IN THE COURT OF APPEAL

AT NAKURU

(CORAM: NAMBUYE , MARAGA & GATEMBU - JJ.A)

CIVIL APPEAL NO. 201 OF 2011

BETWEEN

JOPA VILAS LLC.....APPELLANT

AND

OVERSEAS PRIVATE INVESTMENT CORP.....1ST RESPONDENT

HARVEEN GADHOKE.....2ND RESPONDENT

DANIEL MUTISYA NDONYE.....3RD RESPONDENT

(Appeal from the Ruling and Orders of the High Court of Kenya at Machakos (Waweru, J) Dated 4th August, 2011

in

H.C.C.C. NO. 25 OF 2004

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JUDGMENT OF THE COURT

The appellant filed a notice of motion dated 18th day of February, 2010 in Machakos HCCC No. 215/2008 seeking injunctive reliefs to restrain the firm of Kaplan and Stratton (the firm) from acting for or litigating on behalf of ***Overseas Private Investment Corporation*** (**OPIC)** and the ***Receiver Managers Harveen Gadhoke and Daniel Mutisya Ndonye*** the 1st, 2nd and 3rd respondents respectively. It also sought a further injunction to restrain the firm of Messers Kaplan & Stratton Advocates from acting or passing over to the respondents herein and/or their servants, agents or any party any documents or information confidentially obtained from the appellant whilst the said Kaplan & Stratton Advocates were acting for it and the first respondent in drawing and preparing the debenture and charge documents pending the hearing and determination of the application in the first instance and the suit in the second instance. The application was opposed on the basis of replying affidavits of ***Nathan Bayer*** deposed on the 11th day of March, 2010 and filed on the 24th day of March, 2010 and that of ***Harveen Gadhoke*** deposed and filed on the same date of 6th April, 2010.

The merit disposal of that application resulted in dismissal orders by ***P.G. Waweru, J*** dated and delivered

on the 4th day of August, 2010.

Aggrieved by that ruling, the appellant has appealed to this Court citing nineteen (19) prolix grounds of appeal. In summary, the Appellant alleges that the learned trial Judge erred:-

i. in dismissing the appellants application without serious consideration of all documents on the record,

ii. by framing only three issues for determination.

iii. by failing to properly appraise the appellants grounds in support of the application for the injunctive reliefs.

iv. by failing in his evaluation of the facts relied upon by the respondents in their replying affidavits.

v. by failing and refusing to correctly determine the issue of whether or not the firm of Kaplan & Stratton was involved in the preparation of the security documents included but was not limited to the debenture, charge, Deed of Appointment of Receiver and Escrow agreement.

vi. in failing to appreciate and hold that since the firm of Kaplan & Stratton was involved in the preparation, drafting and attestation of the security documents, was privy to confidential material likely to prejudice the appellants case if the said firm were to be allowed to act for the respondents in the pending litigation.

vii. by failing to consider that the main suit-prays for declaration that the security documents and in particular the debenture are un enforceable and should be discharged.

viii. by failing to give heed to principles laid down by ***Madan J*** in the case of ***United India Insurance Co. versus***< span style="text-decoration: underline;"> Underwriters Civil Appeal No. 36 of 1983.

ix. by failing to find 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.

x. by failing to appreciate that the firm of Kaplan & Stratton not only prepared the security documents on record being the debenture, charge and Escrow agreement, but that the said firm was also the Escrow agents in the financial transaction.

xi. by failing to appreciate that the Escrow agreement created a fiduciary relationship between the firm of Kaplan & Stratton and the appellant.

xii. by failing to appreciate that the entire loan agreement and all incidental agreements thereto were subject to the governing law of the State of New York by reason of which exclusive jurisdiction over disputes arising there from was vested in Courts of the United States located in the District of Colombia.

xiii. by failing to appreciate the conflict of interest both in the Courts in the United States, District of Colombia and in Kenya since the dispute is subject to both jurisdiction.

xiv. by failing to appreciate that in accordance with the law in New York and the United States as a whole, an Escrow agent is disqualified from serving as legal counsel in a dispute arising from the same transaction because of perceived bias and potential conflict of interest.

xv. by failing to appreciate that it is not ethically permissible for a lawyer to represent a client and at the same time act as an Escrow agent in the same transaction if both parties to the transaction consent.

xvi.by failing to appreciate and find that since the firm of Kaplan & Stratton were the Escrow agents in the said financial transaction, the same are fiduciary with duties to all parties who have an interest in the Escrow property.

xvii.by failing to appreciate and find that since the fiduciary duty is imposed by the Escrow arrangement, equity requires a stricter standard or behavior than the comparable tortuous duty of care at common law.

xviii.by failing to appreciate and find that the obligation and duty even under the Escrow agreement were still in force.

xix.by being wholly wrong in arriving at the decision to dismiss the appellants application.

Upon those grounds, the appellant prayed that the appeal to be allowed in its entirety with costs.

In his oral submissions to Court, learned counsel for the appellant M***r. Haron M. Ndubi*** while arguing all the nineteen grounds globally urged us to allow the appeal in its entirety. He reiterated the contents of his written submission, arguing that the crucial issue in controversy in the litigation culminating in this appeal was whether the firm of Kaplan & Stratton was in a fiduciary relationship or a relationship of trust with the appellant. If so, then that firm would be in possession of the appellant's confidential and personal information warranting the firm's recusal from acting for the respondents in a dispute whose substratum forms the core of the alleged fiduciary relationship.

To ***Mr. Haron Ndubi,*** this question should have been answered in the positive and in favour of the appellant by the learned trial Judge. He said this is because contrary to the erroneous finding by the learned trial Judge, the firm of M/S Chege and Co. Advocates did not prepare the security documents (the charge, debenture and Escrow-Agreement). It only perused and approved them. Those documents were prepared by the firm and the appellant settled their fee note for that work. That created an advocate/client relationship and as the firm was the escrow agent for the parties, it was in a fiduciary relationship with them. That relationship demands from the loyalty, confidentiality, and an obligation on the part of the firm to disclose to the client or put at the clients disposal all information within the advocates knowledge that was relevant in order to act in the clients best interests; and lastly an obligation not to put the advocates own or any other person's interest before those of the client.

Mr. Ndubi further argued that in view of the above relationship, his client's fears that the firm will divulge to the respondents and, consciously or unconsciously use confidential information received from the appellant to further its adversary's case to the detriment of the appellant are well founded. He cited Section 134 of the Evidence Act and the case of ***Uhuru Highway Development Limited versus Central Bank of Kenya [2002] 2EA 654*** in support of his submission that the firm should be restrained from acting for the respondents.

In response, ***Mrs. Opiyo,*** learned counsel for the respondents dismissed this appeal as lacking in merit. Citing the cases of ***Delphis Bank Limited versus Chanman Singh Chatthe and 6 others [2005] eKLR*** and ***Ododa and another versus Yier and another [2004] LLR 4412 (CAK),*** she argued that it is not for the Court to choose counsel for the parties. Each party has a right to be represented by counsel of its choice. Once a party had appointed its counsel, it will require clear proof that a party will suffer a miscarriage of justice if a particular firm of advocates is allowed to represent its adversary. She said no such proof has been placed before Court in this matter. To the contrary, the evidence on record shows that in the financial transaction giving rise to the case which is the subject of this appeal, the appellant was represented by the firm of J.M. Chege Advocates in Kenya and Shackle Ford, Melton and Mckinley in the United States of America represented the first respondent. She accused the appellant for lack of candour and non material disclosure of this representation. That non-disclosure as was stated in the case of

Ahmed Musa Ismael versus Kumba Ole NtaMorua & 4 others [2014] eKLR disentitled the appellant to the relief it sought. She submitted that the firm in this case routinely prepared security documents and nothing more. The fact that the firm sent the appellant a fee note which it settled with any form of retainer

agreement is not enough, to establish advocate/client relationship, counsel concluded and urged us to dismiss this appeal with costs.

This being a first appeal, our mandate is as set out in Article 164 (3) of the Constitution 2010. Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya section 3 of the appellate Jurisdiction Act Cap 9. Laws of Kenya and Rule 29(1) of this Court's Rules. It is to re-appraise the facts before us and draw inferences of fact. This role was set out thus by ***Sir Clement Delestang, V.-Pin*** the case of ***Selle and another versus Associated Motor Boat Company Ltd & others [1968] EA 123,*** at page 126.

> "***An appeal to this Court from a trial by the***
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> ***High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally"***

From the record before us it is plainly clear that the Appellant sought from the High Court an injunctive relief to restrain the firm of Kaplan & Stratton from representing the respondents herein because the said firm of advocates was alleged among other things to be a potential witness it had drawn the security documents which were the subject of the litigation then pending in the High Court. In support thereof the appellant annexed to the supporting affidavit, the debenture, charge and payment receipts as exhibits. There was no mention that any other firm of advocates was involved in the said transaction or that there was an Escrow Agreement in existence.

Two replying affidavits were filed by the Respondents in opposition to that application, one deposed by ***Nathan Bayer*** as the major one; and the 2nd one deposed by ***Harveen Gadhoke*** which merely adopted the depositions in the first replying affidavit. In summary, the respondents contended that the appellant had failed to disclose that both the borrower (appellant) and the lender (1st respondent) had been represented in the transaction by the firms of Shackle Ford, Melton Mckinley (overseas advocates) M/S J.M. Chege advocates (local Kenya advocates); the firm of Kaplan & Stratton was retained by the 1st respondent as sole Escrow agent for the borrower; the bundle of documents emanating from the firm of J.M. Chege & Co. Advocates to M/S Kaplan & Stratton annexed to the replying affidavit all went to confirm that the said firm of J.M. Chege advocates was acting for the Appellant in relation to the transaction subject of this appeal.

Two opinion documents were exhibited. The first one was an opinion dated March 16, 2006 by Shackle Ford, Melton & Mckinley LLB,to Opic the first respondent. In it, there is indication that the said firm of advocates was at the material time acting as counsel to the first respondent company in connection with the negotiations, execution and delivery of the loan agreement and certain other agreements and instruments related thereto. There is confirmation that learned counsel giving the opinion had in the course of duty examined either the originals or copies of all the documents mentioned in the said opinion inclusive of the unanimous consent of the members of the company, authorizing the execution of the loan documents and assumed the genuineness of signatures and the authenticity of all the said documents.

The second opinion originated from the firm of J.M. Chege & Company Advocates also dated 16th March, 2006. In it, there is also an acknowledgement by that firm that the opinion was for delivery to Opic (the first respondent) in connection with the loan agreement of March 1, 2006 between Jopa Villas LLC (the appellant) and Opic (the 1st respondent). There is also acknowledgement that the said firm had in the course of its duty perused all the documents mentioned in the said opinion inclusive of the Escrow Agreement, documents relating to the organizational structure of the company, conducted an official search, relied on the opinion of Messers Shackleford, Melton & Mckinley, and assumed the genuineness

of the signatures and the authenticity of the documents.

In the same bundle of annextures, there is found a certification of company documents under the hand of John Paul as president of JOPA Villas LLC; a bundle of e-mails exchanged between the firm of Kaplan & Stratton and J.M. Chege & Co. Advocates, in relation to the crystallization of the terms of the charge and debenture documents; correspondences dated 5th April, 2006, 6th April, 2006, 10th April, 2006 and exchanged between the firm of Kaplan & Stratton and J.M. Chege and Co. Advocates in relation to the exchange of the security documents relating to the certificate of registration of the charge to the 1st respondent and the debenture, original stamp duty receipts four (4) in number and original filing receipts together; an e-mail dated March 10, 2006 emanating from the 1st respondents' Washington counsel's office and directed to Paul inviting him to proceed to Washington to sign the loan document and lastly an Escrow Agreement.

The Escrow Agreement was made on the 16th March, 2006 between the appellant and the first Respondent. In it the firm of Kaplan & Stratton of Kenya is clearly described as the Escrow agent. Clauses 9, 9.1, 9.2, 9.3 and 9.4 read thus:

> **9.** ***Position for the Escrow agent.***
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> ***9.1. The Escrow Agents duties shall be limited to the holding of the monies standing to the credit of the Escrow account until either the condition for release in clause 6.2 has been met or this agreement has been terminated, whichever shall occur earlier and subsequently the conversions and payment thereof in accordance with clauses 6.2 or 7. The Escrow Agent shall not deal with the said monies otherwise than as provided hereunder and shall have no discretion in relation thereto.***
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> ***9.2 The Escrow Agent shall not be liable for any loss, costs, damage, expense or inconvenience which may directly or indirectly result by reason of the Escrow Agents Action or in either taken in accordance with the terms of this agreement so long as the Escrow Agent has acted in accordance with the terms of this agreement.***
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> ***9.3. Subject to the provisions of this agreement, the Escrow agent shall be entitled to rely on any instructions, notice or direction which appears to have been given by the lender and to assume that the same has been duly authorized and signed and that any information, instruction contained therein is accurate.***
>
> ***9.4 Nothing in this agreement shall constitute the Escrow Agent as a trustee or the borrower for the vender, notwithstanding that the Escrow account is designated a trust account."***

Clauses 12, 13, 14 and 15 indicate clearly that variations (oral or otherwise) to the Escrow Agreement without the consent of the parties was prohibited. There is clear indication that the Appellant was obligated to solely pay to the Escrow agent reasonable legal fees and expenses charged by the Escrow agent in relation to its work in carrying out the terms of the agreement.

The letter of July 1, 2004 emanated from Opic (the first respondent), it was addressed to the firm of Kaplan & Stratton. The subject of the communication indicates clearly that, it was in connection with representation by Kaplan & Stratton Advocates (the firm) of Overseas Private Investment Corporation (Opic), (the 1st respondent), in connection with the proposed loan to Jopa Villa LLC, (the appellant). The letter reads in part:-

> ***"This letter confirms our understanding that Kaplan & Stratton Advocates (the firm) will act as Kenya counsel for Opic in connection with the disbursement and other matters relating to the matter from the date hereof.***
>
> ***The first representation of Opic is subject to the understanding of Opic that Opic will not be***

responsible for any of the firms fees and expenses attributable to representing Opic in connection with the matter, including post-closing issues and Opic requirements and Opic and the firm Agree that the firm may look only to JAP property (the sponsor) for payment of such fees and expenses, without recourse to Opic."

The obligation of Kaplan & Stratton among others were set out as review of all underlying documents in relation to the transaction, prompt action on all issues arising in connection with the transaction; negotiation and preparation of all the financing documents, matters of local laws and legal advise with respect to the project; an undertaking to provide progress reports on the project as and when these fell due. The agreement reads thus in part:-

"By accepting and agreeing to the terms of this letter, the firm confirms that with respect to the matter there are no conflicts of interests with present or former clients of the firm"

Messers Kaplan & Stratton acceded to the conditionalities set by the 1st respondent in their correspondences of 1st July, 2004. The Appellants also responded to the 1st respondents letter of 1st July, 2004 vide their letter of October 25, 2004, from JNP properties INC and addressed to the firm of Kaplan & Stratton. It is under the hand of one ***John Paul*** whose title is indicated as president. The subject heading indicates clearly that the communication was in respect of payment of fees and expenses for services performed for the overseas Private Investment Corporation (OPIC), the 1st respondent, in connection with the proposed loan by Opic to Jopa Villa LCC (the "***transaction").***

The following paragraphs briefly lay out the purpose of that communication.

"We understand that the transaction requires counsel outside the department of legal Affairs of the Overseas Private Investment Corporation (Opic) due to the fact that the project being financed is located in Nairobi Kenya, for this purpose, we understand that Opic has approved the use of and will engage the firm of Kaplan & Stratton Advocate (outside counsel) from the date hereof.

We further understand that in circumstances such as these, it is customary for the sponsor to pay all fees of and expenses associated with outside counsel and to pay a retainer to outside counsel. Accordingly as the sponsor in the transaction, we hereby agree to promptly:-

(i) Pay all fees and expenses charged by outside counsel; (ii) pay an initial retainer to outside counsel in the amount of $5,000.00 (the Retainer Amount); and (iii) from time to time thereafter replenish the Retainer, amount upon notification by outside counsel. We acknowledge our obligation to pay all fees and expenses of outside counsel, whether or not Opics financing for the project is provided, and /or whether incurred prior to the date hereof, pre-closing or post-closing. We acknowledge that Opic will not be responsible for any fees and expenses charged by outside counsel related to the transaction and that if the retainer amount is not promptly replenished, outside counsel shall, upon Opics direction, cease working on the transaction. We understand that following termination of the representation of Opic, any unused Retainer Amount shall be returned to us."

Our understanding of the above statement that the firm of Kaplan & Stratton was being professionally retained by Opic (the first respondent) as overseas counsel in connection with the financial transaction entered into between it (Opic) and the appellant; fees for this retainer were to be met by the appellant on behalf of the first respondent; and this was not a question of double retainer of overseas local counsel by both competing interests (appellant/first respondent).

Three issues were framed for determination by the learned Judge of the High Court namely whether in fact it was Kaplan & Stratton who prepared the security documents (debenture and charges); if not, whether there is any other valid reason, in law, to exclude them from continuing to act for the Opic; If so whether they ought to be excluded, in law, from continuing to act for the Opic in this case? The Judge

then drew inspiration from the decision of this Court in the case of ***King***

Woolen Mills Limited and another versus Kaplan and Stratton Advocates [1990-1994] EA244 wherein it was held *inter alia* as follows:-

i. "***An advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients.***

ii. ***A retainer creates contractual relationship between the advocate and the client irrespective of whether two or more clients are involved.***

iii. ***An advocate cannot act in a manner prejudicial to his client or disclose any confidential information to anyone without the client's consent.***

iv. ***An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients. Concerning the original transaction or the subject matter for which he acted for the clients as a common advocate (RE: A firm of solicitors [1992] IALLER 353 followed; Rukeson versus Ellis Munday and clerk [1912] KL831 distinguished).***

v. ***Acting for two or more common clients did not remove the necessity of confidentiality between the advocate and each of the clients separately.***

vi. ***Conclusion of the transaction for which the retainer was made did not extinguish the duties and obligations of the common advocate.***

vii. ***Delay in objecting, to an advocates continued representation of a certain client does not defeat or change the duty or obligations of the common advocate imposed on him under the retainer.***

viii. ***There must be real anticipated prejudice and mischief if the advocate were to be permitted to continue acting for one of the parties"***

On the basis of the above guiding principles and upon applying these to the rival arguments before him, the Judge proceeded to determine the issues framed by him *inter alia* as hereunder:-

> ***"Regarding the first issue, in the 1st replying affidavit (sworn by Nathan Bayer) filed on 24th March, 2010, it is deposed that the firm of J.M. Chege & Co. Advocates represented the plaintiff in the preparation of the various documents (including the debentures and charge) While the firm of Shackle ford, Melton & McKinley represented the plaintiff in the United States. Clause 4.01(h) of the loan agreement confirms this. M/S J.M. Chege & Co. themselves have confirmed their representation of the plaintiff in one of their letters annexed to the affidavit. Opinions regarding enforcement of the debenture and charge were given by the two firms. J.M. Chege & Co. and Shackle ford, Melton & Mckinley. No such opinion was given by Kaplan & Stratton, J.M. Chege & Co. also negotiated the terms of the security documents on behalf of the plaintiff. The same firm presented the security documents for registration on behalf of the plaintiff. There is ample documentary evidence of all this annexed to the 1st replying affidavit a foresaid, which evidence has not been controverted by the plaintiff. There is also no retainer agreement between the plaintiff and Kaplan & Stratton placed before the Court. The only retainer agreement exhibited is between the 1st defendant and Kaplan & Stratton. In fact, in a letter dated 25th October, 2004 annexed to the 1st replying affidavit the plaintiff (through its holding company) disclaimed any advocate client relationship between it and Kaplan & Stratton. The letter is signed by both Paul Njoroge president of both holding company and the plaintiff. The fees paid by the holding company to Kaplan & Stratton were paid not because of any advocate/client relationship but because of the plaintiff holding company arrangements***

with the financiers

It is also apparent that the plaintiff representative executed the debenture and charge documents not in Kenya before any advocate from Kaplan & Stratton but in the United States before Attorney or Notaries Public in that country. This is a fact deponed to in the 1st replying affidavit which has not been controverted by the plaintiff. I find with the evidence now before the Court that Kaplan & Stratton were not involved in the preparation or execution of the security documents, either as the plaintiffs counsel or in any other capacity. Having not been involved in the preparation or execution of the security documents, how can Kaplan & Stratton be a witness in any issue arising therefrom? How could they have come into any confidential information involving the plaintiff? As for the said issue I find no valid reason in law to exclude them from continuing to act for the 1st defendant in this suit. That being the case it is not necessary to answer the third issue."

We are alive and bear in mind the fact that the appeal under our review arises from refusal to grant an interlocutory relief and not the merit disposal of the main issues in controversy before the High Court. We are therefore enjoined to exercise restraint so as not to make observations that may likely appear to pre-empt the likely outcome of the litigation pending before the High Court.

Section 2 of the Act (Advocates Act (supra) defines "***client"*** as ***including 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;".*** On the other hand Rule 9 of the Advocates (practice Rules) provides:-

"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"

On our own construction of the above two provisions of law, we opine that the operative word in section 2 of the Act (supra) is the word "***retainer",*** whereas that in rule 9 of the Advocates, practice Rules is "***witness."*** Blacks Law Dictionary ninth Edition by Byran A. Garner page 1430 defines ***"retainer"*** as: "***A client's authorization for a lawyer to act in a case,". It defines the term*** "***witness"*** as "***one who accesses, knows or voches for something, one who gives evidence in a cause before a Court, and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceedings and to include deponements and as well as persons delivering oral testimony.***

From the above definitions, it is our finding that in order for the Appellants assertions that the firm of M/S Kaplan & Stratton were retained by them and are therefore potential witnesses to hold, there has to be demonstration either in writing or otherwise that indeed (i) the Appellant authorized the said firm of advocates to act for them in the transaction, the subject of this appeal, and (ii) that the said firm also accessed and is also in possession of some confidential evidence capable of being adduced in a judicial proceeding.

Two firms of advocates which have featured prominently herein gave opinions as regards the status of the documentation relied upon by either side with regard to the transactions giving rise to this appeal. The firm of J.M. Chege & Co. Advocates gave an opinion on behalf of the appellant indicating that they had examined all the various documentations mentioned in the said opinion with regard to the overall affairs regarding the viability of the Appellant in relation to the transaction giving rise to this appeal and found

them to be in order. This opinion paved the way for the sealing of the financial deal between the Appellant and the 1st respondent. As asserted by the respondent, there has been no denial from the said firm of J.M. Chege & Co. Advocates that they were not so retained by the appellant. Likewise, the firm of Shackle Ford, Melton and McKinley advocates gave an opinion regarding the status of the documentation on the viability of the 1st respondent in relation to the financial transaction culminating in this appeal.

The security documents were indeed negotiated and drawn by the firm of J.M. Chege and Co. Advocates as confirmed by the content of their undisputed opinion. These were exchanged in their formative stages between the said firm (J.M. Chege & Co. Advocates) and ShackleFord and McKinley. It is not disputed that the 1st respondent requested for an overseas counsel to be roped in and that is how the firm of Kaplan & Stratton were brought on board vide the letter of 1st July, 2004. In this communication, the 1st respondent had placed a condition that such an Overseas counsel would only act for them and although such a firm would with regard to finances be holding funds for purposes of disbursement towards the project, they would at no time be referred to as trustees for the "***borrower.***" The "***borrower.***" Was of course the Appellant. The Appellant was required to signify his consent to that condition before any disbursement of any funds under the said agreement could be made. The Appellant did accede to the said 1st respondent's condition vide their letter of 25th October, 2004. It is in the course of the creation of this status of "***Trusteeship***" that what came to be known as an "***Escrow Agreement***" was born. It is in the course of the creation of this Escrow Agreement that the said firm of Kaplan & Stratton accessed the security documents namely the debenture, charge and the loan Agreements.

In the case of ***Delphis Bank Limited versus Channan Singh Chatthe and 6 others (supra)*** this court laid down parameters within which a litigant may be barred by a Court of law from being represented by counsel of its own choice. This may arise where there is demonstration that (i) the counsel sought to be barred had access to confidential information regarding the transaction; (ii) that the involvement of the particular counsel in matters pertaining to the litigation goes beyond the mere fact that the debenture loan Agreements, legal charges or guarantees were drawn by the advocate as this may not of itself be a confidential matter between the parties because such documents would ordinarily be exchanged in the first instance, and in the second instance they would also have information common to all parties. As submitted by the respondent, besides the content of these security documents and the correspondences exchanged herein, the Court has not been told what else the said firm of Kaplan & Stratton had access to, in order to convince the Court that in fact the said firm of Kaplan & Stratton had in fact not only accessed information in the security documents, but some other additional information which was not only confidential, but will also be necessary in the disposal of the issues in controversy as between the parties currently pending before the High Court.

The burden of proving this lay with the appellant. It is this Court's considered opinion that the appellant has not placed before Court any material to warrant the Court to bar the firm of Kaplan & Stratton from acting as such for the respondent. A simple way of proving this would have been to exhibit either the retainer (authorization to so act on the appellants behalf) or show existence of circumstances which demonstrate its existence in the absence of a written authorization. Neither of these was demonstrated to exist.

On non disclosure of material particulars, we agree with the assertion of the respondent that the Appellant was economical if not selective as regards information they ought to have put forth in support of their application. In the absence of any deposition in by the Appellant that they were not privy to the documentation on the involvement of the firms of J.M. Chege & Co. advocates on the one hand and Shackle Ford, Melton & McKinley on the other hand as participatings firm of advocates in the transaction giving rise to this appeal, and also considering the undoubted existence of the Escrow Agreement, which limited the area of involvement of the firm of Kaplan & Stratton in the transaction subject of these proceedings, we find the appellants assertions faulted.

In the case of ***Ahamed Musa Ismael versus Kumba Ole Ndamorua & 4 others (supra)*** this Court ruled *inter alia* that in the absence of demonstration that such withholding of information was not a deliberate withholding of information or it was on account of excusable in advertence, a court of law would have no

alternative but to hold that the only reasonable inference to be drawn as to why such information was not volunteered by the party affected was because, it would have been against their interests. This Court makes no hesitation in finding that this was the correct inference to be drawn by it from the appellants conduct of first, failing to disclose the existence of all the documentation that the first respondent annexed to the replying affidavit of Nathan Bayer; and second, by their failure to controvert the deposition of the said Nathan Bayer in the 1st replying affidavit.

Turning to the receipts exhibited by the Appellant, we are in agreement with the assertion of the respondent that no explanation was assigned to their exhibition. It is only in the submission to this Court that the Appellant has invited us to hold that these provide proof of retainership of the said firm to act for the Appellant in the transactions subject of this appeal. Against this assertion is the respondent's assertion that these receipts have to be considered against the totality of the content of three vital documents namely the correspondences of 1st July, 2004, 25th October, 2004 and the Escrow Agreement, all of which have not been disputed by the Appellant. Neither has knowledge of their existence been denied by the appellant.

The contents of these documents, all go to demonstrate that it is a practice or requirement known to such financial transactions that the financing entity if outside the local jurisdiction of where the financed project is to be undertaken be represented by an approved firm of advocates within the local jurisdiction of where the borrower is located but at the expense of the borrower. The name of the firm of Kaplan & Stratton was floated and accepted first by the 1st respondent and then the Appellant acceded to that acceptance (by the first respondent) in a disclaimer contained in their letter of 25th October, 2014 to the effect that payment for the expenses of Kaplan & Stratton Advocates by the Appellant on behalf of the financier (the 1st respondent) would not give rise to any conflict of interest. To this Court, by conflict of interest, it meant that acceptance of the obligation to meet the Escrow Agent expenses by the Appellant on behalf of the financier did not amount to creation of an impression that it (Appellant) too was being represented by the said firm of Kaplan & Stratton. As found by the learned Judge of the High Court, the disclaimer speaks for itself and cannot be qualified by any oral assertion. We therefore find nothing on the record to show otherwise than what the content of the Escrow Agreement portray that the payment receipts issued in the name of Kaplan & Stratton by the appellant annexed to their affidavit in support of the application were solely made in fulfillment of the conditionality in the Escrow Agreement, as well as the communications in the letters of 1st July, 2004 and the 25th October, 2004 afore stated. These were expenses paid by the borrower for the retention of the local counsel (Kaplan & Stratton) as the Kenyan local counsel for the overseas lender (the 1st respondent).

The upshot of the foregoing assessment is that, we find no fault in the findings of the learned Judge of the High Court in the ruling sought to be impugned herein. The appeal therefore fails. It is accordingly dismissed in its entirety with costs to the respondents both in the High Court and on appeal.

Dated and delivered at Nairobi this 21st day of November, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR