



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 38 OF 2014

BETWEEN

ALBERT CHAUREMBO MUMBA & 7 OTHERS

(Sued on their own behalf and on behalf of their predecessors

and/or successors in title, as the registered Trustees of the

Kenya Ports Authority Pension Scheme.....APPELLANTS

AND

MAURICE M.MUNYAO & 148 OTHERS

(Suing on their own behalf and on behalf of the

some members/beneficiaries of the Kenya

Ports Authority Pension Scheme).....RESPONDENTS

(Being an appeal from the Judgment of the Industrial Court at Mombasa

(Makau J.) dated 14th February, 2014

In

IND.C.NO.116 OF 2013)

RULING OF THE COURT

In dispute between the parties, are various trust deeds and rules drawn pursuant to the Kenya Ports Authority Pension Scheme. The deeds and rules were prepared and/or amended on diverse dates by the firm of Kaplan & Stratton Advocates. The contentious 2002 deed of amendment amended the previous deed and removed the provision that permitted members of the scheme to give their consent before the introduction by amendment of any clause in the deed that would diminish their benefits. The amendment aggrieved the members who instituted a claim against the trustees of the scheme. **Makau, J** found in his

judgment *in re ralia* that, as a result of the aforesaid amendment, the aggregate pension arrears owed to the claimants as at July 2012 stood at Kshs.201,981,424.50 and that the deed of amendment and rules were fraudulent and illegal in so far as it decreased the pension benefit of the members.

The trustees are themselves now aggrieved by this finding and intend to challenge it on appeal to this Court. In the meantime they have brought an application for stay of execution of those orders pending hearing and determination of the appeal which has been lodged. As a matter of fact it is this application (for stay) that was due for argument when the instant one was instituted. In the instant application, brought principally pursuant to **Rule 5(2) (b)** of the **Court of Appeal Rules**, the members of the scheme have applied that the Court restrains, by an order of injunction, the firm of Kaplan & Stratton Advocates from acting for the trustees in this matter for the reason that, having acted for all the parties in the preparation and subsequent amendment of the trust deeds it would be unconscionable, due to conflict of interest, to allow them to represent only one party in these proceedings; that in the process of preparing the deeds, confidential information was passed on to the firm; that the information will most likely be used against the members of the scheme; that the trust deeds have been challenged and are the subject of these proceedings; that it will, therefore be constitutionally unfair for the firm to participate in these proceedings. The applicants have also argued that, in addition to these grounds, there is no resolution of the board of trustees appointing the firm to act for the members.

Mr. Tindika learned counsel for the members stated from the bar that an application under **Rule 9** of the Advocates (Practice) Rules has been filed in the High Court to compel the attendance of the firm as a witness.

The application was opposed by **Mr. Gachuhi**, learned counsel for the respondent on the grounds that the trust deed in contention was produced by the trustees in the proceedings in the High Court; that nothing stopped the members from applying to call evidence from the firm; that the nature of the confidential information passed on to the firm has not been disclosed; that the appointment of advocates to represent the trustees is the function of the board of trustees and the founder (the Kenya Ports Authority); that legal representation being a constitutional right cannot be taken away lightly; that no prejudice will be suffered if the firm acted for the trustees.

Central to the dispute herein, we reiterate, is the deed of amendment of 2002 which was drawn by Kaplan & Stratton Advocates on behalf of the founder and the trustees for the benefit of the scheme members. Although Civil Appeal No.38 of 2014 was filed in September, 2014 by the firm of Kinyua Muyaa & Co. Advocates, it is apparent that in January, 2015 Kaplan and Stratton Advocates took over and filed the application for stay of execution on 9th March, 2015 even though they had drawn the deed of amendment.

Rule 9 of the Advocates (Practice) Rules upon which this application is premised provides that;

“9. No advocate may appear as such before any Court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non contentious matter of fact in any matter in which he acts or appears.” (our emphasis)

There is, therefore, from the above provision, no general bar to an advocate who acted in a transaction for two or more parties to represent one party in a subsequent litigation. The test that has been laid down by judicial authorities is whether real mischief or prejudice will, in all human probability, result, always bearing in mind that the decision of each case will turn on its own facts to establish this. See **Delphis Bank Limited v Chatthe & 6 others** (2005) IKLR 766. See also **Re a Firm of Solicitors** (1992) 1 AII ER 353.

The fact that certain documents were drawn by an advocate may not of itself import confidentiality in a matter between the parties because in the normal course of things, those documents would be exchanged and shared by all concerned parties. See **Delphis Bank** (*Supra*). The burden is upon the party seeking to bar an advocate from acting in a matter to prove the existence of real prejudice, mischief or conflict of interest. See **King Woolen Mills Ltd & Another v Kaplan & Stratton**

Advocates (1990 – 1994) EA 244. See also **Uhuru Highway Development Ltd & others v Central Bank of Kenya & others**, (2002) 2 EA 654 and **Jopa Vilas LLC v Overseas Private Investment Corp & 2 others**, Civil Appeal No. 201 of 2011.

Applying these guiding factors to the application before us, and bearing in mind the right of the trustees to be represented in court by an advocate of their choice, it is uncontroverted that the deeds were drawn by the firm of **Kaplan & Stratton Advocates**. The members of the scheme have in the affidavit in support of the present application, averred:

“5. THAT while preparing the respective Trust Deeds and/or Deeds of Amendments referred to in Paragraph 3 above and/or acting for both Trustees of the Kenya Ports Authority Pension Scheme and ourselves, confidential information was passed over to the firm of Kaplan & Stratton Advocates, which, confidential information, they are thus highly likely to use against us in this matter in gross breach of our constitutional and legal rights

11. THAT having prepared the documents in controversy in this matter and/or having acted for both parties herein, inter alia, there will be gross conflict of interest, and undue prejudice to use to have the firm of Kaplan & Stratton Advocates represent the Appellants in this matter.

12. THAT further to the foregoing, I believe that grave and unwarranted mischief is apparent and will occur should the Firm of Kaplan & Stratton Advocates act for the Appellants in this matter.” (Emphasis supplied)

Apart from these general averments, there was no attempt to demonstrate the prejudice, mischief or the nature of confidential information that the members passed on to the firm and how that information may be used in these proceedings or in the appeal to their detriment. It is unlikely, from the provisions of the deeds, and rules that any confidential information would arise to be exchanged or even passed on to the firm.

We reiterate that an advocate will be restrained as a matter of absolute obligation from placing himself in a position where he may deliberately or inadvertently disclose any information which is confidentially reposed in him. Confidential information imparted on an advocate by one party cannot be used for the benefit of one party and to the detriment of another.

Regarding the ground that there was no resolution of the board of trustees to engage the firm, we are persuaded on the basis of a letter addressed to the firm by KPA, the founder, dated 28th January, 2015 that the firm was regularly appointed to represent the trustees in accordance with clauses 7 (c) and 10 of the 2002 deed of amendment.

This application, though premised on Rule 5(2) (b), is strictly-speaking not one that deserves the invocation of that rule. We do not find any merit in this application save to say that courts cannot choose advocates for parties before it. The motion dated 6th March, 2015 is dismissed with costs.

Dated and delivered at Malindi this 3rd day of July, 2015

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR