REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 300 OF 2011

GUARDIAN BANK LIMITED.....PLAINTIFF

Versus

SONAL HOLDINGS (K) LIMITED.....1ST DEFENDANT

SONAL PHARMA (K) LIMITED.....2ND DEFENDANT

PARESHKUMAR KESHVAJI DODHIA.....3RD DEFENDANT

RULING

Disqualification of counsel

[1] I have a motion before me an application by the firm of **OCHIENG, ONYANGO, KIBET & OHAGA** Advocates for the Plaintiff/Applicant, seeking this court to disqualify the firms of **AKOTO & AKOTO ADVOCATES** and **ORIARO & CO ADVOCATES** from acting in this matter. The motion is also seeking for costs and any such or further order which is fit and expedient.

[2] The application was canvassed before me on 30.1.2014. Mr Abitha made the following submissions. The firms of **AKOTO & AKOTO ADVOCATES** and **ORIARO & CO ADVOCATES** are potential witnesses in this matter in accordance with rule 8 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.***

[3] He relied on the case of **FRANCIS MUGO & OTHERS v JAMES BRESS MUTHEE & OTHERS CIVIL SUIT NO 122 OF 2006** where an advocate was disqualified from representing the

Plaintiffs for the defendants intended to call the advocate as a witness on a lease which he had drawn between the parties. Also the case of **UHURU HIGHWAY DEVELOPMENT LTD v CENTRAL BANK OF KEENYA (2002) 2 E.A. 654** where the court observed that there is a likelihood for an advocate who had prepared the charge document to ***consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will no doubt be prejudice.*** See also the cases of **KAGUNYI v GATHUA & ANOTHER (2008) 2 KLR,** and **KING WOOLEN MILLS LTD & ANOTHER v KAPLAN & STRATTON ADVOCATES (1990-1994) 1 E.A. 224 (CAK).** On the basis that the firm of **AKOTO & AKOTO ADVOCATES** participated in the preparation of and or witnessing of the Debenture dated 26.5.2008 which is impugned, and they have been all along been aware of the said Debenture including the rights and obligations of the parties thereunder, they are potential witnesses in the case, and so they are precluded under rule 8 of the Advocates (Practice) Rules from acting for any of the parties in this case. Equally, the firm of **ORIARO & CO ADVOCATES** are precluded from acting for the 2nd defendant for they acted for the 2nd defendant at all material time and they knew or ought to have known the existence of the said Debenture through the 3rd defendant who was a signatory and a guarantor to the said Debenture, and also a director in the 2nd defendant company. The firm also acted for the third parties in the transfer, selling and or disposing of the trademarks of the 1st defendant in an attempt to defeat and or render useless the said Debenture.

[4] On 20.2.2012, Mabeya J made findings that the activities of the 1st defendant and its agents, the 3rd defendant included, in an effort to transfer, sell and or dispose of the assets of the 1st defendant amounted to criminal acts. The participation of the firms of advocates herein will come to question on the basis of that finding by Mabeya J. The plaintiff therefore, intends to call the firms of **AKOTO & AKOTO ADVOCATES** and **ORIARO & CO ADVOCATES** to testify on their role in assisting the 1st and 3rd defendants and other third parties in removing, transferring, selling and or disposing of the assets of the 1st defendant in an effort to defeat or render useless

[5] The Applicant contends that a retainer was established of the two firms by the parties in this suit when they participated in the drawing and witnessing of the documents in issue herein, and these firms of advocates should desist from acting for any of the parties especially because there is bound to be a conflict of interest. They specifically referred the court to the fact that the firm of **AKOTO & AKOTO ADVOCATES** drew and witnessed the Deed of Assignment of Trade Marks between ***Sonal Holdings Kenya Limited*** and ***Sonal Pharma Kenya Limited,*** which Deeds of Assignment are disputed in these proceedings. The firm of **ORIARO & CO ADVOCATES** witnessed the deed of assignment of Trade Marks between ***Miraj Enterprises Limited*** to ***Dallo International Pharma Limited.*** Equally, the said Deed of Assignment is disputed in this suit. The said Deeds of Assignment are a source of major conflict of interest as long as they are disputed in these proceedings. The Applicant, relying on the case of **FRANCIS MUGO (supra),** emphasized that the said firms of advocates owe a duty, not only to their clients, but to themselves, the opponent or other parties in the suit, the state, and above all to the cause of justice and truth. In the premises, the said firm of advocates, who are the subject of this application, need not have waited to be impeached by the plaintiff through a formal application; they should just have refrained from taking instruction to represent the defendants. They want the advocates concerned to appear in court and clarify Clause 2 of the Debenture and also their participation to defeat the Debenture. Mr Akoto did not disclose that his firm drew all the deed of assignment. For those reasons, the plaintiff beseeches the court to disqualify the said firms of advocates from representing the defendants.

Submissions by 1st and 3rd defendants

[6] The firm of **AKOTO & AKOTO ADVOCATES,** who are acting for the 1st and 3rd defendants in the case, opposed their disqualification from acting for their clients. They filed submissions and a Replying Affidavit of the 3rd defendant sworn on 28.5.2013. Term the application for their disqualification as peculiar requiring a higher standard of proof that there is a possibility that a conflict of interest will arise out of representation by the concerned law firms. Two things are not clear to them: 1) the kind of conflict of interest that may possibly arise herein; and 2) the nature of actual prejudice the

Applicant stand to suffer. The Applicant has failed to demonstrate these two elements.

[7] They continued. Mere witnessing of two impugned Deeds of Assignment does not in itself raise any conflict of interest, because the contents of the said Deeds of Assignment of Trade Marks are not the core subject matter of this suit. The question on whether the trademarks in issue are capable of being assigned is purely a legal question of construction of the terms of the Debenture Instrument, which can only be effectively determined after the full hearing and final determination by the court. They are of the view that it is only fair that a determination is made on whether the charge contemplated was a fixed or a floating charge, which is only possible after proper examination of the intention of the drafters of the Debenture is done. Their main argument is that mere fact that an advocate was involved in a conveyance or commercial transaction which is subject of litigation does not warrant disqualification. They relied on the case of **HEALTH CARE NETWORK ASSOCIATION LLC v CENTRAL SUFFOLK HOSPITAL INC and PECONIC BAY MEDICAL SERVICES, HF FIRE AFRICA v AMR GHARIEB [2005] eKLR, KENYA PIPELINE CO LTD v RAIPLYWOOD (K) LTD [2008] eKLR.** Accordingly, merely because **AKOTO & AKOTO ADVOCATES** participated in the preparation of the Deeds of Assignments does not raise any conflict of interest, and the apprehension by the Applicant if just misguided as the purported conflict of interest is remote or non-existent.

Necessity or relevant of counsel's evidence

[6] They made further submissions that the anticipated testimony of the two firms is to say the least irrelevant, not necessary and meaningless, of no significance and of little evidentiary value to the dispute herein, for they did not draft the Debenture. The question on whether the Trade Marks were capable of transfer is a question of construction of Clause 2 of the Debenture whose intended meaning can only be ascertained after full trial and receipt of evidence from the drafters i.e. Hamilton and Mathews Advocates. The opinion of Stephen W. Fisher J.P, Mark C. Dillion, William E. McCarthy and Ariel E. Belen JJ of the Supreme Court of New York in **HUDSON VALLEY MARINE INC v TOWN OF COURTLAND 30 AD 3d 378** is clear that:

> ***The burden of demonstrating the necessity of the attorney's testimony is on the party seeking his or her disqualification...In determining whether the attorney's testimony is necessary, the court must consider the relevance of the expected testimony and must ''take into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence''.***

Applying this test, the Applicant has completely failed to demonstrate to the satisfaction of the court, the kind of evidence he seeks from the advocates, relevance of such testimony and how necessary the testimony is in relation to the matters in question.

Waiver: Dilatory conduct

[7] The application was brought 18 months after the filing of suit, and that inordinate delay has not been explained. At the time of filing suit, the Applicant was in possession and custody of all documents herein. It is, therefore, incomprehensible why the Applicant did not promptly seek disqualification of the firms concerned. This is a perfect example of dilatory conduct. The application is tactical move which is aimed at stalling the 2nd defendant's application dated 13.8.2013 challenging the irregular orders the Applicant obtained from Justice Mutava and if allowed will cause the defendants great prejudice. Those orders were obtained on the basis of unfiled Amended Plaint and no leave was granted to the defendants to file their replies, thus they were condemned unheard. The application is also tinctured with inordinate delay which has not been explained. As a matter pf practice and for fairness, such motions ought to be prosecuted timeously, and failure to apply immediately the conflict of interest becomes apparent, the Applicant is deemed to have waived the right to apply for disqualification. See the case of **NANCY VAUGHAN v BARBARA WALTER 875 S.W. 2d 690 (1994).**

Right to counsel

[8] **AKOTO & AKOTO ADVOCATES** submits, and rightly so, that the advocate-client relationship is sacrosanct and should not be disturbed unless there are overriding and exceptional compelling reasons. As a general rule, courts should aim at preserving rather than terminating the relationship thus prevent taking away of right to legal representation. See **KENYA PIPELINE CASE (supra).** Article 50(g) of the Constitution enshrines this right which is so fundamental to be limited casually.

Advocate-client privilege

[9] Tied to the right to legal representation is the advocate-client privilege. To ask the advocates for the 1st and 3rd defendants to testify against their own client, will upset the principle of advocate-client privilege envisaged under section 134 of the Evidence Act; a great prejudice to the said defendants. They however, submitted that, the firm of **AKOTO & AKOTO ADVOCATES** consists of more than one advocate, and those who did not draft or witness the Deeds of Assignment would still represent the defendants without any conflict arising. See case of **NATIONAL BANK OF KENYA v PETER KIPKOECH KORAT [2005] eKLR.** They are convinced the application should be denied.

2nd defendant's submissions

[10] The firm of **ORIARO & COMPANY ADVOCATES** submitted that the essence of rule 9 of the Advocates (Practice) Rules is that the court must be satisfied that real mischief and real prejudice in all human possibility will result should the advocate concerned be allowed to represent the defendants. As a general rule, the court should not interfere unless mischief is rightly anticipated. None has been demonstrated against the firm of **ORIARO & COMPANY ADVOCATES.** Attestation of the Deeds in question is not in issue and the said firm of advocates did not draw the document. They cited **DELSPHIS BANK LTD v SINGH CHATTHE & 6 OTHERS [2005] eKLR.** It would be wrong to remove counsel form record on such grounds.

[11] Further, the Deed he attested to is not before the court and is not in issue. Miraj Company Ltd, to which the Deed relates, is not a party to the suit. There is also no evidence that the 3rd defendant is a director of the 2nd defendant. To say that they ought to have known that the 3rd defendant is a director of the 2nd defendant is speculative. In the circumstances, they do not see how **ORIARO & COMPANY ADVOCATES** can even be called as witnesses. Lastly, Trade Marks being questioned have not been disclosed in the schedule to the debenture as required. Therefore, there are no good reasons to disqualify the firm of **ORIARO & COMPANY ADVOCATES** from acting for the 2nd defendant.

COURT'S RENDITION

[11] This application is about rule 8 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.***

[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that ''these advocates participated in the drawing and attestation of the Deeds in dispute''; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say

‘’ I intend to call them as witnesses’’. What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be ‘’their counsel’’ in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

What is the nature of anticipated evidence?

[12] Mr Abitha broadly stated that the firm of **AKOTO & AKOTO ADVOCATES** participated in the drawing and attesting of the Debenture dated 26th May, 2008 as well as the impugned Deeds of Assignments which then exposes then to be called upon to shed light on the illegal transfers of Trade Marks which were subject of the Debenture. He relied on the findings by Mabeya J that the Deeds of Assignment and transfer the ownership of pharmaceutical products which were the subject of the debenture in question were a clear breach of section 291 of the Penal Code and amounted to criminal offence. That finding is alright. But it was directed at the 1st and 3rd defendants, not the advocates. Secondly, at least for the sake of this application, there is nothing to suggest the advocates were involved in or had personal knowledge about the scheme to divest the plaintiff of their property which then would have called the proviso to section 134 of the Evidence Act into play, thus, the privilege to the communication between advocate and client would be blown away. If that were the case, the said advocates would be parties in the suit and an application for disqualification will not be necessary. Although Mr Abitha argued that **ORIARO & COMPANY ADVOCATES** ought to have known the existence of the Debenture dated 26.5.2008 through the 3rd defendant and who is a director of the 2nd, there is nothing to back up that claim. It is, therefore, doubtful whether the said advocates will offer any useful evidence or different from what the plaintiff is stating in its pleadings, because the drawing and attestation of the Debenture and Deeds of Assignment are not in issue. What is in dispute is the allegation that the Deeds of Assignment were made fraudulently by the 1st and 3rd defendants to rip off the plaintiff of its property. That notwithstanding, should the advocates be required to testify on the non-contentious matters of drawing and attesting to the Debenture and the Deeds of Assignment, the proviso to rule 8 of the Advocates (Practice) Rules will still bail them out and may ***give 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.***

Will there be any conflict of interest?

[13] I don’t think so. Given the role of the concerned advocates and the nature of the claim herein, there is no possibility of conflict of interest arising herein as it has not been shown they have any particular

personal interest which will collide with their fiduciary duties as advocates. The fraudulent intent on the part of the defendants will have to be established from other cogent evidence but no from the evidence of the advocates whose scope was limited to drawing and attesting to the Deeds herein. But I should state that, it is good practice that where an issue such as this arises, the advocate should exercise careful discretion and make a decision which will avoid any embarrassment or dimming of his otherwise high standing as a professional. And, therefore, I welcome the suggestion by Mr Akoto that he will not handle the case himself but other advocates in his firm will.

[15] Before I close, I should state that application of this nature should be made without delay because the party applying is expected to have had all the relevant material at the time of filing suit. It should not be made too late in the day for it may be a source of delay of proceedings. But scarcely will the ground of delay alone defeat a deserving application as disqualification serves higher goals in the administration of justice.

[16] The upshot is that the application dated 27th September, 2012 is dismissed. Costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 4th day of March, 2014

F. GIKONYO

JUDGE