



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 482 OF 2015

RICHARDSON & DAVID LIMITED ::::::::::::::::::::::::::::::::::: PLAINTIFF

-VERSUS-

KENYA DEPOSIT INSURANCE CORPORATION ::::::::::: 1ST DEFENDANT

CENTRAL BANK OF KENYA LIMITED ::::::::::::::::::::::::::: 2ND DEFENDANT

R U L I N G

1. What is before the court is a **Preliminary Objection** dated and filed in court on **12th October, 2015**. The objection is by Mr. Hassan Zubedi who describes himself as an Interested Party and a shareholder in Dubai Bank Kenya Limited (*in liquidation*). The objection seeks orders that Mr. Ochieng Oduol recuses himself from being lead counsel and appearing for the 1ST Defendant in this suit. The following grounds are listed for the objection:-
 1. ***That Mr. Ochieng Oduol advocate was acting for TLM International FZE – Vs – Dubai Bank Kenya Limited in HCCC No. 60 of 2013.***
 2. ***That Mr. Ochieng Oduol has also acted in Nereah Michael Said – Vs Dubai Bank Kenya Limited & Hassan Zubeidi in HCCC No. 2451 of 2012.***
 3. ***That Mr. Ochieng Oduol has also acted in Winding up Cause no. 26 of 2015.***
 4. ***That Mr. Ochieng Oduol has acted in Constitution & Human Rights Division Petition No. 583 of 2012.***
 5. ***That Mr. Ochieng Oduol received payments and drew payments for or against Dubai Bank Limited and hence there will be conflict of interest.***
 6. ***That as an advocate and thus an expert it is not necessary under the provisions of Order 11 of the Civil Procedure Rules 2010 to file his statement.***
 7. ***That Mr. Ochieng Oduol, having occupied a professional position for both the bank and/or against the bank, should not be allowed to lead and/or act for the 1st Defendant or any party in these proceedings as he was privy to official information of the bank obtained when he acted for the bank and/or against the bank and such information should not be used selectively against the bank.***
2. The application is supported by affidavit of **Hassan Zubedi** sworn on **12th October 2015**. It is also supported by the Plaintiff through oral submissions of the Plaintiff Counsel Mr. Omuga.

3. The Objector's case is that he is the 2nd Respondent in Industrial Cause No. 2451 of 2012 while Dubai Bank Kenya Limited is the 1st Respondent. He is therefore duly qualified to make these objection proceedings. In that matter, Mr. Ochieng Oduol acted for the Claimant, Nereah Michael Said, who was employed as a Manager/Managing Director of Dubai Kenya Limited. On or about 19th December 2012, Mr. Ochieng of Ochieng, Onyango, Kibet & Ohaga Advocates filed Petition No. 583 of 2012 in the matter of intended criminal prosecution of Nereah Michael Said for the Alleged unlawful termination of employment by Dubai Bank Kenya Limited. It is alleged that on or about 20th December 2012, Mr. Ochieng of Ochieng, Onyango, Kibet & Ohaga Advocates filed Civil Case No. 60 of 2013 on behalf of TLM International FZE against Dubai Bank Kenya Limited. On or about 9th June 2012, Mr. Ochieng of Ochieng, Onyango, Kibet & Ohaga Advocates filed Winding Up Cause No. 26 of 2015 Dubai Bank Kenya Limited. The Objector's case is that the total effect of the above observations is that Mr. Ochieng Oduol should recuse himself from acting as lead counsel in this matter because of his interactions with the bank and its employees which led to his being privy to official and confidential information of the bank when he acted for or against the bank.
4. It is further submitted that Mr. Ochieng Oduol had submitted in court, making derogatory remarks against DBK and stating that:-

“This is not a bank, and we will disclose to this court why it is being liquidated” and that the said derogatory statement was quoted verbatim by Business Section of the Standard on Sunday Newspaper of 11th October, 2015.

5. The Preliminary Objection is opposed. Mr. Ochieng Oduol filed a replying affidavit sworn by himself on 12th October 2015 and also made oral submissions. The Respondent submitted that he received a request from Mr. Muema Kitulu of Muema Kitulu & Co. Advocates seeking that he acts as Assisting Counsel in representing the 1st Defendant in this suit and he accepted the said request as an Assisting Counsel. Mr. Ochieng Oduo also admitted acting in various suits against Dubai Bank Kenya Limited now in liquidation. However, he believes that there is no conflict of interest whatsoever in his present position as Assisting Counsel in this suit. The Respondent denies that he has ever acted for DBKL in any matter whatsoever and he further denies the allegation made in the Notice of Preliminary Objection dated 12th October 2015 and in the affidavit of Hassan Zubedi in support thereof. The Respondent submitted that he has never in his capacity as an advocate of the High Court of Kenya or in any other capacity whatsoever received payments from and drawn document for DBKL. DBKL has never been his client and he has not interacted with DBKL in an advocate/client relationship and has not received any confidential information from DBKL as alleged or at all. The Respondent admits that he represented Ms. Nereah Michael Said in **Industrial Casue Number 2451 of 2012: Nereah Michael Said – Vs – Dubai Bank Kenya Limited & Hassan Zubedi**, but denies that there is any conflict of interest by such action. The Respondent also admits that the firm of Ochieng Onyango, Kibet & Ohaga Advocates at large have conduct of **Winding Up Cause No. 26 of 2015** and **TLM International FZE – VS – Dubai Bank Kenya Limited**, matters whose genesis lies in the illegal and unethical conduct of DBKL including its failure/inability to honour its contractual obligations. Mr. Ochieng Oduol submitted that he cannot be disqualified from acting as Lead Counsel for presenting the truth to the court and that any information he may have is the truth about DBKL and which is now in the public domain and most of which has been the subject of court proceedings in various matters filed against DBKL and reports to various regulatory and investigative authorities. The Respondent submitted that there is no competent application before the court and that the preliminary objection raised on behalf of Mr. Hassan Zubedi is motivated by bad faith and ill motive, is misconceived and seeks to delay the hearing and determination of the application before this court with the aim of interfering with the on-going liquidation of DBKL.
6. I have carefully considered the Preliminary Objection. Mr. Ochieng has on oath denied the allegations made about him, and in the circumstances, this court would not know whom to believe. In order for this court to disqualify Mr. Ochieng, full oral evidence almost amounting to a trial would be necessary. However, this court needs not resort to that measure. Article 50 of the Constitution guarantees every person including corporations a right to a fair hearing which includes right to be represented by an advocate of his or her choice. This constitutional guarantee

can only be taken away in situations where the exceptions can, and have been clearly articulated. It cannot be taken away by speculation. It is also my finding that the comments made by Mr. Ochieng Oduol and which were reported as aforesaid, were fair comments which a counsel in the cause of litigation can make. After all, it is the duty of counsel, as an officer of the court, to show, prove or disprove a particular cause of action and when the Counsel stated that they would disclose to this court why the DBKL is being liquidated, the comment was purely procedural and in order. That it was placed out of context by the reporter does not make Mr. Ochieng Oduol culpable for the reportage.

7. In view of the foregoing, I find that the Notice of Preliminary Objection filed herein on 12th October 2015 is not merited and the same is dismissed with costs in the cause.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 15TH DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Rashid for the Plaintiff

Mr. Ochieng Oduol and Mr. Kitulu for the 1st Defendant

M/s Ng'onde and Regeru for the 2nd Defendant

Teresia – Court Clerk