**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Case 1561 of 2007**

**CENTURY OIL TRADING COMPANY LIMITED…….APPLICANT**

**VERSUS**

**KENYA SHELL LIMITED……..RESPONDENT**

**RULING**

In the Notice of Motion under Order 50 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the applicant seeks;

"**That Mr. Philip Nyachoti, the firm of Nyachoti & co. Advocates and Mr. Nelson Havi all appearing for the respondent herein, be barred or disqualified from representing or appearing for the respondent in this matter and in any other related proceedings in any manner whatsoever".**

The application is grounded on the following:-

**(1) Mr. Nelson Havi who is leading and/or appearing with Mr. Nyachoti in these proceedings previously worked for Muriu Mungai & co. Advocates who represented the applicant in HCCC No.988/2002 and Court of Appeal Civil Appeal No.198/2003 which were subsequently and by agreement of the parties referred to arbitration. The arbitration is the subject of the applications now filed in this court.**

**(2) Mr. Nelson Havi dealt with the suit while he was an Advocate in the firm of Muriu Mungai & co. Advocates.**

**(3) The information and knowledge acquired by Mr. Havi, whilst a hearing for the applicant is privileged by reason of the confidentiality arising from the Advocate and client relationship between Mr. Havi and the applicant.**

**(4) The information and knowledge so acquired and its likely use thereof by Mr. Havi in these proceedings is likely to place the applicant at a disadvantage occasioning prejudice.**

**(5) By virtue of acting together with Mr. Havi, Mr. Philip Nyachoti and the firm of Nyachoti & Co. Advocates which is on record for the respondent is likely to have the knowledge of Mr. Havi.**

**(6) The applicant will be prejudiced and its privilege breached if the said Mr. Havi Mr. Nyachoti and the firm of Nyachoti & co. Advocates continue to represent the respondent in these proceedings.**

The application is also supported by the affidavit of **Mr. Peter Ndirangu**, the finance Manager of the applicant who avers as follows:-

That the respondent herein filed HCCC No.988/02 against the applicant for various claims arising from a reseller agreement between the parties. The advocates of the applicants were **M/S Mohamed & Muigai** Advocates at the time the suit was filed. On or about October 2005 the applicant instructed the firm of **Muriu Mungai & co**. Advocates to take over the conduct of the matter.

That he has been informed that **Mr. Nelson Havi** who is now leading and/or appearing in those proceedings with **Mr. Philip Nyachoti**, was practicing as an Advocate in the firm of **Muriu Mungai & co.** Advocates at the time, the said firm was handling this matter on behalf of the applicant. And that **Mr. Nelson Havi** was involved in the matter and participated actively in conduct of the matters and proceedings related hereto on behalf of the applicant.

The deponent contends that whilst the firm of **Muriu Mungai & Co.** Advocates was acting for the applicant, the applicant herein provided to and disclosed to the said firm information relevant to the matters in court and at the arbitration, which information is confidential. He also states that the said firm dealt with the matter to conclusion where an arbitral award was published. The matter was then taken over by **M/S Hamilton, Harrison & Mathews** Advocates. The deponent now states that;

(1) The relationship between a client and Advocate is one of a confidential nature and the communication therein privileged.

(2) The confidential relationship so created by a retainer between the client and Advocate demands that knowledge and/or information acquired by the Advocate whilst acting for the client be treated as confidential and should never be disclosed to anyone else without the client's consent.

(3) Further the duty of confidentiality continues not only even after the retainer but also even after the conclusion of the matter for which the retainer was created.

It is the case of the applicant that it is reasonably apprehensive that the information and/or knowledge acquired by Mr. Havi, whilst he was acting, is confidential and that the same is likely to be used, thereby placing the applicant at a disadvantage occasioning prejudice, hence **Mr. Havi** may consciously or unconsciously or even inadvertently use the confidential information acquired and imparted to him in his capacity as an advocate acting for the applicant in the firm of **MURIU, MUNGAI** Advocates.

Secondly that **Mr. Havi** having acted for the applicant in previous proceedings relevant hereto has a good knowledge of the applicant's confidential position and vulnerability and which knowledge he may use to the applicant's detriment.

In the replying affidavit filed in court on 21st January 2008, **Mr. Nelson Havi** contends that he has been consulted by **Mr. Philip Nyachoti** to assist him on legal research in this matter. He also says that he was formerly employed with **MURIU MUNGAI & CO**. Advocates who acted for the applicant generally. **Mr. Havi** says that he left the said firm's employment on 1st September, 2006.

He further states that whilst in the employment of **MURIU MUNGAI & CO**. Advocates, he handled some of the applicant's matters including HCCC No.988/2002 **Century Oil Trading Company Ltd v Kenya Shell Limited**. However he avers that he never interviewed any of the officers of the applicant on the said case nor was any confidential information released to him by any of the officers of the applicant. And that his participation in the matter was limited to two court attendances referred to and the writing of the letters exhibited in the affidavit of **Mr. Ndirangu**.

It is also the position of **Mr. Havi** that there is no conflict of interest on his part or breach of Advocate/client privilege between the applicant and himself. And that he is legally and morally competent to assist **Mr. Nyachoti** of his request. Of essential and material importance is the disclosure by **Mr. Havi** that he has not divulged any privilege information about the applicant as he had none in the

beginning. The consultancy has been limited to legal research.

I have considered the rival position of each side and after the said consideration, my take of the dispute is as follows: First and foremost, it is no business of the court to appoint advocates for the parties, as it is within the constitutional right of litigants to consult an Advocate of their choice. In essence the respondent has a constitutional right to legal representation of its choice. It has been contended that the mere fact that **Mr. Havi** previously acted for the applicant does not, without more disentitle him from appearing or being consulted on this matter. Besides, his association with the firm of **Nyachoti & Co**. Advocates cannot be a ground to deny the respondent its constitutional right to representation of choice.

**Mr. Nyachoti** learned counsel for the respondent submitted that the application has failed the objective test for disqualification. And that the objection of the applicant is based on perceived and alleged fears of wickedness of the respondent's Advocates and **Mr. Havi.**

**Mr. Kiragu Kimani** Advocate says that the information and knowledge acquired by **Mr. Havi** whilst acting for the applicant is privileged by reason of the confidentiality arising from Advocate/client relationship between **Mr. Havi** and the applicant. He also contended that the information and knowledge acquired by **Mr. Havi** is likely to place the applicant at a disadvantage occasioning prejudice despite the denial by **Mr. Havi**. **Mr. Kimani** relied on two cases in support of his proposition:-

(1) **Uhuru Highway Development Ltd & others v Central Bank of** Kenya & others (2002) 2 E.A. 654, where the Court of Appeal held;

"**it would amount to a failure that the information under the retainer or employment was confidential ab initio and that counsel being the author of the charge may know much more behind the charge than is apparent on the charge and is bound to use that knowledge against the plaintiffs, his former clients. The suspicion is well founded".**

And in **Kenya Woolen Mills Ltd and another vs M/S Kaplan & Stratton** Advocates Civil Appeal No.55/93, where the Court of Appeal held;

"**the Advocated should be wary to act for one client against the other or clients in a subsequent action or litigation concerning the original transaction or the subject matter for which he acted for the client. The reason for this is not far fetched. The information or knowledge so acquired and which is confidential by reason of the fiduciary relationship between the opponent client and the common Advocate will place the other client or clients at a disadvantage occasioning prejudice if that knowledge or information is used against them by the common Advocate in a subsequent litigation arising from the original transaction or subject matter for which he acted for the clients".**

There is no dispute that **Mr. Nelson Havi** was previously employed in the firm of **MURIU MUNGAI & CO**. advocates. The said firm handed some of the applicant's matters including **HCCC No.988/2002** involving the same parties herein. The arbitration subject of this litigation emanated from **HCCC No.988/02 Century Oil Trading Company Limited vs Kenya Shell Limited.**

The test for disqualification of an Advocate on a matter where he has previously acted for a party has been captured in the case of **Delphis Bank Limited, (2005) 1 K.L.R**. Page 766 where the Court of Appeal laid down the test as;

"**As is clear from those authorities each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, we hardly have any facts to consider to arriving at such conclusion. We do not know whether Mr. Menezes was involved in negotiations for the loans in issue. We do not know whether he was acting for both, the bank and the borrowers or just for one party and if so which. We do not know the nature of confidential or privileged information if any that may have been imported 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 sum there is no evidence before us, as there should be, for consideration before the drastic decision of interfering with a party's constitutional right to counsel of his choice is interfered with".**

**Mr. Kimani** Advocate asserted that **Mr. Nelson Havi** who is leading and/or appearing with **Mr. Nyachoti** in these proceedings previously worked with a firm of Advocates who represented the applicant in this same dispute both in the High Court and Court of Appeal. And the same dispute and/or matter was subsequently and by agreement of the parties referred to arbitration, which arbitration is the subject of the applications now filed in this court.

In my understanding and in its usual form, an Advocate/client privilege is that a client is entitled to prevent an Advocate from using, in a manner adverse to the client's case, any knowledge or information which the Advocate has gained while acting on behalf of the client. The purpose of such privilege is to promote openness between lawyers and clients. Clients tend to believe that nothing they say will be used against them and to the advantage of the adversary.

It is my position that where a previous relationship existed which is sufficiently close to the second case, the court should infer that confidential information was imparted unless the Advocate satisfied the court that no information was imparted which could be relevant, not forgetting that lawyers together in the same firm often share confidences, therefore it is essential to ensure sufficient steps have been taken to eliminate such abuse. The point I am making is that where an Advocate appears against a former client in the same case or in a related case, a prima facie case of mischief is established. However, I must add that evidence will then have to be adduced to indicate that the anticipated mischief will not materialize.

The position I intend to advance is that an Advocate's loyalty to his client must remain undivided. He cannot properly discharge his mandate to one whose interest and obligations are in opposition to those of another client. In my humble view it is always the Advocate's duty to generally and universally act in his client's best interests and not to do anything likely to damage/prejudice and/or compromise his client's interests. I think the relationship is one rooted in fiduciary relationship. Essentially the relationship is one in which the client reposes trust and confidence in the Advocate. In my understanding a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty. He puts himself in a position where his duty to one principal may conflict with his duty to the other, by inadvertently furthering the interest of one principal.

**Mr. Nelson Havi** says that while in the employment of the firm of **MURIU MUNGAI** Advocates, he never interviewed any of the officers of the applicant and therefore no confidential information was released to him. The applicant in reply says that notwithstanding there could be information and knowledge acquired by **Mr. Havi**, whilst acting for the applicant, which is privileged by reason of the confidentiality arising from the advocate and client relationship. And that there is no duty cast upon the applicant to show the information acquired by **Mr. Havi** and that it has been passed to **Nyachoti & co**. Advocates. The applicant in essence says that reasonable suspicion is good enough for its application, to succeed.

The starting point is that there is no general rule prohibiting an Advocate who has acted in a particular matter for one of the parties from acting subsequently in the same matter for the opposite party except where an Advocate owes a duty to someone other than a particular client which conflicts with his duty to that client.

The question is whether the applicant's plea and/or complaint is justified against Mr. Havi and the firm of **Nyachoti & Co.** Advocates. Secondly whether the continued representation of **Mr. Havi** in this matter would prejudice, damage and/or compromise the rights and interest of this giant oil company known as **Shell Kenya**. These questions are to be answered on evidence, balancing the different interests involved and remembering that the issues would inevitably overlap. As stated, there is no absolute rule of law that an Advocate may not act in litigation against a former client. It is also important to understand that, an Advocate is under duty not to communicate to others, any information in his possession which is confidential to the former client. It is the duty of an advocate to ensure that the former client is not put at

risk that confidential information which the Advocate has obtained from that relationship may be used against him in any circumstances. In my view particular care is needed if the advocate agrees to act for a new client who has or who may have an interest which is in conflict with that of the former client. The duty of an Advocate should not be put in a scenario where there is actual or potential conflict of duty so that he cannot fulfill his obligations to one principal without failing in his obligations to the other.

The position advanced by **Mr. Havi** through his affidavit and able submission of **Mr. Nyachoti** Advocate is that there is no ground on which this court could properly intervene unless two conditions were satisfied;

(1) That **Mr. Havi** was in possession of information which was confidential to the former client and

(2) That such information was or might be relevant to the matter on which he was instructed by the 2nd client.

In my view this makes the possession of relevant confidential information the test of what is comprehended within the expression the same or connected matter. That was the position advanced by the learned judges of the court of Appeal in the **Delphis Bank** case and it is on this note that the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.

As for the circumstances in which the court will intervene by granting an injunction, it will not intervene if it is satisfied that there is no risk of disclosure. But if it is not so satisfied it should bear in mind that the choice as to whether to accept and/or continue with instructions from the new client rests with the Advocate. In doing so, the court is empowered to determine;

(1) Whether there was confidential information or privilege which if disclosed was likely to affect the applicant's interests adversely.

(2) Whether there was a real or appreciable risk that confidential information would be disclosed.

(3) Whether the nature and importance of the former fiduciary relationship meant that the confidential information should be protected by an order of the kind sought. (The issues set out is not exhaustive).

The matter under my determination involves huge sums of money and it has been going on since the year 2002. It ended up in the Court of Appeal and after that journey the parties by mutual agreement referred the dispute to arbitration. **Mr. Havi** Advocate says that there is no conflict of interest on his part and no breach of Advocate/client privilege because;

(1) There was no confidential information released to him by any of the officers of the applicant,

(2) That his participation in the matter was limited to two court attendances and the writing of the letters exhibited by the applicant through the affidavit of **Mr. Ndirangu** and

(3) That he never interviewed any of the officers of the applicant in this case.

In my view an Advocate is always under obligation not to disclose confidential information which has come to his knowledge as an Advocate for a client. And like any other agent he has a higher degree because of his position as an officer of the court and the privileges the law allows to legal professional confidence, so he is bound to act and observe the requirements of good faith towards his client. The court will grant an injunction to prevent breach of obligations by an Advocate.

It is also my view that where a partner in a firm of Advocates which has been on record for one party in litigation moves to a new firm and one of the parties wishes to employ his services as an Advocate, the burden is on that Advocate to prove that there is no real risk that he has in his possession any relevant confidential information which makes improper for his services to be employed. I think that is what **Mr.**

**Havi** endeavoured to undertake in this proceedings. However the applicant is apprehensive that there is reasonable anticipation of mischief flowing from his continued participation in this matter. In my understanding the applicant is saying that although we have no specific evidence of confidential material that may be in possession of **Mr. Havi**, there is a general risk, prejudice and/or danger that his presence in this matter would jeopardize the success of their case.

To my mind it is not necessary to adopt a particular procedural path to find the answer posed by the applicant. First and foremost there is no cause to impute or attribute the knowledge of one advocate to other Advocates in the same firm of Advocates. And whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the cases. In my view a client is entitled to prevent his former Advocate from exposing him to any avoidable risk and this includes increased risk of the use of the information to his prejudice arising from acceptance of instructions to act for another client with an adverse interest in a matter in which the information is or may be relevant. The court will not intervene unless it is satisfied that there is a reasonable probability of real mischief.

One may be tempted to say that **Mr. Havi** Advocate has a duty one side and an interest which he has manifested on another and I think an Advocate who puts himself in that sort of dilemma takes upon himself a grievous responsibility which must be weighed reasonably and delicately. It is said that an Advocate should not put himself in a case of duty on both sides, which would be impossible to perform. It comes back to the same simple point that if an Advocate is unwise enough to undertake irreconcilable duties, it is his own fault and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified. The question is whether **Mr. Havi** is in a position to jeopardize the case of the applicant and whether the case for disqualification is based on mere suspicion which is not well founded.

In my humble view it is of great importance for the proper administration of justice that a client should be able to have complete confidence that information in pursuit of his cause of action remains secret. This may sound as a matter of perception as well as substance. The issues raised by the applicant may sound real and not merely fanciful or theoretical but it need not be substantial or inadvertently come to his notice and knowledge but the starting point must be that unless special measures are taken, information moves within a firm of Advocates especially one who handled the matter at some stage. At the time, **Mr. Havi** Advocate handled the file, he must have been equipped with all the information or knowledge that would make the case of the client to succeed. The law is that a person on possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.

I think the party Mr. Havi now acts for, has an adverse interest and his presence in this matter can disrupt and disorientate the applicant's case. If reasonable persons with knowledge of the facts would reasonably anticipate the danger the information gained from the previous firm would be used against the applicant, then the presence of Mr. Havi Advocate in this matter invites and/or portends disaster for the applicant. I think one can make a reasonable conclusion by handling the matter on behalf of the applicant as acknowledged, **Mr. Havi** Advocate acquired information, adequate skills and knowledge, which can be properly and sufficiently be used to the detriment of the former client.

The common denominator of acceptable Advocate behaviour is against dual representation and the court is empowered to strive to maintain the integrity of the legal process. The court has to move away from the concept of whether to determine that actual information, which is relevant has been imparted. To make that the yardstick would give greater leeway to Advocates to engage in dual representation. Lawyers are quick to point out that a person should not be appointed guardian of his own cause.

In my view the public can justifiably expect that the rule should apply to all, even though courts are inclined to assume that all Advocates are honourable persons. One simply cannot have faith in every person who has been called to the bar, it therefore becomes essential for courts to avoid any appearance of impropriety of the public's respect and that of the litigants in the case are to be retained. It is for that reason, the lawyers cannot be given the invidious position of determining which information is

confidential and which can be disclosed.

Similarly even if no confidential information is in possession of Mr. Havi, one can be tempted to argue that where a lawyer moves from one firm to another and where he is retained either directly or doing research like the case herein by the adversary, the presumption is that the lawyer was privy to some confidential information while working in the first firm. In my view an Advocate being an officer of the court must avoid instances that would give rise to suspicion in his representation in a matter. Lawyers are most likely to say that judges or other judicial officers are like czar's wife and their integrity must be beyond reproach. I am tempted to say that if judicial officers are like Czar's wife, then Advocates are like Czar's daughter, therefore should not attract suspicion to their character and integrity. I think with respect Mr. Havi is like the great daughter of Czar.

The interest of the public in the proper administration of justice and the perception fairness by the public and individual is a fundamental issue in addressing whether an Advocate should be disqualified from acting in a matter. I am alive to the equally important principal that a party should not be restricted unduly in obtaining the services of lawyers of his choice. There is also the consideration that no one should interfere with the Advocate/client relationship/marriage. However where reasonable person would conclude that with or without confidential information and/or knowledge apparent unfairness and injustice would obtain in the presence of Mr. Havi acting, the court would intervene. It is not mischief which to be reasonably anticipated but the risk or danger of a breach of a duty resting upon an Advocate and to uphold and/or maintain the perception justice in our system. It is meant to avoid the possibility of disclosure or misuse of confidential belonging to the former client. These measures are formidable but nonetheless in applying the test of reasonable man, the court will be concerned that confidential information might be leaked or there is a real likelihood that the case of the party may be compromised.

In my view even if there is no confidential information in possession of **Mr. Havi** Advocate, his presence and participation in this matter would accord a tactical advantage and/or psychological blow to the applicant and a benefit to the respondent. That would have a real prejudicial effect on the state of mind of the applicant and may also shake the determination of the applicant's Advocates who were not originally in this matter. Similarly even if no confidential information is used Mr. Havi's impression of the applicant's case, its weakness and strength, witnesses personality and demeanour could put the applicant in unwarranted panic and/or fear. That is a grave danger to the principle that justice must be done but must also be seen to be done. In my humble opinion, the presence of **Mr. Havi** Advocate in this matter would be a grave danger to that cherished principle of law.

Lastly may I say that the policy of maintaining the integrity and standard within the system of justice is a consideration that touches a raw nerve. In most cases the public feel that courts are reluctant to impose restrictions on the legal profession. The public confidence in the legal system is of paramount importance and it is an overriding factor in the determination I have made in this matter.

All I am persuaded to make a finding that **Mr. Havi's** presence and/or participation in this matter is no longer tenable. The decision of this court is that he must cease to act on behalf of the respondent. I appreciate that the respondent may suffer inconveniences due to the skill and knowledge of **Mr. Havi**, but a price must be paid for protecting and maintaining the integrity of our system of justice. That demands that **Mr. Havi** Advocate is no longer allowed before this court. I have directed him to the exist point, which he must locate.

On the other hand, there is no ground on which this court could properly intervene against the presence of **Mr. Philip Nyachoti** of **Nyachoti & Co.** Advocates. There is absolutely no reason why the application for disqualification was made against the firm of **Nyachoti & co.** Advocates who were on record for the respondent at the time the dispute was referred to arbitration.

**In the premises and in conclusion the application succeeds against Mr. Nelson Andayi Havi Advocate but fails against Mr. Philip Nyachoti and the firm known as Nyachoti & co. Advocates. Each party to bear own costs.**

Dated, signed and delivered at Nairobi this 28th day of February 2008.

**M. A. WARSAME**

**JUDGE**