REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 932 of 2002

TWICTOR INVESTMENTS LTD.....PLAINTIFF
VERSUS
EURO BANK LTD (IN LIQUIDATION).....1ST DEFENDANT
CHAMGAA COMPANY LTD.....2ND DEFENDANT
TESHA (K) LTD.....3RD DEFENDANT

RULING

Before me is an application by the plaintiff purportedly made under Rule 9 of the Advocates (Practice) Rules and unnamed section of the Evidence Act *(in the written submission made by the plaintiff it was apparent that the plaintiff was referring to Section 35 of the Evidence Act)* seeking to have the firm of Messrs Ochieng' Onyango, Kibet & Ohaga Advocates to cease acting or be disqualified from acting for the 1st defendant. The application is supported by the annexed affidavit of Lawrence Muriithi Mbabu, a director of the plaintiff. The grounds are stated on the face of the application. The plaintiff contends that the statutory notice dated 18th September 1998 which is a central issue in the suit and which the plaintiff shall seek to produce in evidence during the hearing of the case was drawn by the firm of Messrs Onyango Ohaga Advocates which has now been incorporated into the firm of Messrs Ochieng', Onyango, Kibet & Ohaga Advocates. It is the plaintiff's contention that it intends to call the said firm of advocates to adduce evidence during the trial. The plaintiff further stated that the said firm of advocates authored several letters which will be the subject of the trial. The said firm of advocates ought therefore to be disqualified from acting for the 1st defendant. The plaintiff contends that since the firm of Ochieng', Onyango, Kibet & Ohaga Advocates is likely to be called as witnesses in the case, it is undesirable and unprofessional for the said firm of advocates to continue acting for the 1st defendant in the same suit.

The application is opposed. The firm of Ochieng', Onyango, Kibet & Ohaga Advocates, on behalf of the 1st defendant, filed grounds in opposition to the application. It was the 1st defendant's view that the application was bad in law, incompetent, misconceived and an abuse to the due process of the court. They state that the application was a desperate and belated attempt to undermine the 1st defendant's defence. The 1st defendant was of the view that the plaintiff had not demonstrated any grounds, whether legal or factual, to entitle the court grant the application seeking the disqualification of the said firm of advocates. The 1st defendant stated that Rule 9 of the Advocates (Practice) Rules did not bar an advocate from acting in a matter where he had previously acted in a non-contentious issue involved in the suit. The 1st defendant was of the view that if the application was granted, it would amount to denying it the right and freedom to be represented by counsel of its choice. The 1st defendant urged the court to take into consideration the fact that Rule 9 of the Advocates (Practice) Rules requires the disqualification of an advocate and not a law firm in the manner sought by the plaintiff. The 1st defendant urged the court to dismiss the application with costs.

Prior to the hearing of the application, counsel for the affected parties filed written submissions in support of their respective opposing positions. The written submissions were duly filed. Mr. Njiru for the plaintiff and Mr. Werimo for the 1st defendant orally highlighted the written submissions when the application was listed for hearing before this court. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully considered the submissions, both written and oral, made by learned counsel. The plaintiff seeks the disqualification of the firm of Ochieng', Onyango, Kibet & Ohaga Advocates on the ground that a partner in the firm, Mr. John Ohaga, had authored certain correspondence to the plaintiff in regard to the property which is the subject matter

of the suit. The plaintiff is not alleging that Mr. Ohaga acted on its behalf in any matter prior to the filing of the suit: rather, the plaintiff is saying that certain correspondence which the said Mr. Ohaga addressed to the plaintiff shall be required to be produced in evidence during trial. The plaintiff is relying on the provisions of Rule 9 of the Advocate (Practice) Rules made under the Advocates Act that states 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."*

The documents that the plaintiff claims were authored by Mr. John Ohaga are annexed to the affidavit in support of the application. I have perused them. The first document is a letter written by the said advocate, then a partner in the firm of Onyango, Ohaga & Co. Advocates. It is dated 18th September 1998. The letter is a statutory notice issued under Section 69A of the Transfer of Property Act. The letter is addressed to the plaintiff as a guarantor to a company known as Mirema Drive Estate Limited. The other four (4) letters relate to correspondences exchanged between the said firm of Onyango, Ohaga & Co. Advocates and the advocates who previously acted for the plaintiff i.e. Messrs Mwiti & Co. Advocates. It has been acknowledged by the plaintiff that the firm of Onyango, Ohaga & Co. Advocates merged with other firms to form a larger firm. The larger firm is now referred to as Ochieng', Onyango, Kibet & Ohaga Advocates. The said firm of advocates does not deny that indeed a partner in the firm authored the letters in question. However, they argued that neither Rule 9 of the Advocates (Practice) Rules nor the Evidence Act bar the firm from acting for a client on whose behalf correspondence was written prior to the filing of the suit.

Is the argument advanced by the plaintiff in support of its application for the disqualification of the said firm of advocates sustainable? I do not think so. The correspondence in question were written by the advocate prior to the filing of the suit. The letters were written on instructions of the 1st defendant. At no time did the said advocate purport to act for the plaintiff. The Court of Appeal decision in Uhuru Highway Development Ltd & Others vs Central Bank of Kenya & Anor (2) [20002] 2EA 654 does not apply in the circumstances of this case. That decision is distinguishable because the court found that the advocate had acted for both the plaintiff and the defendant in the instrument that was the subject matter of the suit. If the plaintiff is desirous of calling the advocate, John Ohaga as a witness, it is at liberty to do so. But, it will not incapacitated the law firm of Ochieng', Onyango, Kibet & Ohaga Advocates from acting on behalf of the 1st defendant in the suit. The fact that Mr. Ohaga is a partner in the said firm of advocates does not, by itself, incapacitate the entire firm from acting on behalf of the 1st defendant in this suit. My interpretation of Rule 9 of the Advocates (Practice) Rules leads me to no other conclusion than that the rule refers to an advocate who may be called as a witness and not an entire firm where such advocate is a partner or works for gain.

Unless prejudice can be shown, the entire law firm cannot be barred from acting for a party in a suit just because an advocate in the law firm may potentially be called as a witness in a suit. The Court of Appeal in Republic vs Mwalulu & 8 Others [2005] 1KLR 1 held that a judge who was a partner in a firm representing one of the people adversely mentioned in the proceedings of the Goldenberg Commission of Inquiry could not be disqualified from hearing a case emanating from the conduct of the proceedings at the commission of inquiry by the mere fact that he was a partner in the firm. Similarly in this case, by allusion, the entire firm of Ochieng', Onyango, Kibet & Ohaga Advocates cannot be disqualified from acting for the 1st defendant by the mere fact that a partner in the firm will be called as a witness during the hearing of the case. The plaintiff must go beyond arguing the mere fact that Mr. Ohaga is a partner in the firm, by putting forward grounds that will entitle the court to reach determination in respect of the disqualification of each member of the firm, if it were to succeed in the disqualification of the entire firm in the matter. The case would be different if the plaintiff alleged that the said firm had acted on its behalf in respect of the matter that is in dispute. In such case, the court would not have hesitated in disqualifying the entire law firm.

In the premises therefore, I find the application to be without merit and proceed to dismiss it with costs. If the plaintiff desires to call Mr. Ohaga as a witness during the hearing of the case, any other advocate in the firm has capacity to appear on behalf of the 1st defendant.

DATED AT NAIROBI THIS 15TH DAY OF MARCH 2010.

L. KIMARU
JUDGE