



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.194 OF 2018

NJAMA WAMBUGU.....PLAINTIFF

VERSUS

SPACE AND STYLE LIMITED.....1ST DEFENDANT

WINFRIDA WANJIKU NGUMI.....2ND DEFENDANT

CECILIA NJOKI MUHOHO (Sued as proxy for

DECAMIS LIMITED.....3RD DEFENDANT

LUCY MUMBI KIMANI.....4TH DEFENDANT

EDWARD MULEWA MWACHINGWA.....5TH DEFENDANT

DAVID OTIENO OPIYO.....6TH DEFENDANT

RULING

1. Before me are two applications dated 28th June 2018 and 20th July 2018 which I directed to be heard together.

2. The application dated 28th June 2018 is filed by the plaintiff pursuant to provisions of the law on the face of the application; in which the plaintiff seeks the following orders:-

1. This application be and is hereby certified as urgent.
2. This firm of Wamae & Allen Advocates be and is hereby barred from acting for the Defendants in this matter.
3. The firm of Wamae & Allen Advocates be and is hereby barred from acting for the Defendants in this matter.
4. The Memorandum of Appearance dated 18th June, 2018 and Statement of Defence dated 18th June, 2018 filed on behalf of the 1st, 2nd, 4th, 5th and 6th Defendants as well as the Replying Affidavit sworn on 22nd May, 2018 by the 2nd Defendant, all drawn by Wamae & Allen Advocates be struck out and expunged from the Court record.
5. The costs of this application be awarded to the Plaintiff.

3. The application is based on grounds on the face of the application being as follows:-

1. The claim before the Court emanates from a dispute between the 2nd Defendant and the Plaintiff over the shareholding and directorship of the 1st Defendant Company.
2. The relationship between the 2nd Defendant and the Plaintiff is governed by the 1st Defendant's Memorandum and Articles of Association dated 14th March, 2002 which contains an arbitration clause for resolution of disputes.

3. The 3rd Defendant acquired shares in the 1st Defendant after incorporation and is therefore, bound by the arbitration clause notwithstanding the fact that it has not paid for its shares and has no voting rights in meetings of shareholders.

4. On or before 31st January, 2018, the 2nd Defendant and the Plaintiff executed a term sheet as a preparatory process towards the sale and transfer of all the Plaintiff's shares and interests in the 1st Defendant to the 2nd Defendant.

5. On the same date, the 2nd Defendant and the Plaintiff executed a loan agreement, and on 9th February, 2018 the Plaintiff executed a power of attorney in favour of the 2nd Defendant to secure Kshs. 25,000,000.00 received by the Plaintiff towards the deposit on the purchase price for the sale and transfer of the Plaintiff's shares and interests in the 1st Defendant.

6. Wamae & Allen Advocates acted as the joint Advocates for the Plaintiff and the 2nd Defendant in the intended sale and transfer of the Plaintiff's shares and interests in the 1st Defendant and were the Legal Advisor under the term sheet.

7. The term sheet, loan agreement and power of attorney were negotiated, drawn by and executed on the legal advice of Wamae & Allen Advocates as joint Advocates for the 2nd Defendant and the Plaintiff.

8. The 1st, 2nd, 4th, 5th and 6th Defendants have retained Wamae & Allen Advocates to act for them in this claim and the said Advocates are led by Waweru Gatonye & Company Advocates.

9. Wamae & Allen Advocates are precluded from acting for any of the parties in this matter on account of conflict of interest and so too are Waweru Gatonye & Company Advocates.

10. Wamae & Allen Advocates received information or knowledge in the course of their retention which is confidential and are precluded by the fiduciary duty owed to the Plaintiff from acting against him and using the said information.

11. Wamae & Allen Advocates have shared the confidential information with Waweru Gatonye & Company Advocates who purports to lead them yet in actual facts he acts for John Karimi Njiraini whose interest in the 1st Defendant as secured through the 3rd Defendant as well as Waweru Gatonye & Company Advocates.

12. The Plaintiff has already been prejudiced and stands to be further prejudiced by the conduct and actions of Wamae & Allen Advocates and Waweru Gatonye & Company Advocates.

13. Wamae & Allen Advocates have filed the Statement of Defence dated 18th June, 2018 in a calculated attempt to prejudice, embarrass and delay the resolution of the dispute through arbitration. The filing of the Statement of Defence is also, an abuse of the process of the Court.

14. It is just and proper that Wamae & Allen Advocates and Waweru Gatonye & Company Advocates be barred from acting for the Defendants and the pleadings and all documents filed by them be struck out.

4. The application is supported by affidavit of Njama Wambugu, the Plaintiff/Applicant dated 28th June 2018 in which he has reiterated the grounds on the face of the application and attached annexures NW-1 - NW-9 in support of the application.

5. The 2nd defendant filed a Replying affidavit dated 20th July 2018 on her behalf and that of the 1st and 4th – 6th defendants opposing the plaintiff's application dated 28th June 2018 and praying the same to be dismissed with costs. The affidavit has dealt with provisions of Rule 9 of the Advocates (*practice*) Rules; on the dispute resolution; confidential information and on matters rebutting the plaintiff's supportive affidavit.

6. The 3rd Respondent has filed a Replying affidavit dated 19th July 2018 through Mr. Charles Waweru Gatonye, appearing for the 3rd Defendant/Respondent opposing the application by the Plaintiff/Applicant and attached annexures **CWG-1 – 3A, B and C**.

7. The 2nd Application by 1st, 2nd and 4th – 6th defendants dated 20th July 2018 is brought similarly pursuant to the provisions of the law on the face of the application and seeks the following orders:-

1. This application be certified as urgent, heard ex parte in the first instance.

2. The application be consolidated for hearing together with the Plaintiff's application dated 28th Jun 2018.

3. Paragraphs 8-11, 14, 19, 27, 34, 43-46, 51-55, 57, and 59-61 of the Supporting affidavit of Njama Wambugu dated 28th June 2018 be and hereby struck out and expunged from the court record.

4. The consent orders of 22nd May 2018 be and are hereby discharged and/or set aside.

5. The firm of Havi and Company Advocates be and is hereby barred from acting for the Plaintiff in this matter.

6. The firm of Havi and Company Advocates is condemned to bear the costs of this application personally.

7. The costs of this application be awarded to the 1st-2nd and 4th – 6th Defendants.

8. Any other orders the court may deem fit to grant in the interests of justice.

8. The application is premised on the grounds on the face of the application. The application is further supported by affidavit of Winfrida Wanjiku Ngumi dated 20th July 2018.

9. The plaintiff filed a Replying affidavit to the 1st, 2nd, 4th – 6th defendants' application dated 20th July 2018 through his affidavit dated 23rd July 2018.

10. The parties filed written submissions in support of their rival opposing positions. The Plaintiff's/Applicant's submissions dated 25/7/2018 were drawn and filed by M/s Havi & Company Advocates; whereas M/s Wamae & Allen Advocates drew submissions dated 24th September 2018 on behalf of the 1st, 2nd, 4th- 6th defendants and lastly M/s Waweru Gatonye & Company Advocates drew submissions dated 19th July 2018 on behalf of the 3rd defendant. At the time set for highlighting, all counsel agreed to rely on their written submissions and dispensed with the highlighting.

11. The instant suit was filed on 17th May 2018, together with an application for interim measures pending arbitration, in terms of Section 7 of the Arbitration Act (Cap 49) of the Laws of Kenya. An interim Order was issued on 22nd May, 2018, restraining the 2nd and 3rd defendants from changing the bank operation mandates of the 1st Defendant. The 2nd defendant consented to the issuance of the Order of 22nd May, 2018. She was represented by M/s Wamae & Allen Advocates, who was led by Waweru Gatonye & Company Advocates.

12. The 1st, 2nd, 4th to 6th Defendants entered appearance on 19th June, 2018 through M/s Wamae & Allen Advocates and filed their Statements of Defence. It is evident that the said defendants did not want the dispute referred to arbitration.

13. The dispute intended to be referred to arbitration centers around the interpretation of the 1st Defendant's Memorandum and Articles of Association dated 14th March, 2002, Term Sheet and Loan Agreement executed on or before 31st January, 2018, by the 2nd Defendant and the Plaintiff on 20th January, 2018 and Power of Attorney executed by the Plaintiff on 9th February, 2018. The latter three documents were drawn by Wamae & Allen Advocates as joint Advocates for the 2nd Defendant and the Plaintiff.

14. I have carefully considered the twin applications and submissions by counsel and from the aforesaid the issues for consideration can be summed up as follows:-

a) Whether there was a joint retention by the 2nd defendant and the plaintiff of M/s Wamae & Allen Advocates on the Term sheet, Loan Agreement and Power of Attorney, precluding them from acting against plaintiff in this matter?

b) Whether M/s Wamae & Allen Advocates together with Waweru Gatonye & Company Advocates received confidential information in the converse of the retention of the former, precluding them from acting against the plaintiff in this matter?

c) Whether the firm of M/s Havi and Company Advocates can be precluded from acting for the plaintiff in this matter?

d) Whether the consent order of 22nd May 2018 was obtained by material non-disclosure and should be discharged and set aside?

e) Whether paragraphs 8-11, 14, 19, 27, 34, 42-46; 51-55, 57 and 59-61 of the supporting affidavit of Njama Wambugu dated 28th June 2018 should be struck out and expunged from the court's record?

15. The law relating to disqualification of an Advocate from acting for a party is provided from under Rule 8 (*formerly Rule 9*) of the Advocates (*practice*) Rules which provides 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."

16. In **Tom Kusienya & others Vs. Kenya Railways Corporation & others [2013] eKLR** the High Court in interpreting Rule 8 of the Advocates (*practice*) Rules stated as follows:

"From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit."

17. Further to the above, it has been decided in determining the circumstances under which the Rule would apply, in the case of **Delphis**

bank Limited Vs Channan Singh Chatthe & 6 others [2005] eKLR where it was observed as follows:-

"The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative by an 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."

18. Similarly it has been held in an attempt to determine where conflict of intent would arise, in the case of **Serve in Love Africa (Sila) Trust Vs David Kipsang Kipyego & 7 others [2017] eKLR** it was held as follows:-

"Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter."

A. Whether there was a joint retention by the 2nd defendant and the plaintiff of M/s Wamae & Allen Advocates on the Term Sheet, Loan Agreement and power of Attorney, precluding their firm acting against the plaintiff in this matter?

19. In the instant application, there is no dispute that M/s Wamae & Allen Advocates were retained by the 2nd defendant and the plaintiff in the transaction for the sale of the plaintiff's shares to the 2nd defendant, which firm is stated to be the legal Advisor under clause 3 of the Term Sheet; and clause 4 of the Term Sheet clearly sets out the purpose thereof thus:-

"The ultimate aim of the commercial terms contained in these TS is to enable the transfer of all shares owned by NW in S & S to WN or to any party that WN may in her sole discretion nominate."

20. From the aforesaid the Term Sheet was drawn by M/s Wamae & Allen Advocates, and was to be used by the same Advocate to draft "Definite Agreement" which included a sale and purchase agreement between the parties; the sale agreement for any property whether personal or owned by the 1st defendant, and by any other agreement deemed necessary to enable the purchase and settlement of the shares. It is evident also that the Loan Agreement and Power of Attorney were also drawn by the same firm of Advocates.

21. Perusal of clause 17 of the Term Sheet reflected as follows:-

"Fees due to the Transaction Team shall be paid directly to the LTA (Lead Transaction Advisor). These fees shall exclude disbursements required by the LA (Legal Advisor). Such disbursements shall be communicated to the parties and paid directly to the LA."

22. The fees for the entire transaction was agreed at Kshs.2, 500,000.00 to be shared equally between the 2nd Defendant and the Plaintiff (see pages 53 of exhibits to the Affidavit of the Plaintiff sworn on 28th June, 2018). The 2nd Defendant and the Plaintiff were required to pay a deposit of Kshs.450, 000.00 each, by a cheque made out to the Lead Transaction Advisor, Charles Omanga (see page 43 of exhibits to the Affidavit of the Plaintiff sworn on 28th June, 2018). The Plaintiff settled his share by a cheque appearing at page 44 of the exhibits to his Affidavit sworn on 28th June, 2018.

23. From the plaintiff's affidavit sworn on 28th June 2018 the details of the nature and scope of the legal work that was to be done by the firm of M/s Wamae & Allen Advocates is set out. In the circumstances I have no doubt that a retainer has been proved of the firm of the Advocates in this matter.

24. It is the duty of this court to consider whether in view of the retainer and the Advocates having acted for both the plaintiff and the 2nd defendant, in previous transaction subject of this matter, a conflict of interest has been established which would prohibit M/s Wamae & Allen firm from acting for the defendant's in this matter.

25. **Rule 98 and 99 of the Advocates code of standard of professional practice and Ethical conduct** places the prohibition in the following words:-

"98. Maintaining loyalty to clients promotes trust and confidence in the Advocate. Therefore, as a general rule, an Advocate should not knowingly assume or remain in a position in which a client's interests conflict with the interests of the Advocate, the firm's or another client. The Advocate should not represent a client if the representation involves a conflict of interest."

99. Situations in which a conflict of interest might arise include:-

(a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;

(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 Advocate.

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

26. In my view I would find it hard for M/s Wamae & Allen Advocates to balance the conflicting interest between the plaintiff and the 2nd defendant. In representing the 2nd defendant or any of the defendants for that matter. M/s Wamae & Allen Advocates would most likely assist the defendant's claim against that of the plaintiff, who there is no dispute, by having had acted for in the transaction leading to this litigation; and which acting for the defendant is prohibited by code of standard of professional practice and Ethical conduct and also by Rule 8 of the Advocates (*practice*) Rules.

27. Prohibition against an Advocate acting against a client in a dispute in respect to transaction he was retained was affirmed by the Court of Appeal in **King Woolen Mills Ltd Vs Kaplan & Stratton Advocates (1993) eKLR**; where the court expressed itself thus:-

"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 between those clients."

28. Similarly in the decision in the case of **Uhuru Highway Development Ltd & 3 others Vs Central Bank of Kenya & 4 others (2003) eKLR** at page 87 it was held:-

"Even if payment of fees was made pursuant to a provision in the charge, this does not exclude the person making the payment being a client. This follows from the definition of "client" as provided in section 2 of the Advocates Act, as set out above."

29. I now turn to the issue of confidential information held by M/s Wamae & Allen Advocates. That though there is no general rule that a party cannot act for one party in a matter and then act for the other party; in subsequent litigation; the court in dealing on an issue of that nature should be guided by laid down test by the Court of Appeal in whether real mischief or real prejudice will in all human likelihood occur (**Delphis Bank Limited Vs Channan Singh Chatthe & others (supra)**).

30. From the averment by the plaintiff as detailed in paragraphs 8 to 19 in plaintiff's affidavit sworn on 28th June 2018, the information which necessitated plaintiff's exist from the 1st defendant, was to be kept confidential by M/s Wamae & Allen Advocates, which paragraphs the 2nd defendant want struck out. The confidential nature is set out under paragraphs 21 to 23. It is averred that M/s Wamae & Allen Advocates at page 106 of the exhibit to the plaintiffs sworn affidavit that there was no loan:

"It is only a loan agreement for technical reasons until the valuation and sale agreements are completed."

31. It is alleged that information has been misused by M/s Wamae & Allen Advocates to enable the 2nd Defendant take undue advantage of the Plaintiff by transferring the Plaintiff's shares to herself instead of pursuing the sale of shares agreement as intended in the Term Sheet. This action contradicts M/s Wamae & Allen Advocate's own reassurance and at page 102 of the exhibits to the Plaintiff's Affidavit sworn on 28th June, 2018 in answer to the following question from the 2nd Defendant:-

"...I need a clarification, why have you drafted it as a loan agreement. I thought it is a sale agreement. There is no reimbursement only transfer of shares equivalent to the payment after valuation is completed by Horizon.

That

Our understanding is that Njama intends to transfer all his shares in the company to Decamis Limited. However, he is in need of a loan of Kshs.25 million pending transfer of the shares. The said sum will be deducted from the consideration payable in the main agreement..."

32. It is further averred that the M/s Wamae & Allen Advocates knew that no monies were advanced to the Plaintiff under the Loan Agreement and that the sum set out therein was a deposit towards the purchase of all his shares. It is clear from the acknowledgment at pages 38 to 48 of the exhibits to the Plaintiff's Affidavit sworn on 28th June, 2018 that only Kshs. 6,000,000.00 came from the 2nd Defendant. The balance of Kshs.19, 000,000.00 is funds received from the 1st Defendant. Again, it is urged that; this is confidential information that has been misused by Wamae & Allen Advocates to mispresent that the Plaintiff was indebted to the 2nd Defendant, justifying the transfer to herself, of the Plaintiff's 4,197 shares. Real prejudice has occurred to the Plaintiff.

33. On issue of conflict of interest Rule 99(c) of the Advocates Code of Standards of professional practice and Ethical conduct provides:-

"Situations in which a conflict of interest isn't arise include:-

Where in the course of representing a client there is a 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. In the instant matter; the plaintiff has sufficiently demonstrated existence of a retainer between the plaintiff, 2nd defendant and the

Advocates and the Advocates should not have agreed to act for any of the parties herein, thus the plaintiff and the 2nd defendant due to conflict of interest between the two clients. Further I find that the Advocate had confidential information which may be used in representing the 2nd defendant as against the plaintiff wittingly or unwittingly to the disadvantages of the plaintiff or former client to the advantages of the other client. There is real mischief or real prejudice against the Applicant which in all human likelihood may occur. The fiduciary relationship created by the retainer between the client and the Advocate demand that the knowledge acquired by the Advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the client's consent.

B. Whether Wamae & Allen Advocates together with Waweru Gatonye & Company Advocates received confidential information in the converse of the retention of the former, precluding them from acting against the plaintiff in this matter?

35. It is Applicant's contention that Waweru Gatonye & Co. Advocates were first retained in this matter by the 2nd defendant and Mr. John Karimi Njirani; who in this matter led the firm of M/s Wamae & Allen Advocates, which have since ceased leaving M/s Wamae & Allen Advocates but insisted act for the 3rd defendant. The plaintiff contention is that the 3rd defendant is a proxy for Mr. John Karimi Njirani, who M/s Waweru Gatonye & Co. Advocates is directly acting for.

36. I have perused the plaintiff's affidavit and I note other than the allegation noted herein above, there is no demonstration that there is conflict of interest on the part of the firm of Advocates of M/s Waweru Gatonye & Co. Advocates in acting for the 3rd Defendant as against the plaintiff. There is no demonstration of the said firm having acted for both the plaintiff and the 3rd defendant. I find no existence of Advocate-client relationship between any party in the suit and M/s Waweru Gatonye & Company or Mr. Charles Waweru Gatonye as a person. This issue has been dealt with extensively in the affidavit of Charles Waweru Gatonye.

37. Section 2 of the Advocates Act (Cap 16) of the Laws of Kenya define "client" to include:-

"Any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ and advocate and any person who is or may be liable to pay to an advocate any costs."

38. In the case of **Oriental Commercial Bank Limited Vs Central Bank of Kenya [2012] eKLR** on "*client-Advocate*" relationship opined as follows:-

"It is trite law that a client-advocate relationship arises when a client retains an advocate to offer legal services specifically or generally...In my view therefore, for a client-advocate relationship to arise, there has to be a retainer, a party must employ and/or instruct an advocate to offer legal services."

39. In view of the above, I find that the Applicant has failed to demonstrate any Advocate-client relationship between the plaintiff and the firm of M/s Waweru Gatonye & Co. Advocates nor has he demonstrated that he has been a client to the said firm as defined under section 2 of the Advocates Act. The plaintiff has failed to place any evidence before this court demonstrating that the Law firm of M/s Waweru Gatonye & Co. Advocates had prior to the filing of this suit, been employed and/or retained by any of the parties in this suit and if so whether he is likely to give evidence or be called to give evidence in this matter by any of the parties. I am convinced in this matter, it has not been demonstrated that there existed Advocate-client relationship between any of the parties herein and the law firm of M/s Waweru Gatonye & Co. Advocates that would now be prejudicial to the Applicant.

40. In dismissing an application similar to the present one for lack of sufficient evidence the court in the case of **Charles Gitonga Kariuki Vs Akuisi Farmers Co. Limited [2007] eKLR** held as follows:-

"It is not enough for the applicant to allege that because an advocate acted for it in several matters, such an advocate was barred from acting against it in other matters. The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise where the advocate is allowed to act for the opposing party against such a litigant. In the present case, apart from stating that Mr. Karanja had acted for it in several matters, the defendant did not present to the court material upon which this court could make a determination that indeed there were grounds upon which this court could reach a determination that there exists a possibility of conflict of interest."

41. In view of the fact that the applicant has failed to establish Advocate-client relation between the plaintiff and the firm of M/s Waweru Gatonye & Co. Advocates, the court would reach a conclusion that there would be no conflict of interest if the said firm of Advocates continue acting for the 3rd defendant, as holding otherwise, the court would be denying the 3rd defendant the right to be represented by the Advocate of its own choice, merely because the Applicant is apprehensive the firm used to having information from the firm of Wamae & Allen Advocate, which assertion has not been sufficiently demonstrated to be so. The court acting on that ground and proceeding to accede to plaintiff's application would be violating the 3rd defendant's constitutional right to be represented by the firm of M/s Waweru & Gatonye & Co. Advocates which is its advocates of its own choice. The 3rd defendant's fundamental and constitutional right to be represented by an Advocate of his own choice can only be interfered with if there is cogent evidence to demonstrate the existence of conflict of interest that would cause a prejudice to the other party, if such representation was to continue. I find that it would be gross violation of the 3rd defendant's constitutional right of representation by an Advocate of his own choice to interfere with his constitutional right by allowing this application as regards his right of representation by counsel of his choice on unsubstantiated allegation and misapprehension of the Applicant.

C. Whether the firm of M/s Havi and Company Advocates can be precluded from acting for the plaintiff in this matter?

42. The 1st, 2nd and 4th to 6th defendants are seeking to bar the firm of Havi & Company Advocates from acting for the plaintiff for violation

of the Rules of the Law society code of conduct and Ethics for Advocates; basically Rule 8 and Rule 12. It is alleged the firm violated Rule 8 in its advising of its client to purport to make payments not contemplated by contractual documents pending the suit with a view to strengthening its claim; advising client to revoke an irrevocable power of Attorney during the pending of the proceedings; causing unsubstantiated allegation regarding a third party not before court; and violating Rule 12 in concluding unsubstantiated facts; failing to forward orders to the parties for approval; writing to 1st defendant's bank service with a view of portraying the 1st and 2nd defendants in bad light and outplay the 1st defendant's operations.

43. It is further contended the defendants would suffer great risk if the firm of M/s Havi & Company Advocates is allowed to continue in conduct of this matter due to violation of the Law Society code of conduct and Ethics for Advocates.

44. It is noted that the defendants in seeing the firm of M/s Havi & Co. Advocates to be disqualified from acting for the plaintiff, for which myriads of complaints are levelled against the said firm as reasons for wanting them to be disqualified. The firm is mainly accused of acting dishonorably, to subvert the due process of law. It is accused of creating fictitious case for its client and pursuing a malicious remedy in court as well as before Registrar of Companies at the same time. It is further accused of non-disclosure of material facts and further accused of dishonest and misconduct in the way of extraction of an order of 22nd May 2018 without prior approval of the defendants Advocates and failing to include the part "BY CONSENT" in the order. The firm is further accused of "sharp practice and antics" in advising the plaintiff to terminate the sale of his shares to 2nd defendant and revoke the power of Attorney earlier donated to the 2nd defendant.

45. The burden of proof is on he who alleges (see **section 107 of the Evidence Act**, which provides:-

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

46. The defendants have in seeking disqualification of the firm of M/s Havi & Company Advocates to demonstrate to the court how the alleged advice by the said Advocate contravenes Rules 8 and 12 of the Advocates Code of Standards of Professional Practice and Ethical conduct. It is not enough to allege and fail to prove the allegations. It is not for the defendants to demand that advice given to the client by his Advocates must be to their clients favour or benefit. This cannot be so in an adversarial system. An advocate acting for a client is within his rights and bounds to advise his client on any lawful cause to pursue in respect of the matter in which legal advice is sought. There is always no one side of the coin in that matter. I am not satisfied that sufficient grounds have been laid down in this matter to justify granting of the order sought under this sub-heading. It seems the firm of M/s Wamae & Allen Advocates might have been provoked to take tit for tat approach in their response to the plaintiff's application seeking their disqualification. I find the approach cannot succeed for reasons advanced in opposition of their application and in fact the averments in the Replying affidavit sworn on 23rd July 2018 by the firm of M/s Havi & Company Advocates.

47. It is further noted that the application is said to have been made by 1st, 2nd, 4th – 6th defendants, however the 2nd defendant has not demonstrated that he has authority to act for the other defendants as he has not filed written authority from the other defendants to represent them as provided under **Order 1 Rule 13(1) and (2) of the Civil Procedure Rules 2010** which provides:-

"(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."

48. I am on this point guided by the decision in **Chaliba FCS Ltd Vs Odhiambo & 9 others (1997) eKLR** at page 15 where the court stated:-

"...If George Odhiambo was to represent them, then either Order 1 rule 8 or rule 12 of the Civil Procedure Rules should have been followed."

D. Whether the consent order of 22nd May 2018 was obtained by material non-disclosure and should be discharged and set aside?

49. The 1st, 2nd, and 4th to 6th defendants contend that that the parties by consent, agreed on 22nd May 2018 that there would be no changing to the banking operation mandates of the 1st defendant's bank. The consent order was recorded before Hon. Lady Justice Kasango, who transferred this matter to be heard by me on 2nd July 2018.

50. The alleged consent is sought to be discharged and set aside on the ground related to the manner in which the order was sought and extracted. It is averred the letter of 10th May 2018 from M/s Havi & Company Advocates to the Registrar of Company was not disclosed to the court and the letter of 10th May 2018 to 1st defendant's Bank was cancelled. That the order was also extracted without preamble, **"BY CONSENT"** and without prior approval of the 2nd defendant's Advocates.

51. I have perused the court file and have found that the questioned order was granted *inter-partes* and not *ex-parte*. That as deponed and unchallenged the order was extracted and signed by the court without any intervention or participation by the plaintiff's Advocate. The order is not challenged or attacked on the ground that it does not reflect the formal pronouncement of the court on 22nd May 2018. That there has been unexplained delay why the defendants did not take action till almost after 2 months since this order was made with a view to have it set

aside, which however cannot be taken as confirmation that the defendants complaint is not sincere due to that delay.

52. It is trite law that court orders, can be set aside upon proof of fraud, mistake or misrepresentation and not otherwise. This principle is espoused in the case of **Flora N. Wasike Vs Destimo Wamboko (1988) eKLR** in which it was held:-

"It is now settled law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside..."

53. In case of **Samuel Mbugua Ikumbu Vs Barclays Bank of Kenya Limited [2015] eKLR** the court stated as follows:-

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

54. The 1st, 2nd, and 4th – 6th defendants urge the consent order should be set aside on the ground of misrepresentation being *inter-alia*:-

a) The Defendants only consented to the issuance of the said order on the understanding that it would not cause any difficulty in the operations of the company or otherwise taint its reputation;

b) The Plaintiff however extracted the consent order unilaterally and failed to include in its text that it was issued by consent;

c) The foregoing deliberate omission has caused the company harm by portraying it as intending to undertake changes to its banking operation mandates other than in accordance with the law and its memorandum and articles of association; and

d) The foregoing has caused the company and the other Defendants to be negatively portrayed and their estimation lowered in the eyes of right-thinking members of society and all third parties to whom the Plaintiff forwarded the said order.

55. Having evaluated the evidence and considering the submissions and the relevant law, I am of the view that the order of 22nd May 2018 was obtained on the basis of mistake as no evidence of an attempt to change the said mandate or intention to do so has been placed before court. I am also of the view that in the interest of doing substantive justice to all parties the said order should accordingly be discharged.

E. Whether paragraphs 8-11, 14, 19, 27, 34, 42-46; 51-55, 57 and 59-61 of the supporting affidavit of Njama Wambugu dated 28th June 2018 should be struck out and expunged from the court's record?

56. It is contended by the defendants that the averments at paragraphs 8-11, 14, 19, 27, 34, 51-55, 57, and 59-61 of the plaintiff's affidavit in support of the application dated 28th June 2018 contain frivolous, vexatious and scandalous matters for reason that the paragraphs and relate to the 3rd defendant's acquisition of shares in the 1st defendant. Paragraph 9-11 and 14 are not confidential information as they regard to third parties; paragraph 19, 27, 34, 51-55 and 57 are an abuse of the court process for being baseless and as such the paragraphs should be struck out.

57. **Order 19 Rule 3(1) of Civil Procedure Rules** provides:-

"1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

58. I have perused the **Order 19 Rule 3(1) of Civil Procedure Rules** and the plaintiff's affidavit dated 28th June 2018. The plaintiff has under paragraph 1 of his affidavit stated:-

"I am the plaintiff herein, conversant with the fact of the case hence competent to swear this affidavit and under paragraph 68 he has stated:-

"What is deponed to herein above is true to the best of my knowledge save to matters of advice, sources whereof have been disclosed and matters deponed on belief, grounds whereupon have been given."

59. From the above the plaintiff has complied with order 19 Rule 3(1) of Civil Procedure Rules. I do not agree that the contents of the paragraphs complained of have been demonstrated to be frivolous; vexatious and scandalous. I find no basis to struck out the paragraphs complained of in the defendants application.

60. Having come to the conclusion, I have come to in respect of all the above listed issues for consideration. I proceed to make the following orders:-

a) The firm of M/s Wamae & Allen Advocates be and is hereby barred from acting for the defendants in this matter.

b) The application to have the firm of Waweru Gatonye Advocates barred from acting for the 3rd defendant be and is HEREBY dismissed.

c) The defendant's application to have the firm of M/s Havi & Company Advocates barred from acting for the plaintiff be and is **HEREBY** dismissed.

d) Application for paragraphs 8-11, 14,19,27,34,43-46; 51-55, 57 and 59-61 of the supporting affidavit of Njama Wambugu dated 28th June 2018 to be struck out and expunged from the court record is **HEREBY** dismissed.

e) The consent order of 22nd May 2018 be and is hereby discharged and/or set aside.

f) I decline to order Memorandum of Appearance dated 18th June 2018 and statement of defence dated 18th June 2018 filed on behalf of the 1st, 2nd, 4th, 5th and 6th defendants as well as Replying affidavit sworn on 22nd May 2018 by the 2nd defendant, all drawn by M/s Wamae and Allen Advocates struck out and expunged from the court's record.

g) As both parties in this matter have failed and succeeded in some of their

h) prayers I order that each party bear its costs of the application.

Dated, signed and delivered at Nairobi this 8th day of November, 2018.

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J .A. MAKAU

JUDGE