principles that come out of these authorities, in my view, are that it is a party's fundamental and constitutional right to have an advocate of his choice, that that right is to be balanced against the hallowed principle of confidentiality in an advocate-client relationship and moreso where an advocate will double up as a witness, that the nature of the confidential or privileged information imparted to the Advocate which may be prejudicial should be disclosed to the court, that there is no general rule that an Advocate cannot act against his client in a subsequent litigation, that the test is whether real mischief or real prejudice will in all human probability result if an Advocate is allowed to act, that for a Court to deprive a litigant his right to representation of his choice there **MUST** be a clear and valid reason for so doing and finally that each case must turn on its own facts to establish whether real mischief and real prejudice will result.

How do these principles apply to this case? By its Plaint dated 2nd March, 2011, the Plaintiff claimed against the Defendant for a sum of Kshs.122,975,244.15 allegedly being illegal and unjustified and punitive debits levied against the Plaintiff by the Defendant on account of breach of banking practice. The said debit was occasioned by the failure of the Plaintiff's predecessor, Delphis Bank Ltd to deliver to the Defendant US$ 19 million pursuant to a foreign currency spot sale contract entered in or about 26th April,

1993. By an amended Defence amended on 18th May, 2011 running to 21 pages the Defendant pleaded that the genesis of the Plaintiff's claim is a contract dated 26th April, 1993 which formed part of the investigation by the Goldenberg Commission of Inquiry. From the Plaint, it would seem that the said sum of Kshs. 122,975, 244.15 was levied way after June, 1993.

In the motion before me, the Defendant has contended that since contract No. A.73482 between the Defendant and Delphis Bank Ltd of 26th April, 1993 was part of the subject of the Goldenberg Commission of Inquiry in which Dr. Khaminwa was an Assisting Counsel, and that since Dr. Khaminwa was an advocate for the Government of Kenya, Dr. Khaminwa would be breaching his professional duty in advocate-client relationship with the Defendant and he should therefore be restrained from representing the Plaintiff in this matter.

To begin with, the prayers sought in the motion are of an injunctive nature. Unlike in the cases **of Uhuru Highway Development Ltd & Others –vs- Central Bank of Kenya (supra) and King Woolen Ltd – vs- Kaplan Stratton (Supra)** wherein the jurisdiction of the court to grant the injunction was invoked, the present motion is not shown to have invoked that jurisdiction. It is expressed to be brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. Since no objection was raised by Dr. Khaminwa on the suitability of the application as brought, I will not address the issue.

Was Dr. Khaminwa the Advocate for the Defendant in the Goldenberg Commission of Inquiry? Dr. Khaminwa contends that he did not have any client at the Goldenberg Commission of Inquiry, that having been appointed as an Assisting Counsel for the commission, he acted for no party and that in any event the inquiry was only an investigation. I have already set out above Mr. Murgor's submissions on this issue which I need not recapitulate here.

Section 2 of the Advocates Act defines a "client" to include:-

"Any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity has power express or implied, to retain or employ, and retains or employs or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs."

It is trite law that a client-advocate relationship arises when a client retains an Advocate to offer legal services specifically or generally. In **BLACKS LAW DICTIONARY, 6th Edition, 1990,** the word retainer has been explained as follows:-

"In the practice of Law, when a client hires an attorney to represent him, the client is said to have retained the Attorney. This act of employment is called the retainer. The retainer agreement between the client and Attorney sets forth the nature of services to be performed, costs, expenses and related matters."

In **STROUDS JUDICIAL DICTIONARY of words and phrases, 1986, Vol 4 at page 2283,** it is posited that to retain is "to keep in pay", "to hire."

Finally, in **WORDS AND PHRASES LEGALLY DEFINED, 2nd Edition, Vol. 4 by JB Saunders,** it is explained that:-

"The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitors retainer by that client, consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment……"

In my view therefore, for a Client-Advocate relationship to arise, there has to be a retainer, a party must employ and/or instruct an advocate to offer legal services.

In the Consultancy Agreement dated 23rd July, 2004 and produced as "KA2", it is clear that the

Government of Kenya appointed Dr. Khaminwa to be assisting counsel to the said Commission and paid for his services therefor. That agreement, in my view, amounted to a retainer between the Government of Kenya and Dr. John Khaminwa. Accordingly, it is not correct as contended by Dr. Khaminwa that he did not have a client at that Commission of Inquiry. Indeed and I so hold, Dr. Khaminwa had a client in the name of the Government of Kenya to whom he owed the professional duty of care required of an advocate in the execution of the obligations under that retainer.

Is the Defendant akin to the Government of Kenya and did the Advocate-Client relationship between Dr. Khaminwa and the Government of Kenya extend to the Defendant? Mr. Murgor ably submitted that in Gazette Notice No. 1238 of 29th February, 2003 "KA3" which set out the terms of reference for the Goldenberg Commission of Inquiry, the terms Government of Kenya and Central Bank of Kenya were used inter-changeably meaning they meant one and the same thing. He also submitted that under Section 8 of the Central Bank of Kenya Act Cap 491, the ownership of the entire paid up capital of the Bank vests in the permanent secretary to the Treasury and therefore the Bank is wholly owned by the Government of Kenya.

I have examined in detail "KA3" which is gazette Notice No. 1238 setting out the terms of reference the Goldenberg Commission of Inquiry and I am not in agreement with Mr. Murgor. It is not correct that the names Government of Kenya and Central Bank of Kenya are used inter-changeably. The words Central Bank of Kenya are only used and or referred to in clauses (b) (iv) and (c) whereby the Commission was to inquire whether foreign currency was remitted to the Central Bank of Kenya and the payment by Central Bank of Kenya of US$ 210 million to the Exchange Bank Ltd. It is only in those circumstances and instances that Central Bank of Kenya has been referred to therein. Whilst there is reference to the term Government of Kenya where necessary, they are not used inter changeably.

My view is that, the terms of reference set out in Gazette Notice No. 1238 does not amount to an inquiry by the Central Bank of Kenya to the activities of the so called Goldenberg International Ltd but an inquiry by the Government of Kenya to the activities of the Goldenberg International Ltd. In any event, there were other entities involved other than the Central Bank of Kenya.

As regards Section 8 of the Central Bank of Kenya, the Bank may wholly be owned by the Government of Kenya but that does not make it to be the Government of Kenya. Indeed all corporations in Kenya are owned by the Government of Kenya through various ministries but that does not make them to be the Government of Kenya. Indeed those corporations, as is the Defendant herein, when being sued they are sued in their own name and there is no reference whatsoever to the Government Proceedings Act or the Attorney General. Indeed Section 3 of the Central Bank of Kenya Act, Cap 491 provides:-

"3.(1) There is hereby established a bank which shall be known as the Central Bank of Kenya and which shall also be known by the alternative corporate name of the Banki Kuu ya Kenya.

(2) The Bank shall be a body corporate with perpetual succession and a common seal with power to acquire, own, possess and dispose of property, to contract, and to sue and to be sued in its own name." (Emphasis mine)

The said Section clearly establishes that the Defendant is a body corporate which is completely independent of the Government of Kenya and cannot purport to be the Government of Kenya itself although it may be owned by the said Government.

In my view therefore, if the Government of Kenya wished "its Bank" the Defendant to be covered by the retainer with Dr. Khaminwa dated 23rd July, 2004, the Government should have made the Defendant a party to the same. The same was never executed by or on behalf of the Defendant but by the Government of Kenya and Dr. Khaminwa only.

Accordingly, I hold that there is no material before me to find that Dr. Khaminwa acted for the Defendant during the Judicial Commission of Inquiry to the Goldenberg Affair.

As regards the contention that Dr. Khaminwa is prohibited by the retainer produced as "KA2" from disclosing confidential matters obtained during that inquiry for a period of seven (7) years and that it prohibited him from acting in conflict with the activities under that contract, I have already found that that contract was personal, individual to the parties therein, i.e. the Government of Kenya and Dr. Khaminwa, the same did not extend to other entities, the Defendant included.

Even if I am wrong on the non-existence of client-advocate relationship between Dr. Khaminwa and the Defendant, which believe I am not, what confidential and privileged information was imparted to Dr. Khaminwa which may be prejudicial to the Defendant?

In the recital to the citation in Gazette Notice No. 1238 of 24th February, 2003, His Excellency, the President of the Republic of Kenya, inter alia, directed that:-

"And I do direct that in accordance with the provisions of Section 10 (1) of the said Act, the Commissioners shall summon any person or persons concerned to testify on oath and to produce any books, plans and documents that the Commissioners may require.

And I do command all other persons whom it may concern to take due notice hereof and to give their obedience accordingly."

My take of this is that all persons including the Defendant were duty bound, when summoned, to attend the commission and to produce any and all documents required by the commission. This is the light and angle in which the letter dated 5th January, 2004 by Dr. Khaminwa to the Defendant and produced as "KA1" in the Further Affidavit of Kennedy Abuga should be looked at.

As set out above, the claim is for breach of contract and allegations of discrimination by the Defendant against the Plaintiff. In the two Affidavits filed by the Defendant, there has been no deposition as to the nature of the confidential information that was imparted to Dr. Khamiwa that would be prejudicial to the Defendant in these proceedings. The Court of Appeal in the authorities I examined above has clearly stated that a litigants choice of counsel should not be interfered with unless there is evidence that real mischief or real prejudice will in all human probability result. There is no such evidence to conclude that if Dr. Khamnwa was to act for the Plaintiff in this case the Defendant will suffer prejudice.

It has not been shown in the Affidavits or otherwise and/or alleged in any way whatsoever that Mr. Micah Cheserem, Professor Njuguna Ndung'u, Mr. Kenneth Abuga, Mr. Gerald Nyaoma, Mr. J.K. Birech, Mrs. A.D.N. Mochache and Mr. John Muruu gave any statement to or were interviewed by Dr. Khaminwa. In any event, it should also be shown that if any of them was interviewed by Dr. Khaminwa the information given touched on the debiting of Kshs.122,975,244/15 by the Defendant of the Plaintiff's Account with itself which form the basis of the claim in this suit. That evidence lacking, this court is not prepared to speculate and extend its imagination as to the likelihood of the existence of such information. The mere fact that Dr. Khaminwa took statements from the Defendants employees or perused its documents is not enough. The Court of Appeal in the cases of **Delphis Bank Ltd –vs- Channan Singh Chatthe and 6 others (supra) and William Audi Odoba & Another –vs- John Yier & Another** was categorical that the mere fact that a counsel has acted for a party and prepared such party's documents does not in itself bar such advocate from subsequently acting against such a party. In any event, only Mr. Kenneth Abuga has filed his witness statement none of the other alleged proposed witnesses has filed any witness statement.

In my view, the cases of **Uhuru Highway Development Ltd (Supra) and King Woolen Mills Ltd (Supra)** are distinguishable in that in those cases it was clear that the Advocates were involved in the negotiations of the Loan Agreements and subsequent execution of the securities in question. There was also allegations of duress in the Uhuru Highway Development case and there was a likelihood that the Advocates in those cases were to be called as possible witnesses thereby bringing into operation Section 9 of the Advocates Act Cap 16 of the Laws of Kenya. In the present case, Dr. Khaminwa did not author the contract for US$ 19 million, he did not author any documentation that led to the charge or debit of the sum of Kshs.122,975,244/15 upon the Plaintiff's account by the Defendant, neither did he author the

Report of the Judicial Commission of Inquiry to the Goldenberg Affair which is allegedly proposed to be relied on. Indeed it was not even suggested that Dr. Khaminwa could be a witness of the Defendant in these proceedings.

In view of the foregoing I am not convinced that the Defendant's application dated 13th January, 2012 has any merit and the same is hereby dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 20th day of April, 20120

…….
A. MABEYA
JUDGE