



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION 1217 OF 2007**

**KIRAGU HOLDINGS LTD.....1<sup>ST</sup>  
PETITIONER/APPLICANT**

**MUMBU HOLDINGS LTD.....2<sup>ND</sup>  
PETITIONER/APPLICANT**

**KBKANNE INVESTMENTS LTD.....3<sup>RD</sup>  
PETITIONER/APPLICANT**

**TAGAKA HOLDINGS LTD.....4<sup>TH</sup>  
PETITIONER/APPLICANT**

**P.J. KIRAGU MWANGI.....5<sup>TH</sup>  
PETITIONER/APPLICANT**

**J.K. MBUU.....6<sup>TH</sup>  
PETITIONER/APPLICANT**

**MARY WAITHERA GACHUI.....7<sup>TH</sup>  
PETITIONER/APPLICANT**

**VERSUS**

**THE HON. MINISTER FOR  
FINANCE.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup>  
RESPONDENT**

**THE CENTRAL BANK OF KENYA.....3<sup>RD</sup>  
RESPONDENT**

**THE CONSOLIDATED BANK OF KENYA  
LTD.....4<sup>TH</sup> RESPONDENT**

**THE PERMANENT SECRETARY TO THE  
TREASURY.....5<sup>TH</sup> RESPONDENT**

**PRIVATIZATION COMMISSION.....6<sup>TH</sup>**

## RESPONDENT

### RULING

1. The Petitioners/Applicants herein, by a Notice of Motion dated 1<sup>st</sup> July 2011 seek Orders under **Article 22** of the **Constitution** of Kenya, **Rule 9** of the **Advocates (Practice Rules, Advocates Act, Cap.18)**, that the firm of M/s. Kaplan and Stratton Advocates be restrained by an Order of Injunction from further acting for the Consolidated Bank of Kenya Ltd, the 4<sup>th</sup> Respondent in the Petition.
2. In the Supporting Affidavit sworn on 1<sup>st</sup> July 2011 by one Peter James Kiragu Mwangi, it is the case for the Applicants that the Proceedings herein relate to events in 1991 leading to the incorporation of the Consolidated Bank Limited and the takeover of Nationwide Finance Co. Ltd (NFCL) in which he and others had substantial shares. That the said action in his view was undertaken to *“aid and abet a political conspiracy being executed by the SIC in patent contravention of the Banking Act and other Laws including the Constitution of Kenya then in force.”*
3. Further, that two crucial documents viz. A Memorandum of Understanding dated 30<sup>th</sup> January 1990 and 30<sup>th</sup> January 1991 and an Agreement for Sale of Shares signed by the shareholders of NFCL in or about March 1992 were drawn by M/S. Kaplan and Stratton Advocates and the Applicants require those documents in furtherance of its case. The said firm in a letter dated 27<sup>th</sup> June 2007 declined to release the documents to the Applicants without the express approval of their client, Consolidated Bank Ltd.
4. The above being the case, it is the contention by the Applicants that the said law firm and particularly Mr. Fred Ojiambo, Advocate, are in a conflict of interest situation and that the exigencies of the Rules of Law and principles of natural justice would dictate that they should cease from acting for the 4<sup>th</sup> Respondent. That their continued representation aforesaid would constitute a patent contravention of **Articles 10** and **159** of the **Constitution** and would also amount to a violation of the Applicants fundamental freedoms as enshrined in **Articles 27, 28, 47 and 150** of the **Constitution**.
5. In furtherance of the above arguments, Mr. Mungai, advocate for the Applicants has urged the point that the alleged excesses in the sale transaction referred to above, involved the firm of Kaplan and Stratton and that two of its partners were subscribers to the Memorandum and Articles of Association of consolidated Bank Ltd and therefore their role was blurred during the material time. It would therefore prejudice the Applicants case since some of the witnesses they intended to call would include members of the law firm and for them to continue acting for the 4<sup>th</sup> Respondent would be improper in the circumstances.
6. Mr. Mungai pointed me to the decisions in Uhuru Highway Development Ltd. & Others vs. Central Bank of Kenya Ltd. & 9 Others [2002] 2 EALR 645 as well as King Woolen Mills Ltd & Anor vs. Kaplan and Stratton Advocates [1990-1994] E.A. 244 which I will return to later in this Ruling.
7. The response to the Application is contained in a Replying Affidavit sworn on 10<sup>th</sup> February 2012 by Fred Ojiambo aforesaid and it is his case in that Affidavit and in Submissions on behalf of Kaplan and Stratton, that the Application is misguided and devoid of any credible evidence to warrant grant of the Orders sought. That whereas the firm provided legal services leading to the incorporation of the 4<sup>th</sup> Respondent, which then took over the assets and liabilities of nine insolvent financial institutions in Kenya, including NFCL, none of the Applicants were its clients and their claim in that regard *“is not only delusionary and fanciful but also baseless, as is evident from the lack of evidence in that regard.”*

In any event, any evidence as to the relationship that exists between the 4<sup>th</sup> Respondent and its lawyers is privileged and protected by **Sections 134** and **137** of the **Evidence Act (Cap.80)**. That no evidence has been tendered to show what illegality the law firm has been engaged in and which would then amount to an exception to the Rule relating to non-disclosure of privileged information.

8. Further, that the invocation of **Articles 10, 27, 50 and 159** of the **Constitution** is in error and the said Articles are irrelevant to the issues raised in the Application. On the contrary, that prejudice would be caused to the 4<sup>th</sup> Respondent if it is denied the right to a counsel of its choice and the Application was mischievously filed to frustrate the prosecution of the 4<sup>th</sup> Respondent's Preliminary objection to the entire proceedings herein.

9. I have considered the Application and the rival Submissions and I consider that the first issue to determine is whether Kaplan and Stratton had any relationship with the Applicants during the material time. To that question I find no clear answer. What is not in doubt is that Kaplan and Stratton drew the Memoranda of Understanding dated 30<sup>th</sup> January 1990 and 30<sup>th</sup> January 1991 respectively. It also drew the Agreement for sale of shares in February or March 1990. It also rendered legal services relating to the creation and establishment of the 4<sup>th</sup> Respondent in or around 1989.

From the documents placed before me, coupled with the denials contained in Mr. Ojiambo's Affidavit, I am unable to tell who instructed M/s. Kaplan and Stratton during those transactions but certainly there is no evidence that the 8 Petitioners in this matter ever had an advocate-client relationship with the said Law Firm. The fact that they may have been shareholders in Nationwide Finance Co. Ltd does not *per se* create that relationship because in fact I have no evidence that the law firm ever acted for NFCL in the said transaction or at all. That would seem to be a matter to be determined when the Petition is finally heard.

10. Having so held, it has been argued that Kaplan and Stratton have certain information which the Applicants require to prove their case and Mr. Ojiambo and other members of the firm may be called as witnesses. Sadly, I cannot at this stage rule conclusively on that issue. Save for Mr. Ojiambo who has specifically been mentioned as a possible witnesses, no other witness has been named and in any event it is not clear what evidence is required of them. The documents mentioned elsewhere above do not belong to the law firm. They must belong either to the 4<sup>th</sup> Respondent or another party, and it is those parties that must produce them.

11. In a letter dated 4<sup>th</sup> June 1991 attached to Mr. Kiragu Affidavit in support of the Application, a demand is made to the Managing Director, Consolidated Bank Ltd and I deem it fit to reproduce that letter. It reads as follows;

***"4<sup>th</sup> June, 1991***

***The Managing Director,***

***Consolidated Bank of Kenya Ltd.***

***P.O. Box 51133,  
NAIROBI.***

***Attention: Mr. Eliud Mathiu***

***Dear Sir,***

***RE: SHARES IN NATIONWIDE***

***As you know, we signed the agreement for sale and all the transfer documents to respect of our shareholding in Nationwide some three months ago. The agreement was signed in your presence and you undertook to send us our copies of the final document.***

***Please send us these copies as quickly as possible. Needless to say, being Parties to the documents,***

each one of the sellers is entitled to a copy.

Yours faithfully,  
**KIRAGU HOLDINGS LIMITED**

**P. J. KIRAGU MWANGI**  
**MANAGING DIRECTOR**

cc **Hon. Mwai Kibaki**

**Hon. J. M. Gachui**  
**Mr. A. K. Murithi**  
**Mr. J. K. Mbuu.”**

12. By a letter dated 30<sup>th</sup> November 1991, the 4<sup>th</sup> Respondent’s Deputy Managing Director wrote as follows;

**“30<sup>th</sup> November, 1991**

**Mr. P. J. Mwangi,**  
**Kiragu Holdings Ltd.**  
**P.O. Box 57746,**  
**NAIROBI.**

**Dear Sir,**

**RE: SALE OF SHARES IN NATIONWIDE FINANCE COMPANY**

**As requested, we enclose photocopies of the Memorandum of Understanding and the Agreement for sale of shares in Nationwide Finance Company in which you are party.**

**Kindly acknowledge receipt.**

Yours faithfully,  
**CONSOLIDATED BANK OF KENYA LTD.**

**E. K. MATHIU**  
**DEPUTY MANAGING DIRECTOR**

**Encl.”**

13. The issue should have come to an end but apparently not, because on 27<sup>th</sup> June 2007, Kaplan and Stratton wrote as follows;

	<b><u>“YOUR REFERENCE</u></b>	<b><u>OUR REFERENCE</u></b>	<b><u>DATE</u></b>
2007	KK/NFC/CR/07	FNO/ZZ/1/201	27 June

**Messrs Kinoti & Kibe Co. Advocates,**  
**Queensway House, 5<sup>th</sup> Floor,**  
**Mama Ngina/Kaunda Street,**

NAIROBI.

Attention: Kibe Mungai, Esq

Dear Sirs,

**RE: NATIONWIDE FINANCE COMPANY LIMITED**

**CONSOLIDATED BANK: REQUEST FOR DOCUMENTS**

*We refer to your letter of 25<sup>th</sup> June, 2007 from which we note that you act for Messrs P. J.Mwangi, Alex Kibaki Muriithi and John Kariuki Mbuu.*

*You do appreciate that the circumstances in which you asked us to let you have the documents enumerated in your letter impose upon us a duty not to release any documents to yourselves without our erstwhile clients' approval. Accordingly, we would respectfully request you to contact our clients direct and ask them for the documents.*

*Please note, however, that this letter does not constitute any admission or acknowledgement of any of the allegations made in your letter.*

*Yours faithfully,*

**FRED N. OJIAMBO, S.C.**  
**KAPLAN & STRATTON**

*FNO/mnm."*

14. It is clear to me that the above chain of correspondence would only reinforce the fact that Kaplan and Stratton were at all times acting in their professional capacity. If at the hearing, evidence is led to show that they were involved in an illegality, the Court may at that stage make the necessary findings but at this stage and at a *prima facie* level, it would be improper to make determinate findings on their role when the relevant documents were being prepared. In any event, as I understand the Law, **Rule 9** of the **Advocates (Practise) Rules** deals with such situations quite well. It provide as follows;

***"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;***

***Provided that this Rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non contentious matter of fact in any matter in which he acts or appears."***

15. In the instant case, I am unable to find good reason that either Mr. Ojiambo or any other unnamed advocate in Kaplan and Stratton has to be called as a witness and it is not enough that the Applicants have expressed that desire. However, if in the course of the hearing such a need will properly manifest itself, then the necessary orders will be made including the invocation of the proviso to **Rule 9** which in fact allows an advocate to continue representing his client although he may be required to give evidence on non-contentious matters. I am shy at this stage to order them to cease acting as I do not have sufficient evidence to enable me do so. I agree with both Mr. Kibe and Mr. Ojiambo that the cases of Uhuru Highway Development and King Woolen Mills Ltd are relevant to the interpretation of **Rule 9** aforesaid but I am inclined to be guided by the decision in the latter case where it was held as follows;

***"An advocate cannot act in a manner prejudicial to his client or disclose any confidential information***

*to anyone without the client's consent.*

*An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate.*

*Acting for two or more common clients did not remove the necessity of confidentiality between the advocate and each of the clients separately.*

*Conclusion of the transaction for which the retainer was made did not extinguish the duties and obligations of the common advocate.*

*Delay in objecting to an advocate's continued representation of a certain client does not defeat or change the duty or obligations of the common advocate imposed on him under the retainer.*

*Real prejudice and mischief is anticipated if the respondents are permitted to continue acting or one of the parties."*

16. The above holding is relevant because aside from the fact that I see no reason to bar Kaplan and Stratton from acting, there is also the issue of confidentiality and privilege between an advocate and his client. Consent is required from a client before an advocate can divulge confidential information and elsewhere above, I have reproduced a letter by Kaplan and Stratton to that effect. I have no reason to order breach of that principle and in any event, the right to an advocate of a party's choice cannot be violated merely because another party may wish to call that advocate as a witness and I have said why.

17. In Virji and Others vs. Sood, Trevelyan J. invoked **Section 134** of the **Evidence Act, Cap.80** in holding that communication between an advocate and his client is privileged and Cozens-Hardy, M.R. in Rakusen vs. Ellis [1912] Chapter 831 at 834 had many years ago made a profound holding that "*before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.*"

18. I see no prejudice in this case at this point in time and if such prejudice is clearly disclosed later, **Rule 9** of the **Advocates (Practise) Rules** is open ended and the matter can be revisited.

19. In conclusion, I see no merit in the Application and the same is dismissed with the rider that each party should bear its costs. The reason for the latter order is that Kaplan and Stratton is not a party to the proceedings and it would not be right to embroil it as such when it is merely acting as a firm of lawyers for one party.

20. Parties should now take directions on all pending issues leading to a speedy conclusion of the issues raised in the Petition.

21. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF AUGUST, 2012**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Irene – court clerk*

*Mrs. Letapan hold brief for Mr. Kibe for Applicant*

*Miss Ndoho for Respondnet*

**Further Order**

*Preliminary objection dated 10/6/2011 to be heard on 6/11/2012*

*Parties to file Submissions before then.*

**ISAAC LENAOLA  
JUDGE**

**2/8/2012**