



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

Civil Case 557 of 2007

BERNARD MURIUKI KANYIRI

c/o B.M. KANYIRI & CO. ADVOCATES PLAINTIF

VERSUS

STAR COLLEGE OF MANAGEMENT STUDIES LIMITED.....DEFENDANT

RULING

This ruling is in respect of a Preliminary Objection dates 12th October, 2007 and filed the same date. Two points were raised namely:

- 1). That all the pleadings filed by the firm of M/S MONYO AND ASSOCIATES ADVOCATES be struck out from the record and the firm has no capacity to appear and plead on behalf of the defendant.
- 2). That the firm of M/S MONYO and Associates be disqualified forthwith from acting for the defendant as they are potential witnesses by virtue of having drawn a sale agreement dated 23rd May 2006 annexed to the defendant's replying affidavit dated 14th August, 2007.

The grounds in support are:-

1. Dispute concerns office premises the plaintiff/objector has been occupying, namely LR. NO.209/743 called Kaiyan house.
2. That the summary of the dispute is contained in the plaint.
3. In March 2007 ownership of the premises changed hands and then the new landlord started collecting rent.
4. No assignment of lease was requested for or executed.
5. The entire transaction took place without any knowledge of the Plaintiff.
6. The new landlord then collected rent and after three months he purported to issue notice to increase rent and termination of tenancy.
7. The action in no .6 above forced the plaintiff to move to the Business Premises Rent Tribunal and filed case No.351/07 and obtained an order barring the landlord from evicting the plaintiff and

simultaneously declaring the notice to increase the rent illegal.

8. Since the tribunal could not issue an injunction the applicant moved to this Court to seek an injunction filed on 30.7.07.

9. The application is supported by a supporting affidavit whose paragraph 4 attaches FM2 being the sale agreement for the suit premises drawn by Kimani Kairu & Co. Advocates as advocates for the landlord Monyo and Associates Advocates for the purchaser.

10. The agreement vide paragraph 5 thereof shows clearly that the property has been sold subject to existing tenancy.

11. For this reason the said Counsels are potential witnesses and so they are disqualified from acting in the matter as they will be required to be examined on that agreement.

In response Counsel for the Respondent opposed the Preliminary Objection on the following grounds:-

- (1) The Preliminary Objection raised is not sustainable as it is not on a pure point of law as issues raised are matters of evidence to be examined by the Court.
- (2) Since the agreement was drawn by a different firm and they were merely acting for the purchaser, there is no law which bars them from acting as such.
- (3) The objector has dwelt on conflict of interest and disclosure of information which do not apply to sustaining of a Preliminary Objection.
- (4) They contend they cannot be barred from acting for their client because there is no dispute as to ownership of the property as they have conceded that sale took place, there was change of ownership and they have gone ahead to pay rent.
- (5) They are validly on record as they have a valid Practicing Certificate.
- (6) The applicant is just delaying the matter and denying the respondents their rightful share of the money.

In response Counsel for the objector reiterated that his Preliminary Objection is sustainable as he has merely given the background information to enable the Court sustain it.

- (2) It is sufficient to show that there is a likelihood of Counsel being called as a witness.
- (3) There are no facts to be ascertained as the document speaks for itself.

The Respondent relied on case law as well in opposition of the Preliminary Objection. In the case of **KING WOLLEN MILLS LTD FORMERLY KNOWN AS MANCHESTER OUTFITTERS SUITING DIVISION LTD) AND GALOT INDUSTRIES LTD VERSUS M/S KAPLAN AND STRATON ADVOCATES NAIROBI C.A. 55/93** which deals with conflict of interest. At page 8 of the judgment it was noted that there was no dispute that the respondents so acted as the common Advocate for the appellants, the London bank and acceptances. During this period the formalities of the loan were successfully completed. The loan was guaranteed the first appellant with the legal charge and all assets Debenture in favour of the Acceptances. The Respondents had prepared the loan agreement, the guarantee, the debenture and the legal charge on behalf of the London Bank, the acceptance and the appellants as well as the furnishing of the requisite legal opinion. The loan agreement and the legal securities were duly executed by the parties without any objection.

At page 10 last paragraph the Court of Appeal summarized the point in contention on appeal as “*the*

respondents having accepted to act for both the appellants and the acceptances in the loan transaction between the appellants and the London Bank and the acceptances are they in breach of their fiduciary relationship of client and advocate by representing the London Bank in any litigation arising from the said loan transaction in which the validity of the loan and security document are challenged, or simply is the advocate who acts for both the borrower and the lender on a transaction disqualified from acting or representing one of the parties or clients in any subsequent litigation concerning the said transaction”.

At page 11 2nd paragraph it is observed that “it is not disputed that the respondents accepted and acted for both the appellants, the London Bank and the Acceptances in all the transactions involving the loan to the appellants from the London Bank and the guarantee, the legal charge and the debenture in favour of the Acceptances. That a Mr. Keith of the Respondents firm of Advocates was responsible for putting together the transaction. As such for all intents and purposes he was an advocate for both the borrower(the appellant) and the London (the London Bank and the Acceptances)”.

At last paragraph on the same page the observation is that thus there was retainer – a contractual relationship between the appellants and a Mr. Keith on behalf of his firm whereby he undertook expressly or by implication to fulfill the appellant’s obligations in connection with the transactions involving the loan from 1981-82.

At page 12 the first paragraph, it is stated that “once the retainer is established then the general principle is that an advocate should not accept instructions to act for two or more clients where there is a conflict of interest to their clients”. At the last paragraph that “the retainer created a contractual relationship between the advocate and the client in respect of whether two or more clients are involved. The relationship is not tripartite. Each client has a separate retainer relationship with the common advocate” page 13 and paragraph 11 “the fiduciary relationship created by the retainer between the client and advocate demand that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to any one else without that clients consent. That Advocacy relationship exists even after conclusion of the matter for which the retainer was created. This principle applies equally where an Advocate acts for two or more clients in the same transaction or subject matter because the retainer is specific between the individual client and the common advocate. There is no fiduciary relationship between the clients to the common advocate. It is the advocate who is under a duty not to disclose confidential information from one client to the other”. At page 12 line 5 from the bottom. It is stated “The corollary to this cardinal principle is that the advocate having so acted for two or more clients should be wary to act for one client against the other client or clients in a subsequent action or litigation concerning the original transaction or the subject matter for which he acted for the clients as their common advocate. The reason being that 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 their client advocate”

At page 32 line 11 from the bottom it is stated “The very nature of the contract of retainer imposed a duty on Mr. Keith to treat the information imparted to him by the appellants as confidential. It also imposed on him an obligation not to disclose such confidential information to any one including the other clients involved in the transaction without the consent of the client providing the confidential information in this case the appellants. Nor do I think for a moment that it can be argued that the duty and obligations imposed on him as a common advocate ceased after conclusions of the transaction for which the retainer were made. Further the mere delay in raising the point of continuing acting against the appellants does not defeat or change the duty or the obligations of the common advocate imposed on him under the retainer”.

In the case of QUASAR LIMITED VERSUS METRO PETROLEUM LIMITED MILIMANI HCCC NO.240/2005 Kasango J. at page 4 of the ruling last paragraph quoting Rule 9 of the Advocates (practice) Rules forbids an advocate from acting in a matter where he is a potential witness.

At page 5, 3rd paragraph Section 134 of Evidence Act forbids an Advocate disclosing any communication

obtained in the course of his employment unless the client consented to such disclosure. At line 2 from the bottom that *“It is incumbent upon a party wishing to disqualify an advocate to lay evidence to support his claim for mere suspicion or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.”*

In the case of **MANSFIELD TRADING (C) LTD VERSUS RUSHMORE COMPANY LTD AND FRANCIS MKIBUI, MILIMANI HCCC NO. 1784** of 2000 Kasango J. at page 8 of the ruling quoted with approval the principle in the case of **MUKISA BISCUIT MANUFACTURING CO LTD VERSUS WEST END DISTRIBUTORS (1969) E.A. 696** which established the ingredients of a preliminary objection. At line 7 from the bottom she quoted *“a PRELIMINARY Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

In the case of **LAXMANBHAI CONSTRUCTION COMPANY LTD VERSUS ANSPAR BEVERAGES LTD, MILIMANI HCCC NO. 1327 OF 2001** Ringera J as he then was at page 5 of the ruling set out the prerequisites for a preliminary objection as set out by both LAW JA and Sir Charles New bold ‘P’ in the case of **MUKISA BISCUITS MANUFACTURING CO.LTD VERSUS WEST END EA. 696. LAW JA’S** is found at paragraphs D-E and states this *“so far as I am aware a preliminary objection consists of a point of Law which has been pleaded or which arises by clear implication out of pleadings, and which I argued as a Preliminary Point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. As per Sir Charles New bold ‘P’ at page 701 letter ‘B’. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the opposite side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs, and on occasion, confuse the issues. This improper practice should stop”*

The case of the **DELPHIS BANK LIMITED VERSUS CHANNAN SINGH CHATTHE, SATWANT SINGH CHATTHE, SIKH WINDER SINGH CHATTHE, RAGH BIR SINGH CHATTHE, CHANNAN AGRICULTURAL CONTRACTORS, CHARANJIT SINGH HAYER AND RAJNIKAAL KARSANDAS SOMAIA, NAIROBI CA. NAI.136 OF 2005 (76/05 UR)**. In this case objection was raised against Counsel appearing in the matter under consideration because the dispute in the main suit was between a bank and its borrowers, and central to it was the validity and enforceability of various charges which the borrowers claim were obtained through deceit, fraud and misrepresentation but the bank says were valid and enforceable. The charges had been drawn by Counsel being objected to and who conceded this fact. It was contended this raised a serious question of impropriety since the Counsel objected to may be summoned in as witness at the hearing of the suit (see page 2 line 11-14 from the bottom.

At page 3, 3rd paragraph line 10 from the top being guided by the principles in the case of **KING WOOLAN MILLS LTD AND ANOTHER VERSUS M/S KAPLAN AND STRATTORN (1993) LLR 2170 (CAK) C.A. 55/93 AND UHURU HIGHWAY DEVELOPMENT LTD AND OTHERS VERSUS CENTRAL BANK OF KENYA LTD AND OTHERS & (2002) 2 EA 654**. The suit reiterated the following *“the starting point is of course, is to reiterate that most valued constitutional right to a litigant, the representative or advocate of his choice. In some cases however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality, in advocate/client fiduciary relationship or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result”*.

At page 4 line 8 from the top quoting Muli JA.as he then was in **KING WOLLEN case (supra)** sated

“I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit. The result will be that the appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during the trial of the main suit.”

At line 6 from the bottom on page 4 approving quotations from English decisions in **RUKUSEN VERSUS ELLS MUNDAY AND CLERKE (1912) 1 CH. 831 RE-AFIRM SOLICITORS (1992) 1 AII ER 353 AND SUPASAVE RETAIL LTD VERSUS COWARD CHARCE AND OTHERS (1991) 1 AII ER 668** summed up the general rule as laid down by SIR NICOLAS BROWNE WILKINSON V.C. thus *“The English Law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in RUKUSEN V. ELLIS, MUNDAY & CLERKE (1912) 1 ch. 831.....The law as laid down there is that there is no absolute bar on a solicitor in a case where of partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (.....) real prejudice to the former client. Unlike the standard to be satisfied is expressed in numerous different forms. In Ruksens case itself. Cozens – Hardy M R laid down the test as being that a court must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act... As a general rule, the Court will not interfere unless there be a case where mischief is rightly anticipated”.*

At the same page 5 line 13 from the bottom the Court went on to say *“As is clear from the authorities each case must turn on its own facts to establish whether the real mischief and real prejudice will result.*

In this case we hardly have any facts to consider in arriving at such conclusion we do not know whether the advocate was involved in negotiation for the loan in issue. We do not know whether the advocate was acting for both the bank and the borrower or just one party and if so which we do not know of the nature of the confidential or privileged information that may have been imparted 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 these 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 in interfered with”.

Applying the foregoing principles of law to the facts herein, it is clear that in order to succeed counsel for the objector has to satisfy the following:-

- 1) That the Preliminary Objection raised satisfies the ingredients for raising a Preliminary Objection.
- 2) That there is sufficient justification to warrant this court to withhold the respondent’s constitutional right to counsel of own choice.

As regards the satisfaction of the ingredients for sustaining a Preliminary Objection it is now trite law that in order for it to stand it must be:-

- (i) Purely on a point of law.
- (ii) It must be sufficient to dispose off the point in issue.
- (iii) It must based on undisputed facts pleaded by the other side.
- (iv) It must not be seeking the exercise of the courts discretion.

(v) No facts need to be ascertained.

When the above listed facts are applied to the Preliminary Objection here in, it is clear that it is not:

(a) Purely on a point of law as the Court's attention was drawn on to the agreement annexed to the replying affidavit. Such a move is to ask the Court to assess the evidence drawn to it.

(b) It is not sufficient to dispose off the point in issue in issue in so far as participation of the firm of Monyo & Associate Advocates in these proceedings is concerned, as there is issue as to whether the individual lawyer who was involved in the transaction is the one to be barred from participating or the entire firm. This would hinge on the extent of confidentiality between the client and advocate concerned in so far as that confidentiality goes to affect or prejudice the objector's case. Herein the complaint is on a sale agreement where another advocate not party to the proceedings acted for the vendor and drew the agreement. The advocate objected to acted for the purchaser and witnessed the agreement. In the absence of proof that in so acting he came across material confidential evidence which he is likely to use to prejudice the objectors case, he cannot be injuncted from so acting either by himself or the firm. On the facts herein it has not been shown that the witnessing of the sale agreement by the firm of Monyo & Associates Advocates was not mere routine.

As regards the requirements that the Preliminary Objection be based on undisputed facts, this ingredient has not been satisfied as it is disputed as to whether Counsel for the purchaser can be injuncted from acting in the matter by an objector who has not moved to fault the sale but is merely disputing rent increase. He has not stated that the said Counsel instigated the rent increase for improper motive.

As regards the ingredient that the Preliminary Objection must not be based on the Court's exercise of its discretion, the Court, is satisfied that what it is being asked to do is simply to consider the facts presented before it, and then exercise its discretion, either to uphold the objection to the firm objected to from acting in the matter or disallow the objection.

As regards the requirement that there should be no facts that need to be ascertained, this too has not been satisfied because there needs to be ascertained whether:-

- (i) The participation of the firm of Monyo & Associates Advocates was routine or otherwise.
- (ii) Whether they had contact of any confidential material concerning the transaction which go to affect the objectors case.
- (iii) Whether there is a real likelihood of arising a miscarriage of justice or prejudice to the objector.
- (iv) Whether on the facts displayed, the respondent's Counsel of own choice should be withheld.

Turning to the second requirement that there is sufficient justification for withholding the respondents right to Counsel of own choice, has not been satisfied as pointed out by the CA in the case of the **DELPHIS BANK LTD VERSUS CHANNAN SINGH CHATTHE AND OTHERS (SUPRA)**. The objector has not:-

- (i) Pointed out in what way the said Counsel objected to was going to be a useful witness.
- (ii) The nature of evidence that he is required to tender is not given
- (iii) It has not been indicated as to whether such evidence will be formal or otherwise.
- (iv) There is no revelation of the nature of the confidential or privileged information if any that may have been imparted on the course by either party which may be prejudicial to the Objector.
- (v) The mere fact that an agreement was witnessed by Counsel from the said firm may not of itself be a

confidential matter between the parties because the sale agreement was exchanged and parties have common knowledge of the same.

(vi) It has not been stated the said Counsel has a hand in the increase of rent which grieved the Applicant/Objector forcing him to come to Court.

For the reasons given, the Preliminary Objection is refused. This one falls into the class which should not have been raised at all as it has simply served to waste judicial time save for generating juris prudence on the subject.

The same is dismissed with costs to the Respondent to it. The said costs to be paid personally by counsel raising it personally.

DATED, READ AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2008.

R.N. NAMBUYE

JUDGE