



**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 452 of 2007**

**SUNRISE PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL INDUSTRIAL CREDIT BANK.....1<sup>ST</sup> DEFENDANT**

**AL JALAL ENTERPRISES LIMITED**

**In Receivership).....2<sup>ND</sup> DEFENDANT**

**CHEGE WAIGANJO.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

By a notice of motion dated 12<sup>th</sup> September 2007, Sunrise Properties Limited, the plaintiff herein has moved this court under Section 3A of the Civil Procedure Act, Order L Rule 1 and 9 of the Civil Procedure Rules, and Rule 9 of the Advocates (Practice) Rules under the Advocates Act, for orders *inter alia*: -

- That the court do order that the law firm of Mohammed Muigai Advocates on behalf of the 1<sup>st</sup> defendant herein be restrained from acting for the 1<sup>st</sup> defendant herein and or disqualify itself from the conduct of this matter.
- That all the pleadings and or documents filed by the law firm of Mohammed Muigai Advocates on behalf of the 1<sup>st</sup> defendant herein be expunged from the court’s record and struck out with costs.

The motion is supported by grounds stated on the body of the application, an affidavit sworn by Farah Mohamed Abdi a director and shareholder of the plaintiff, and a further affidavit sworn by Hassan Mohammed Abdi also a director and shareholder of the plaintiff’s Company. The grounds stated on the body of the application fully capture the applicant’s contention and the same are reproduced herein for their full purport: -

- a) *That the law firm of Mohammed Muigai Advocates had acted for both the plaintiff and the 1<sup>st</sup> defendant herein in the preparation of the purported guarantor charge dated 31<sup>st</sup> November 2005 which charge document is the primary document in this dispute.*
- b) *That the real dispute in this case is the import and purport of the said charge, its execution and the degree of its applicability to the various facilities accounts and the maker and/or drawer of the said document will thus be a necessary witness.*

- c) That by purporting to act for the defendants herein the law firm of Mohamed Muigai Advocates would be acting contrary to the law established.
- d) That the plaintiff is apprehensive that the firm of Mohammed Muigai Advocates may consciously and unconsciously or even inadvertently use the confidential information acquired during the preparation of the purported charge dated 31<sup>st</sup> November 2005 to its prejudice.
- e) That in view of the latent and patent inconsistencies in the charge the partners in the law firm of Mohammed Muigai Advocates will during the litigation be called as possible witnesses.
- f) That there is therefore a conflict of interest on the said law firm and it is in the interest of justice and fairness that the orders sought be granted.

It is submitted that Rule 9 of the Advocate's Practice Rules prohibits the firm of Mohammed Muigai from appearing for the 1<sup>st</sup> defendant as the partners are potential witnesses. The applicant relied on the following authorities: -

- Alcon International Limited & 2 Others vs Kenya Commercial Bank & 2 Others, Milimani HCCC No.735 of 2003.
- Francis Mugo & 22 Others vs James Briss Muthee [2005] e KLR.
- LTI Kisii Safari Insurance Limited & 2 Others vs Coopers & Lybrand Trust Corporation & 4 Others, Milimani HCCC No.1517 of 1997.
- Kuig Wollen Mills Limited & Another vs Ms Kaplan & Stratton Advocates, Civil Appeal No.55 of 1993.
- Lucy Mumbi Njoroge & 2 Others vs Mwemba Women's Prishori Wholesalers Limited, Civil Misc. Case No.276 of 1997 (O.S.).
- Uhuru Highway Development vs Central Bank of Kenya & Others [2002] 2 E A 654.

In response to the motion the 1<sup>st</sup> defendant has filed grounds of opposition. There is also a replying affidavit which has been sworn by Joan Mutabari, an advocate practicing in the firm of Mohammed Muigai Advocates. It is contended that the application is frivolous, mischievous, non-meritorious and only calculated to delay the expeditious disposal of this suit. Joan Mutabari swears that although the firm of Mohammed Muigai Advocates drew the charge document which is the subject matter of the suit, it was never retained by the plaintiff company nor did the relationship of client/advocate exist as between the plaintiff and the firm of Mohammed Muigai Advocates.

It is therefore maintained that none of the partners in the firm is likely to be a witness, nor is there any likelihood of conflict of interest or prejudice to the plaintiff. It is contended that what is in issue between the parties being the validity and execution of the charge, it would not be necessary to call a witness from the firm which drew the charge document as the document is self explanatory. Relying on the case of Rakusen v Ellis Munday & Clarke, [1912] 1 ch 831, it was submitted that the plaintiff has not satisfied the test laid down in that case, which required that there must be proof that the advocate was acting for both parties as a matter of substance. The case of H. F. Fire Africa Limited v Gharieb (Civil Case Number 665 of 2003) was also relied upon for the proposition that the court must in each case decide according to the circumstances obtaining. Also relied upon is National Bank of Kenya Limited v Peter Karat & Another (Civil Suit No.77 of 1997) wherein it was held that even in a situation where the firm was actually acting for the opposite party, disqualification of the entire firm may not be required.

It was further submitted that the plaintiff is well protected under Section 134 of the Evidence Act (Cap 80) which prohibits an advocate from disclosing confidential information unless the client waives that right.

Finally, it was contended that the plaintiff has not demonstrated that the advocates were privy to any confidential information nor was there any evidence of any mischief suffered by the applicant. The 1<sup>st</sup> and 3<sup>rd</sup> defendants did not file any response to the application, but their advocates associated themselves with the submissions made on behalf of the 1<sup>st</sup> defendant.

I have carefully considered the application before me, the affidavits in support and in reply, the pleadings, the submissions made by counsels and the authorities cited. Rule 9 of the Advocate's Act upon which this application is based 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.”*

It is common ground that the charge document subject of the dispute between the plaintiff and the defendant was drawn by the firm of Mohammed Muigai Advocates.

The question is whether in drawing the charge documents the firm of Mohammed Muigai Advocates was acting on behalf of the plaintiff and if so whether the firm came into possession of confidential information, such that it can be said that the partners in the firm in appearing for the 1<sup>st</sup> defendant in this matter, may use the information to the prejudice of the plaintiff. Secondly, whether it is apparent that the partners in the firm may be required as witnesses in this suit.

Apart from the fact that the firm of Mohammed Muigai Associates prepared the charge documents, no evidence has been exhibited to confirm whether the firm prepared the documents on instructions of the 1<sup>st</sup> defendant, or both 1<sup>st</sup> defendant and plaintiff or the plaintiff only. The only correspondence which have been exhibited from the firm of Mohammed Muigai Advocates are letters written in January 2006, and October 2006 which was long after the charge had been prepared and executed, unlike in the case of *Uhuru Highway Development Limited and Others vs Central Bank of Kenya and Others [2002] E A 654* in which there was ample evidence of correspondence as well as evidence of fee notes raised and payments made, there is no such evidence, upon which an advocate client relationship may be discerned.

Further, it is evident that although the firm of Mohammed Muigai Advocates has several partners and associate advocates, the plaintiff has not identified any particular partner or associate advocate in the firm to whom particular instructions or confidential information relevant to the matters in issue may have been given or whose presence may be necessary as a witness in this case.

As was held in the case of *H. F. Fire Africa Limited vs Gharied (Supra)*, in determining whether there is an advocate/client relationship and whether there is a likelihood of conflict of interest warranting the disqualification of an advocate from appearing for a particular party, the court must be guided by the circumstances of the case.

In this case the plaintiff has failed to show that there was any advocate/client relationship between it and the firm of Mohammed Muigai Associates nor has it established circumstances justifying reasonable apprehension of likelihood of bias. I therefore find no good basis upon which the firm of Mohammed & Muigai can be disqualified from acting in this matter or restrained from acting for the 1<sup>st</sup> defendant. Accordingly, I find no merit in the plaintiff's notice of motion dated 12<sup>th</sup> September 2007 and dismiss the same with costs.

***Dated, signed and delivered this 22<sup>nd</sup> day of November 2007.***

**H. M. OKWENGU**

**JUDGE**