

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
HCT - 00 - CC - CA - 4 - 2011

(ARISING FROM MISCELLANEOUS CAUSE NO. 22 OF 2010)
(ARISING FROM HCCS NO. 479 OF 2010)

KASEEGU TECHNICAL SERVICES LTD. APPELLANT

VERSUS

M/S ENOTH MUGABI ADVOCATES AND SOLICITORS RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This appeal is by Notice of Motion under S. 98 of the Civil Procedure Act and Order 50 rules 8 of the Civil Procedure Rules (CPR) for orders by the Learned Registrar of this Court barring the firm of M/S Oketcha Baranyanga & Co. Advocates from representing the appellant in the taxation of an Advocate/Client bill of costs to be set aside.

The brief background to this appeal is that the appellant as plaintiff in the head suit filed HCCS No. 479 of 2009 against M/S Jyoti Structures Ltd. The appellant instructed the respondent (**M/S ENOTH MUGABI ADVOCATES AND SOLICITORS**) to represent it in the said suit while M/S Jyoti Structures Ltd as defendant in the head suit instructed M/S Oketcha Baranyanga & Co. Advocates. The parties entered a consent judgment before the hearing of the suit and M/S Jyoti Structures Ltd paid a sum of Ushs 6,000,000/= as costs. The respondent then filed an advocate-client bill of costs vide Miscellaneous Cause No. 22 of 2010 against the appellant. The appellant instructed the firm of M/S Oketcha Baranyanga & Co. Advocates to represent it during the taxation proceedings while the respondent instructed M/S Muyanja Associates & Advocates. At the hearing of the taxation application before the Registrar, the respondent raised a preliminary objection that there was conflict of interest because M/S Oketcha Baranyanga & Co. Advocates who were instructed by the appellant had been counsel for M/S Jyoti Structures Ltd the defendant in HCCS No. 476 of 2009 and therefore this would lead to

breach of confidentiality. The preliminary objection was upheld by the Registrar, who ordered the appellant to engage another firm of lawyers for the taxation proceedings hence this appeal against the Registrar's order.

The ground of appeal is that the learned Registrar erred in law and fact when she held that M/S Oketcha Baranyanga & Co. Advocates instruction or brief to represent the appellant in the advocate-client bill of costs would breach confidentiality between the appellant and the respondent.

The case for the appellant is that HCCS 476 of 2009 was settled between the parties and there can not arise as a result any conflict of interest in Miscellaneous Cause No. 22 of 2010 since M/S Jyoti Structures Ltd is not a party to said application. Furthermore, that Miscellaneous Cause No. 22 of 2010 is a taxation matter for taxation of an advocate-client bill of costs, which does not deal with the substance of the main suit that was settled.

Mr. Enoth Mugabi Advocate for the respondent firm deponed that on perusing the court file, he discovered that the appellant had instructed M/S Web advocates to represent them and a notice of change of advocates had been filed in court but not served on the respondent.

Mr. Kasibante David the Managing Director of the appellant company in his affidavit in rejoinder deponed that after the ruling of the Registrar upholding the preliminary objection in Miscellaneous Cause No. 22 of 2010, the appellant indeed instructed M/S Web Advocates to represent them but on further consultation, the appellant now took the view that the ruling of the Registrar disqualifying M/S Oketcha Baranyanga & Co. Advocates was made in error and hence this appeal against the Registrar's decision.

At the hearing of this appeal, the appellant was represented by Mr. Micheal Oketcha while the respondent was represented by Mr. Jimmy Muyanja. The parties filed written submissions.

Counsel for the respondent raised some preliminary issues in their submissions which I find necessary to consider. He objected to the filing of the affidavit in rejoinder of Mr. David Kasibante for the appellant company. Counsel for the appellant submitted that the given the time the time they were served with the affidavit in reply it was only possible to serve the affidavit in rejoinder together with the submissions. In the

alternative but without prejudice to the foregoing, counsel for the appellant submitted that this Honorable Court may grant leave to admit the affidavit in rejoinder.

Order 12 r 3 of the Civil Procedure Rules provides

“...An interlocutory application shall be fixed for hearing within twenty-one days from the date of service of the reply on the applicant...”

In this case, the appeal was fixed a day after the service of the affidavit in reply, which is before the time line provided under Order 12 r 3 above. The appellant therefore was still within the time prescribed for filing a rejoinder and there was no need to seek leave of court.

I will now proceed to consider the ground raised by the appellant in this appeal. The ground is that the learned Registrar erred in law and fact when she held that M/S Oketcha Baranyanga & Co. Advocates instruction or brief to represent the appellant in the advocate-client bill of costs would breach confidentiality between the appellant and the respondent.

In respect of this ground, Counsel for the appellant submitted that the respondent did not have the locus standi to raise the preliminary objection because the respondents were Counsel for Ms. Jyoti Structures Ltd in HCCS No. 476 of 2009. Furthermore, that the respondent was not a party to HCCS No.476 of 2009 and did not have instructions from any of the parties therein. Counsel for the appellant submitted that M/S Jyoti Structures Ltd is the proper party entitled to raise such an objection because it actually instructed Ms. Okecha Baranyanga & Co. Advocates in a suit involving the appellant and/or in the alternative the appellant would have a right to raise such an objection only if Ms. Okecha Baranyanga & Co. Advocates was representing the respondent.

Counsel for appellant submitted that Miscellaneous Cause NO.22 of 2010 is an entirely new suit with different parties and that HCCS No. 476 of 2009 was concluded. In the alternative counsel for the appellant submitted on the authority of *Halsbury's Laws of England* (4th Edition Volume 3(1) at page 369 paragraph 464), that Counsel is advised to decline instructions which would render it difficult for him to maintain his professional independence or otherwise make his representation of a client incompatible with the interests of Justice. Counsel for the appellant submitted that this was not applicable in this case because M/S. Okecha Baranyanga & Co. Advocates' instructions are limited to representation in an Advocate-Client bill of costs of HCCS

No. 476 of 2009, a suit which was already concluded. Counsel for the appellant submitted that Reg. 4 of the Advocates (Professional Conduct) Regulations provides that,

“An advocate shall not accept instructions from any person in respect of a contentious or non contentious matter if the matter involves a former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in that matter.”

According to counsel for the appellant, the interpretation of Rule 4 above is that an advocate offends the provision if he was instructed by a client in a matter against another person and subsequently represents the opposite party in another or the same matter against his or her former client.

On the other hand, counsel for the respondent submitted that the rule of confidentiality ties the appellant's hands from elaborating to court the defence regarding these issues because the respondent is now being represented by the former opposing counsel.

Counsel for the respondent submitted that Reg. 7 of the Advocates (Professional Conduct) Regulations which provides for non disclosure of client's information by an advocate is intended to cater for situations where critical information would be extracted from Counsel. Counsel for the respondent further submitted it cannot be said that Mugabi Enoth Advocates & Solicitors acted ultra vires their instructions, without evidencing the same.

Counsel for the respondent further submitted that the Regulations do not vest the law firm with a right to forfeit the client-confidentiality obligation, save where it is necessary in the conduct of the affairs of that client.

Counsel for the respondent submitted that without the appellant's elaboration on the detail of instructions which were issued, then all officers in the law firm Enoth Mugabi Advocates & Solicitors are bound to withhold facts which they believe fall under the client confidentiality realm.

Counsel for the respondent further submitted that Halsbury's Laws of England, 4th Edition Vo1. 3 (1) at paragraph 464, page 369 provides that,

"Even if there is no conflict of interest, when a barrister has accepted a set of instructions or held a brief or any party in any proceedings, he should not accept a set of instructions or a brief on an appeal or further stage in the proceedings for any other party without obtaining the prior approval and consent of the original client".

Counsel for the respondent submitted that the Affidavit in Support of the appeal in this regard does not bring out any grievance on the part of the client.

Counsel for the respondent submitted that Mr. Waniala for the appellant deponed that they had instructed Web Advocates to conduct the appeal and a notice of change of Advocates was filed, however thereafter Okecha counsel appeared in court to conduct the appeal when no other notice of change of advocates had been filed.

I have considered the submissions of both counsels in respect of this appeal for which I am grateful.

The substantive issue for determination in this appeal is whether the brief of M/S Oketcha Baranyanga & Co. Advocates in Miscellaneous Cause No. 22 of 2010 is a conflict of interest and/or breach of confidentiality.

The obligation of confidentiality has long been recognized as a critical feature of the lawyer-client relationship. In the case of **RAKUSEN V ELLIS, MUNDAY & CLARKE [1912] 1 Ch 831, Fletcher Moulton LJ** found that the duty of confidentiality is particularly onerous in relation to lawyers.

In her ruling on the matter the Learned Registrar found that

"...the respondent's lawyers were actively on the other side representing the defendants...It is out of that suit that this application arises. The situation is rather uncomfortable and it would be hard to believe or desist to image real or otherwise that the same lawyers will not use privy information or breach confidentiality of their earlier opposite client in the parent suit..."

According to Halsbury's Laws of England Vol. 3(1) Paragraph 464,

*"A barrister is not obliged to accept a set of instructions or brief if he has previously advised or drawn pleadings or appeared for another person on or in connection with the subject matter...Even if there is no conflict of interest, when a barrister has accepted a set of instructions or a brief for **any party in any proceedings**, he should not accept a set of instructions or hold a brief for any party **in any proceedings, on appeal or further stage in the proceedings for any other party without obtaining the prior approval and consent of the original client.**"(Emphasis mine)*

There is no doubt that the firm of M/S Oketcha Baranyanga & Co. Advocates represented M/S Jyoti Structures Ltd in HCCS 476 of 2010 and in that suit, the respondent represented the appellant. A taxation of a bill of costs to my mind is a further stage in the proceeding of a suit.

A reading of Reg. 4 of the Advocates (Professional Conduct) Regulations suggests that counsel should take great precaution when dealing with a matter that involves a former client as he is aware of facts that may be prejudicial to that former client. I find the authors of Halsbury's (Supra) give us what should be the best practice to avoid conflict in such situations. Best practices guide professional matters and should be enforced together with the laws and regulations.

In line with that best practice there is no evidence to show that consent was obtained by M/S Oketcha Baranyanga & Co. Advocates from their original client M/S Jyoti Structures Ltd to prosecute this appeal. I agree with the Learned Registrar that this presents an uncomfortable situation and the Court must intervene to improve the standards of the profession in this regard.

That being my finding I uphold the Registrar's order directing the appellant's to engage other advocates independent from the earlier conduct of the proceedings in the earlier suit. The appeal is accordingly dismissed with costs.


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Geoffrey Kiryabwire

JUDGE

Date: 16/08/2012

16/08/12

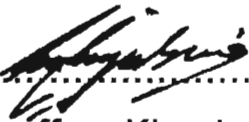
10:07am

Ruling read and signed in open Court in the presence of;

- Lutaaro Kizito h/b for Oketcha for Appellant
- Muyanja for Respondent

In Court

- None of the parties
- Rose Emeru – Court Clerk



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Geoffrey Kiryabwire

JUDGE

Date: 16/08/2012