REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 461 OF 2011

KENYA PIPELINE CO. LTD. :: PLAINTIFF

- VERSUS -

CORPORATE BUSINESS FORMS LTD. :::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. Before the court is a **Notice of Motion** application dated **13th April 2012** brought under **Rule 9** of the **Advocates (Practice) Rules; Order 51 Rule 1** of the **Civil Procedure Rules, Section 3** and **3A** of the **Civil Procedure Act.** The application seeks the orders that the firm of **ONYONI OPINI** and **GACHUBA ADVOCATES** be disqualified from acting for the Defendants, and that the costs of the application be provided for.

2. The application is premised on the grounds *inter-a-alia* that:-

a) Andrew Mwaniki Gachuba, a partner in the firm of ONYONI OPINI & GACHUBA ADVOCATES who has the personal conduct of this matter on behalf of the Defendant, worked at the Plaintiff's procurement department at the material time when all the transactions giving rise to the cause of action herein arose and even executed most of the documents to be relied upon by the Plaintiff in this matter.

b) The said advocate has vital information relating to the matter which will make it highly prejudicial to the Plaintiff and therefore render him unfit to act for the Defendant due to conflict of interest.

c) Rule 9 of the Advocates (Practice) Rules expressly bars advocates from acting in a situation giving rise to a conflict of interest.

3. The application is supported by affidavit sworn by **FLORA OKOTH** dated **13th April 2012** with annextures. These annextures include a letter of appointment dated **2nd June 2006** by the Defendant appointing Mr. Gachuba to the post of Supplies Officer II – Group 6 with the Defendant, a letter of resignation from that post by Mr. Gachuba dated **28th November 2008**, and a letter dated **16th February 2012** by Lilian Koech & Associates asking Onyoni Opini Gachuba Advocates to disqualify themselves from the suit. The last annexture is a letter dated **21st February 2012** by Onyoni Opini & Gachoba Advocates where they state categorically that they would not disqualify themselves.

4. The application is opposed vide a replying affidavits sworn by **MWANIKI GACHUBA** and **JOSEPH KOGO** both dated **23rd April 2012**. Together with those the Respondents also filed a Preliminary Objection dated **23rd April 2012** opposing the said application. The grounds of objection are 2:-

(a) That Flora Okoth the deponent of the Plaintiffs' Affidavit is not authorized under Company Seal to swear the verifying affidavit and other necessary affidavits.

(b) That the suit filed by the Plaintiff has not been authorized by way of a shareholder's resolution nor has the firm acting for the Plaintiff been authorized to do so under the Corporation Seal.

5. The court directed that the Preliminary Objection be considered as a response by the Respondent to the application and so the Preliminary Objection and the application were heard together.

6. From the outset, I must state that I have considered the Preliminary Objection and I find it a legal irritant which is meant to cloud and clog the issues in this matter. In the exercise of my discretion I have decided to ignore the said Preliminary Objection so that I can reach the substance of the matter in the substantive application. As the said Preliminary Objection only raises technical legal issue, I do not consider those issues substantive enough to dispose off this matter at this stage, and should there be any legal deficiency identifiable from the said Preliminary Objection for any future references in this matter, I herewith grant leave to the Defendant to take relevant corrective measures if need be, taking into account that the court, under **Article 159 2 (d)** will not be unduly stuck with technicalities such as the ones at hand.

7. I have carefully considered the substantive application, the opposing submissions and the law. The Applicant's main submission is that by virtue of Mr. Gachuba having been employed by the Plaintiff between 2006 – 2008, Mr. Gachuba came into confidential information which would make him severely conflicted to act for the Defendant in this matter. This conflict is now extended to the law firm in which Mr. Gachuba is. Relying on the annextures to the supporting affidavit by FLORA OKOTH, Mr. Gachuba has contended that there are no documentary evidence that he acquired any or any relevant information during his employment with the Defendant to warrant the fear that he could be conflicted in the matter before the court. The additional replying affidavit by JOSEPH KOGO reinforces this submission.

The Applicant further submitted that Mr. Gachuba is a key witness in this matter. Although the Applicant has not cited it, the Applicant must have had **Section 134** of the **Evidence Act** in mind. That Section makes any communication between an advocate and his client privileged. However, it is agreed that Mr. Gachuba has never at any one time been an advocate for the Plaintiff, since his employment was as a Suppliers Officer II and not as an advocate. So, it is arguable that he obtained no communication which may be deemed to be subject to privilege envisaged under **Section 134** of the **Evidence Act**.

However, the Applicant has cited **Rule 9** of the **Advocates (Practice) Rules**, which states:-

"no advocate may appear as such before any court or tribunal in any matter in 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 affidavit, he shall not continue to appear."

Although the Applicant never referred to any authorities in the matter, the Applicant would have been interested in the following cases which would appear to support the Applicant's position:-

- **KING WOOLEN MILLS LTD. & ANOTHER – VS – KAPLAN & STRATOO ADVOCATES (1990-1994) 1EA 224 (CAK).**
- **UHURU HIGHWAY DEVELOPMENT LTD. & OTHERS – VS – CENTRAL BANK OF KENYA & OTHERS [2002] 2EA 654 (CAK).**
- **FRANCIS MUGO & OTHERS – VS – JAMES BRESS MUTHEE & OTHERS CIVIL SUIT NO. 122 OF 2005 – NAKURU.**

All the above cases are distinguishable but would provide a clear leverage for the Plaintiff/Applicant's

case. However, in all those cases issue at hand was existing advocate-client relationship and whether it created conflict of interest to warrant the advocate be disqualified from appearing for one of the parties.

In **FRANCIS MUGO** case cited above, the High Court disqualified Mr. Andrew Mulate Musangi Advocate from representing the Plaintiff in the suit on grounds that the Defendants intended to call Mr. Musangi as their witness in that he drew and witnessed a certain lease between the 1st Plaintiff and some other parties relevant to the suit. In that case the Defendants had actually put the Advocate on notice that he would be summoned a as witness and so on that ground he could not be an advocate for the Plaintiff and at the same time a witness for the Defendant.

This case is persuasive. This court is not bound by it but even if it were, I think it is distinguishable in the sense that in that case the Advocates had carried out instructions on behalf of one of the Plaintiffs. He had also been put on notice that he would be a witness, and he was told in advance what he would be required to testify about. In the case before the court, things are not as clear. It is not stated what confidential information Mr. Gachuba may have acquired which may make him conflicted in this matter. A general submission that Mr. Gachuba worked in the procurement department and may have acquired information relevant to this case is, in my view, not enough to disqualify a counsel from representing a client. The submissions that Mr. Gachuba will be called as a witness is at this stage merely speculative as no such notice has been given despite the requirement by law that a list of witnesses be provided with the institution of the suit. Should it be necessary at some time in future for the Plaintiff to wish to call Mr. Gachuba as a witness, a notice to the effect will issue giving reasons and probably a witness questionnaire. At this stage the assertion that Mr. Gachuba will be called as a witness is not only speculative but also appears to be mischievous. In **MEREKA – VS – NATIONAL BANK OF KENYA LTD. HCCC NO. 182 OF 2002**, the facts were not far different from what we have here. In that case Justice Waki had this to say:-

"If such communication would be the basis for disqualifying advocates from acting for their clients, then I do not think any advocate would communicate freely with his clients. All persons have a right, whether in criminal or civil proceedings to be represented by legal counsel of their choice, if they decide to appoint one. It is a right that cannot be interfered with lightly. Whether the Defendant's Advocate will eventually be summoned as a witness remains moot and may be raised and considered if and when that happens. I am not satisfied that I should disqualify the Advocates on that ground at this stage."

8. It is important to note that all the cases I have considered involved allegations of conflict of interest in situations where it was alleged that an advocate had acted for one of the parties to the suit. In the particular case, there is no such allegations that Mr. Gachuba had acted for the Plaintiff. Rather, it is agreed that he worked for the Plaintiff in its Procurement Department where he was led by the Procurement Manager assisted by Supplies Officer, Senior Supplies Officer, Supplies Officer I and then Mr. Gachuba. Mr. Gachuba's role was clearly supportive in that structure. There is no evidence that he executed any of the documents to be relied upon by the Plaintiff. Neither is there any evidence that during his tenure he came across any specific information or documentation relating to the matter in dispute herein. The Plaintiff has already filed its list of documents on **12th October 2011**. It is not indicated which of those documents have Mr. Gachuba's input or inprint, and he is not listed as a witness. Finally, Mr. Gachuba was employed as a Supplies Officer II and not as an advocate and therefore applicability of **Rule 9** of the **Advocates (Practice) Rules** is distinguishable.

9. Lastly, it is important to note that the Defendant has a right under the Constitution to be represented by an advocate or law firm of its choice. This right can, for good reasons, be taken away. However, such reasons must be full proof to find justification. It is the duty of this court to safeguard the interest of the Defendant and to make sure that such a right is not arbitrarily denied.

10. In the end, I must state that case law in matters like this is not consistent, as each case is so particularly peculiar to warrant a distinction from other cases. At the end of the day the court will have to consider the peculiar circumstances of each case and make an appropriate decision, where necessary, exercising discretion in a most judicious manner. In this matter, I am not convinced that sufficient

grounds have been advanced to convince me, in the judicious exercise of my discretion, to allow the application.

11. In the upshot I herewith dismiss the Notice of Motion application dated **13th April 2012** with costs to the Defendant/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 23RD DAY OF JULY 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Ms Peke for the Plaintiff

Opini for the Defendant

Teresia – Court Clerk