



Wakahe v Faulu Floor Mills (Civil Case E564 of 2021) [2022] KEHC 47 (KLR) (Commercial and Tax)
(31 January 2022) (Ruling)

Neutral citation number: [2022] KEHC 47 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Civil Case E564 of 2021

DAS Majanja, J

January 31, 2022

Between

Jonathan Wangararia Wakahe

Plaintiff

and

Faulu Floor Mills

Defendant

Ruling

1.By the Notice of Motion dated 24th August 2021, the Defendant invokes Clauses 95-105 of the [Law Society of Kenya Act](#) and Code of Ethics and Conduct of Advocates, 2016, Order 51 Rule 1, of the [Civil Procedure Rules](#), 2010 and seeks an order removing the firm of J.K Kibicho & Company Advocates from participating in the proceedings and representing the Plaintiff. The application is supported by the affidavit of Maina Kanyua, a director of the Defendant, sworn on 24th August 2021. It is opposed by the Plaintiff through the replying affidavit of Mwangi Kibicho, the managing partner of J.K Kibicho & Company Advocates ("the Advocates") sworn on 21st September 2021.

2.The Defendant's application comes at the back of this suit filed by the Plaintiff against the Defendant where the Plaintiff is seeking KES 25,000,000.00 due and owing as at 24th January 2021 together KES 6,000,000.00 on account of interest under two investment agreements dated 4th August 2018 and 7th April 2020 respectively.

The Application

3.The Defendant's case is that on or about October/November 2020, the Advocates represented and acted for it in a commercial transaction relating to registration of a charge and debenture against its machinery and properties generally in favour of I&M Bank Limited. That in the process of effecting those instructions for the Defendant, and in favour of I&M Bank, an Advocate-Client relationship was established and on that basis, crucial information was shared by the Defendant and legal fees was paid to the Advocates.

4.The Defendant therefore avers that the Advocates are directly conflicted by purporting to represent the Plaintiff against their current and former client, the Defendant and that the Defendant stands to suffer pressure and negative exposure in the event the Advocates use such crucial and confidential information while prosecuting this suit on behalf of the Plaintiff. The Defendant is also apprehensive that the Plaintiff stands to enjoy an unfair advantage over the Defendant if the Advocates are allowed to prosecute this suit as presented before court for determination by themselves owing to the confidential information held against the Defendant.

5.The Defendant submits that no matter how slight the interest may be, even the slightest information received from a person and now likely to be employed in favour of a current client, may warrant the removal of an advocate or a firm of advocates from proceedings where their such former, or current client is involved. The Defendant further avers that it is a general rule that an advocate may not act against a former client without his consent, no matter how slight the information may be. For these reasons, the Defendant urges the court to allow its application to have the Advocates recuse themselves from these proceedings.

The Plaintiff's Reply

6.The Plaintiff opposes the application. It denies that the Advocates ever acted for the Defendant and states that there has never existed an advocate-client relationship between the Advocates and the Defendant. It states that the Defendant has failed to meet the threshold necessary for disqualifying the Advocates from acting for the Plaintiff.

7.It is the Plaintiff's position that it is I&M Bank which instructed the Advocates to prepare and register a charge instrument and a debenture on behalf of the Bank and the instructing client was and remained

I&M Bank. The Plaintiff further states that the nature of instructions from I&M Bank did not require the Defendant to share any confidential information as alleged and that the instructions from I&M Bank were limited to preparation of the security documents alluded to above. That needless to say, the Bank reserved its right to instruct any firm of lawyers in its panel to act in any future transaction involving the Defendant.

8.The Plaintiff denies that the Defendant consulted the Advocates or any of its individual advocates in this or any other matter and that in any event, if there exists any client-advocate privilege, which is denied, the same can only be waived by the client and not the lawyers and therefore the Defendant is raising a red herring. The Plaintiff contends that if indeed the information deposed on breach of confidentiality is true, the Defendant has a recourse in law and it should pursue such legal remedies to their logical conclusion

Analysis and Determination

9.The main issue for determination is whether the Advocates should be removed from representing the Plaintiff and participating in this proceedings because of conflict of interest. Halsbury Laws of England 4th Edition at para. 527 page 353 states as follows in respect of conflict of interest and client confidentiality:A practicing barrister must not accept any instruction if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients, unless all relevant persons consent to the barrister accepting the instructions.A barrister must also not accept instructions if there is a risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent. [Emphasis mine]

10.In the same vein, The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016 defines ‘conflict of interest’ in Rule 6 para. 96 as follows:A conflicting 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.

11.Rule 6 para. 99 of the 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.

12.The fact that the Defendant and the Advocates were involved in the same transaction is not in dispute. However, the fact that the Advocates previously represented or are still representing the Defendant in the said transaction is disputed. The Plaintiff has annexed the instructions letter by I&M Bank to the Advocates dated 25th August 2020 which states in part as follows:We have now agreed vide our Letter of Offer to the Borrower dated 14th August, 2020 (“Letter of Offer”) to extend facilities as indicated in Clause 1 of the Letter of Offer(“the Facility”) for the purpose as indicated in Clause 2 of the letter of Offer.We have agreed to accept as security for the Facility, inter alia;.....We now kindly instruct you to act on our behalf in:-a.The preparation, execution and registration of the Debenture and the two legal charges.Kindly note that we shall obtain internally the other securities as detailed in the Letter of Offer.b)A notation of the following against the titles to the two properties (the “Properties”) at the relevant Lands Registry:-i.The Bank’s rights under Sections 82 & 83 of the [Land Act](#).ii.The

restrictions under Section 87 of the [Land Act](#).c.Arranging for the appropriate resolutions to be passed by the Borrower's directors and majority shareholders', inter alia, approving the terms and conditions of the Facility as per the Letter of Offer and creation of the securities.....Kindly therefore in the first instance conduct a search of the Borrower at the Companies Registry, the Borrower and the Chargor at the Movable Property and Security Rights Act....At the point of forwarding the securities for execution by the Bank, PLEASE NOTE to include a confirmation that you have conducted all the pre-requisite and historical investigations over the Title and properties or its predecessors if the resultant title is not specifically mentioned in the Ndungu's Land Report and any other Title Revocation Notices issued by the Land Commission, Lands Registrar or any other Government institution noting to also submit a Search from Lands Survey Records Office confirming that the land is not on any public amenity nor set aside for any public use.

13.From the above excerpt of the instructions letter, it is clear that I&M Bank instructed the Advocates to act for it in the transaction which instructions included perfection and registration of the securities and conducting due diligence in respect of the securities. I do not find anything therein indicating that the Advocates were being instructed to act on behalf of the Defendant and the Defendant has not led the court to any evidence that they developed an advocate-client relationship in the course of the transaction as claimed. The Defendant has also not told the court what confidential information was shared with the Advocates in the course of the transaction that the Defendant is now apprehensive will prejudice it in this suit.

14.In [Jopa Vilas LLC v Overseas Private Investment Corp & 2 others NKR CA Civil Appeal No. 201 of 2011 \[2014\] eKLR](#) the Court of Appeal reiterated what it stated in [Delphis Bank Limited v Channan Singh Chatte and 6 Others CA Civil Appl. No. NAI 136 of 2005 \[2005\] eKLR](#) where the court laid down the parameters which a litigant may be barred by the court from being represented by a counsel of its own choice. It stated: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.

15.In sum, the mere fact that the debenture loan agreements, legal charges or guarantees were drawn by the advocate 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. The burden of proving that the Advocates had access to confidential information prejudicial to it or that their interaction went beyond mere drafting of the security documents lay with the Defendant. In the circumstances, I hold that the Defendant has not placed before the Court any material to warrant the Court to bar the Advocates from acting as such for the Plaintiff.

Disposition

16.For the above reasons, I dismiss the Defendant's application dated 24th August 2021 with costs to the Plaintiff.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.D. S.

MAJANJAJUDGECourt of Assistant: Mr M. OnyangoMs Cheruiyot instructed by J. K. Kibicho and
Company Advocates for the Plaintiff.Wambua Maseno and Company Advocates for the Defendant.



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