



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 324 OF 2016**

**AFRICAN PROJECT COORDINATION AGENCY LTD.....PLAINTIFF**

**VERSUS**

**UMOA INVESTMENT LIMITED.....DEFENDANT**

**RULING**

(1) Before this Court is the Notice of Motion dated 17<sup>th</sup> April 2019 by which **UMOA INVESTMENT LIMITED** the Defendant/Applicant seeks the following Orders: -

“1. SPENT

2. SPENT

3. SPENT

4. THAT upon hearing the application Inter partes, the Honourable Court be pleased to review and set aside the Orders issued on 13/2/2019.

5. THAT upon hearing the application Inter Partes, the summons issued by the Honourable Court to Mr. Ben Munyasya of Munyasya and Co. Advocates and Mr Ben Mwonyonyo of Bank of Africa in Court to testify as witnesses on behalf of the Plaintiff be revoked and/or set aside.

6. THAT upon hearing the application Inter Partes, Mr Ben Munyasya be barred from appearing before the Honourable Court as a witness on behalf of the Plaintiff/Respondent.

7. THAT upon hearing the application the Inter Partes, Mr Benard Mwonyonyo be barred from testifying before the Honourable Court as a witness and a representative of Bank of Africa Limited.

8. Costs of this application.

(2) The application was premised upon **Order 45, Order 51 Rule 1 of the Civil Procedure Rules, 2010 Sections 134, 136 and 140 (2) of Evidence Act and Sections 1A, 1B and 3B of the Civil Procedure Act, Cap 21, Laws of Kenya Article 31 and 50(1) of the Constitution** and all enabling Provisions of the law. The application was supported by the Affidavit of even date sworn by **PATRICK MUNG'ALA** a Director of the Applicant Company and the Supplementary Affidavit dated 16<sup>th</sup> July 2019.

(3) **AFRICAN PROJECT LTD** the Plaintiff/Respondent opposed the application by way of the Replying Affidavit dated 29<sup>th</sup> April 2019, sworn by **FLORIAN JOHN MULI**, a Director of the Plaintiff Company. The application was canvassed by way of written submissions. The Defendant/Applicant filed its written submissions on 22<sup>nd</sup> July 2019 whilst the Plaintiff/Respondent filed their submissions on 2<sup>nd</sup> July 2019.

**BACKGROUND**

(4) The hearing of the suit between the two parties herein commenced before this Court on 6<sup>th</sup> November 2018. The Plaintiff put their first witness on the stand. On 13<sup>th</sup> February 2019, the Court extended summons which had been issued to two of the Plaintiffs witnesses namely

**Mr Ben Munyasya** an Advocate of the High Court and **Mr Ben Munyonyo** who at the material time was an employee of **Bank of Africa** who were the Defendants financiers.

(5) On **23<sup>rd</sup> April 2019** while the matter was still going for hearing of the Plaintiffs case, the Defendant filed this present application seeking to bar two of the witnesses, the Plaintiff intended to call to testify on their behalf. The Defendant sought to bar **Mr Munyasua** Advocate from testifying on the grounds that an Advocate-Client relationship existed between the parties as **Mr Munyasya** acted as a legal consultant on the project that was to be undertaken on the Applicant's parcel of land known as **Machakos Town Block 11/279**. Thus the Defendant contended that any information which came into the knowledge of said Advocate during the period of that engagement is protected by privilege of **Advocates under Sections 134 and 137 of the Evidence Act Cap 80** laws of Kenya.

(6) The Defendant sought to bar the testimony of **Mr Munyonyo** on ground that at the time when he worked for Bank of Africa their engagement was protected by Bank-Client confidentiality and further that the said **Mr Munyonyo** is no longer an employee of Bank of Africa and has not been authorized to testify on behalf of the Bank. The Applicant submits that to allow these two witnesses to testify would amount to a violation of the Defendant's right to privacy as provided under **Article 31 of the Constitution of Kenya**.

(7) On their part the Plaintiffs counter that the present application is merely an abuse of court process. That the Defendants are seeking a review of the Court orders of **13<sup>th</sup> February 2019**, but have failed to demonstrate the discovery of new information or to show an error on the face of the record. That the present application is merely a ploy by the Defendants to delay the hearing of the suit and ought to be dismissed.

#### **ANALYSIS AND DETERMINATION**

(8) I have carefully considered the written submissions filed by both parties in this matter. The following issues arise for determination:-

- (i) Whether the Court orders of **13<sup>th</sup> February 2019** ought to be set aside.
- (ii) Whether the two witnesses ought to be barred from testifying for the Plaintiff in this suit.

#### **(i) Setting Aside Order of 13<sup>th</sup> February 2019**

(9) **Order 45 Rule 1 of the Civil Procedure Rules 2010** provides as follows: -

**“(1) Any person considering himself aggrieved.**

**(a) By a decree or other from which an appeal is allowed, but from which no appeal has been preferred: or**

**(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

(10) The Defendant seeks to stay and/or set aside the orders made by this Court on **13<sup>th</sup> February 2020**. I do agree with the Plaintiff that on that day the court did not make any substantive orders. All the Court did was to adjourn the hearing and to direct that the summonses which had been issued in respect of the two witnesses be extended.

(11) The Defendant objects to the Advocate **Mr Munyasya** being called as a witness contending that this would be a breach of Client/Advocate privilege. Firstly, the fact that this Advocate had been lined up as a witness by the Plaintiffs is not a new fact. The Defendant were fully aware that **Mr Munyasya** was to be called as a witness by the Plaintiffs from back as far as **18<sup>th</sup> September 2017** when the Plaintiffs served upon the Defendant during Case Management a document (Annexure to the Replying Affidavit dated **29<sup>th</sup> April 2019**) which at Page 11 clearly indicates that the Plaintiff would be seeking for witness summons for **Mr Ben Munyasya** and **Mr Ben Mwononyo**. The summonses were issued during Case Management. Having known all along that the two were to be called as witnesses by the Plaintiff it is disingenuous for the Defendant at this late stage to object to the two witnesses. On **9<sup>th</sup> March 2018** the Counsel for the Defendant attended the case Management Conference and confirmed the case ready for hearing and on that date, no objection was raised about the two witnesses.

(12) The Court record indicates that on **13<sup>th</sup> February 2019** the case was called out but was adjourned due to the illness of the Defendant's Advocate. However, there was in Court an Advocate holding brief for the Defendant. Counsel for the Plaintiff sought an extension of the summons. Counsel holding brief raised no objection and the court did extend the summons. Further the Applicants have not made this application timeously. From **September 2017** when the Applicant became aware that the two (2) witnesses were to be called by the Plaintiff he sat pretty and waited for 2 years until the matter was partly heard before seeking to bar the two witnesses. Based on the above I find that no valid grounds have been advanced why the courts orders of **13<sup>th</sup> February 2019** ought to be set aside.

(ii) **Whether the two witnesses ought to be barred from testifying?**

(13) The Applicants have objected to the calling of Advocate **Mr Ben Munyasya** as a witness for the Plaintiffs on grounds that the said advocate acted for both the Plaintiff and the Defendant as a common lawyer as the proposed project's legal consultant.

Section 134 of the Evidence Act provides that:-

**“No advocate shall at any time be permitted unless with Clients express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client or to state the contents or conditions of any document with which he has been acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.”**

(14) Rule 9 of the Advocates Practising Rules provide 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 in formal or non-contentious matter of fact in any matter in which he acts or appears.”**

(15) An Advocate/Client relationship arises where a person retains an advocate to act for him in a particular matter. The above provisions prevent an advocate from representing a client in any matter where he is likely to be called as a witness.

(16) The said Advocate **Mr Ben Munyasua** acted for **both** of the parties herein. He was the link between the Plaintiff and the Defendant and facilitated the transaction between the two. The Plaintiff wishes to call this Advocate to prove the existence of the relationship between the parties whilst the Defendant who has since disowned the said Advocate asks the court to bar him from testifying for the Plaintiff in this suit. To my mind to bar this witness from testifying would be tantamount to denying the Plaintiff a chance to prove its case. The Advocate will only testify as regards the nature of the relationship between the Plaintiff and the Defendant as he knew it and to authenticate documents he authored. He is not being called in order to divulge any confidential information relayed to him by either party. As such I find the witness is competent to testify.

(17) As regards **Mr Mwononyo** the Defendant objects to his testifying on grounds that firstly he no longer works for Bank of Africa and secondly that his evidence would violate Banker – Client confidentiality. Again I find no valid basis for this objection. The witness does not require the authority and/or consent of his former employer to testify in this matter. The Defendant ought not be seeking to clog the Plaintiffs right to call witnesses in support of its case. The defendant will have opportunity to cross-examine said witnesses and to produce counter witnesses if need be.

(18) Based therefore upon the foregoing, I dismiss this objection and direct that the two witnesses are competent to testify on behalf of the Plaintiff in this suit.

Dated in **Nairobi** this **21<sup>ST</sup>** day of **May 2020**.

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**Justice Maureen A. Odero**