REPUBLIC OF KENYA

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IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: O'KUBASU, WAKI AND DEVERELL, JJ.A)

CIVIL APPLICATION NO. NAI. 136 OF 2005 (76/05UR)

BETWEEN

THE DELPHIS BANK LIMITED.....APPICANT

AND

CHANNAN SINGH CHATTHE

SATWANT SINGH CHATTHE

SUKHWINDER SINGH CHATTHE

RAGHBIR SINGH CHATTHE

CHANNAN AGRICULTURAL CONTRACTORS

CHARANJIT SINGH HAYER

RAJNIKANT KARSANDAS SOMAIA.....RESPONDENTS

(An application for stay of proceedings of the High Court from the ruling and order of the High Court of Kenya at Kisumu (Tanui, J.) dated 04.05.05

in

H.C.C.C. NO. 164 OF 2003)

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RULING OF THE COURT

The parties herein were all set for the inter parte hearing of the application filed on 23.05.05 seeking a stay of all further proceedings in Kisumu HCCC 164/03. The application had been set down for hearing on priority basis due to its certified urgency.

However, learned counsel for the applicant, Mr. Regeru, sought our directions on one issue, which we allowed him to raise, and which we have to determine in limine. The issue is the participation of learned Counsel Mr. Menezes in the proceedings. It was not the first time Mr. Regeru raised that issue. He did so

in similar fashion before the superior court on 04.05.05 but he was shot down with a short, sharp order, thus: -

"The objections raised do not appear to affect the position of Mr. Menezes as a counsel who prepared the charges. Hearing to proceed".

No reasons were given for that ruling and we are told it is one of the issues that will be raised on appeal before this Court. As such we cannot say too much about it lest our comments be prejudicial. Explaining why, both before the superior court and before this Court, he had to raise the issue in an impromptu and informal manner, Mr. Regeru stated that Mr. Menezes is not on record in this matter and he simply made an appearance before the superior court as leading counsel for Mr. Ombiro, the advocate on record for the 1st defendant in the counterclaim there, who is the 5th respondent here. He was not aware that Mr. Menezes would appear before us either, and since we have original jurisdiction to deal with the matter before us, he felt compelled to raise the issue at the earliest opportunity lest he was accused of condoning an illegality in procedure.

The objection raised by Mr. Regeru is this: The dispute in the main suit is between a bank and its borrowers, and central to it is the validity and enforceability of various Charges which the borrowers claim were obtained through deceipt, fraud and misrepresentations but the bank says were valid and enforceable. But those Charges were drawn up by Mr. Menezes and he conceded it. In Mr. Regeru's view, that raises serious questions of impropriety since Mr. Menezes may be summoned as a witness at the hearing of the suit. His participation in these proceedings as an advocate for one of the respondents would therefore be prejudicial to the bank and against the interests of justice.

No authority was cited for those profound submissions.

For his part, Mr. Menezes who felt he had been ambushed twice over by Mr. Regeru, found no impropriety in offering legal services to one of the litigants despite his concession that he drew up the Charges in issue. Those Charges, he submitted, were not challenged in their form or substance and they speak for themselves without ambiguity.

He could not fathom how useful he would be as a witness for any party. We did not receive any further assistance in this tussle from the other counsel appearing, M/S Karanja and Wasunna, who chose to stay mum.

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. The authorities we allude to are **King Woolen Mills Ltd & Anor vs. M/S Kaplan & Stratton** [1993] LLR 2170 (CAK), (C.A 55/93) and Uhuru Highway Development Ltd & others vs Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.

In the first authority, a partner in the Firm of Kaplan & Stratton, Mr. Keith, 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 Mr. Keith and the bank, confidential information and their secrets in confidence under the retainer to enable Mr. Keith to successfully conclude the loan transaction. The court

concluded, per Muli J.A with whom the other members of the court agreed: -

"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". Mr. Keith and any partner in the firm of Kaplan & Stratton were restrained from continuing to act for the Bank in the main suit or in any litigation or proceedings arising from the loan transactions. In so deciding the court cited with approval English decisions in **Rakusen** vs **Ellis Munday and Clerke** [1912] 1 Ch. 831, Re – A Firm of Solicitors [1992] 1 A 11 E.R 353, and **Supasave Retail Ltd v. Coward Chance and others** [1991] 1 All ER 668. The former two cases were applied in the latter, where Sir Nicolas Browne – Wilkinson V-C summed up the general rule as follows: -

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

The **King Woolen Mills** case (supra) was applied in the **Uhuru Highway Development Ltd** case (supra) where it was contended in affidavit evidence, and the court found, that the Advocate, Mr. George Oraro, had acted for both the bank and the borrowers and had drawn up the Charge which had become contentious in subsequent litigation.

As is clear from those authorities, each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, we hardly have any facts to consider in arriving at such conclusion. We do not know whether Mr. Menezes was involved in negotiations for the loans in issue. We do not know whether he was acting for both the bank and the borrowers or just for one party and if so which. We do not know the nature of confidential or privileged information, if any, that may have been imparted on him by either party which may be prejudicial to the other. The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties. In sum, there is no evidence before us, as there should be, for consideration before the drastic decision of interfering with a party's constitutional right to counsel of his choice is interfered with.

But Mr. Regeru did not rest his objections on advocate/client relationship and confidentiality of information only. He indicated, from the nature of the pleadings and discovery so far made in the main suit, that the bank would summon Mr. Menezes as a witness and that alone would bar him from appearing for any party as an advocate. Once again Mr. Regeru cited no authority for that proposition, either because it was obvious to him or because he knew of none. We presume however that he was making reference to Rule 9 of the Advocates (Practice) Rules which provides: -

"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".

In the **Uhuru Highway development** case the court stated that the bar to the counsel appearing as a possible witness was not subjective. Mr. Menezes here does not believe he would be a useful witness, but that is not the point because the indication is that he would be summoned. We remain uneducated however on the nature of the evidence that he is required to tender before the superior court. If it is merely formal and non-contentious, then of course the proviso to the rule would bail him out. The only certainty is that Mr. Menezes would not be required, and we have not been told so, to testify as a witness before us in the pending application. On that consideration we find it unnecessary to issue orders barring him from participating in the application either as the advocate directly instructed to do so or as lead-counsel for such advocate.

The upshot is that the objection raised is overruled and the main application shall be set down for inter parte hearing in the registry on priority basis. Interim orders are extended in the meantime.

Dated and delivered at Nairobi this 10th day of June, 2005.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEALS

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR