



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

**Civil Case 665 of 2003**

**H.F. FIRE AFRICA LTD..... PLAINTIFF**

**VERSUS**

**AMR GHARIB..... DEFENDANT**

**RULING**

By an application brought by way of a Notice of Motion dated 27.05.2005 the 1st and 2nd Plaintiffs in the Counter Claim have sought orders in this cause that:

(1) Saleh El-Din and / or the firm of Omar K. Amin & Co., Advocates, be disqualified from acting for /or Representing the Plaintiff and the 1st Defendant in the Counter Claim, H.F. Fire Africa Limited, the 2"d Defendant in the Counter-claim Hesham Fouad El- Sayed and the 3rd Defendant in the Counter Claim, H.F. Fire International Ltd

(2) The costs of this application be awarded to the Defendant and the 1st and 2d Plaintiffs in the Counter Claim.

The application is supported by the Affidavit of AMR GHARIB sworn on 27.05.2004 and the grounds that

***(a) Salah El-Din Amin and or partners in the firm of Omar K.***

***Amin & Company Advocates are potential witnesses in these proceedings.***

***(b) There is a conflict of interest in Salah El-Din Amin and /or***

***Omar K. Amin & Company Advocates acting against the Defendant the 1st Plaintiff in the Counter Claim***

During the hearing of this application, both Mr. Owino learned Counsel for the Applicants and Mr. Amin relied upon the pleadings herein and in the case of Mr. Owino, he relied upon the Supporting Affidavit of Mr AMR GHARIB sworn on 27.05.2004 and the Further Affidavit of the said AMR

GHARIB sworn on 9.07.2004, on behalf the Applicants whereas Mr. Amin relied upon his own Replying Affidavit sworn on

8.05.2005.

So far as is material to this Ruling, the Applicant's case is that neither Mr. Salah El-Din Amin, learned Counsel for the Plaintiff, nor his firm Omar K. Amin & Company Advocates should act either for the Plaintiff in the Principal action against the Defendant, or the three Defendants in the Counter-Claim. The sole ground for this case is that the said Salah El-Din Amin is a **"potential witness" in these proceedings and that by reason thereof there is a conflict of interest."**

The reason why there is a conflict of interest is because the said salah El- Din Amin, and/or his firm Omar K. Amin & Co., Advocates mediated in and resolved a dispute between **AMR GHARIB** and the second Defendant in the Counter-Claim Mr. Hesham Fouad El-Sayed. Mr. AMR Gharib depones in his Supporting Affidavit that arising out of the said mediation the said firm of Omar K. Amin & Co., Advocates drew up a Memorandum of Agreement dated 13.06.2000 in which the said AMR Gharib and Heshan Fouad El-Said agreed upon the matters set out in the said Agreement. I also observe that signature of the said Memorandum of Agreement was witnessed by Salah El-Din Amin and the said Agreement was first drawn by the said firm of Omar K. Amin & Co., Advocates.

This deponent further avers that the said Salah El-Din Amin became a director of the plaintiff company or the 1st Defendant in the counter-claim by virtue of a Power of Attorney dated 30-06-2003 donated to him by Hesham Fouad El-Sayed, the 2nd defendant in the counter-claim, and by virtue of such Power of Attorney requisitioned a meeting of the board of the respondents to be held on 22.07.2003 at 3.00 p.m. From the averments in paragraph 7 of the Supporting Affidavit of Amir Gharieb the said meeting requisitioned for 22.07.2003 did not take place because this deponent whose presence was required did not attend because he avers, the meeting was called at short notice and he had prior arrangements for engagement elsewhere. For all these reasons, this deponent concluded that the firm of Omar K. Amin & Co., Advocates, and/or Saleh El-Din Amin, were **intrinsically** involved with the Plaintiff, and that having mediated between him and the 2nd Defendant in the counter-claim are potential witnesses in these proceedings and should consequently be disqualified from acting for either of the parties.

In addition to the Supporting Affidavit, the applicants also filed a Further Affidavit that in consideration of the services rendered by Mr. Salah El Din Amin, the applicant, whose full names are Amir Abd Elazin Gharieb, paid the said Salah El-Din Amin, the sum of \$4,500=00 by cheques issued on 4/10/2000 (for US \$2000=00) and on 15/4/2000 (for US \$2,500=00).

There is filed in reply to these averments, and the application as a whole, a Replying Affidavit by Salah El-Din Amin sworn on 8.03.2005, and filed on the same day.

So far as is material to this application, Mr. Salah El- Din Amin depones in paragraphs 7, 13, 14, & 15 as follows:-

***..... I have never acted as an Advocate for the Amir Gharieb personally in respect of any matters material, relevant or in the issue in this suit. I told Mr. Amir Gharieb on several occasions and he was fully aware that in the event of any dispute***

***he may have in regard to Hesham Fouad or any Companies***

***associated with him I could only advise him to seek independent***

***legal representation which he subsequently did..... In***

***subsequent meetings he (Amir Gharieb) told me that it was better that we did not discuss***

*matters relating to his personal interest in the Plaintiff company as he could foresee the disputes arising between him with Heshan Fouad and he (Amir Gharieb) did not wish to embarrass me (Salah El-Din Amin) professionally or compromise their personal friendship.....*

**13. The Plaintiffs in the Counter-claim are only at**

*risk of suffering prejudice if I were to give evidence as a witness*

*against them and not if I were to represent my clients as Counsel.*

**14. ....I cannot be compelled to testify as a**

*witness in these proceedings as to require me to give evidence*

*would be tantamount to forcing me to betray the confidentiality I owe to my clients and thereby to violate my professional and ethical duties to my client.*

**15. .... for the foregoing reasons I cannot be a potential witness nor can I fairly be accused of being in a position of conflict of interest. On the other hand if I am prevented from acting for my clients in this suit it will occasion them grave prejudice and injustice as they will be prevented from instructing an Advocate of their choice who can most effectively represent them in this litigation "**

The other relevant paragraph of the Salah El-Din Amin Replying Affidavit is paragraph 5 thereof. In it, Mr. Salah El-Din Amin confirms that he facilitated the reconciliation of the parties and acted as an expert, and a friend of both parties, he consequently drew and had executed by the parties, the Memorandum of Agreement, and did also draw up the Agency Agreement dated 14-6-2000 between H.F. International Inc. and Golden Arrow International Trade Engineering Ltd. which later changed its name to "**H.F. Africa Ltd**". Salah El-Din Amin consequently avers that

***those agreements contain the entire understanding of the parties and supersede all previous agreements and arrangements pertaining to issues of the Agency and the Managing Director respectively which are the only issues material and relevant to this suit.***

***Copies of the said agreements are annexed to the said affidavit.***

The sole issue for determination in this application is whether the said Salah El-Din Amin Advocate or his firm Omar K. Amin should either voluntarily cease acting for the Plaintiff in the Original suit, or the Plaintiff as 1st Defendant and the other two Defendants in the Counter-Claim, or be prohibited by the Court from so acting.

Salah El-Din Amin of the firm of Omar K. Amin has, in his sworn affidavit and in the paragraphs cited above, sworn that he is not willing to voluntarily cease acting for the Plaintiff in the Counter-claim. He cannot see any good reason for ceasing to so act, and denying his firm a lucrative retainer. He does not see any conflict of interest between his previous acting for the Plaintiff and mediating between the Plaintiff majority owner of the Plaintiff Company and the Plaintiffs in the Counter-claim. He avers that he has never acted personally for the Plaintiffs in the Counter-Claim and that for the payment of US 4,500.00 paid to him under the personal cheque of the Plaintiff in the Counter-Claim, this Counsel submitted that even those funds or fees were on account not of the Defendant in the principal action, or the Plaintiffs in the Counter-Claim but was in fact paid on behalf of the Plaintiff in the original action as the Defendant mixed company funds with his

own.

This Counsel further states that the matters material between the parties and of which he could be

called upon to give evidence are the two agreements which Counsel acknowledges that he prepared. These agreements are namely:

***(i) The Memorandum of Agreement dated 13.06.2000 between***

***Hesham Fouad and Amir Gharieb in connection with the shareholding of the Plaintiff company, and other matters stated therein.***

***(ii) The Agency Agreement dated 14.06.2000 between the Plaintiff in***

***the original action, and the 3rd Defendant in the Counter-Claim in connection with the matters stated therein.***

***(iii) The Managing Director's Agreement dated 14.06.2000 between***

***Plaintiff and the Defendant in the Original action.***

Mr. Salah El-din Amin has sworn that these agreements contain the entire understanding of the parties and supersede all previous agreements and arrangements pertaining to issues of the Agency and the Managing Director respectively and that these are the only issues material and relevant to this suit.

Having considered this application carefully I am unable to find any plausible reason for compelling the **Salah El-Din Amin** or the firm of **Omar K. Amin** to abandon the brief to them by either Plaintiff in the original action or the Defendants in the Counter-claim. My reasons are founded firstly on the facts as disclosed in parties respective affidavits as outlined above, and secondly on the law.

On the first, the applicants have in the supporting Affidavits and the further Affidavit of AMR Gharieb cited the salient and probably the most relevant and material evidence on their relationship with either the firm of Omar K. Amin, or Mr. Salah El- Din Amin. Those agreements are in the public domain and expressed what the parties said in relation thereto and are not likely to be allowed to say anything else to explain anything else beyond those agreements. I cannot therefore say that acting for one party by Counsel who drew these agreements, would in any way prejudice the Defendant's case in the original action, or the Defendant's (as Plaintiffs) case in the Counter-Claim.

Secondly, Counsel, as a member of the Bar is permitted to make a statement robed from the Bar without being sworn on any matter within his knowledge in connection with the case. If however, he does not avail himself of this privilege, he should give evidence in the ordinary way from the witness box, unrobed, and on oath., Counsel is a competent witness, but where he knows that he will be a material witness he should not accept a retainer in the case.

I was referred by Mr. Salah El-Din Amin to the English case of RAKUSEN VS ELLIS MUNDAY & CLARKE 1912 1 Ch. 831 where the Court of Appeal, reversing the decision of Warrington J, and overruling the decision of Hall VC in Little Vs Kingwoods & Co (1882) held

***"That there is no general rule that a solicitor who acted for some person either before or after litigation began could in no case act for the opposite side. The Court must be satisfied in each case that a mischief would result from his so acting; that there could be no danger of any breach of confidence if the solicitor acted for the company and that the injunction must be refused (i.e. reversing the decision of Warrington J) "***

In that case the Applicant had consulted the firm of **Ellis Munday** and **Clarke** in connection with an action for wrongful dismissal. He then charged his solicitors. Upon the company appointing the same firm to act on its behalf the Appellant brought an action for injunction to restrain the Defendant firm or any of its Partners from acting for the company on the general principle that where a solicitor has acted for a client in any particular matter he cannot subsequently act against him in the same matter, nor can his partners do so.

Dismissing the matter, Cozen Brandy MR said at P. 95

***"I do not doubt for a moment that the circumstances may be such that the solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability, result if the solicitor is allowed to act. "***

Fletcher Moulton L. J. at pp 889 890 compared the position of a solicitor with persons employed in positions of confidentiality that the knowledge which they acquire is not knowledge at their own disposal but consists substantially of the secrets of the employer, and that such employments come to an end, sometimes at the choice of the master, sometimes at the choice of the servant, and that thereupon difficulties necessarily arise, because the person who is no longer in employment still has in his breast Secrets which are the property of his former employer or master. The court does not say that the possession of those secrets shall cripple his work or sterilize it. He may go into employment quite inconsistent with the employing which he had in the past. All that the law says is

***"you shall not disclose or put at the disposal or service of your new employer the secrets that belong to your old***

***Employer. "***

The Master of the Rolls went on and in the case of the employment of solicitors

said at 840 -

***"In my opinion the fundamental principle remains the same as in other cases of confidential employment ....(i) That although there was no law that, because a solicitor had acted for a person, he might afterwards act against him, it was not to be supposed that he was at liberty to disclose the secrets of his former client to his opponent in the subsequent proceedings, and that the court could always on general principles restrain a solicitor who threatened to disclose those secrets."***

That is the law with regard to all confidential employment and it applies therefore to confidential employment of a solicitor by the client. The **Master of the Rolls** continued that although the fundamental law is not different, its application is widely different in degree, and for two reasons.

Firstly the degree of the confidential character of the relation between a client and his solicitor and of the communications made by the client to the solicitor is in the eyes of the law the very highest so high that the solicitor is absolutely privileged and cannot be made to state what passed between him and his client. To that extent the solicitor is made as it were a part of his client. for the purpose of those communications. The second reason is that the court is not bound to accept in that case the standard of sensibility which it may feel is all that it can enforce on people in general who are in confidential relations, one with the other. It can fix a standard of behaviour of its own officers which is higher than it would be practicable to exact from persons in other types of confidential relations.

I think therefore, that in deciding the question of what the action of a solicitor may be, although the court does not start fundamentally from a different rule, the decisions it gives may be different in many cases from the decisions which it would give were it appealed to in an action between persons who were not in the position of solicitor and client but nevertheless had been in contractual relations involving confidential communications. The court must act in each case according to the circumstances of the case. Buckley L.J. was of the same Vein. At p. 842 he said

***" There is a general principle, applicable not to solicitors only but to confidential agents of all kinds, that confidential information shall not be used against the principal from whom or for whom and in whose***

***employment, it has been obtained. There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent. Whether***

***or not he will be restrained or not depends on the particular circumstances, he will be restrained from communicating confidential information.....***  
"

In the instant case, Counsel has made disclosure of that which he or his firm did in relation to the Plaintiff herein and to the Defendants in the Counter-Claim. Beyond this his position would be like that of any confidential agent. He will be bound not to disclose any confidential information to his new employer concerning the affairs of his former employer. However in this instance also it is not a case of a former employer, the Plaintiff herein who is, along with two other the Defendants in the Counter-Claim was, and is, the Advocate's Client. He is not therefore acting for the opposite or another party. He has always on matters material as stated above acted for the same party. The Defendant in the original action and the Plaintiff in the Counter Claim was always a party but collateral to the Advocates principal client, that is to say, the Plaintiff's company. There was therefore no question of any relationship of confidentiality between the said Salah El- Din Amin and the Defendant or the Defendant as Plaintiff in the Counter-Claim.

Further, under the Evidence Act (Cap 80, Laws of Kenya), the standard of confidentiality of an Advocate ( as opposed to any other confidential agent or employee) is regarded so high that the relation of Client and Advocate is protected. Section 134 of the Evidence Act prohibits the disclosure by an Advocate of any communication made to him by his client in the course and for the purpose, of his employment or retainer as an Advocate unless, he has the client's express permission to disclose such communication. In any event further, such protection continues after employment of the Advocate has ceased.

This protection from disclosure is only removed if the communication was made in furtherance of an illegal purpose or any fact observed by an Advocate in the course of his employment showing that a crime or fraud has been committed. In brief protection is only withdrawn from a Client/Advocate communication if it is shown to be in furtherance of a criminal and not merely, an illegal purpose.

In addition, Section 134 of the Evidence Act, Section 142 of the Evidence Act also provides that no person who is entitled to refuse to produce a document may be compelled to give oral evidence of its contents. The Advocate herein being so privileged as provided under S. 134 of the Evidence Act, cannot be compelled to give evidence on any of the three Agreements which the Advocates concedes were drawn by him or his firm.

Taking therefore the said legal provisions, the nature of the high standard of confidentiality of an advocate and his client all the circumstances of the matter at hand, I am of the view that no injunction can issue against either Salah El-Din Amin as an individual Advocate or the firm of Omar K. Amin & Company Advocate from acting for the Plaintiff herein as the Plaintiff and two other persons as defendants in the Counter-Claim. In the result therefore, the Notice of Motion dated 27.05. 2004 brought by the Defendant and <sup>1st</sup> and <sup>2nd</sup> Plaintiffs in the Counte-Claim is dismissed with costs.

Dated and Delivered at Nairobi this 9th day of July 2005

**ANYARA EMUKULE**

**JUDGE**

