Imperial Bank Limited (In Receivership) & another v Popat & 18 others (Civil Appeal E395 of 2017) [2025] KECA 1013 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 1013 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E395 OF 2017

W KARANJA, LA ACHODE & GV ODUNGA, JJA

MAY 30, 2025

BETWEEN

IMPERIAL BANK LIMITED (IN RECEIVERSHIP) ..... 1ST APPELLANT

APPELLANT KENYA DEPOSIT INSURANCE CORPORATION .... 2ND APPELLANT

AND

ALNASHIR POPAT ..... 1ST RESPONDENT

ANWAR HAJEE ..... 2ND RESPONDENT

JINIT SHAH ..... 3RD RESPONDENT

HANIF MOHAMED AMIRALI SOMJI ..... 4TH RESPONDENT

MUKESH KUMAR PATEL ..... 5TH RESPONDENT

VISHNU DHUTIA ..... 6TH RESPONDENT

ESTATE OF ABDULMALEK JANMOHAMED ..... 7TH RESPONDENT

ERIC BENGI GITONGA ..... 8TH RESPONDENT

OMUREMBER IYADI ..... 9TH RESPONDENT

CHRISTOPHER ANGELO DIAZ ..... 10TH RESPONDENT

IMARAN LIMITED ..... 11TH RESPONDENT

JANCO INVESTMENT LIMITED ..... 12TH RESPONDENT

REYNOLDS & COMPANY LIMITED ..... 13TH RESPONDENT

EAST AFRICAN MOTOR INDUSTRIES SALES & SERVICE LIMITED ..... 14TH RESPONDENT

MOMENTUM HOLDINGS LIMITED ..... 15TH RESPONDENT

ABDULMAL INVESTMENTS LIMITED ..... 16TH RESPONDENT

KENBLEST LIMITED ..... 17TH RESPONDENT

REX MOTORS LIMITED ..... 18TH RESPONDENT

THE CENTRAL BANK OF KENYA ..... 19TH RESPONDENT

(An Appeal from the Ruling and Orders of the High Court of Kenya (Commercial and Tax Division) at Nairobi (F. Tuiyott J.) (as he then was) delivered on 17th January 2017)inHigh Court Civil Case No. 392 of 2016)

JUDGMENT

1. This appeal has, as its genesis, the ruling delivered on 17th January 2017 by the High Court of Kenya at Nairobi (F. Tuiyott J.) (as he then was) in High Court Civil Case No 392 of 2016, in which the learned Judge dismissed the application dated 26th October 2016 by the 1st appellant. The application had sought to bar Mr. Njoroge Nani Mungai of the firm of Muriu Mungai & Co Advocates and the firms of Ahmednasir Abdikadir & Co. Advocates and Coulson Harney Advocates from acting for certain parties in the suit.

2. The 1st appellant (the Bank), a banking institution carrying on banking business under the *Banking Act*, was placed under receivership on 13th October 2015 and the 2nd appellant was appointed the receiver.

3. The 1st to 6th Respondents and the 8th to 10th respondents were directors of the 1st appellant while the 7th respondent was sued on behalf of one of the deceased's directors of the 1st appellant. The 11th to 18th respondents were shareholders of the 1stappellant. The 19th respondent is a body corporate incorporated under the *Central Bank of Kenya Act*.

4. The events leading to the placing of the 1st appellant under receivership were based on the allegations that the 1st to 10th respondents, contrary to their statutory and regulatory obligations and fiduciary duty owed to the 1st appellant, perpetrated or were aware or ought to have been aware of acts of systematic fraud and theft on the 1st appellant by way of money laundering, fraudulent and false accounting, theft, bribery, corruption, conflict of interest and fraudulent suppression/window dressing by the 1st to 9th respondents. The said respondents were also alleged to have committed breaches of the provisions of the *Companies Act*, the *Banking Act* and Prudential Guidelines. They were further accused, in collusion with the 11th to 18th respondents, of fraudulent declaration of dividends and fraudulent acquisition of the 1st appellant's properties. It was contended that due to the multiple breaches of fiduciary duty, negligence, gross negligence, fraud and breach of statute, the 1st to 10th respondents caused the loss of Kshs 42.2 billion constituting the 1st appellant's assets and depositors' funds. Listed in the plaint were various companies in which it was alleged the 1st to 7th respondents held shares directly or indirectly. Those shares, it was sought to be transferred to the 1st appellant in part recovery of the loss suffered by the 1st appellant

5. The application as relates to the firm of Ahmednasir Abdikadir & Co. Advocates was: that there was evidence that in the year 2007, the 1st appellant sought legal services from the said firm and specifically on the 3rd appellant's Prudential Guidelines and more particularly on Corporate Governance which services were provided for, fees charged and paid for; that at the request of the 1st appellant made on

6th December 2007, the said firm rendered an opinion on the composition of the 1st appellant's Islamic Board Membership; that the Audit Report and Financial Statement of the 1st appellant for the years 2006, 2007, 2008, 2011 and 2012 listed the said firm as one of its legal advisors; that the representation of the 7th and 12th respondents by the said form presents a conflict of interest on their part since the central issue in the suit was failure to ensure corporate governance, a subject on which the 1st appellant sought advice and was granted by the said firm.

6. Regarding Mr Njoroge Nani Mungai, the complaints against him were: that he was the lead counsel to the firm of Coulson Harney Advocates for the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th and 10th respondents; that the firm of Muriu Mungai & Co Advocates, in which Njoroge Nani Mungai practises, was listed in the 1st appellant's Audit Report and Financial Statements for the year 2006-2014 as one of its Legal Advisors; that there was evidence that the said firm was admitted to the 1st appellant's panel of advocates on 11th August 2006 and continued to act on behalf of the 1st appellant in respect of debt recoveries, registration of Trade Mark in Tanzania and advised on personal guarantees and indemnity; that Mr Mungai was in an awkward position because his firm was still active as lawyers of the 1st appellant; and that the firm's legal opinion on personal guarantees and indemnity was directly related to issues in dispute as the borrowing/lending procedure of the 1st appellant was one of the subject matters of the suit.

7. As regards Coulson Harney Advocates, it was contended: that there was undisputed evidence that sometime in September 2014, the firm received instructions from the 1st appellant in relation to proposed restructuring of the shareholding of the 1st appellant dubbed "Project Crown"; that the instructions were carried out and the restructuring was completed on 31st December 2014; that the creation of the new holding company known as Imperial Securities Ltd was to enable the 1st appellant to invite a strategic investor to overcome its financial shortcomings caused by massive fraud on its depositors funds; that this was motivated by fraud since the shareholders were putting themselves into a holding company then 'tiptoeing to Tanzania to set up a Bank'; and that in the course of the restructuring brief, confidential information was imparted on the firm.

8. In his ruling on the issues raised against the firm of Ahmednasir Abdikadir & Co. Advocates, the learned Judge found: that the issue to be determined was whether there was anything in the past engagement between the firm and the 1st appellant that would cause a reasonable man, with knowledge of the facts, to rightly anticipate that there would be real mischief and real prejudice if the said firm were to be allowed to continue in the litigation; that the correspondences adduced did not provide useful information as to the nature of the brief undertaken by the firm for which Kshs 194,659 was paid; that although some correspondence suggested that there was work done in regard to preparation, execution and sealing of a shareholders agreement, it was unclear how this related to section 3.1.6 of the Prudential Guidelines on Corporate Governance; that it was unclear how an intended preparation of a will was related to the official business of the 1st appellant; that although the burden of proof was on the 1st appellant to demonstrate the nature of the confidential information imparted on the firm and how that information was or may be relevant to the matter at hand, the 1st appellant did not give any details of the work undertaken by the firm and the nature of the information imparted on the firm in the cause of that engagement; that the letters, without more, could not constitute sufficient facts to warrant a reasonable man to rightly anticipate that the information imparted on the firm in the course of those instructions had a bearing on the central issue of corporate governance and neither did the letters suggest that the said firm rendered legal advice on Prudential Guidelines; that in the letter dated 6th December 2007 containing specific advice on a Draft Contract of Service in respect to the Islamic Board Members forwarded by the firm to the 1st appellant, it was not demonstrated how that

advice related to and could implicate on the 1st appellant's grievances since the nature of the confidential information that was imparted on the firm that was or may be relevant to the matter at hand was not disclosed; that although the firm was mentioned in the Financial Statements, as legal advisors, since it was alleged that the Accounting and Financial statements were used as a vehicle of fraud, deceit and theft, it was necessary for the appellants to establish the roles, if any, of the law firm in the preparation or validation of the Annual Reports and Statements; that the court could not presume conflict of interest or possession of confidential information on the part of the advocates or the possibility of them being called as witnesses merely because the firm was named as legal advisors in the controversial Reports and Statements; and that the 1st appellant failed to demonstrate that the firm's continued acting in the matter constituted a real mischief and real prejudice to the 1st appellant's case.

9. Regarding the complaints against Njoroge Nani Mungai, the learned Judge found: that in the absence of a Retainer Agreement or Service Contract barring cross-over of an advocate from one side to the other side, there would be no legal basis to disqualify a law firm that has decided to act, unless the briefs are incompatible; that the test as to whether the advocates should be legally barred is whether in acting in the matter a real mischief or reasonable prejudice will, in all human probability, result; that the 1st appellant failed to establish that there was some confidential information that was in danger of being abused or inadvertently misused and that the firm's empanelment alone did not sufficiently demonstrate conflict of interest in respect of the litigation; that the 1st appellant did not point out which portion of the plaint was relevant to the legal opinion on Personal Guarantees and Indemnity that touched on the matters the subject of litigation; and that the court was unable to find that the security documents advised on by the said firm were used to perpetrate or accomplish the fraud or misfeasance alleged against the 1st to the 10th respondents.

10. With respect to Coulson Harney Advocates, the learned Judge found: that whereas certain confidential information in respect of the shareholding of the Bank and perhaps of the Bank could have passed to the firm in order to enable it advice on restructuring, it was not demonstrated that the information gained in confidence was connected with the issues at hand and whether the information was likely to be used deliberately or inadvertently to the detriment or disadvantage of the 1st appellant in the proceedings; that it was not alleged that the restructuring of the 1st appellant or creating of the Imperial Securities Ltd was a scheme to further the alleged fraud, deceit or wrongdoing by the respondents; that the restructuring and creation of the non-operating holding company was not an issue in the suit; that the 1st appellant failed to demonstrate that any information imparted on the firm in the 'Project Crown' assignment was relevant to the matter at hand; that it was common knowledge that in the process of applying for a banking licence in Tanzania the firm wrote a letter of good standing dated 23rd February 2015 in support of the 1st appellant; that in that letter the firm confined itself to its assessment of the Companies and Shareholders in the firm's dealings with them; that in so far as it had not been demonstrated by the 1st appellant that any of those dealings was the subject of the suit, no conflict was proved to have arisen; that by the communication in the email of 29th September 2015, the 2nd respondent was readying himself, in the event of any action against himself and other directors, and was not a communication between the firm and the 1st appellant but between the firm and its current clients; that in the post receivership development, the clients of the firm were the shareholders of the Imperial Bank Limited and not the 1st appellant, hence the 1st appellant had not demonstrated the confidential information which could possibly have passed from the 1st appellant to the firm in such circumstances; and that there is no rule that an advocate cannot act against his/her own client just because it is on its panel of advocates hence the firm's empanelment alone could not be sufficient reason for the court to remove it from the matter.

11. Dissatisfied with that decision the appellants appealed to this Court on the grounds: that the ruling contravenes the mandatory provisions of Order 21 rule 3 of the Civil Procedure Rules; and that the learned Judge erred in failing to find that the multiple breaches of fiduciary duty on the part of the respondents that led to a massive, complex, long running and well orchestrated fraud of Kshs 42.4 billion of the bank's assets and depositors fund, perpetrated during the period when the firm of Ahmednasir Abdikadir & Co Advocates and Muriu Mungai & Co Advocates were listed as legal advisers of the appellant in its annual reports and financial statements, placed the said firms in an irreconcilable conflict.

12. The other grounds were that the learned Judge erred in law and in fact: by failing to find that the firm of Muriu Mungai & Co Advocates having been listed as legal advisors of the appellant, in its annual reports and financial statements and during the period in which the fraud occurred were privy to or must have been privy to the confidential information of the appellant; by failing to find that it is reasonable to expect that an advocate from the firm of Muriu Mungai & Co Advocates would be called as a witness for the appellant, and therefore it would be greatly prejudicial to the appellant for the members of the said firms to represent the 1st to the 18th respondents; by failing to find that the firm of Muriu Mungai & Co Advocates is conflicted and cannot therefore act for the 1st, 2nd, 3rd, 4th, 5th, 8th, 9th and 10th respondents against the 1st appellant; by failing to appreciate and hold that the said firm of Muriu Mungai & Co Advocates being legal advisors of the 1st appellant, and during the period in which the fraud occurred, was privy to the confidential information of the 1st appellant; by failing to find that the firm of Ahmednasir Abdikadir & Co Advocates having been listed as legal advisors of the appellant, in its annual reports & financial statements and during the period in which the fraud occurred, were privy to or must have been privy to the confidential information of the 1st appellant; by failing to find that it is reasonable to expect that an advocate from the firm of Ahmednasir Abdikadir & Co Advocates would be called as a witness for the appellant, and therefore it would be greatly prejudicial to the appellants for members of the said firms to represent parties against the 1st appellant; by failing to find that the firm of Ahmednasir Abdikadir & Co Advocates is conflicted, and cannot therefore act for the 7th and 12th respondents against the 1st appellant; by failing to appreciate and hold that the said firm of Ahmednasir Abdikadir & Co Advocates being legal advisors of the 1st appellant, and during the period in which the fraud occurred, was privy to the confidential information of the appellant; and by failing to find that the firm of Ahmednasir Abdikadir & Co Advocates, is conflicted after correctly finding that there is a mix up of corporate matters and individual affairs.

13. The grounds directed to Coulson & Harney Advocates were: that the court failed to take into account the acknowledgement, and the admission by Jonathan Stewart Coulson, Senior Partner at Coulson & Harney Advocates, in his affidavit sworn on 27th October 2016, of the sensitive and confidential transaction of the assignment undertaken by the 1st appellant; that this made it necessary to code name it "Project Crown" which related to the restructuring of the appellant which was by then ailing due to the massive fraud, and which is the subject matter of the suit; by failing to find that the firm of Coulson & Harney Advocates, is conflicted and cannot act for the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th and 10th respondents against the 1st appellant, having held that it was improbable that for the firm to vouch for the probity of Imperial Securities Ltd and its shareholders and Imperial Bank Limited (K) for such a serious purpose as establishing a bank in Tanzania; that the said assurance could not have been given unless the said firm had confidential information about the integrity and rectitude of the Bank's banking operations which is the subject of the suit; by failing to find that the firm of Coulson & Harney Advocates, is conflicted, and cannot therefore act for the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th and 10th respondents against the 1st appellant; by failing to hold that the communication exchanged between the firm of Coulson & Harney Advocates and the 2nd respondent, against the 1st appellant was not

between the directors in their individual capacity, but in their capacity as directors of the 1st appellant; by failing to appreciate and hold that the said firm of Coulson & Harney Advocates, being on the panel of, and having acted for the 1st appellant, and during the period in which the fraud occurred, is privy to the confidential information of the 1st appellant; and by failing to hold that given the weight of the evidence, it is reasonable to expect that an advocate from the said firm of Coulson & Harney Advocates could be called as a witness to testify on the legal advice given, and transactions at the 1st appellant, which could be greatly prejudicial to the respondents, and hence the conflict of interest.

14. When the appeal was called out for plenary hearing on 24th February 2025, the appellant was represented by learned counsel, Mr Samuel Mbatai, who held brief for Mr Issa Mansur,learned counsel, Ms Effie Omondi, appeared for the 1st to 6th respondents and 8th to 10th respondents, learned Senior Counsel, Mr Ahmednasir Abdulahi, appeared for the 7th and 12th respondents, learned counsel, Mr Andrew Wandabwa, appeared for 11th and 13th respondents and learned counsel, Mr Paul Chege, appeared for the 18th respondent. Mr Mbatai, Mr Ahmednasir and Mr Wandabwa relied on their written submissions which they briefly highlighted. Mr Chege associated himself with the appellants' submissions while Ms Omondi did not make any submissions.

15. The appellants' submissions were: that the learned Judge failed to consider the distinction between a firm being on a panel of advocates and acting as legal advisors; that while the 1st appellant's approved panel of advocates, as at 16th August 2011, contained twelve law firms, the 1st appellant in the Annual Report & Financial Statements for the year 2011 only listed ten as legal advisors; that unlike our jurisdiction where the distinction between legal advisors and advocates on a panel has not been specifically addressed, in Federal Deposit Insurance Corporation (as Receiver for Silverado Banking, Savings and Loan Association) v Michael R. Wise 758F. Supp. 1414 [1991], the court declined to allow a motion to dismiss part of the suit that sought liability against the financial institution's legal advisors and concluded that the facts supported the claim that the attorneys, as advisors, had access to relevant dealings in the institution and owed a duty to advise and investigate certain matters; that the learned Judge's findings disregarded the correspondence between the firm of Ahmednasir Abdikadir & Co Advocates and PKF Kenya Limited which was tasked with preparing the 1st appellant's Financial Audit and which directly involved disclosure of the relevant information to enable PKF prepare the annual audit; that this was an indication that both firms, as legal advisors, participated in the preparation and were privy to the information contained in the Annual Report & Financial Statements; that the Financial Statements were used to window dress the fraud by the 1st -17th respondents and this will be considered in HCCC No. 392 of 2016; and that it is therefore reasonable to anticipate that the firm would be placed in an awkward position as there was a likelihood that the information divulged during the preparation of the Annual Reports and Financial Statements would be used against the 1st appellant.

16. As regards the firm of Muriu Mungai & Co Advocates, it was submitted: that the firm was placed in a conflict when it rendered an opinion for the 1st appellant on the regularisation and stamping of Guarantees and Indemnities; that on a balance of probabilities, and in order to render the opinion, the firm was privy to loan facilities issued by the 1st appellant without the involvement of a Board Credit Committee, an issue for consideration and determination in the said case; that the learned Judge was required, on a balance of probabilities, and upon reviewing the facts and the documents adduced by the appellants, to determine whether there was a likelihood that the firm had access to information based on which a reasonable man could conclude would be prejudicial to the 1st appellant's case; that based on the case of Aden Ibrahim Mohammed & 6 Others v County Assembly of Wajir & 6 Others; Governor of Wajir County Mohammed Abdi Mohammud & 3 Others (Interested Parties) [2021] eKLR, it is enough for a party to provide a general outline of the instructions and the information disclosed to

enable the court determine the existence of a conflict; and that there is likelihood that the firm had access to confidential information regarding the lending procedures of the 1st appellant to enable it advice on the regularisation and stamping of guarantees and indemnities issued hence if not restrained, from appearing in the proceedings, there is a likelihood that the 1st appellant's confidential information will be used against it.

17. Regarding the conflict of interest by the firm of Ahmednasir Abdikadir & Co Advocates, it was submitted: that apart from erroneously holding that there was no nexus between the firm being named as legal advisors of the 1st appellant and their participation in the preparation of the 1st appellant's annual reports and financial statements, the learned Judge failed to consider and determine the nature of the instructions undertaken by the firm and the nature of information conveyed in the course of undertaking the instructions; that, on the authority of Uhuru Highway Development Ltd & 3 Others v Central Bank of Kenya & 4 Others [2003] eKLR, in determining whether the three firms of advocates were privy to information that was confidential and relevant to HCCC No. 392 of 2016, the learned Judge was required to consider the totality of the instructions that the firms undertook on behalf of the Bank and the information that the Bank would have disclosed to the firms in the course of undertaking the instructions; and that the firm clearly had instructions to consider and advise on the corporate governance of the 1st appellant and in particular the effect of the Central Bank of Kenya's Prudential Guidelines on Corporate Governance, 2006, an issue that is for consideration in HCCC No. 392 of 2016.

18. As regards Coulson Harney LLP Advocates, it was submitted: that the learned Judge raised the standard of proof on the likelihood that the confidential information gained in confidence would be used to the prejudice of the 1st appellant from a balance of probabilities to beyond reasonable doubt; that the findings by the learned Judge were contrary to the decision in King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & Another v M/s Kaplan & Stratton Advocates [1993] eKLR where the court determined that once an advocate is found to be in possession of confidential information there is prima facie chance that the information will be used against the client and on a balance of probabilities there is real mischief to be suffered; that there is therefore a reasonable apprehension that the information gained by the firm will be used against the 1st appellant to its detriment and without its consent; that despite questioning how the firm could vouch for Imperial Securities Limited, without being privy to the undertakings and business of the 1st appellant, the learned Judge found that the letter of recommendation confined itself to the dealings between the firm and the shareholders and the 1st appellant; that the learned Judge having observed that information was divulged to the firm as regards the operations of the 1st appellant and the role of the respondents, a live issue before the High Court, the learned Judge should have found that the nature of the information divulged is privileged and there is a danger that information will be used against the 1st appellant; and that the appeal ought to be allowed with costs.

19. On behalf of the 1st to 6th and 8th to 10th respondents, it was submitted: that the 1st appellant and Imperial Bank Limited are two separate entities, legally distinct from each other; that the 1st appellant did not exist in 2014 and it cannot therefore be said to have given confidential information to the firm in 2014; that the appellants have failed to demonstrate how the trial court allegedly erred in its ruling as to warrant the setting aside of the resultant orders; that for a conflict of interest to arise, the 1st appellant ought to have demonstrated the manner in which this was made out; that no confidential and/or highly sensitive information of the 1st appellant was given to the firm during its involvement in the restructuring of the 1st appellant in 2014; that the restructuring was a usual transaction that is carried out by financial institutions to diversify their investments for example by owning shares in banks in other countries; that the restructuring instructions were given approximately 12 months

before the 1st appellant was placed under receivership hence the work done by the firm did not in any way touch on or relate to the issues raised in this appeal; that it is not enough for an applicant to allege that, because an advocate acted for it in another matter, such advocate is barred from acting against it in future; that the court will only intervene if satisfied that the continued action of a firm against the client is likely to cause real prejudice to the latter; that to invoke such interventions by court, the party citing conflict of interest must disclose the nature of the confidential or privileged information that may have been imparted to the advocate which may be prejudicial; that an allegation of conflict of interest should therefore be based on real evidence of conflict of interest consisting in a possibility of using confidential information by the advocate in question in favour of the party he is representing and to the detriment of the other party; that the appellant did not provide any evidence to demonstrate that a conflict of interest arose in the firm of Coulson Harney Advocates acting for the 1st to 6th and 8th to 10th respondents hence the appellants' apprehension of conflict of interest was unfounded; that the firm has not acted for the 1st appellant post receivership; that the present suit is premised on entirely different issues and do not arise from the restructuring transaction undertaken by the form on behalf of the Imperial Bank Limited; that at no time was the firm instructed to advice on any other aspects of its banking operations and/or potential liabilities arising from restructuring of the Imperial Bank Limited in 2014; and that in the circumstances the appeal has no merit and should be dismissed with costs.

20. The 7th and 12th respondents cited the definition of conflict of interest in Black's Law Dictionary, 10th Edition and rule 6 paragraph 96 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016.

21. In support of the submissions, the said respondents relied on Uhuru High way Development Ltd & 3 Others v Central Bank of Kenya & 4 Others [2003] eKLR and Rukusen v Ellis Munday & Clerke [1912] 1 Ch. 831 for the position that a careful consideration of the correspondence on record is required and that each case must be considered as a matter of substance on its facts. On the authority of the case of Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others [2015] eKLR, and British-American Investments Company (K) Limited v Njomaitha Investments Limited & Another [2014] eKLR it was submitted that the burden is upon the party seeking to bar an advocate from acting in a matter to establish the factual basis for the apprehension or anticipation of conflict of interest. The respondents relied on the case of Charles Gitonga Kariuki v Akuisi Farmers Co. Ltd [2007] eKLR for the position that the fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest and that in this case, the appellants did not demonstrate that there was conflict of interest by the firm of Ahmednasir Abdikadir & Co. Advocates representing the 7th and 12th respondents. They also relied on the case of Delphis Bank Limited v Channan Singh Chatthe and 6 Others as cited in Jopa Villas LLC v Overseas Private Investment Corp & 2 Others [2014] eKLR, Willliam Audi Ododa & Another v John Yier & Another Civil Appeal No. Nai 360 of 2004, Geveran Trading Co. Ltd v Skjevesland [2003] 1 WLR 912 and the High Court decision of Tom Kusienya & Others v Kenya Railways Corporation & Others [2013] eKLR, for the submissions that removal of an advocate from acting for a party in proceedings is an extraordinary and drastic remedy to be contemplated only in the most extraordinary circumstances. The High Court case of Dorothy Seyanol Moschioni v Andrew Stuart & Another [2014] eKLR, was cited on what ought to be considered in the determination of whether or not to bar an advocate from acting for a party while the authority of Re a Firm of Solicitors [1995] 3 All ER 482, was highlighted for the position that it is not sufficient for the client to make general allegation that the solicitor is in possession of relevant confidential information. The authority of the case of National Bank of Kenya Limited v Peter Karat & Another Civil Case No. 77 of 1997 as cited in Sunrise Properties Limited v National Industrial Credit Bank & 2 Others [2007] eKLR in which rule 9 of the Advocates (Practice) Rules, was relied on for the holding that the disqualification of the entire firm may not be required even where the firm was acting for the

opposite party. To the respondents, the appellant failed to demonstrate how the firm of Ahmednasir Abdikadir & Co Advocates representing the 7th and 12th respondents creates conflict of interest for the 1st appellant. It was contended that there is no iota of evidence that the firm of Ahmednasir Abdikadir & Co Advocates are likely to be witnesses in this matter and that the appellants failed to demonstrate and establish conflict of interests by the said firm. We were urged to dismiss the appeal.

22. We have considered the appeal and the submissions made before us. It is our view that in order to determine the issues in this appeal, it is important to set out the circumstances under which a court will bar an advocate from acting for a party on the grounds of conflict of interest. Black's Law Dictionary, 10th Edition, defines "conflict of interest", inter alia, as:

A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.

23. Rule 6 paragraph 96 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct,2016 (the 2016 Code) defines conflict of interest in the following terms:

> "A conflict of interest is an interest which gives rise to substantial risk that the Advocate's representation of the client will be materially and adversely affected by the Advocate's own interests or by the Advocate's duties to another current client, former client or a third person."

24. Rule 6 paragraph 99 of the 2016 Code enumerates instances in which a conflict of interest might arise. They include: -

a. Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;

b. Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.

c. Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.

25. The general rule is that it is not the duty of the court to decide for the parties by whom they are to be represented in legal proceedings. The removal of an advocate from representing a client is not to be taken lightly as the litigant who appointed such advocate enjoys the constitutional right to be represented by an advocate of his choice and the right to a fair hearing which is recognised in Article 50 of *the Constitution*. Thus, in Jopa Vilas LLC v Overseas Private Investment Corp & 2 Others [2014] eKLR this Court, in emphasizing the gravity of the matter stated as follows:

> " The Supreme Court of Samoa in Apia Quality Meats Limited v Westfield Holdings Limited [2007] 3 LRC 172 held on the subject of removal of an Advocate from proceedings that such an application had to be considered under the relevant legal principles on the courts exercise of inherent jurisdiction to control the conduct of the proceedings and those who appeared before it as counsel. The factors to be considered were such factors as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct. It was further held that removal of an Advocate from acting for a party in

proceedings was an extraordinary and drastic remedy to be contemplated only in the most extraordinary circumstances, requiring misconduct so serious that removal was the only way of safeguarding the future integrity of the proceedings."

26. Similar position was adopted in William Audi Ododa & Another v John Yier & Another Civil Application No. Nai. 360 of 2004 where Okubasu, JA while citing Delphis Bank Ltd v Channan Singh Chatthe & 6 Others Civil Application No. Nai. 136 of 2005, Geveran Trading Co. Ltd v Skjevesland [2003] 1 All ER 1, King Woolen Mills Ltd & Anor v M/S Kaplan & Stratton Civil Appeal No. 55 of 1993 and Uhuru Highway Development Ltd & Others vs. Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654 expressed himself as hereunder:

> "It is not the business of the Courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate and unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel...Each case must be decided purely on its facts and for a Court to deprive a litigant of his right under section 70(a) of *the Constitution* which guarantees citizens protection of the law, there must be clear and valid reasons for doing so."

27. In Delphis Bank Ltd v Channan Singh Chatthe & 6 Others [2005] eKLR the objection against the participation of an advocate in representing a party in the matter was based on grounds that the former had prepared disputed instruments and was likely to be summoned as a witness. This Court stated 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 interests 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."

28. Nevertheless, an advocate is generally bound to a duty of confidentiality in relation to privileged information arising out of his communication with a client. The advocate's duty to his client according to Halsbury's Law of England 3rd Edition Vol. 3 para 67 is a:

> "Duty not to disclose or misuse information: The employment of counsel places him in a confidential position and imposes upon him a duty not to communicate to any third person the information which has been confided to him as counsel to his client's detriment. This duty continues after the relationship of counsel and client has ceased."

29. The controlling authority in England, as regards conflict of interest by solicitors was largely determined by the Court of Appeal in Rakusen v Ellis, Munday and Clarke [1912] 1 Ch. 831. This case concerned a small firm of solicitors with only two partners who carried on what amounted to separate practices, each with his own clients, without any knowledge of the other's clients and with the exclusive services of some of the clerks. The plaintiff consulted one of the partners in relation to a contentious matter. After he had terminated his retainer, the other partner, who had never met the plaintiff and was not aware that he had consulted his partner, was retained by the party opposite in the same matter. The

judge granted an injunction to restrain the solicitor from acting. The Court of Appeal found that there was no risk of disclosure of confidential information and discharged the injunction.

30. The case is authority for two propositions: (i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and (ii) that the solicitor may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.

31. Rukusens v Ellis Munday & Clerke (supra) was considered in Re-A Firm of Solicitors [1992] 1 All ER 353, 354 in which it was held by Parker, LJ at p 354 that:

> " 1. There was no general rule that a firm of solicitors who had acted for a former client could never thereafter act for another client against the former client, but a firm of solicitors would not be permitted to act for an existing client against a former client if (Per Parker L J and Sir David Croom- Johnson) a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or (per Stanghton L J) there was some degree of likelihood of mischief, ie of the confidential information imparted by the former client being used for the benefit of the new client. If (Stanghton L J dissenting) there was such a conflict of interest it was only in very special cases that the Court would consider that a Chinese Wall would provide an impregnable barrier against the leakage of confidential information
>
> 2. (Stanghton LJ dissenting) On the facts, a reasonable man with knowledge of all the facts including the measures for a Chinese Wall proposed to be taken by the firm would, notwithstanding those measures, still consider that if the firm was allowed to continue to act for the defendant, there would be a risk that some of the confidential information provided by the ASA companies to the firm when it was acting for ASM might inadvertently be revealed to the firm's team who were to act for the defendant. Accordingly, the appeal would be dismissed and the injunction restraining the firm from acting for the defendant would be continued..."

32. Rukusen v Ellis, Munday & Clerke (supra) and Re A Firm of solicitors (supra) were applied and followed in Supasave Retail Ltd v Coward Chance and others [1991] 1 All ER p 668. In that case Sir Nicolas Browne - Wilkinson V-C summed up the general rule at p 673 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 v Ellis, Munday & Clerke [1912] 1 Ch 831... The law as laid down there is that there is no absolute bar on 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 (and) real prejudice to the former client unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusens case itself. Cozens - Hardy MR 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".

33. Muli, JA's judgement, in King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd & Another v M/s Kaplan & Stratton Advocates [1993] eKLR, which the other members of the bench agreed with, is instructive on the matter. In that case, a partner in the Firm of Kaplan & Stratton, participated in negotiations for offshore loan facilities between a Bank and the borrowers and he also went ahead and drew up the loan agreement, the guarantee, the debenture and the legal charge on behalf of the Bank and the borrowers, as their common advocate. When disagreements subsequently arose and litigation commenced in respect of those transactions, the firm of advocates chose to act for the Bank but the borrowers objected and sued the firm seeking an injunction to stop it from breaching client/advocate confidentiality. It was contended, and the court found, that the borrowers had imparted to that partner and the Bank, confidential information and their secrets in confidence under the retainer to enable the partner to successfully conclude the loan transaction. The Learned Judge held that:

> "I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit. The result will be that the appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during the trial of the main suit".

34. Citing the case of Supasave Retail Ltd v Coward Chance and Others [1991] All ER 688 the learned Judge held that:

> "I am persuaded to adopt the rule as has emerged since in Rukusen vs Ellis, Munday and Clerk as reported in orderly on solicitors 7th edition page 70.
>
> A solicitor who has been retained by a client is under an absolute duty not to disclose any information of a confidential nature which has come to his knowledge by virtue of a retainer, and to exercise the utmost good faith towards his client not only for so long as the retainer lasts but even after the termination of the retainer, in respect of any information acquired during the course of and by virtue of the retainer and the Court will restrain the solicitor by injunction from any breach likely to damnify the client and award damages for breach. There is no general rule prohibiting a solicitor who has acted for one client in a matter acting for an opposite party in the same matter, but where a solicitor owes a duty to a third party which conflicts his duty to a particular client he is not relieved of his duty to that client."
>
> In Rukusen v Ellis, Munday & Clerke [1912] 1 Ch p 831 Conzens - Hardy MR as he then was put the principle as follows p 835:
>
> "A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidently reposed in him. In that respect, it does not very much differ from the position of any confidential agent who is employed by the principal. But in the present case we have to consider something further. It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who has acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances, and it is said that that is so much a general rule and the danger is such that the Court ought not to have regard to the special circumstances of the case. I do not doubt for a moment that the circumstances

may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client, but in my view we must treat each of the cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client but, as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability, result if his solicitor is allowed to act."

35. He concluded that:

> " The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rukusen v 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".

36. In Geveran Trading Co. Ltd v Skjevesland [2002] EWCA Civ 1567, Arden, LJ held that:

> " The Judge has to consider the facts of the particular case with care (see the words of Lord Steyn in the Man O'War Station case cited as [32], above). However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. We accept Mr Jones' submission that it may be difficult for the party objecting so to do. In many cases it will be sufficient that there is a reasonable lay appreciation that this is the case because as Lord Hewart CJ memorably said in R v Sussex jj, ep McCarthy [1924] 1 KB 256, [1923] All ER Rep 233,it is important that justice should not only be done, but seen to be done. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal, as in R v Smith (Winston), he should have acceded to an order restraining an advocate from acting. But we stress that the Judge must consider all the circumstances carefully."

37. It is clear from the above authorities that each case must turn on its own facts to establish whether real mischief and real prejudice will result. It was therefore held in Rukusen v Ellis, Munday & Clerke (supra) that:

> " we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act...."

38. Kimaru, J (as he then was) in Charles Gitonga Kariuki v Akuisi Farmers Co. Ltd [2007] eKLR weighed in by holding that:

> " It is not enough for the applicant to allege that because an advocate acted for it in several matters, such an advocate was barred from acting against it in other matters. The fact that an advocate acted for a litigant does not, per se, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise were the advocate is (sic) allowed to act for the opposing party against such a litigant. In the present case, apart from stating that Mr. Karanja had acted for it in several matters, the defendant did not present to the court material upon which this court could make a determination that indeed there were grounds upon which this court could reach a determination that there exist a possibility of conflict of interest."

39. The principle was discussed in Re a firm of Solicitors (supra) at page 489 as follows:

> " ...on the issue whether the solicitor is possessed of relevant information, it is in general not sufficient for the client to make general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required...".

40. The burden is, however, on the party propounding the notion that an advocate ought not to appear in a matter, on grounds of conflict of interest, to satisfy the court that that ought to be the position. In Prince Jefri Bolkiah v KPMG (a firm) [1999] All ER at 527, it was held that:

> " it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case."

41. In Hudson Valley Marine Inc v Town of Courtland 30 AD 3d 378 quoted with approval by Sergon, J in Walter Ndindi Wambu v Dr J R Wambwa & 2 Others [2015] eKLR, it was held 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."

42. It is, therefore, clear that general averments that the advocate acted for a client is not sufficient to bar the advocate from appearing against that particular client. This is particularly so in a matter such as the present one where the client is a financial institution with multifaceted financial and legal undertakings.

The mere fact that it did instruct an advocate or that an advocate is in its panel of advocates is not a sufficient ground to disqualify an advocate. Where an advocate is alleged to have been on its panel, it must be shown not only that the advocate did get specific instructions from the client, but also that the nature of the instructions given were such as to lead to a conclusion that the confidential information gained was connected with the issues at hand and that it was likely to be used deliberately or inadvertently to the detriment or disadvantage of the client in the proceedings. It is only then that it can be said that real mischief and real prejudice will, in all human probability result if the advocate is allowed to act. In other words, for the courtt to interfere with the representation, the party objecting must show that mischief is rightly anticipated.

43. Having set out the law regarding debarment of advocates from appearing against their clients or former clients, we now proceed to examine whether the allegations made against Mr. Njoroge Nani Mungai of Muriu Mungai & Co Advocates and the firms of Ahmednasir Abdikadir & Co. Advocates and Coulson Harney Advocates seeking to bar them from acting for some of the parties in the suit against the 1st appellant were merited.

44. As against the firm of Ahmednasir Abdikadir & Co. Advocates, it was contended that in the year 2007, the 1st appellant sought legal services from the said firm and specifically on 19th respondent's Prudential Guidelines on Corporate Governance and that the fees for the services rendered were paid for. Further, it was alleged that the said firm rendered an opinion on the composition of the 1st appellant's Islamic Board Membership and that in the 1st Appellant's Audit Report and Financial Statement for the years 2006, 2007, 2008, 2011 and 2012, the said firm is listed as one of the appellant's legal advisors. According to the 1st appellant, the firm's conflict of interest arises from the fact that the failure to ensure corporate governance is central to the suit.

45. In his decision, the learned Judge found that in none of the letters that were relied upon by the 1st appellant was the nature of the brief undertaken by the firm disclosed and that there was no nexus between the preparation, execution and sealing of a shareholder's agreement with the said Prudential Guidelines on Corporate Governance. We have ourselves considered the averments in the affidavit sworn by David Kiptoo on 20th October 2016, in support of the application seeking to bar the said advocates from appearing against the 1st appellant. Apart from the allegations that the firm of Ahmednasir Abdikadir & Co Advocates advised the 1st appellant on the said Prudential Guidelines on Corporate Governance which Guidelines are at the heart of the suit, no specific instances of the conflict of interest are pointed out. It is not sufficient o simply aver that advice was given on the Prudential Guidelines on Corporate Governance, but it ought to be pointed out which portion of the suit is relevant to those Guidelines and how the advice given by the advocate negatively impacts on the advocate's representation in the suit. As regards the opinion on the composition of the 1st appellant's Islamic Board Membership, it is not elaborated how this opinion impacts on the material availed to the said firm which material is likely to be used to the detriment of the 1st appellant. While we agree that the party objecting to the representation by an advocate on grounds of conflict of interest need not prove that the material availed to the advocate by virtue of the earlier representation will be used to the detriment of the former client, more than mere generalisation is required to justify the court's interference with the advocate's representation in the proceedings. We are unable, based on the material placed on the record, to find that real mischief and real prejudice will, in all human probability result if the firm of Ahmednasir Abdikadir & Co Advocates is allowed to act in the suit. The appellants have failed to persuade us that the learned Judge erred in not finding that by the said firm acting in the matter as it sought to do, mischief was rightly anticipated.

46. As regards the objection to Mr Njoroge Nani Mungai of Muriu Mungai & Co Advocates, it was contended that they were the 1st appellant's legal advisors. As we have said above, the mere listing

of an advocate as a legal advisor, without more, does not justify interference with an advocate's representation in a matter. The party objecting must go further and show that, not only was that advocate on the list, but that it did actually give the advice. In addition, it ought to be shown that the advice in question is in respect of the subject matter from which the dispute has arisen. In this case, it was contended that the said firm continued to act for the 1st appellant in matters involving the 1st appellant's intellectual property rights, as well as provision on personal guarantees and indemnities, touching on securitisation and protection of the 1st appellant's assets. From the supporting affidavit we are unable to see any specific transaction in which the said firm was involved in that is the subject of the pending suit. Although it was deposed that forensic investigations over the financial irregularities at the 1st appellant revealed multiple breaches of fiduciary duty on the part of the respondents leading to massive, complex, long running and well-orchestrated fraud perpetrated over the periods the three firms of advocates were listed as advisors of the 1st appellant, we reiterate that such an averment falls short of what is required to warrant interference with representation by an advocate. At best, what it amounts to is mere suspicion that the said firms may have, in the course of rendering services for the 1st appellant, come across information that may be used against the 1st appellant. To bar an advocate from representing a client thereby restricting that client's right to legal representation, more than mere suspicion is required. Evidence of confidential information being imparted in the advocate ought to be adduced followed by reasonable belief that the same is likely to be used against the client to the advantage of the other party.

47. Similar allegations of admission to the 1st appellant's panel of legal advisors were made against the firm of Coulson Harney. It was however averred that this firm was appointed and undertook several assignments including a secret "Project Crown" involving restructuring of the 1st appellant to create a new holding company known as Imperial Securities Ltd which the directors would thereafter use to enable it invite a strategic investor to overcome its critical financial shortcomings caused by the massive fraud of its depositor's funds. It was further deposed that when the 1st appellant was in the process of applying for a banking licence in Tanzania, and required a letter of good standing, the firm of Coulson Harney did in fact prepare, execute and deliver the letter of good standing dated 23rd February 2015 and was, therefore, a trusted advisor to the 1st appellant and came into possession of crucial and sensitive information regarding the 1st appellant's operations and business. We have dealt with the issue of the listing of the firms as legal advisors. On the issue of the letter of good standing, the pertinent part thereof states that:

> " My firm and I have acted for Imperial Securities Limited the past one year and for [ ] and its interests through various companies including its subsidiary, namely Imperial Bank (Kenya) Limited, for the last [ ] years. During the course of this relationship we have acted on their behalf on numerous business transactions in Kenya and Uganda. Throughout that time Imperial Securities and Imperial Bank (Kenya) Limited have conducted business with the highest integrity and commercial sense. I have always found shareholders and Directors of both Companies to be honest, straightforward and energetic. In those circumstances, I have no hesitation in highly recommending Imperial Securities Limited to you as I believe [ ]
>
> In accordance with this firm's usual practice this reference is made without liability on behalf of the writer, the firm or its employees."

48. In order for the firm to write this letter, it was contended, some confidential information about the operations of the 1st appellant must have been imparted in the firm. With due respect to the appellants, we are unable to agree with that conclusion. The firm, in our understanding was vouching for the character of the Imperial Securities Limited and Imperial Bank (Kenya) Limited generally in so far

as its relationship with those clients were concerned as opposed to any particular transactions. The appellants failed to point out which confidential information was passed to the said firm and which was likely to be used to the detriment of the 1st appellant. We are unable to stretch the contents of the said letter to mean that some confidential information relevant for the purposes of conducting the pending suit must have thereby been divulged to the said firm. We agree that the firm's representation of the shareholders, post receivership cannot, without more, be a basis for disqualifying the firm of Coulson Harney from acting in the pending suit.

49. Regarding the intention to call the advocates as witnesses, apart from mere averment, we were not informed of the steps, if any, that have been taken indicative of that intention and the specifics of their intended testimonies.

50. Having considered the material placed before us in this appeal, we find no reason to interfere with the findings of the learned Judge. Whereas the appellants may well have suspicion that certain material may have come to the knowledge of the three firms while they were acting for the 1st appellant, such suspicion, however well founded, are not the basis for granting such "extraordinary and drastic remedy to be contemplated only in the most extraordinary circumstances". In addition, we are unable to find that the information that may have been given to the said firms of advocates in confidence is likely to be used to the detriment of the 1st appellant thereby causing real prejudice to the 1st appellant. We are not persuaded, based on the evidence presented, that real mischief and real prejudice will, in all human probability result, if the said advocates are allowed to act or continue acting and that there is no satisfactory evidence that mischief is rightly anticipated.

51. In this case, although it was alleged that the respondent firms are privy to pertinent facts relating to the instant suit which may be used in the matter to the detriment of the 1st appellant, the nature and source of the alleged facts and how they may have come into the possession of the respondent firm, is not disclosed. It is not enough to make vague unsubstantiated allegations in these kinds of matters. In this instance, the assertion of existence of conflict of interest appears tenuous at best. Even if some material had been supplied by the 1st appellant as stated by the Court of Appeal in Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others [2015] eKLR, the burden is upon the party seeking to bar an advocate from acting in a matter to prove the existence of factors such as conflict of interest, actual or potential breach of the duty to protect confidential information, or misconduct giving rise to the anticipation of real mischief or real prejudice. In other words, to establish the factual basis for such apprehension or anticipation.

52. In the premises, this appeal fails and is dismissed with costs.

53. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30*TH* DAY OF MAY, 2025.

W. KARANJA

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

.....

G.V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.