REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 79 OF 2018

NGATIA & ASSOCIATES ADVOCATE ……..… PLAINTIFF

-VERSUS-

INTERACTIVE GAMING AND LOTTERIES LIMITED ... DEFENDANT

BY WAY OF COUNTER-CLAIM

INTERACTIVE GAMING AND LOTTERIES LIMITED …..... PLAINTIFF

-VERSUS-

NGATIA & ASSOCIATION ADVOCATES ……..…… 1ST DEFENDANT

CHASE BANK (K) LIMITED ……..…..…2ND DEFENDANT

(IN RECEIVERSHIP)

AND

MAMA FATUMA GOODWILL ……. INTERESTED PARTY

CHILDREN'S HOME

RULING

1. A prayer in the Notice of Motion dated 26th October 2020 seeking leave of Court to amend the Plaint is not opposed. What remains of the Motion is the Plaintiff's request that the firm of Mbugua Nganga & Co. Advocates, their partners or servants and/or agents be barred from acting for the 1st Defendant in this suit and in any litigation and or proceedings incidental against the Plaintiff.

2. The Plaintiff contends that George Nganga Mbugua, an advocate practicing in the firm of Mbugua Nganga and Co. Advocates, worked for gain for him at the material time it rendered legal services to the 1st Defendant and that Mr. Mbugua obtained confidential information with regard to the relationship between the 1st Defendant and the Plaintiff.

3. The Plaintiff laments that it is unconscionable for Mr. Mbugua to gain confidential information as an advocate practicing in the name of the Plaintiff and then seeks to use the same information to prejudice the Plaintiff's claim for its legal fees.

4. The Court is asked to note that the 1st Defendant's Counterclaim is on the sole basis that the Plaintiff was negligent and acted in breach of trust. That during the relevant period Mr. Mbugua was involved in drafting pleadings and general duties in all the suits in which the Plaintiff was instructed by the 1st Defendant.

5. Elaborating further on Mr. Mbugua's involvement in the controversy, Mr. Ngatia, on behalf of the Plaintiff firm, deposes that Mr. Mbugua helped in the drafting of the letter dated 19th March 2013 which severed the relationship of the firm with the 1st Defendant. Further, that Mr. Mbugua acted for the 1st Defendant in matters which are the subject of the fees the Plaintiff seeks.

6. Explaining the timing of the application, Mr. Ngatia deposes that once the hearing of the case was adjourned on 21st October 2020, he continued reading the documents as he had dedicated the day to the case and having gone through the voluminous bundle of documents he realized that Mr. Mbugua was using information he obtained while working in his office in the matter.

7. The Plaintiff argues that the involvement of the firm of Mbugua Nganga & Co. Advocates in the suit is a violation of the Plaintiff's right to a fair hearing.

8. Mr. Mbugua responded to the application through an affidavit sworn on 2nd November 2020. Mr. Mbugua takes the view that the Plaintiff's cause of action is to secure costs and expenses for legal services it rendered to the 1st Defendant. He is emphatic that he never acted for the Plaintiff in this suit or in any other suit in relation to his claim for legal costs against the 1st Defendant. And that at any rate the Plaintiff's claim for fees on his taxed costs has been admitted by the 1st Defendant and the 1st Defendant merely mounts a counterclaim, sought a set-off and judgment for the balance.

9. Mr. Mbugua denies ever been employed or otherwise working for gain for the Plaintiff. He explains that his involvement with the Plaintiff in the year 2016 was as an independent practicing Advocate in which he would be engaged by the Plaintiff to draft pleadings and make court representation on diverse matters and that in those matters the clients did not belong to Ngatia & Co. With respect to the 1st Defendant, he deposes that he got all information and material tendered in Court from them as his clients and that he has received no information from the Plaintiff whatsoever.

10. He asserts that the mere fact that counsel handled briefs for another firm cannot constitute an actionable confidential relationship as a brief does not belong to a firm but a client.

11. Regarding the Counterclaim, Mr. Mbugua expounds that it is based on how a joint account opened pursuant to a Court order and for whom the Plaintiff as a signatory was operated. That is the extent to which the negligence has been pleaded against the Plaintiff. Counsel does not see how his alleged participation in drafting pleadings can then be a basis for debarring him.

12. In Paragraph 21 of his affidavit, counsel Mbugua sets out why he holds the application to be an afterthought:-

> **"21. This Application is an afterthought and not *bonafide* as demonstrated below:-**
>
> **i. Since the Applicant ceased acting for IGL vide the letter dated 19th March 2013 marked FN 1 in his Affidavit, I immediately came on record for IGL and served him with a notice of change of advocates. The Plaintiff did not object. A true copy of the Notice of Change of Advocates is attached as "GNM 2".**
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> **ii. I continued acting for IGL in related suits and even when he filed the various taxations against IGL in the year 2016, I represented IGL. He again did not object to my representation.**
>
> **iii. In the year 2015, the Plaintiff took out an application dated 1st December 2015 for joinder in JR. No. 370 of 2010 one of the suits the subject matter of his claim for fees. A true copy of the application is attached herewith and marked "GNM 3". I appeared for IGL in that suit and successfully opposed his application for a lien over funds held in account at SBM Bank. A true copy of the ruling is attached herewith and marked "GNM 4". The Plaintiff did not object to my representation or allege any prejudice.**
>
> **iv. Subsequently, the Plaintiff instituted this case on 23rd February 2018 and I immediately came on record and filed all responses and evidence including the Counter-claim. There was no objection by the Plaintiff.**
>
> **v. I participated in filing of all pleadings including hearing of all interlocutory applications culminating in a partial compromise of the suit by way of a consent letter signed by the parties including the Plaintiff's Advocates on 18th May 2020. There was no objection by the Plaintiff. A true copy of the consent is attached herewith marked "GNM 5".**
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> **vi. Thereafter, parties exchanged all interrogatories, settled issues for determination and even attended Case Management Conference on 14th July 2020. There was no objection by the Plaintiff.**
>
> **vii. On the 21st October 2020, all parties other than SBM Bank were prepared to go on with the hearing of the case. The Plaintiff all the while knew that I was representing IGL and did not raise the issue with the court then obviously because such an objection would have been baseless.**
>
> **viii. On the 26th October 2020 at around 3.30pm, the Plaintiff served this Application clearly with the intention of scuttling the hearing slated for 27th October 2020."**

13. An issue raised by the Respondent is the delay in the bringing of this Application. This suit was presented on 23rd February 2018 and Mr. Nganga Mbugua, the advocate sought to be debarred, had come on record by at least 1st March 2018. For this reason the Respondent

perceives this application brought over two years later, on 26th October 2020, as an afterthought.

14. That dilatory action by the Applicant invites this Court to discuss if and when delay in bringing an application for debarment can defeat such a request.

15. As a start, it has to be underscored that it is a party's fundamental and constitutional right to have an advocate of his choice and that right is not one to be taken away or interfered with lightly (Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 others [2018] eKLR and Mereka vs National Bank of Kenya Ltd HCCC No. 182 of 2002). For that reason a party seeking to judiciously limit this right needs to give an early signal that it will be seeking the debarment. This prepares the party to be affected to confront the matter early in the proceedings or to prepare for alternative representation.

16. Gikonyo J in Guardian Bank Limited v Sonal Holdings (K) Limited & 2 others [2014] eKLR alluded to the need for an applying party to act diligently in the following way:-

> **"The application is also tinctured with inordinate delay which has not been explained. As a matter pf practice and for fairness, such motions ought to be prosecuted timeously, and failure to apply immediately the conflict of interest becomes apparent, the Applicant is deemed to have waived the right to apply for disqualification."**

17. Regarding whether delay in itself is decisive in defeating an application for debarment, the Court of Appeal in Uhuru Highway Development Ltd & 3 others v. Central Bank of Kenya & 4 others [2003] eKLR states:-

> **"Delay, of course, is of particular importance in any case where, as a result of the delay, the interest of the defendants has been prejudiced. The advocate for the plaintiffs submits, we think with some substance, that this is not a case of that character. Where, as her, an advocate is acting in breach of privileged protection, delay in bringing an application such as the present one does not change or defeat the duty or obligation of the common advocate of the parties."**

18. And the Court of Appeal in California, Fifth District in River West, Inc –vs- Nickel 234. Cal. Rptr 33 had this to say:-

> **"…The trial court must have discretion to find laches forecloses the former client's claim of conflict. The burden then shifts back to the party seeking disqualification to justify the delay. That party should address: (1) how long it has known of the potential conflict; (2) whether it has been represented by counsel since it has known of the potential conflict; (3) whether anyone prevented the moving party from making the motion earlier, and if so, under what circumstances; and (4) whether an earlier motion to disqualify would have been inappropriate or futile and why….**
>
> **….(3b) Because of the law's concern for unhampered counsel on both sides of the litigation, "mere delay" in making a disqualification motion is not dispositive. The delay must be extreme in terms of time and consequence. Thus the court must initially determine when the former client became aware of the attorney's potential conflict. Whether there was diligence in making the motion for disqualification depends upon establishing that knowledge."**

19. To be deduced from these decisions is that each case must be treated in its own circumstances and delay will be considered as a relevant factor if extensive and unexplained and where the affected party demonstrates that the delay on its own prejudices it in some way or adversely affects its right to representation. For example, where a party has heavily invested time and fees in counsel and establishes that it would be patently unfair to expect him to leave the advocate proposed to be debarred and move on to another.

20. There will be occasion where, even though delay may not prejudice the respondent, such delay coupled with the conduct of the applicant will be construed as a waiver by the applicant to bring a debarment motion. Instances where, for example, the applicant has allowed the advocate sought to be debarred to undertake important and extensive steps in the proceedings without giving any hint that the advocate's presence in the proceedings will be challenged.

21. On the other end of the spectrum, delay may be overlooked all together. This Court had occasion to consider one such circumstance in Francis Githinji Karobia v Stephen Kageni Gitau [2017] eKLR. The facts of the case, briefly, were that an application was brought to debar a firm that witnessed the execution of an agreement from acting for one of the parties to the agreement. It had been alleged and expressly pleaded that the agreement was procured by undue influence and intense duress from both the Plaintiff and the firm sought to be debarred. It seemed to the Court that the circumstances under which the agreement was executed or procured would in all likelihood be discussed at the hearing of case and so the role or otherwise of counsel would, inevitably, be an issue of focus. For that reason, it was evident that the propriety of the Advocate to act for the party was an issue that was likely to arise and both the Advocate and the applying party ought to have known this. It was therefore the duty of the advocate sought to be debarred, as much as that of the applying party, to bring the issue of possible conflict to the attention of the Court as early as possible for resolution. Delay by either side could therefore not be construed against the other or considered to be a waiver.

22. I observed:-

> **10. As a general Rule an Application seeking to bar Counsel should be made at the beginning of proceedings or as soon as the circumstances giving rise to the objection are known to the applying party. However, there is also an obligation on a Counsel who has reason to believe that an objection might be taken to his continuing to act to disclose this to the other side and to the Court at the earliest opportunity. This will enable any objection to be heard and resolved as early as possible. However as stated in Geveran Trading Co. Ltd Vs. Skjevesland [2002] EWCA Civ 1567;**

"….the obligation to make this disclosure to the other side only arises if the position can reasonably be regarded as open to objection. Moreover, if the other party has duly waived the objection there is unlikely to be any need to mention the matter to the Court …."

"14. Given that the issue of duress and undue influence by the Plaintiff and his advocate was raised early in the proceedings and continued to persist to date, Mr. Maina Murage should have had reason to believe that the issue as to whether he would be required to testify would in all likelihood arise at one time or other. This may be good reason to excuse the inordinate delay."

23. With these in mind, I turn to review the length of delay, reasons put forward for the delay and whether in the circumstances of this case the delay should, without further ado, foreclose the Applicant's assertion of conflict.

24. First and foremost, the objection comes about thirty one (31) months after the advocate sought to be barred came on record. This is lengthy delay and which is of greater significance because case management had been settled and the matter fixed for hearing without the issue of representation being raised.

25. What explanation is given for this delay? Mr. Ngatia, in his affidavit sworn on 26th October 2020 deposes:-

"[14] Once the case was adjourned on 21st October 2020, I continued reading the documents as I had dedicated the day to the case.

[16] I went through the voluminous bundle of documents filed in this suit and realized that Mr. George Ng'ang'a Mbugua, is using the information that he obtained while working in my office in this matter."

He reiterates this in his further affidavit.

26. This Court has difficulty accepting that explanation. First, Counsel does not elaborate on the documents said to have aroused his attention on conflict. Second, in his further affidavit he states that Mr. Mbugua left the Plaintiff's firm surreptitiously in 2013 together with the Defendants pending litigation suits. Surely, the manner in which Mr. Mbugua left would have put the Plaintiff on the alert as what information could be reposed in Mr. Mbugua and which could be used to further the Defendants cause and this alertness would be expected right from the day Mr. Mbugua's firm got on record. Last, it would be surprising that the matter had been settled for hearing and a hearing date set without the Plaintiff familiarizing himself with his case.

27. One other event would have caused the Plaintiff to promptly question the involvement of Mr. Mbugua's firm in this matter. By a Notice of Motion dated 1st December 2015, three years before this suit, the Plaintiff sought to be made an interested party in Nairobi Judicial Review No. 370 of 2010. In the main, the Plaintiff sought entry into the proceedings so as to obtain an order that his firm was entitled to offset costs due and owing from the Defendant from funds held in the names of the firm and the Chief Registrar, Judiciary. A request not dissimilar to his plea in this suit. In those proceedings the Defendant was the exparte applicant and represented by the firm of Mbugua Nganga & Co. The Defendant successfully resisted joinder.

28. In his ruling Odunga J set out some of assertions made by the Defendant in those judicial review proceedings:-

" It was further contended that the Applicant herein despite having acted for IGL never disclosed details regarding the said interest earning account and that so soon after this Court made Orders on how the said funds should be disbursed, both Mama Fatuma and IGL embarked on a very painful exercise in trying to locate the account and various correspondences were exchanged and until the Judiciary finally managed to get the details of the account from Central Bank, the Firm of **Ngatia & Associates Advocates** herein was tight lipped on the matter and it is not clear why he deliberately concealed such information. It was contended that as a signatory to the said account, the Applicant has an obligation to make a full and candid disclosure of interest accrued."

29. Clearly the main issue raised in the Counterclaim by the Defendant was long held by it and had been argued even before presentation of these proceedings. I have to take a view that the Plaintiff had sufficient time, even before the commencement of these proceedings to assess whether the firm of Mr Mbugua would be a proper firm to urge such matters on behalf of the Defendant

30. In addition to failing to give a plausible explanation for delay, the circumstances the Court has set out above can be understood to amount to waiver to seek debarment of Mr. Mbugua's firm. And there is more. It is not disputed that after the Plaintiff ceased acting for the Defendant, he took out the taxations alluded to by this Court earlier. In all those matters, the Defendant was represented by the firm of Mr. Mbugua's firm. No objection as to representation was raised.

31. The Court takes the view that this is a case where delay coupled with the conduct of the applicant should, without more, defeat the plea for disqualification. But I will still consider whether there is a real apprehension of conflict. Gleaned from the Motion itself and the affidavits in support, the Plaintiff's complaint is that Mr. Mbugua is using or is likely to use information obtained by him while working for the Plaintiff to prosecute a claim against it and hence breach of the duty of confidentiality.

32. While the Plaintiff also cites violation of Rule 9 (perhaps 8) of the Advocates Practice Rules, the Court has difficulty appreciating the relevance of that Rule to this matter as it is not the Plaintiff's position that either party is likely to require Mr. Mbugua to give evidence in these proceedings or that in his own intuition Mr. Mbugua ought to believe that he may be required to give evidence. The Rule reads:-

"8. 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."

33. In expounding on this possible conflict, counsel for the Plaintiff in his submissions draws the Court's attention to Rule 86(b) and 86(c) (should be Rule 99 as per Code of Conduct of June 2016) of the Law Society of Kenya Code of Ethics and Conduct for Advocates 2015 which, on conflict, reads:-

"b. Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocates.

c. Where in the course of representing a client there is risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client."

34. While counsel for the Defendant complains that reliance on the Rule is an improper expansion of the application before Court, I think that the Rule merely elaborates on situations where conflict of interest may arise. The challenge will be on the Plaintiff to demonstrate that the allegations raised in the motion fits into these categories.

35. Counsel for the Plaintiff relies on the following passage in King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & another v M/s Kaplan & Straton Advocates [1993] eKLR and submits that having worked closely with the Plaintiff in his office and having come into contact with all the information with regard to the relationship between the 1st Defendant and the Plaintiff, it is prejudicial to the Plaintiff for Mr. Mbugua to be allowed to cross-examine the Plaintiff and prosecute the matter against the Plaintiff. The Plaintiff contends that there is a risk of Mr. Mbugua willingly or unwillingly using information obtained from the Plaintiff to cross-examine the Plaintiff. Counsel asserts that the object of the Rule 86(c) (99) is to ensure that the risk of information obtained by an advocate in the course of discharge of his duties is not used for the benefit of the opposite side.

36. The Plaintiffs also pause the questions "how is one to tell what information he obtained from the Plaintiff and what he may have obtained from the 1st Defendant once this suit was filed."

37. In response the Defendant argues that the Advocate did not act for the Plaintiff in his claim for recovery of fees which is the subject of these proceedings and the Advocate cannot possibly be conflicted. Two, the cases that the advocate appeared were on behalf of the Defendant and not the Plaintiff. And that in any event, the cases in which the Advocate appeared are not the subject of the matter of these proceedings and that the advocate played no role whatsoever in the matters giving rise to both the claim and counterclaim.

38. The Defendant further asserts that as the Plaintiff alleges that some confidential information was obtained which is now being used against him, he has an obligation to prove the existence of that information.

39. On this question of proof the Plaintiff takes a divergent view. He quotes the following observation by Warsame J (as he then was) in Century Oil Trading Company Limited v Kenya shell limited [2008] eKLR:-

"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"

40. It is argued that Mr. Mbugua was deeply involved in the litigation and the burden is on Mr. Mbugua to show that no confidential information was imparted on him. Second, that the principle is to avoid the risk of information being used against the party from whom it may have been obtained.

41. As I understand it, Mr. Mbugua has not acted for the Plaintiff as against the Defendant in any matter at all. What the Plaintiff alleges is that by virtue of a professional relationship between Mr. Mbugua and the Plaintiff, Mr. Mbugua dealt with files in which the Defendant was the Plaintiff's client and by virtue thereof came or may have come about information which is relevant to the litigation now at hand.

42. Although in respect to different facts I would think that passage from the decision of Browne – Wilkinson VC in Supasave Retail Ltd v.

Coward Chance and others [1991] 1 All ER 668 sets out the test to be applied here:-

> **"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 a 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. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusens 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."**

43. The Court will not act to disbar an advocate unless it is satisfied that real mischief and real prejudice is likely to occur if the advocate is allowed to act. The Court of Appeal in Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR 766 suggests that such a heightened threshold is necessary because to interfere with a party's constitutional right to counsel of his choice is a drastic decision.

44. The question whether or not real mischief and real prejudice will in all human possibility result if Mr. Mbugua was allowed to continue acting in this matter can only be answered by understanding the subject matter of the litigation and the nature of Mr. Mbugua's interaction, if any, with the subject matter. There is no value conducting a generalized examination.

45. The Plaintiffs claim against the Defendant is for legal fees and expenses for work done by the Plaintiff on behalf of the Defendant. Costs in four of the five matters have been taxed and the amount payable to the Plaintiff has been ascertained. In its pleadings the Plaintiff explains that it was necessary for it to present this suit so as to protect certain monies deposited in Chase Bank Limited (in receivership) from being disbursed and so that part of it can be available in settling the fees due to the Plaintiff from the Defendant.

46. As noted earlier the firm of Mbugua represented the Defendant in the Taxation proceedings and the Plaintiff did not protest representation. Indeed I do not understand the Plaintiff having discomfort in Mr. Mbugua representing the Defendant on the issue of costs. What the Plaintiff protests is in Mr. Mbugua dealing with the Counterclaim. Yet the Counterclaim is not an attempt by the Defendant to impeach the Plaintiff's conduct of the various litigations on behalf of the Defendant. Rather, and this clear from the pleadings, it assails the Plaintiff on how it handled and managed an account in which money held for its benefit was deposited. In paragraph 55 of the pleadings the Defendant gives the following particulars of breach;

PARTICULARS OF BREACH;

> **i. Withdrawal of Kshs.50 Million on the 4th of June, 2015, from the deposit account to the Plaintiff's Account without an Order of the Court.**
>
> **ii. Deposit of Kshs.42 Million on the 8th of December, 2015, from the Plaintiff's Account to the deposit account without an order of the Court.**
>
> **iii. Occasioning loss of the Defendant's deposit.**
>
> **iv. Failure to apply the relevant and/or applicable interest rate on the deposit.**
>
> **v. Unlawfully withdrawing Kshs.8 Million from the Account.**
>
> **vi. Engaging in unauthorized and illegal transactions hence devaluing the Defendant's deposit.**
>
> **vii. Failing to furnish the Defendant with account opening forms and Statement of Accounts.**
>
> **viii. Acting oppressively, contemptuously and in blatant disregard of the Defendant's rights.**
>
> **ix. Deliberately subverting justice by withholding information on the Account.**
>
> **x. Contravening customary banking practice, relevant banking laws, regulations and procedure and failure to honor obligations owed to a customer by a Bank.**
>
> xi. **Obstructing execution of lawful orders of the court by suppressing information that the Defendant is entitled to.**

47. The Plaintiff has not stated that Mr. Mbugua was a signatory to or a joint manager of this account. It has not been demonstrated or even alleged that Mr. Mbugua was in any way involved in the management of the account. No nexus has been drawn between the work Mr. Mbugua did on the Defendant's cases or files and the account. Only then, on the proposition in **Century Oil Trading Company (supra),** would have the burden shifted to require Mr. Mbugua to disclose what information may have reposed in him regarding his involvement in the matters raised in the Counterclaim. Only then could it be said some mischief or prejudice would in all human possibility result if Mr. Mbugua continued to act for the Defendant.

48. Prayer 1 of the Notice of Motion dated 26th October 2020 seeking leave to amend the Plaint, and which was not opposed, is allowed as

prayed. Prayer 2 is disallowed. Costs of the Application to the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 11th Day of May 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kimani Kiragu S.C for the Applicant.

Mbugua Nganga for the Respondent.

Miss Ndong for the 2nd Defendant to the Counterclaim.