



# **REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 534 OF 2011**

**KENYA PIPELINE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**PORT CONVEYORS LIMITED.....DEFENDANT**

## **R U L I N G**

1. Before me is the Plaintiff's Notice of Motion dated **21<sup>st</sup> February 2013** and filed in Court on even date. It is expressed to be brought under **section 3A** of the **Civil Procedure Act** and **rule 9** of the **Advocates (practice) Rules**.
2. The application is seeking for one main order that the firm of Onyoni Opini & Gachuba Advocates by itself, its partners, associates, employees and or agents be barred and removed from record as representing the Defendant in this suit.
3. The application is based on the grounds stated on the face thereof and is supported by the affidavit of **Flora Okoth** sworn on **21<sup>st</sup> February 2013**. The deponent is described as the company secretary of the Plaintiff and is duly authorised to swear the affidavit.
4. It is averred that one Andrew Mwaniki Gachuba Advocate was an employee of the Plaintiff and was working in the Procurement and Supplies Department as Supplies Officer II. He resigned effective **31<sup>st</sup> January 2009** as evidenced by a copy of his resignation letter dated **28<sup>th</sup> November 2008**.
5. It is further averred that during the period between 2006 and 2008 when this cause of action arose, the said Mr. Gachuba was involved in the Plaintiff's transactions with the Defendant. According to the deponent, he handled and signed documents that are subject of the proceedings herein. (*Attached and marked FO-3 is a bundle of the documents bearing his signature/initials/name.*)
6. It is the deponent's averment that the Plaintiff's Advocate informed them that the said Mr. Gachuba is now an Advocate with the Law firm of the Defendant's Advocates on record. According to the deponent, Mr. Gachuba may be liable to be called as a witness in the Plaintiff's case on transactions which he personally handled and signed documents that will be produced and relied on as evidence in this case.
7. The deponent further avers that their Advocates have informed them that the Advocates (practice) rules prohibit an advocate who may be called as a witness from appearing for a party and also where his appearance could give rise to conflict of interest. It is the Plaintiff's case that for the aforesaid reasons it is manifestly prejudicial to their case for the firm of Onyoni Opini & Gachuba Advocates to remain on record for the Defendant.

8. In response to the Application the Defendant filed two Replying affidavits sworn by **Mwaniki Gachuba** and **Stephen Onyango** respectively on **11<sup>th</sup> April 2013**.
9. Mr. Mwaniki Gachuba, an advocate of the High Court has sworn a detailed affidavit whereby he has explained his responsibilities while he was an employee of the Defendant and has given an overview of the operations in the Procurement & Supplies Department of the Defendant Company.
10. It is Mr. Gachuba's averment that he was at all material times under direct supervision and guidance of the Senior Supplies Officer (Overseas Procurement) and the Procurement Manager who were tasked with the responsibility of making all decisions within the procurement department. He further avers that goods clearance through customs was not his responsibility and he did not handle and sign any documents relating to clearing and forwarding services or the documents relied upon by the Plaintiff.
11. It is also Mr. Gachuba's averment that the annexure FO-3 is irrelevant and is of no probative value as the same is not part of the bundle of documents to be relied on by the Plaintiff and neither has the Plaintiff demonstrated that the same was authored or signed by him. It's his position that the deponent of the supporting affidavit failed to annex any document relating to the cause of action herein that was authored or executed by him. Therefore, according to him the Plaintiff has failed to substantiate the allegation that they will suffer manifest prejudice due to conflict of interest if the Law firm representing the defendant remains on record.
12. It is the deponent's case that the application is an affront to the Defendant's right under **Article 50 (2) (g) of the Constitution of Kenya** to choose a law firm of its choice to conduct its defence.
13. The other replying affidavit was sworn by **Stephen Onyango** described as a Director of the Defendant. He associated himself with the averments contained in the replying affidavit of Mwaniki Gachuba. The deponent confirmed that the Defendant was appointed on various occasions to provide clearing and forwarding services to the Plaintiff by the Procurement Manager and that at no time did they ever deal with Mr. Gachuba.
14. It was his averment that the Plaintiff had not demonstrated how it would be prejudiced if the law firm was not disqualified and if any conflict of interest was likely to arise if the firm remained on record for the Defendant.
15. This application was prosecuted by way of written submissions. The Plaintiff filed its submissions on **9<sup>th</sup> May 2013** and the Defendant responded by way of its written submissions filed in Court on **5<sup>th</sup> December 2013**.

### ANALYSIS

16. I have considered the application, the affidavits on record as well as the submissions by Counsel. Having done so, I take the following view of the matter.
17. The Plaintiff's application is brought under **rule 9** of the **Advocates (practice) Rules** which provides thus:

***“No Advocate may appear as such before any Court or tribunal to 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 of affidavit, he shall not continue to appear.”***

18. At this juncture it is instructive to note that the above rule as well as the various authorities cited by both parties applies in a scenario where there was an existing advocate-client relationship. In the current case it is not denied that Mr. Gachuba never acted as an advocate for the Plaintiff. However, the said authorities could be used as a guide to establish the issue of conflict of interest in this matter.
19. It is the Plaintiff's case that one of the partners, Andrew Gachuba, in the firm representing the Defendant is their former employee. It is submitted for the Plaintiff that Mr. Gachuba's job description involved a lot of contact with clearing and forwarding agents such as the Defendant. It is further submitted that Mr. Gachuba's role even under the supervision of the senior supplies officers involved direct dealing with the Defendant's agents at the terminals where the customs

- forms were handled. According to the Plaintiff's submissions this information is very crucial as it forms the bulk of the Plaintiff's case alleging fraud by the Defendant.
20. It is the plaintiff's case that Mr. Gachuba could be privy to information that is prejudicial to the Plaintiff's case because of his contact with the Defendant and the fact that the Defendant presented customs clearance forms which the plaintiff alleges were fraudulent. The Plaintiff has accused the Defendant of defrauding them by presenting documents alleging that all taxes and duties had been paid to KRA with regards to various consignments only for the Plaintiff to receive subsequent demands from KRA demanding unpaid taxes from it.
  21. Mr. Gachuba averred that his duties and responsibilities as the Supplies Officer II were supportive and limited to preparation of tender documents and invitation of tenders from overseas supplier, co-ordination of tender evaluation process, payment process to overseas suppliers, pre-shipment inspection and shipment of goods. It is not clear what connection this duties had to do with the remittance of taxes to KRA or lack thereof by the Defendant. At least, the Plaintiff has not demonstrated whether there was any connection or whether Mr. Gachuba had anything to do with the remittance of the said taxes.
  22. Furthermore, Mr. Gachuba averred that all clearing and forwarding invoices, delivery notes and Kenya Revenue Authority documents and receipts thereof were exclusively processed by the Supplies Assistant (Overseas Procurement), Procurement Manager, Internal Audit department and finance Department. It was also his averment that goods clearance through customs was not his responsibility. The Plaintiff did not file any reply to Mr. Gachuba's affidavit to counter the said averments and therefore the same are not controverted.
  23. To say the least, the allegations of fraud by the Plaintiff as revealed in the particulars of fraud in the Plaintiff are directed towards the Defendant's conduct of non-remittance of taxes. There is nothing in the said Plaintiff to implicate Mr. Gachuba with the allegations of fraud in the current dispute or to show that he colluded with the Defendant in the alleged fraud.
  24. I have also noted the case of **H.F Fire Africa Ltd vs AMR Gharieb**, which is persuasive and where Emukule J held that:

***“There is a general principle, applicable not to solicitors only but to confidential agents of all kinds, that confidential information shall not be used against the principal from whom or for whom and in whose employment, it has been obtained.”***

Applying the above principle, the Plaintiff has not disclosed to this Court any confidential information which Mr. Gachuba may be privy to that would be used against the Plaintiff or that is relevant to this suit. Further, the said Mr. Gachuba is not a witness in the current matter as the Plaintiff did not give any notice that they intended to call him as such to testify against the defendant. This only goes to show that the Plaintiff did not consider Mr. Gachuba as having any significant information with regard to the allegations of fraud made against the Defendant.

25. It was also the Plaintiff's contention that Mr. Gachuba handled and signed documents that are subject of the proceedings herein. To this end the Plaintiff attached a bundle of documents marked **“FO-3”** to its application which documents I have had the chance to peruse. To begin with some of the documents are correspondences to and from Mr. Gachuba, while others are documents in which his signature is appended in his capacity as an employee then. None of the documents was single-handedly executed by him. That said, having perused the documents, it is my considered view that the nature of the said documents does not reveal that any prejudice will be caused to the Plaintiff by virtue of the said Mr. Gachuba representing the Defendant. The said documents are also not confidential in any way.
26. As started earlier, the Plaintiff's claim against the Defendant is for fraud. The contents of the said documents produced are not in contention and the Plaintiff has not raised any issues of fraud as regards the same.
27. Having made the above observations, it is my considered view that the Plaintiff has not convinced this Court that the firm of **Onyoni Opini & Gachuba Advocates** should be barred and removed from record as representing the Defendant in this suit.
28. In the upshot, the Plaintiff's Notice of Motion dated **21<sup>st</sup> February 2013** and filed in Court on even date is hereby dismissed with costs to the Defendant.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 3<sup>RD</sup> DAY OF FEBRUARY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Karanja holding brief for M/s Mbaabu for Plaintiff/Applicant

No appearance for Defendant/Respondents

Teresia – Court Clerk