



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 624 of 2009**

**GICHUKI KING'ARA & COMPANY ADVOCATES ..... DECREE HOLDER/  
APPLICANT**

**VERSUS**

**MUGOYA CONSTRUCTION & ENGINEERING LIMITED ... JUDGMENT  
DEBTOR/RESPONDENT**

**AND**

**KENYA AIRWAYS LIMITED ..... 1<sup>ST</sup>  
OBJECTOR**

**ARBORETUM PLAZA LIMITED ..... 2<sup>ND</sup>  
OBJECTOR**

**R U L I N G**

1. The issues for determination by the court emanate from the Notice of Preliminary Objection dated 27<sup>th</sup> August, 2012 filed by the Decree Holder (Applicant) in objection to the Judgment Debtor's (Respondent) application dated 21<sup>st</sup> August, 2012. The objections raised by the Applicant in the Notice include *inter alia* that the application cannot issue as both the Respondent and Objectors are represented by same counsel. The Applicant maintained that the application is bad in law as counsel on record is precluded from acting for both the Respondent and Objectors so that the application is incurably defective and should be struck out. it seems the main issue for contention is with regard to representation, or misrepresentation thereof, as the case may be, by the firm of Ochieng', Onyango, Kibet & Ohaga Advocates of both the Respondent and 1<sup>st</sup> and 2<sup>nd</sup> Objectors, Kenya Airways Ltd and Arboretum Plaza Ltd respectively.
2. At the hearing of the Preliminary Objection on 21<sup>st</sup> November, 2012 counsel for the Applicant, Miss. Mithamo, objected to the Respondent's and Objector's application dated 21<sup>st</sup> August, 2012 and further reiterated that the same was bad in law as there was danger of collusion between the Respondent and Objectors if the same was to be allowed. She argued that the action by the firm of Advocates was an effort at humiliating efforts by the Applicant in executing the Decree extracted from the Ruling of Musinga, J on 15<sup>th</sup> August, 2012. She submitted that the court, in exercise of **Section 1A and 1B** of the *Civil Procedure Act*, should disallow the representation.
3. In opposing the sentiments raised by counsel for the Applicant, Mr. Muinde insisted that the

Preliminary Objection is irrelevant as it was not grounded or founded on any statute or rule of procedure and further that the Constitution of Kenya, at Article 50, gives an individual the right to fair trial, which is synonymous with the right to choose an advocate. Learned counsel also argued that the allegation of collusion had not been substantiated and that the law does not preclude advocates from the same firm representing or appearing for separate parties.

4. Ms. Mithamo in response to the objection raised by Mr. Muinde submitted that although the two separate advocates acting for the two different entities as alleged, they were still employees of the same law firm and there was no way that there could not be collusion and conflict of interest as between the Respondent and Objectors.

5. The applicant has raised pertinent issues in its Preliminary Objection. It is self evident that there is eminent danger that the Respondent and Objectors may collude and act mischievously, which acts may be prejudicial and detrimental to the Applicant. However, in raising their concerns over the matter, the Applicant has relied on facts before court and not on any law. A Preliminary Objection is raised purely on a point of law or procedure. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696** Law, J.A (as he then was) held at page 700 *inter alia*:

**“...so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...”** (Emphasis mine).

6. The latitude afforded to litigants under the ‘O<sub>2</sub> Principles’ as provided under **Section 1A and 1B** of the *Civil Procedure Act*, is meant to judicially and expeditiously determine issues that are with merit and unambiguous. In its holding in the case of **Deepak Chamanlal Khamani & Another v Kenya Anti Corruption Commission & 3 Others (2010) eKLR**, this Court referred to the case of **City Chemist (NRB) & Others v Oriental Commercial Bank Ltd Civil Application No. Nairobi 302 of 2008 (UR 199/2008)** where it had been held *inter alia*;

**“...is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies to the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application...”**

7. In the case of **Hunker Trading v Elf Oil (Kenya) Ltd (2010) eKLR**, it was observed that;

**“...the overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”**

The court also observed that the ‘O<sub>2</sub> Principle’ is:

**“...not going to be a magic potion capable of resolving all our problems in the civil justice system’ and further that ‘...they have a powerful ally where they are advancing its aims and a powerful adversary where they are bent on subverting its aim.”**

8. The circumstances arising out of the present case dictate that this court has to act in accordance with powers conferred upon it by the Constitution under Article 159 and the **Section 1A and 1B** of the *Civil Procedure Act*. The court shall not be unnecessarily bound by mere technicalities in executing its mandate. There is a real fear and concern raised by the Applicant that the Judgment Debtor and the Objectors may collude to prejudice the execution of the Decree. The presumption of the conflict of

interest situation is given credence by the Judgement Debtor/Objectors themselves when they allege that there are two different lawyers within the same law firm that are dealing with the parties. The learned counsel further went ahead to attest that the Objectors have a right to choose their own advocates and that the Applicant has not substantiated the claim of collusion. However, the court is inclined to think differently. The court in its deliberation is guided by the leading authority of **King Woolen Mills Ltd & Another v Kaplan & Stratton Advocates [1990-1994] E.A 244** where Muli, J (as he then was) at page 251 held that;

**“...the fiduciary relationship created by the retainer between client and advocate demands 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 that client’s consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created. This principle applies equally where an advocate acts for two or more clients in the same transaction or subject matter because the retainer is specific between the individual client and the common advocate. There exists no fiduciary relationship between the two or more clients of the common advocate. Any knowledge received from each client and their common advocate, although the common advocate acting for two or more clients will be able to complete the transaction speedily and save the clients expense by engaging one common advocate; this fact alone is for convenience only and does not affect the general principle that he should not act or divulge the confidential information received by him from one client to the other client or clients without the consent of the client in the retainer imparting the confidential information. The corollary to this cardinal principle is that the advocate having so acted for two or more clients should be wary to act for one client against the other client or clients in a subsequent action or litigation concerning the original transaction or the subject matter for which he acted for the clients as their common advocate. The reason for this is not farfetched. The information or knowledge so acquired and which is confidential by reason of the fiduciary relationship between the opponent client and the common advocates will place the other client or clients at a disadvantage occasioning prejudice if that knowledge or information is used against them by the common advocate in a subsequent litigation arising from the same original transaction or subject matter for which he acted for the clients as their common advocate. As such the conflict of interest is apparent and the common advocate should not act for one of his client or clients against the other client or clients in a subsequent litigation arising from the original transaction or subject matter.”**

An advocate privy in matters between two different clients, as the circumstances in the present case are, should only act for one of them if it is apparent that there is a conflict of interest if he is engaged for both of them.

9. The ruling in **King Woolen Mills Ltd & Another v Kaplan & Stratton Advocates** (supra) adopted and applied the ruling in **Supasave Retail Ltd v Coward Chance (a firm) & Others v David Lee & Co. (Lincoln) Ltd v Coward Chance (a firm) & Others [1991] 1 All E.R 668** where Browne-Wilkinson, V-C (as he then was) at page 675 held;

**“... Accordingly, I reach the view that, on the evidence before me, which I accept should have been amplified and might have been amplified sufficient to satisfy me, I cannot be satisfied that there is not a real risk of leakage of information in a large firm of partners. I am not reversing the ultimate burden of proof. What I am saying is that prima facie in a firm information does move. If you are going to show that information will not move then it has to be very clearly demonstrated that Chinese Walls or other systems are effective to prevent it doing so.”**

From the above mentioned instances, it is clear that the advocate is in a fiduciary relationship with his client or clients and that in no way in the ordinary practice in a law firm, will that information not move from either one of the two advocates to the other attending to the two different clients, as the present case portends. There is eminent danger of information being passed on from one advocate to the other, or collusion between the advocates, to the detriment and prejudice of the Applicant. In my view, therefore the said firm of advocates acting for the Judgement-Debtor on the one hand and the Objectors on the other would be prejudicial to the Applicant as there would undoubtedly be a conflict of interest.

Accordingly, I uphold the Applicant's Preliminary Objection dated 27<sup>th</sup> August 2012 and dismiss the Judgement Debtor's Application dated 21<sup>st</sup> August, 2012 with costs to the Applicant/Decree-Holder.

**DATED and delivered at Nairobi this 1<sup>st</sup> day of March 2013.**

**J. B. HAVELOCK  
JUDGE**