REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 515 OF 2011

DR. RITESH NANDLAL PAMNANI ……..……..... 1ST PLAINTIFF
GARATRI PAMNANI ……..……..... 2ND PLAINTIFF

VERSUS

DHANWANTI HITENDRA HIRANI ……..……. 1ST DEFENDANT

HITENDRA SHAMJI HIRANI ……..……. 2ND DEFENDANT

STAR BIOTECH LAB & DIAGONOSTICS LIMITED …… 3RD DEFENDANT

RULING

The Motion for determination is dated 7th February, 2012 brought under Rule 9 of the Advocates (Practice) Rules, Sections 134 and 136 of the Evidence Act Chapter 80 Laws of Kenya and Sections 1A and1B of the Civil Procedure Act seeking to restrain and subsequent disqualification of the firm of Ms. Mohamed & Samnakay, Advocates from acting or conducting this matter on behalf of the Defendants. The application is grounded on the Supporting Affidavit of Dr. Ritesh Nandlal Pamnani sworn on 7th February, 2012.

In his Affidavit, Dr. Ritesh swore that in or about April, 2010, the Plaintiffs and the 1st and 2nd Defendants entered into a joint venture known as Star Biotech Lab & Diagnostics, that it was agreed between the parties that a formal agreement for the shareholding and directorship of the joint venture was to be prepared by the firm of Mohamed & Samnakay Advocates, the same was prepared by one Jacob Ng'ang'a who was acting under the express instructions of Mrs. Samnakay Advocate, that upon finalization the said agreement was executed by the parties and five (5) copies thereof were left in the hands of Mrs. Samnakay Advocate in October, 2010 for formalization and stamping, that the firm of Mohamed & Samnakay Advocates acted for all the parties in this suit during the negotiations and drafting of the said Shareholding and Management Agreement of the 3rd Defendant which agreement is the core of the dispute in this suit, that the said firm of Advocates has confidential information imparted during the said negotiations which may be used to the prejudice of the Plaintiffs.

Dr. Hitesh further swore that Mrs. Samnakay Advocate is a potential witness in these proceedings, that

the issue of conflict of interest was raised at the earliest time possible when the Plaintiff's previous Advocate. Mr. A.B Shah wrote to the said Advocates on 29th August, 2011.

Mr. Kang'ethe, learned Counsel for the Plaintiff submitted that having acted for both parties in the transaction, the firm of Mohammed & Samnakay Advocates were obliged to protect the interests of all the parties equally, that from the Defence and the Replying Affidavit of Minaxi Saeed Samnakay it was obvious that the firm of Mohamed & Samnakay had been instructed to reduce the said agreement into writing, that the draft agreement was an input of all the parties the Plaintiffs and the 1st and 2nd Defendant included, that there was openly a conflict of interest in the circumstances. Counsel cited and relied on Rule 9 of the Advocates (Practice) Rules, **Uhuru Highway Development Ltd –vs- CBK case, Delphis Bank Ltd –vs- Chana Singh Chattle & others, William Andi Odoba & others –vs- John Oyier & Anor** in support of his contention that the firm of Mohamed & Samnakay Advocates cannot purport to act for the Defendants against the Plaintiffs in the circumstances of this case.

The Defendants and the firm of Mohamed & Samnakay strenuously opposed the application. They filed a total of four Replying Affidavits of Minaxi Saeed Samnakay, Esther Wanjiku Mbugua, Hitendra Shamji Hirani and Mahendra Chauhan all sworn on the 16th February, 2012 and written submissions filed on 30th April, 2012. They contended that at no time did Mrs. Samnakay was involved in the negotiations of the terms and conditions contained in the draft agreement for shareholding and management of the 3rd Defendant, that the said firm of Advocates was only instructed to act for all the Defendants, that no confidential information whatsoever was imparted by the Plaintiff to the said firm. That had the agreement materialized, the same would have been witnessed by different Counsels and that the issue was being raised belatedly.

Further, Mrs. Samnakay Advocate swore that she has never seen the 2nd Plaintiff and there is no way she could have acted for a client she has never seen or met, that there was no letter of instructions that had been produced nor proof of payment of fees, that it is the 3rd Defendant who paid the legal fees. The Defendants admitted however that the 1st plaintiff severally visited the offices of Mohamed & Samnakay Advocates, that the said firm of Advocates only drew the agreement and that had it been agreed upon, it would have been approved by the Plaintiffs' independent Advocates and that the nature of confidential information has not been disclosed.

Ms. Ntabo, learned Counsel for the Defendants reiterated what was contained in the said Affidavits and further submitted that at no time did the firm of Mohamed & Samnakay request for or was given any confidential information by the Plaintiffs and that the application was meant to delay the trial of the suit. She therefore urged the court to dismiss the suit.

I have considered the Affidavits, the written submissions, the authorities cited and the rival arguments of Counsel.

What is the law regarding Advocate-client relationship? 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. 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 how the courts have dealt with the issue of possible conflict of interest by an Advocate.

In the case of **Oriental Commercial Bank Ltd –vs- Central Bank of Kenya HCCC No. 76 of 2011(UR)** after analyzing case law, I held that:-

"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."

In the present case, the Plaintiffs have claimed in their Plaint dated 18th November, 2011 that in or about April, 2010, they agreed with the 1st and 2nd Defendant to enter into a joint venture known as Star Biotech Lab & Diagnostics for carrying on the business of providing laboratory, medical and Diagnostic research services in Kenya. That they agreed to form the 3rd Defendant in the shareholding set out in paragraph 7 of the Plaint. That a shareholding and management agreement was prepared by the firm of Mohammed & Samnakay Advocates. They further pleaded that all the shareholders contributed to the business which commenced operations in June, 2010. That although the shareholders and management agreement was executed by all the parties and left with the firm of Mohamed & Samnakay Advocates for attention and stamping, a copy thereof has never been given to the Plaintiffs. The Defendants have filed a Defence denying the Plaintiff's claim.

From the foregoing and the prayers in the Plaint, it is clear that the central issue in dispute in this case is the very existence or otherwise of the alleged shareholding and management agreement relating to the 3rd Defendant.

The Plaintiffs have alleged that the firm of Mohamed & Samnakay Advocates was involved in the negotiations and ultimate finalization of the alleged agreement. They have applied that the said firm of Advocates be restrained from acting for the Defendant's against them. The said firm has denied ever acting for the plaintiffs in the matter leading to this dispute.

The issues therefore in the motion before me is, did the firm of Mohamed & Samnakay act for the Plaintiffs in the transaction as alleged and in the circumstances of this case, is there any prejudice to be suffered by the Plaintiff if the said firm of Advocates acted against them?

I have had to review the various Affidavits on record to arrive at my decision. In paragraph 5 of the Supporting Affidavit, the Deponent posited:-

"5. THAT the business commenced in June 2010 and all the shareholders invested in the business in accordance with the agreed terms pending the signing of the written Agreement. The draft Agreement was prepared and dispatched to all parties by one Jacob Ng'ang'a who was working under the express instructions of Mrs. Samnakay Advocate some times in September, 2010. Attached herewith and marked "RNP1 a, b, c & d are copies of the emails."

That paragraph was not denied by the Defendants in any of the four Affidavits filed against the application. I have perused the emails exhibited in that paragraph and my view of them is that they do not strike me as correspondence from an Advocate's office to a 3rd party who is not that Advocate's client. Indeed the emails exhibited as "RNP1a" "1b" and "1d" are common in the sense that they were written to its recipients. They are completely different in tone with the letter by the firm of Mohamed & Samnakay Advocates dated 17th May, 2011 and exhibited in Mrs. Samnakay's Replying Affidavit as "HSH2". I note that the latter letter was written way after negotiations had broken down in November, 2010.

One issue that is not in dispute is that the subject shareholders and management agreement was prepared by the firm of Mohamed and Samnakay Advocates. One of the issues at trial would be whether the said

agreement was completed as contended by the Plaintiffs or not as denied by the Defendants.

The Plaintiffs have indicated that Mrs. Samnakay would be a witness. That is a possibility having in mind that in the email dated 27th September, 2010 and produced as "RNP1d" from the offices of Mohamed & Samnakay Advocates reads:-

"Subject: Final copy for agreement to be signed.

See the attached from the Advocate."

The Plaintiffs contention is that that agreement was executed shortly after this email since the execution is contended to have been in October, 2010. Further, the writer of that email who is said to have been acting at the express instructions of Mrs. Samnakay does not state "see the attached from the Advocates for Dhanwanti and Hitendra" but it states plainly from the Advocate. The question is, whose Advocate if not the Advocates acting in the matter?

Mrs. Samnakay Advocate swore in paragraph 29 of her Replying Affidavit that she had not met any of the Plaintiffs. However, Esther Wanjiku Mbugua, secretary in the firm of Mohamed & Samnakay swore in her Affidavit of 16th February, 2012.

"5. That I have personally seen the 1st Plaintiff in our offices sometime in mid 2010.

7. That in the month of June, 2010 I was given a draft shareholding agreement to type by Mrs. Samnakay which I typed in the draft form.

8. That Dr. Ritesh Nandlal Pamnani visited our offices a couple of times without appointment with our Mrs. Samnakay, and always left without seeing her as she was often in court at the material time.

11. That I believe Mrs. Samnakay personally informed him that he should try not to see her and if there was any issue he should seek help or assistance elsewhere and thereafter did not see Dr. Ritesh."

From the two Affidavits, what comes out is that the 1st Plaintiff did actually visit the offices of Mohamed & Samnakay Advocates, the visits must have been in relation to the agreement in dispute, the person who the 1st Plaintiff met in that firm is not disclosed. What is clear is that between April, 2010 and September, 2010, the 1st Plaintiff made visits to that firm and exchanged correspondences with that firm. This was the time and period when the subject agreement was being negotiated. According to the Affidavit of Esther Wanjiku Mbugua, Mrs. Samnakay gave her a draft of the same in June, 2010. That is the same draft in respect of which emails were being exchanged in September, 2010 between the 1st Plaintiff and one Jacob Ng'ang'a who according to the Plaintiffs was acting under the express instructions of Mrs. Samnakay.

The totality of the foregoing leads me to conclude that there was a relationship between the Plaintiffs (or at least the 1st Plaintiff) with the law firm of Mohamed & Samnakay between April, 2010 and October, 2010. I am convinced that the relationship must have been that of Advocate-client. Why else should the 1st Plaintiff make visits to the offices of that law firm? When and how did Mrs. Samnakay advice the 1st Defendant not to see her as sworn by Esther Wanjiku Mbugua in paragraph 11 of her Affidavit? Why has Mrs. Samnakay kept silent on this fact? As I stated earlier, the emails exchanged in September, 2010 did not disclose a contrary relationship. What the law firm and the Defendants have done is to produce documents that were prepared way after the Plaintiffs and the 1st and 2nd Defendants had fallen out of each other in November, 2010. It is in that light that the cheque dated 29/03/2011, feenote dated 12/04/2011 and letter of 17/05/2011 produced as Exhibit "HSH1", "HSH2" and "HSH3" should be viewed. Indeed, as at the time of negotiations, the 3rd Defendant was not in existence yet it is the one that seems to have ended up paying the fess as can be seen from the cheque dated 29/03/2011 produced as "HSH1".

As regards the Defendant's contention that the Plaintiffs are raising the issue belatedly, I do not accept that fact. As early as 29th August, 2011 when the dispute arose what I believe to have been the very first correspondence from the Plaintiffs to the firm of Mohammed & Samnakay Advocates on this issue, A.B. Shah Advocate raised the issue of the propriety of the said firm acting against the Plaintiffs yet that firm had acted for all the parties in the drawing up of the agreement. The response of Mohamed & Samnakay Advocates to that letter is instructive. They never denied that fact. They wrote on 16th September, 2011 and stated:-

"***We have noted the contents of your said letter and will await your further action in this matter to respond appropriately."***

If the said firm had not acted for all the parties in the drawing up of the agreement as Mr. A. B. Shah Advocate had intimated, why did they not indicate so or deny the same at the very first time that issue arose. My conclusion is that, the said firm did not deny the fact because it was a true fact. Their attempt to deny it now is but an afterthought.

I am convinced that during the negotiations, it may well be that the 1st plaintiff may have imparted confidential information to the firm of Mohamed & Samnakay as to the nature and structure of the shareholders and management agreement relating to the 3rd Defendant.

The Defendants have contended that there is no letter of instructions by the Plaintiffs to the firm of Mohamed & Samnakay Advocates. That may be so. A retainer by an Advocate may be express or implied. In the case of **Ahmednasir Abdikadir & Co. Advocates –vs- National Bank of Kenya Ltd (2007) e KLR**, Osiemo J, (as he then was) while considering the issue of a retainer under Section 51(2) of the Advocates Act observed:-

"Njagi J in the case of NYAKUNDI & COMPANY ADVOCATES (Supra) gave the definition and form of retainer from Halsbury's Laws of England, 4th Edition. Re issue at paragraph 99, page 33 where it is stated:-

……

Njagi J pointed out that in the same work, it is further explained that a retainer need not be in writing, unless under the general law of contract, the terms of the retainer or the disability of a party to it make writing requisite, it is then further stated, the judge added, at paragraph 103:-

'Even if there has been no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular case……."

I am in agreement with the said holding that a retainer need not necessarily be in writing. It can be implied from the dealings between the parties.

Accordingly, I am satisfied that from the circumstances of this case, there existed a relationship of Advocate-client in the negotiation of the shareholders and management Agreement which is the subject matter of the dispute in this case.

Applying the principles of law applicable to applications such as the present one, I am satisfied that it may well be the case that Mrs. Samnakay will be a witness in this case, that if the firm of Mohamed & Samnakay Advocates acts for the Defendants in this case against the Plaintiffs, there is a likelihood of a mischief or real prejudice against the Plaintiffs resulting. The said firm may inadvertently use information that may have passed on between the 1st Plaintiff and the said firm for the benefit of the Defendants and to the detriment of the Plaintiffs.

Accordingly, I am satisfied that the Plaintiffs' Notice of Motion dated 7th February, 2012 is meritorious and I allow the same as prayed.

Dated and delivered at Nairobi this 29th day of May, 2012.

……
A. MABEYA
JUDGE