REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 121 OF 2005

COOPERATIVE BANK OF KENYA LIMITED…….……PLAINTIFF

Versus

CHARTERHOUSE BANK LIMITED……...DEFENDANT

RULING

Disqualification of advocate

[1] The Applicant herein is Charterhouse Bank, the Defendant in the suit. It has applied through a Motion dated 13th day of November 2014 that the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates be disqualified from acting for the Plaintiff Bank. The Application is supported by Supporting Affidavit of Ruth Ngure sworn on the 13th day of November 2014. In opposition to the Application, the Respondent's advocate Mr. John Ohaga swore a Replying Affidavit on the 18th day of November 2014. The application is expressed to be brought under sections 1A, 1B, 3, 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

[2] According to the records, on or about the 8th day of March 2005 the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates instituted this suit against the Defendant Bank on the instructions of Cooperative Bank Limited. The suit is for the enforcement of a guarantee issued by the Plaintiff Bank on behalf of the Defendant's customer for the sum of US 322,411.70. Whilst the suit was still pending, on the 23rd day of June 2006, the Defendant was placed under Statutory Management by the Central Bank of Kenya in exercise of the powers conferred upon the CBK pursuant to the provisions of Section 34 of the Banking Act. To date, Charterhouse Bank is still under Statutory Management. The Defendant argue that, it is conceded that the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates has for the past 6 or so years acted and continues to act for the Statutory Manager of Chartehouse Bank. Charterhouse Bank has now raised an objection to representation by the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates on the basis of conflict of interest. Charterhouse Bank now wants the court to determine two issues: One, whether the Applicant has demonstrated that there is a possibility of conflict of interest in the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates acting for the Plaintiff Bank against the Applicant. And, two, whether there was delay in filing the Application, and does the purported delay defeat or change the duty or obligations of the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates to the Applicant?

[3] Charterhouse Bank relied on the case of **Uhuru Highway Development Limited Vs. Central Bank of Kenya [2002] 2 EA**. The Court of Appeal held that an advocate would be precluded from acting for a client where he could consciously, unconsciously or even inadvertently use the

confidential information acquired when he acted for the client. The Court observed that in such an event, there will be prejudice and the Court ordered the advocate to cease acting for the opposite party. They also cited the dicta of the Court of Appeal in the case of **Uhuru Highway Development Limited (supra)** that an Applicant who seeks disqualification of an advocate from acting for the opposite party must demonstrate the existence of such advocate-client relationship that would result in the advocate being in possession of confidential information which he could use to the detriment of the client seeking the disqualification of the advocate. Therefore, the Applicant concluded that, since the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates has for the past 6 years acted and continues to so act for the Statutory Manager in the matters listed below, the inescapable logical inference to be drawn is that the Applicant has demonstrating sufficiently that there existed and there continues to exist an advocate client relationship between the Statutory Manager and the Firm.

A. NAIROBI HCCC 115 of 2006 between Vijay Kumar Ratilal Kanti Shah Vs Charterhouse Bank Ltd;

B. NAIROBI HCCC NO. 626 OF 2006 (O.S) Between Kenya Commercial Bank Limited and Charterhouse Bank Ltd;

[4] The Applicant stated that the bone of contention in the dispute between the Applicant Bank and the Respondent Bank is whether Cooperative Bank of Kenya Limited paid the sum of US $ 322,411.70 to a beneficiary on a guarantee without the authority of the Applicant Bank. Therefore, the Applicant is apprehensive that the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates having acted for the Statutory Manager of Charterhouse Bank for a period of over 6 years, they obtained, in the course of the said relationship, and become privy to confidential information pertaining to Charterhouse Bank. The said firm of advocates has had information on the mode of operations and/or procedures of the Applicant bank. The Replying Affidavit of John Ohaga, has not disputed these facts; that while acting for the Statutory Manager the said Firm of advocates became privy to as well as acquired confidential information about the Applicant Bank. And as the parties herein are both commercial banks licensed by Central Bank of Kenya, there is conflict of interest consisting in a real likelihood and/or possibility that the Firm may consciously or unconsciously or even inadvertently use the information pleaded in paragraph 13 above in favour of Cooperative Bank of Kenya Limited to the grave detriment of the Applicant Bank. They urged the court to disqualify the said firm of advocates from acting for the Plaintiff. Contrary to the allegations by Mr. Ohaga, the record shows that on 29th day of October 2013, Honorable Mr. Justice Mabeya granted the Applicant leave to file this Application following an oral objection raised by the Applicant to the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates acting for the Plaintiff Bank against the Applicant Bank in the backdrop of the conflict of interest encapsulated above. There was no delay in bringing this application at all. In any event, such alleged delay was dealt with in the case of **Uhuru Highway Development Limited** (supra) where the Court Appeal stated:

> **"Delay, of course, is of particular importance in any case where, as a result of delay, the interests of the Defendants have been prejudiced. The advocate for the Plaintiff submits, we think with some substance, that this is not a case of that character. Where, as here, 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: See Section 134 (1) of the Evidence Act".**

The Court of Appeal went on to endorse the following dicta of the Hon. Mr. Justice Muli JA in the case of **King Wollen Limited Vs. Kaplan and Stratton [1993] LLR 2170 (CAK)**:

> **"Further the mere delay in raising the point of objection to the Respondents continuing acting against the appellant does not defeat or change the duty or the obligations of the common advocates imposed on him under the retainer".**

The advocates resisted disqualification application

[5] The firm of Ochieng', Onyango, Kibet & Ohaga Advocates opposed the application for disqualification from acting in the matter. They filed a Replying Affidavit sworn by **John M Ohaga** on 18th November, 2014. They submitted that Courts have laid down the guiding principles and factors to be considered in determining an application seeking disqualification of an advocate from acting for or representing a client. They started by citing the case of **Imana vs. Ethuro & 2 Others (2008) 3 KLR (EP) 10** where it was stated as follows;

> ***'An advocate can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidentially reposed in him. However, each case must be treated, not as a matter of form, but as a matter of substance. There must be proof that real mischief and real prejudice would in all human probability, result if the advocate is allowed to act.'***

The cited yet another judicial decision by the Court of Appeal of England in the case of **Rakusen vs. Ellis Munday & Clarke (1911-13) ALL ER Rep 813,** as per Cozens-Hardy MR.

[6] Based on the above postulation of law, the advocates submitted that Charterhouse has not as a matter of substance placed before this Court evidence showing real mischief and real prejudice that it could suffer if the Firm continued to act for the Plaintiff in this matter. Whereas they do not refute the fact that the said firm of advocates represented the Statutory Manager of the Defendant Bank in **High Court Civil Case No. 115 of 2006 between Vijay Kumar Ratilal Kanti Shah vs. Charterhouse Bank Limited & Another**. And further, the Firm also acted on behalf of **Charterhouse Bank Limited in High Court Civil Case No. 626 of 2006 (O.S) between Kenya Commercial Bank Limited vs. Charterhouse Bank Limited;** it is instructive to note the following depositions of **Ruth Ngure** in her supporting affidavit, specifically paragraphs 3 and 4 as hereunder;

> ***3. THAT I verily believe that in the course of the aforesaid engagement, the Firm could have become privy to confidential information pertaining to the Defendant Bank***
>
> ***4. THAT in view of the matters pleaded in paragraphs 2, 3, 4 and 5 above I am genuinely apprehensive that there is a real likelihood of the Firm using classified information acquired in the course of representing the Statutory Manager to the detriment of the Defendant Bank.*** **(Emphasis ours)**

[7] As a matter of fact, the advocates argued, that apart from some vague reference to confidential information in Ruth Ngure's affidavit highlighted above, none has been identified with any specificity such as would enable the Court to inquire into the veracity of the alleged prejudice that might be occasioned to the Defendant. Justice Ogola on an application seeking to disqualify a firm of advocates in the case of **Kenya Pipeline Co. Ltd vs. Corporate Business Forms Ltd (2012) eKLR** had this say;

> ***'Lastly, it is important to note that the Defendant has a right under the Constitution to be represented by an advocate or law firm of its choice. This right can, for good reasons, be taken away. However, such reasons must be full proof to find justification. It is the duty of this court to safeguard the interest of the Defendant and to make sure that such a right is not arbitrarily denied.***
>
> ***In the end, I must state that case law in matters like this is not consistent, as each case is so particularly peculiar to warrant a distinction from other cases. At the end of the day the court will have to consider the peculiar circumstances of each case and make an appropriate decision, where necessary, exercising discretion in a most judicious manner. In this matter, I am not convinced that sufficient grounds have been advanced to convince me, in the judicious exercise of my discretion, to allow the application.'*** **(Emphasis ours)**

[8] The advocates made further submission. They stated that no full proof reasons to find

justification or grounds which have been furnished to enable the Court exercise its discretion to disqualify the Firm from representing and or acting for the Plaintiff herein. They urged the Court to be persuaded by the holding in **Re A Firm of Solicitors (1992) 1 ALL ER 353, 354,** where it was held by the majority as under;

> ***'There was no general rule that a firm of solicitors who had acted for a former client could never thereafter act for another client against the former client, but a firm of solicitors would not be permitted to act for an existing client against a former client if (per Parker LJ and Sir David Croom-Johnson) a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or (per Staughton LJ) there was some degree of likelihood of mischief, i e of the confidential information imparted by the former client being used for the benefit of the new client. If (Staughton LJ dissenting) there was such a conflict of interest it was only in very special cases that the court would consider that a Chinese wall would provide an impregnable barrier against the leakage of confidential information.'*** **(Emphasis ours)**

[9] The advocates posit that mere acting for the Statutory Manager does not mean the firm acquired confidential information or that such information will be used against it or that there is some degree of likelihood of mischief that the confidential information imparted by the Statutory Manager if any being used for the benefit of the Plaintiff herein. The deposition by Ruth Ngure are merely allegations and fears and not concrete or full proof reasons to find justification in taking away the right of the Plaintiff to be represented by a firm of its choice. The Court of Appeal in the case of **Uhuru Highway Development Limited vs. Central Bank of Kenya (2002) 2 EA 654** in allowing an application for disqualification of the firm of Oraro and Company, Advocates and in particular, Mr. George Oraro from acting held *inter alia*;

> ***'The Counsel being author of the charge may know much behind the charge than is apparent and is bound to use that knowledge against the plaintiffs, his former clients and the role of the counsel in bringing about the first and second plaintiffs to sign the charge may in the circumstances lead him into consciously or unconsciously or even inadvertently using the confidential information acquired during the preparation of the charge and there will no doubt be prejudice.'*** **(Emphasis ours)**

Further in the case of **King Woolen Mills Ltd & Another vs. Kaplan and Straton Advocates (1990-1994) EA 244**, the Court of Appeal held as follows;

> ***An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate.***

[9] Unlike the above two cases, the Plaintiff herein claims against the Defendant the sum of **US$ 322,411.70** being amount paid by the Plaintiff to Banca Populare Di Intra Verbania Intra of Italy ('the beneficiary') pursuant to a guarantee issued by the Plaintiff to the beneficiary on behalf of the Defendant's customer, East African Air Safari Limited at the request of the Defendant. The firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates was not in any way involved in the preparation or execution of the said guarantee. The Firm did not act as an advocate for the parties to the guarantee either individually or jointly. Therefore there can be no confidential information capable of being acquired by the Firm with respect to the guarantee the subject matter of the dispute herein. To that extent, the cases of **Uhuru Highway Development Limited & King Woolen Mills Ltd & Another (supra)** are distinguishable from the present case. Again, the Defendant herein was placed under Statutory Management on 23rd June, 2006 pursuant to section 34 of the Banking Act, Chapter 488 Laws of Kenya. The said placement under Statutory Management occurred after the pleadings in the suit herein had closed. It is a settled principle of law that parties are bound by their pleadings. Justice Apondi (as he then was) in **Imana v Ethuro & 2 Others (supra)** in conclusion stated emphatically as follows;

'In this case, no prejudice or mischief has been proved. Mr. Karanja Junior is an advocate of the High Court. I am inclined to believe that he knows and understands his role as an officer of the Court. Besides the above, when he joined the new firm all the pleadings were complete. As a general rule, parties are bound by their pleadings in civil litigation. The upshot is that there is no sufficient basis to disqualify the firm of Mirugi Kariuki & Co Advocates from appearing for the Respondent in this case.' **(Emphasis ours)**

[10] The advocates finally stated that the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates should not be disqualified. In any event, they argued that the application has been caught up by inordinate delay. The suit herein was filed on 8th March, 2005. The Defendant was placed under Statutory Management on 23rd June, 2006 under the provisions of Section 34 of the Banking Act, Chapter 488 Laws of Kenya and one **Rose Detho** was appointed the statutory manager. Subsequently, the appointment of Rose Detho was revoked through Gazette Notice No. 4924 of 2008 on 10th June, 2008 and **Ruth Wanjiru Ngure** appointed in her place. Accordingly, Ruth Ngure has been aware for almost six (6) years now the Firm acts for the Plaintiff in this matter. Despite this, she raised no objection to the firm continuing to act for the Plaintiff. Therefore, to them, the application herein is mischievous and vexatious and is an attempt to delay the prosecution of this suit. The suit herein has come before Court on countless occasions over the last nine (9) years for mention or hearing when neither Rose Detho nor Ruth Wanjiru Ngure or the Advocates on record for the Defendant expressed any misgivings or suggested that the Firm was in possession of any confidential information that might prejudice the Defendant in the conduct of this matter. As per **Uhuru Highway Development Limited vs. Central Bank of Kenya (supra)**;

'Delay is of particular importance in any case where as a result of the delay, the interest of the defendants has been prejudiced. Where, as is here, 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.' **(Emphasis ours)**

[11] On the basis of the above, the advocates submitted that the application should be seen for what it is; an abuse of the court process. The Defendant's Notice of Motion application dated 13th November, 2014 should be dismissed with costs.

THE DETERMINATION

[12] I am being asked to disqualify the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates from acting for the Plaintiff in this matter. The thresholds of law for such application are now settled in many judicial precedents including the ones cited by the parties herein. I need not multiply them except to state that they all draw from the opinion by Cozens-Hardy MR of the Court of Appeal of England in the case of **Rakusen vs. Ellis Munday & Clarke (1911-13) ALL ER Rep 813,** where the learned judge pronounced himself as follows;

'A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidentially reposed in him. In that respect, it does not very much differ from the position of any confidential agent who is employed by the principal. But in the present case we have to consider something further. It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances, and it is said that is so much a general rule and the danger is such that the Court ought not to have regard to the special circumstances of the case. I do not doubt for a moment that the circumstances may be such that a 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 the 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 his solicitor is allowed to act.' **(Emphasis ours)**

[13] The firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates represented the Statutory Manager of the Defendant Bank in **High Court Civil Case No. 115 of 2006 between Vijay Kumar Ratilal Kanti Shah vs. Charterhouse Bank Limited & another**. And also acted on behalf of **Charterhouse Bank Limited in High Court Civil Case No. 626 of 2006 (O.S) between Kenya Commercial Bank Limited vs. Charterhouse Bank Limited.** The question then becomes**;** *is there real mischief and real prejudice which will in all human probability, result if the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates is allowed to act for the Plaintiff in this matter? See the* case of **Delphis Bank Ltd –vs- Channan Singh Chatthe & 6 others CA No Nai 136 of 2005 (UR).** It is one thing to tabulate the principles applicable in such matters. I have done that. It is a different thing altogether to apply those principles to the peculiar circumstances of the case in point in order to attain a proportioned justice on the matter. The beginning point here is the evidence on which the Applicant claims that real mischief and prejudice will be suffered by Charterhouse Bank if the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates is allowed to act for the Plaintiff. The evidence in this case is reposed in the affidavit of **Ruth Ngure**, specifically paragraphs 3 and 4 where it is deposed as hereunder;

3. THAT I verily believe that in the course of the aforesaid engagement, the Firm could have become privy to confidential information pertaining to the Defendant Bank

4. THAT in view of the matters pleaded in paragraphs 2, 3, 4 and 5 above I am genuinely apprehensive that there is a real likelihood of the Firm using classified information acquired in the course of representing the Statutory Manager to the detriment of the Defendant Bank. **(Emphasis ours).**

[14] These averments state that the firm could have been privy to confidential and classified information pertaining to Charterhouse Bank and for which the deponent is genuinely apprehensive may be used by the said firm of advocates to the detriment of the Applicant. The firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates admitted having acted and continues to act for the statutory manager in various matters. However, it denies having obtained any confidential information that could prejudice the Defendant in this suit. Mr. Ohaga, a partner in the said firm, averred that the firm was not involved in the preparation or the execution of the guarantee which is the subject of this suit. The case of Uhuru Highway was attended to by specific facts; that the firm of advocates therein acted for both parties in drawing the charges in question. Therefore, there was real likelihood of using the information so obtained against one party, whether unconsciously or consciously. As it was held in **Kiambu Service Store –vs- Mbo-I Kamiti Farmers & 3 others Civil Suit 546 of 1998,** it would be necessary to look at the information received and which is likely to be disclosed in order to determine whether real prejudice would be occasioned on the party complaining. This case is about enforcement of a guarantee. According to the court record, the Plaintiff herein claims a sum of US $ 322, 411.70 being the amount paid by the Plaintiff to Banca Populare Di Intra Verbania of Italy ("beneficiary") pursuant to a guarantee issued by the Plaintiff to the beneficiary on behalf the Defendant's customer, East African Air Safari Limited at the request of the Defendant. It is not disputed that the firm had nothing to do with this particular transaction. It was not involved in the drafting or execution of the said guarantee, nor did it represent any of the parties involved. The Defendant is unclear on what information might have been disclosed to the firm that may impact the instant suit. The affidavit by Mrs. Ruth Ngure sworn on 13th November, 2014 does not also disclose to this Court, even the general nature of confidential information the firm may have been privy to, which may be used to the detriment of the Applicant. The firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates acted in matters which have no nexus with this case and so one ponders what kind of confidential information was obtained or is capable of being used to the detriment of the Applicant. This kind of application should be made on concrete things; not abstract beliefs or fear, because they may result into a denial of right to representation by legal counsel of choice.

And, therefore, courts should be careful not to grant orders which will impinge on right to representation by legal counsel of choice unless it is satisfied that real mischief or prejudice will result if the advocates in question continue to act for the particular party in a proceeding; the contrary will only bring its holocaust on the right to legal representation. See the judicial opinion by **Sir Nicolas Browne – Wilkinson – V-C** in the case of **Supasave Retail Ltd –vs- Coward Chance and others (1991) 1 ALL ER 668:-**

> ***''…As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated… each case must turn on its own facts to establish whether real mischief and real prejudice will result.…We do not know the nature of confidential or privileged information, if any, that may have been imparted on him by either party which may be prejudicial to the other. The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties."***

[15] In the circumstances, the nature of confidential or privileged information that may have been imparted to the firm of Onyango Ochieng Kibet and Ohaga & Co. Advocates which may be prejudicial to the Applicant, a former client, was not disclosed to the court. The matters where the said firm of advocates acted have no nexus with the current suit, and it is impossible to say with any reasonable certainty or projection that confidential information was obtained and which may be used with real prejudice on the Applicant. That mischief is not ascertainable in this case. As such, I find that the Applicant has not met the required standard of proof to persuade this court to exercise its discretion and disqualify the firm from acting on behalf of the Plaintiff. As for delay in bringing the application, I find it is tinctured with lashes and since it has not raised any substantial queries, the application would still have succumbed to judicial demise on that front. The upshot is that I dismiss the Notice of Motion dated 13th November, 2014 with costs to the Plaintiff.

Dated, signed and delivered in court at Nairobi this 4th day of March 2015

F. GIKONYO

JUDGE