REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 425 of 2008

INDUSTRIAL PLANT (E.A.) LIMITED

(IN RECEIVERSHIP) & ANOTHER ……..……..PLAINTIFFS

VERSUS

WALKER KONTOS ADVOCATES ……DEFENDANTS

R U L I N G

Application dated 29/7/2008 brought under **Section 2, Advocates' Act, Cap.16, rule 9 Advocates (Practice) Rules, Order 39 rule 1 and 3, Civil Procedure code, Section 3A** and **63 (c) of Civil Procedure Code Act (Cap. 21).** The outstanding prayers numbered 3, 4, 5 and 6 were argued inter partes on 21/12/08. The applicant through the Counsel argued that the firm of Walker Kontos Advocates, a firm of lawyers practicing law in Kenya should be restrained from acting as advocates for Stanbic Bank Kenya Limited or any of its Receivers/Managers and other associated companies, assignees, successors and/or persons in suits **HCC No.689 of 2002, HCC No.1855 of 2000** and **HCC No.532 of 2006** or in any litigation or proceedings against the plaintiffs by Stanbic Bank Kenya Limited arising out of Advocate/Client relationship and fiduciary duty subsisting between the plaintiffs and defendant pending the hearing of this suit, and that an order for stay of representation by the firm of Walker Kontos and/or any other firm of advocates for Stanbic Bank and the joint receivers pending the hearing of this suit.

The grounds upon which the application is made is that the defendant is a potential witness in all the suits mentioned and that the defendant has breached the provisions of **Advocates Act Cap. 16** and **Rule 9 of Advocates Practice Rules** which provides:

"**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 to give evidence as a witness, 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 by affidavit he shall not continue to appear.**

Provided that this rule does not prevent an advocate from giving evidence …….. on formal or non contentious matters of fact in any matter in which he acts or appears."

Further that there is conflict of interest in the above mentioned proceedings which has far reaching consequences and the applicant is suffering prejudice if the defendant shall continue to act for Stanbic Bank. While the defendant shall suffer no prejudice if orders are granted.

The supporting affidavit shows that in the years 1995 and 1999 there existed contractual relationship between the plaintiffs and the defendants of Advocates and Clients. The terms of relationship is tabulated under paragraph 6 of the supporting affidavit.

During the period of relationship the defendant acted for plaintiffs/applicants in a transaction to borrow money and

prepared all documents necessary for the loan to be released by the said Stanbic Bank, namely a lease agreement, a legal charge, a debenture for Kshs.50 million. These debentures were varied and the liabilities became Nil.

Despite the terms of contractual relationship the defendant prepared and presented a notice of appointment of a receiver/manager on behalf of Stanbic Bank against first plaintiff/applicant. The defendants were acting on debentures dated 16/3/1995 and 19/8/1997 which were no longer valid or enforceable in law. The defendants turned against the plaintiffs/applicants and was assisting the Stanbic Bank with illegal, null and void documents prepared by them on behalf of the plaintiffs. There arose disputes on the validity of the further debenture dated 17/3/1999 and whether Standbic Bank had authority to appoint receivers and managers under those debentures and also whether the Stanbic Bank could sell the assets of the 2nd defendant.

In litigation which ensued the defendant chose to side with Stanbic Bank thus contravening the retainer terms with the applicants. The defendants are represented by the firm of Oraro & Co. Advocates. Mr. John Okello Ougo has filed an affidavit confirming that fact. He also confirms that he was appointed to act for Stanbic Bank Ltd. in **Suit No. HCCC 532/2006** and **HCCC No.689 of 2002** and also in **HCCC No.1855 of 2000.**

It is to be noted that in those cases the advocates were taking over the suits previously handled by the defendant advocates. The issue of the defendant having breached the terms of retainer as stated in the application and plaint is not in dispute.

On the hearing date Mr. Oraro appeared for defendants and submitted that when the plaintiffs filed this suit the defendants chose to remove themselves from the conduct of the suits mentioned above and presented the same firm of Oraro & Co. Advocates as indicated in the affidavit of John Okello Ougo filed herein.

Therefore, the defendants are not handling the matters for Stanbic Bank Ltd. and no orders can be made in the circumstances against the defendant. It is to be noted that the plaintiff prays for restraining orders, mandatory injunction, permanent injunction, declaration that the defendant should not now or in future continue to act for Stanbic Ban Ltd. against the plaintiffs or use the documents obtained from the plaintiffs. The plaintiff has filed a list of authorities No.9 being **King Wollen Mills & another vs. Kaplan & Stratton 1993.** In that case the Court of Appeal discussed at length the issue of one advocate acting for one or more clients in litigation arising out of an agreement entered by and between both clients, one of whom is trying to enforce the agreement.

The facts were that the respondents, a firm of advocates were retained to act for two clients during the negotiations and preparations of loan agreement and security documents, a matter that is not disputed. Later disputes arose between appellants and respondents, the other client resulting in an action being filed against the respondents and the receivers appointed under debenture issued by appellants.

On the eve of the hearing of that suit the appellants moved to court to restrain the respondents (Kaplan & Stratton) from acting for the acceptances and their receivers on the ground that they were not entitled to act for any party which was involved in the loan agreement, it being a breach of the terms of Client/Advocate contract of retainer entered into by the appellants between 1981 and 1982. The court found that the respondent was in breach of their fiduciary relationship with the appellants in any litigation arising out of the loan agreement in which the validity of the security documents was an issue.

Also upon accepting to act for a party the communication passed to the advocate becomes confidential ab initio and was not to be disclosed to any other party without consent of the client.

It is the same in this case the applicants state that the debenture was not valid and the appointment of receiver and manager was unlawful and that the information passed to the respondents when preparing the security documents was confidential and if the respondent is allowed to use the same it would greatly prejudice their cases.

However, it has already been noted that the respondents has voluntarily withdrawn from acting for the said Stanbic Bank Ltd. but only on 2nd day in the month of September 2008 while this suit was filed on 29/7/2008. Notwithstanding the issue of the validity of documents pleaded by the applicants, the respondents may be called as witnesses to establish the truth.

The applicant has cited the case of **Snell vs. Unity Finance Ltd.,** an English case reported in [1963] 3 All E.R. In that case there was illegality on the statutory instrument (by not paying the full amounts payable). Illegality of the agreement was not pleaded or raised by the parties in the lower court. It was held by Court of Appeal that once the facts which made the hire purchase agreement illegal had become apparent to the court, it was the court's duty whether illegality was or was not raised by the parties to refuse to enforce the (hire purchase) agreement.

The authority was in support of the proposition that since the security documents were invalid and illegal, the court would move to nullify the same and therefore the applicant would be prejudiced if the respondents were allowed to act for the Stanbic Bank Ltd. In the case of **Delphis Bank Ltd. vs. Chattle & 6 others,** a Court of Appeal judgment was mentioned by Mr. Oraro to support his proposal that "There is no general rule that an advocate cannot act for one party in a matter and then act for another opposite party in subsequent litigation. The "test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will result. Each case must turn on its own facts. The mere fact that the debentures, loan agreements, legal charges or guarantees were drawn by same advocate may not of itself be a confidential matter between the parties.

The court held also that the right to a legal representative by advocate of his choice is a most valued constitutional right though in civil cases the right is subject to demands of conflict of interest. Several authorities were considered and the court, all the same, overruled the objections. In the present case it is to be considered that the respondents were acting for the applicants. They came to know their financial status and they must have passed such information to the Bank which immediately rushed to appoint receivers under the debentures. It is the respondent who filed the appointment with the Registrar of Companies. When the applicant pleaded the invalidity of securities it was the respondents who rose up to defend the Bank. It is clear, therefore, the respondent decided to breach its contract of retainer with the applicants with the knowledge of their financial status. As Muli, J. said in the **Kings Woollen Mills case,** the confidentiality arose when the instructions were accepted, not any other time during the advocate/client relationship.

The fact that the respondent has passed on the briefs in the cases complained of is an admission that they knew they should not have taken up acting for the Bank against their client, the applicants.

I have perused the authorities tendered by the applicant and I am convinced that real mischief and real prejudice would be occasioned in this case if the respondent was to continue acting for the Bank. To buttress their action of passing on briefs to other advocates, I allow the application and grant all orders as prayed with costs to the applicants.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 22nd day of June 2009.

JOYCE N. KHAMINWA

JUDGE