



**REPUBLIC OF KENYA**

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

**Civil Suit 484 of 2011**

**STRATHMORE RESEARCH CENTRE AND CONSULTING  
CENTRE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**PAUL MAINA GACARI.....DEFENDANT/  
APPLICANT**

**RULING**

1. By a Notice of Motion application dated 14<sup>th</sup> May 2012 and filed in Court on the same day, the Defendant/ Applicant seeks the following orders -:
  - 1) *That the witness statement filed by James Nyiha-Advocate be struck off and the said Advocate be restrained forthwith from adducing any evidence against the Defendant in the case; and*
  - 2) *That the costs of this application be provided for.*
2. The application was brought under sections 1A, 1B, 3A of the Civil Procedure Act, Articles 31 (c) and (d) and 50 (1) and (4) of the Constitution, Order 2 rule 5 (1) (b), (c) and 9 (d), 51 rule 1 and 52 of the Civil Procedure Rules and all other enabling provisions of the Law and is supported by the Affidavits of Paul Maina Gacari sworn on 14<sup>th</sup> May 2012 and 11<sup>th</sup> July respectively.
3. In opposition to the application, there is a replying affidavit by James Nyiha, sworn on 7<sup>th</sup> June 2012.
4. The Defendant's contention both in the Affidavits and submissions by counsel is that the defendant retained Mr. James Nyiha as his advocate on the matters in contention in the present suit and other related transactions. The fact that the Plaintiff seeks to rely on a witness statement by the said advocate, in the Defendant's view, shall be highly prejudicial to him in this case. Consequently, the evidence sought to be adduced by the said advocate was obtained by him under the circumstances where an advocate/ client relationship existed. Further the Defendant avers that though Mr. James Nyiha was also retained as the Plaintiff's Advocate at the time, he failed to warn him that there would be a conflict of interest in acting for both him and the Plaintiff.
5. In order to prove retainer with the said Advocate, the Defendant sought to rely on various fee notes and letters of advice sent to him from Nyiha, Mukoma & Company advising him on fees and various matters.
6. The Defendant also sought to show the court that he retained Mr. Nyiha's services in a contract between himself and the World Council of Credit Unions (WOCCU) for which, in his personal capacity,

he subcontracted 75% of the work to be done under the said contract to the Plaintiff. It's the defendant contention that the said advocate received a 2% handling fee of the amounts that were due to him from WOCCU. It is on these assertions that the Defendant/applicant seeks to show that there was an advocate-client relationship between himself and Mr. James Nyiha in transactions which are now a subject matter in the present suit.

7. Counsel relied on **Francis Mugo & 22 others versus James Bress Muthee & 3 others (2005) ekr, King Woollen Mills Ltd versus Kaplan & Stratton Advocates** and **Simba Hills Farm Limited versus Sultan Haslam Lalji & 5 others (2006) ekr** in support of the propositions that an Advocate should not disclose confidential material obtained when acting for his client and that an Advocate should not act in a position where there would be a conflict of interest including the fact that the court has a duty to maintain and uphold the administration of justice. Counsel therefore urged that the application be allowed.

8. For the Plaintiff, Mr. James Nyiha filed a Replying Affidavit sworn on 11<sup>th</sup> January, 2012 in which it is contended that for there to be a conflict of interest as regards an Advocate, there has to be an Advocate-client relationship which prevents an Advocate from acting for the client's adversary. He asserts that as regards the matters with respect to which the witness statement was prepared, no such relationship existed. In this regard, Mr. Nyiha states that he dealt with the Defendant in his capacity as the Chief Executive Officer of the Plaintiff inasmuch as he was the Plaintiff's Advocate and not the Defendant's Advocate. Mr. Nyiha admits that he did act for the defendant in some personal matters, but that the said matters have no nexus with the present suit. Mr. Nyiha further contends that the witness statement so prepared was on matters which he could positively aver by virtue of his involvement in the transaction and that there was no breach of confidentiality in that regard. Such breach would only occur if an advocate client relationship arose with respect to the matters contained in the statement. The Plaintiff prayed that the Defendant's application be dismissed.

9. I have carefully considered the Affidavits on record, counsel's oral submissions, and the authorities relied upon.

10. The law on conflict of interest on the part of an advocate is fairly well-settled. In **Halsburys Laws of England 3rd Edition Vol. 3 paragraph 67** the learned writers observe:-

***“67. Duty not to disclose or misuse information. The Employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel to his client's detriment (p). This duty continues after the relation of counsel and client has ceased.”***

In **King Woollen Mills Ltd –vs- Kaplan & Stratton Advocates (1990 – 1994) EA 244** where a dispute arose as to the validity of security documents prepared by the Defendants, the Court of Appeal held at page 250 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 the client's consent. That fiduciary relationship exists even after conclusion of the matter for which the retainer was created.”***

In that case the court restrained the firm of Advocates from continuing to act against its former client.

In **Uhuru Highway Development Ltd –vs- Central Bank Ltd (2002) 2 EA 654** whilst considering an application for injunction against a firm of Advocates that had prepared security documentation that was a subject of challenge, the Court of Appeal observed at page 661 thus:-

***“We are satisfied that the real mischief or real prejudice were not rightly anticipated. .... we have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by Counsel in bringing about the first and second Plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired***

**during the preparation of the charge. There will no doubt be prejudice.”**

In that case, the appellants had pleaded duress against the Advocate and had indicated that the advocate was a possible witness in the proceedings. The court restrained the Advocate from continuing to appear against his former client.

A further case to illustrate the principle of advocate –client privilege is **Delphis Bank Ltd –vs- Channan Singh Chatthe & 6 others CA No. Nai 136 of 2005 (UR)** where the Court of Appeal held that :-

***“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however, particularly civil, the right may be put to serious test if there is a conflict of interest which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are King Woolen Mills Ltd & Anor –vs- M/s Kaplan & Stratton (1993) LLR 2170 (CAK), (CA 55/93) and Uhuru Highway Development Ltd & others –vs- Central Bank of Kenya Ltd & others (2), (2002) 2 EA 654.***

In so deciding, the court cited with approval English decisions in **Rukusen –vs- Ellis Munday and Clerke (1912) 1 Ch. 831, RE – A firm of Solicitors (1992) 1 A 11 E.R 353, and Supasave Retail Ltd – vs- Coward Chance and others (1991) 1 ALL ER 668**. The former two cases were applied in the latter, where Sir Nicolas Browne – Wilkinson – V-C summed up the general rule as follows:-

***“The English Law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rukusen –vs- Ellis, Munday & Clerke (1912) 1 Ch. 831.... The law as laid down there is that there is no absolute bar on a solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (.....) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusens case itself. Cozens – Hardy M.R laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability result if the solicitor is allowed to act..... As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated.***

.....

***As is clear from those authorities, 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.”***

In that case, the Court of Appeal declined to restrain Mr. Menezzes, an Advocate, from acting against a former client because the nature of confidential or privileged information that may have been imparted to the Advocate which may be prejudicial was not disclosed to the court.

11. From the foregoing cases, it is clear that there is not general rule that an Advocate cannot act against his client in a subsequent litigation. The test is whether real mischief or real prejudice in all human probability will result if an Advocate is allowed to act. The court must therefore turn on its own facts to establish whether there is real mischief and real prejudice that will result if the Advocate Mr. James Nyiha is allowed act as a witness in this case.

12. The foregoing leads to the question of whether there is a client – advocate relationship between Mr. James Nyiha and the Defendant in this case. Section 2 of the Advocates Act defines a “client” to include:-

***“Any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity has power express or implied, to retain or employ, and retains or employs or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.”***

A client-advocate relationship therefore arises when a client retains an Advocate to offer legal services specifically or generally.

13. It is not disputed that Mr. Nyiha acted for the defendant in some personal matters as disclosed in the Defendant’s supporting affidavit. Rule 9 of the Advocates Practice rules only bars an advocate from appearing in a court or tribunal in which he may be called as a witness. In this case, Mr. Nyiha is not acting for the plaintiff, but is being called as a witness to the plaintiff’s case. What is in dispute is whether Mr. Nyiha is estopped from being a witness in the present suit on account of having acted for the Defendant in some personal matters and whether such services have any nexus with the present suit.

14. In order to establish of there exists a nexus between the present suit and the services rendered to the Defendant by Mr. Nyiha, the Defendant through the supplementary Affidavit sworn on 11<sup>th</sup> July 2012 claims that Mr. Nyiha provided certain services on behalf of two institutions, North West Offshore LLC and Talk Mark Media Inc, who were involved in carrying out a Business Processing Outsourcing Operation (BPO) with Call Street Inc. Northwest Offshore LLC and the Plaintiff in turn agreed to collaborate on the BPO venture, and more so, agreed on how the payments of the venture would be received and disbursed. To structure the arrangement, the Defendant claims that he consulted Mr. Nyiha who agreed to structure the understandings and agreement between the Plaintiff and this institution, in his capacity as an Advocate of both parties. It was then agreed that payments would be received by the firm of Mr. Nyiha for distribution as agreed between SRCC and the other third parties. The Defendant contends that he was the person who at all material times was constituted and fully entrusted in his personal capacity as the agent for the 3rd parties involved in the BPO venture. It is under this personal capacity, that he sought legal advice from Mr. James Nyiha for the structuring of this transaction. Further, the defendant states that the payments held and made to various third parties on his instructions to Mr. Nyiha’s firm, are part of the subject of the suit which entails breach of fiduciary duty.

15. I have perused the Defendant’s witness statements by Ernest Kamau and Thomas Muchina in this regard. The same are elaborative on how the above transaction arose. However, the same are indicative that Messrs Nyiha Mukoma and Company Advocates, were the Plaintiff’s lawyers and were designated as the third parties to receive and disburse payments on behalf of the parties involved in the BPO venture. There is no indication whatsoever, that the Defendant was acting as the Agent of the third parties, namely Talk Mark Media, Northwest Offshore LLC and Call Street Inc.- if this was the case, the same would have been expressly averred.

16. Further, there was no reason to believe that the parties to the BPO arrangement dealt with the defendant on a personal capacity. All directions seem to point that parties dealt with the defendant as the designated representative of the Plaintiff, in his capacity as the Plaintiff’s CEO.

17. With regard to the contract on WOCCU, there is nothing of persuasive value that has been produced by the Defendant/ Applicant to show retainer of the Advocate. All that has been produced is the contract which does little to reveal the assertions of made in paragraph 17 of the Defendant/ Applicant supplementary affidavit.

18. In my view, the cases of **Francis Mugo & 22 others versus James Bress Muthee & 3 others (2005) eKLR**, **King Woollen Mills Ltd versus Kaplan & Stratton Advocates and Simba Hills Farm Limited versus Sultan Haslam Lalji & 5 others (2006) eKLR** produced by the Defendant are distinguishable as the same concern matters in which the Advocates in questions had outrightly been involved in the drafting and the making of the documents in question. In the present case however, questions about Mr. Nyiha's involvement in his capacity as the Defendant's lawyer. What the Defendant has instead sought to do through his supplementary affidavit, is further buttress the fact that in all the aforementioned transactions, Mr. Nyiha was indeed acting for the Plaintiff and was dealing with the Defendant /Applicant in his capacity as the Chief Executive Officer of the Plaintiff. I am therefore not convinced that the said advocate was retained by the Defendant to act on his behalf in the transactions that are a subject matter in this suit.

19. Further to the above, Mr. James Nyiha indicated in his replying affidavit that the statement in which he swore as a witness in this case was done by virtue of his involvement in the transaction. I therefore disagree with the notion that any other party involved in the Plaintiff's operation can give testimony in the matters involving the transactions and particulars of fraud alleged by the Plaintiff.

20. In the foregoing, I think it is fair and just that the Advocate should testify to a large extent as to the matter before the court, with regard to the claim of breach of fiduciary duty by the defendant while engaged in the employment of the plaintiff.

21. Further, the Defendant/ Applicant has failed to demonstrate what confidential and privileged information was imparted to Mr. James Nyiha which may be prejudicial to his case. Ransely J in the case of **Kiambu Service Store –vs- Mbo-I Kamiti Farmers & 3 others Civil Suit 546 of 1998 eKLR** observed that ;-

***“Privilege will obviously extend to confidential matters related by a client to his advocate but it is necessary to look at what has been disclosed by the Advocate in order to determine whether it is knowledge acquired as a result of confidential information or facts disclosed to an advocate in the course of his duties.....A court is entitled to be told the truth and be acquainted with the facts relevant to the matters arising”***

22. In any case, even if I were to find that there was indeed a client- advocate relationship, I am persuaded that the Defendant's concerns are still safeguarded under Section 134 of the Evidence Act. This section prohibits the disclosure by an Advocate of any communication made to him by his client in the course and for the purpose, of his employment or retainer as an Advocate, unless he has the client's express permission to disclose such communication. This protection indeed continues after employment of the Advocate has ceased. Only communication made in furtherance of an illegal purpose or any fact observed by an Advocate in the course of his employment showing that a crime or fraud has been committed is exempt from this protection. This means that to the extent that the suit against the defendant includes claims founded on possible fraud, no protection can be availed.

23. For the above reasons, the Defendant's Notice of Motion application dated 14th May, 2012 fails and is hereby dismissed with costs to the Plaintiff.

**IT IS SO ORDERED.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER 2012.**

**J.M MUTAVA**

**JUDGE**