THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 165 OF 2012

AYEBAZIBWE RAYMOND}.....PLAINTIFF

VERSUS

1. **BARCLAYS BANK UGANDA LTD}**
2. **ANGELLA NAMAKULA OFWONO}**
3. **BALONDEMU DAVID}.....DEFENDANTS**
4. **KIGOZI, SEMPALA MUKASA OBONYO (KSMO) ADVOCATES}**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

On 7 April 2014 when the suit came for hearing and PW1/the Plaintiff had taken the witness stand and had also taken oath and upon his witness testimony being admitted as his testimony in chief on oath, Counsel Simon Tendo Kabenge, Counsel for the Plaintiff expressed discomfort about the first and second Defendants being represented by KSMO Advocates. He further raised objections to KSMO Advocates representing the first and second Defendants in this suit. The Plaintiff's Counsel is of the view that there is a potential conflict of interest if KSMO advocates represented the first and second Defendants.

The Plaintiff's Counsel submitted that when they first objected to KSMO Advocates, it was in respect of them representing themselves and appearing as Counsel and potential witnesses in the suit. KSMO partners subsequently withdrew as witnesses and on that basis this court held that their appearance as Counsel in the suit was not a problem. However Counsel is of the view that the Court did not have the benefit of considering a recent decision of Hon. Justice Lawrence Gidudu in the case of **Uganda vs. Patricia Ojangole Criminal Case No 1 of 2014**. In that case Messrs Ligomarc purported to represent the accused. Messrs Ligomarc had drawn up the documents that formed the subject of the trial. They had executed due diligence reports, incoming and exit interviews in respect of the appointment of the accused. She was being tried for influence peddling in relation to her appointment and his Lordship Justice Lawrence Gidudu held that they could not purport to represent the accused when there was a conflict of interest. Simon Tendo Kabenge maintains that in this suit the statutory notice is drawn by Messrs KSMO Advocates; the alleged notice of application for public auction was drawn by Expeditious Auctioneers on instructions of KSMO Advocates and the sale agreement the subject matter of the suit was drawn by KSMO Advocates and is between the 3rd Defendant and the first Defendant.

Furthermore, Counsel Simon Tendo Kabenge submitted that the monies allegedly paid in respect of the purported sale were deposited in the account of Messrs KSMO Advocates. The cheques that the 2nd and 4th Defendant attached as receipt of payment are also drawn by KSMO Advocates. The notice of sale of property is drawn by KSMO Advocates. The mere fact that the WSD of the 2nd and 4th Defendant is a joint WSD means that their defence cannot be separated. The discomfort professionally is that an advocate must always act in the interest of his client. The Plaintiff's Counsel contends that in this case two interests exist. The first interest is that of Barclays Bank of Uganda and the second interest is that of Angela Namakula Ofwono which can be joined with that of Barclays Bank because she is an employee. The third interest is that of the 4th Defendant KSMO Advocates. KSMO is on trial based on an allegation that they acted fraudulently. Two scenarios arise namely whether the 4th Defendant KSMO can in defending the allegations of fraud act bona fide to also defend the bank and the second Defendant. They contradict their duty to court to act bona fide and the best way to deal with a conflict of interest is to avoid it.

The second leg of the argument is that KSMO Advocates evidently has confidential information of the first and second Defendant by virtue of being the firm of Advocates who carried out the entire transaction. Contrary to regulation 4 of the Advocates (Professional Conduct) Regulations, there is a possibility of use of confidential information for their interest and not that of the first Defendant. The case of **Uganda vs. Ojongole** is applicable: Further precedent is **Hilton vs. Barker Booth and Eastwood House of Lords Session 2004 – 2005** at www.parliament.uk and the judgment of Lord Scot on the duty of a Solicitor to act in the client's best interest. Both decisions were also followed by Justice Yasin Nyanzi in **Nilefos Minerals Ltd vs. Abmak Associates HCMA 60 of 2014**.

In conclusion the Plaintiff's Counsel contends that it would be ridiculous for an Advocate from KSMO Advocates to put a document to a witness which document is in issue and which he himself drew. The natural disposition of KSMO is to ensure that the court agrees that what they did was right. In respect of Barclays Bank, their interest may be to establish whether the actions of their agent KSMO were proper. If they had an independent advocate, they would have privilege of their advocate advising them on whether KSMO acted properly. For as long as KSMO represents Barclays Bank this is not possible. The Plaintiff's Counsel submitted that this court has a higher duty to ensure that an advocate appearing before the court only acts in the interest of the client and not other interest. The court should consider the pleadings on record and documents attached thereto (of the 2nd and 4th Defendants joint WSD and reply of the Plaintiff and attached documents). The court should also peruse the reply to the 3rd Defendants WSD, where all annexure thereto are addressed to and received by KSMO Advocates. He therefore prayed for an order barring the 4th Defendant from representing any of the parties in this suit.

In reply Counsel Richard Obonyo of KSMO Advocates submitted firstly that the objection raised by the Plaintiff's Counsel had been raised before and a determination was made by this court. Counsel Simon Tendo Kabenge cannot at this stage raise the same objection again. On the basis

of that determination a scheduling conference was conducted and resulted in shaping the structure of the case for trial/defence by either party. In the points of agreement and disagreement, neither Richard Obonyo nor David Sempala will be presented as witnesses. Secondly the Plaintiff has not listed any of them as witnesses. The Plaintiff already filed a witness statement indicating that he has only one witness. No conflict of interest arises. KSMO Advocates listed Counsel Jacqueline Kagoya to present evidence on the actions of KSMO in the transaction. The Plaintiff's Counsel ought to wait to hear the evidence. Thirdly Counsel Richard Obonyo submitted that the cases cited by the Plaintiff's Counsel were not binding on this court. The conflict raised is said to arise from documents executed on behalf of the bank. It follows that the Plaintiff's Counsel are in a similar situation of alleged conflict. Parts of the evidence they present include letters authored on the Plaintiff's behalf by his lawyers. The other evidence is based on an interim order which was procured by the Plaintiffs' lawyers. How was it procured? Counsel Richard Obonyo concluded that the application was brought in bad faith and the court should not at this stage grant the prayers of the Plaintiff's counsel.

In further reply to the submissions on the Plaintiff counsel's objection, Counsel David Sempala of Messrs KSMO submitted that the case of **Uganda vs. Patricia Ojangole** (supra) is distinguishable. The facts of that case are different from those of the present suit and the decision is not applicable. He contended that Uganda Development Bank is a public body and Messrs Ligomarc was paid by the accused to defend it. There was a conflict of allegiance. In this case Barclays Bank, the first Defendant is not complaining. If court follows the argument it would have far reaching effects in that it would mean that any lawyer who drafts a sale agreement cannot subsequently act as Counsel for the Defendant in a suit involving the sale agreement. Lastly it is apparent from conduct of the Plaintiff's Counsel that the Plaintiff is not eager to proceed with this matter and court should take note of that. The resultant delays are to the advantage of the Plaintiff who is in possession of the suit property.

In rejoinder the Plaintiff's Counsel Simon Tendo Kabenge submitted that there was no objection to his prayer from the 4th Defendant who is unrepresented and the prayer should be granted. Secondly he agreed with the Defendant's Counsel that the court had earlier made a ruling on whether KSMO can appear in the suit as counsel. He submitted that the current objection is a different objection and is grounded on the issue of conflict of interest. Counsels for the Defendant's have not addressed the issue of conflict of interest at all. In respect to the non-binding nature to this court of the decision in **Uganda vs. Patricia Ojangole**, the decision has been followed by Justice Nyanzi and is very persuasive.

As far as delay is concerned it is KSMO delaying the suit by clinging to it like there is no tomorrow when they ought to have withdrawn. Even judicial officers withdraw from a case on the basis of perception of the parties when the issue has been raised. They have a higher duty. The Plaintiffs witness is on the stand. There is no delaying by the Plaintiff.

On the argument that the decision for the defence Counsel to withdraw would have far reaching consequences, the Plaintiff's Counsel contends that the circumstances are different. In this case the advocates are parties and participated in selling the suit property the subject matter of the suit. Where an advocate is sued for fraud there is a conflict of interest. The documents drawn by Messrs Akampumuza and Co advocates for the Plaintiff are not contentious or in issue and Messrs Akampumuza and Co advocates are not parties to the suit. As far as the interim order is concerned, it is not a contentious issue and it is not an issue. The court order is a document issued by court.

Lastly on the issue of Jacqueline Kagoya being the witness to be presented for Messrs KSMO, she is an advocate working with the firm. In the decisions relied on of Justices Lawrence Gidudu and Yasin Nyanzi (supra), their lordships went as far as holding that where advocates have left the law firm they cannot take up the matter and the conflict of interest does not go away. As advocates, one cannot claim not to have the confidential information/knowledge of the client. As partners they have the knowledge. At the time of the previous ruling on the objection to Partners of KSMO representing their firm as potential witnesses, they had not yet presented Jacqueline Kagoya as a potential witness. The objection covers and affects advocates who work under KSMO.

Ruling

I have carefully considered the submissions of Counsel outlined above. The objection of the Plaintiff's Counsel is to the effect that Messrs KSMO cannot appear in this matter as Counsel so as to represent the first and second Defendants in this suit namely Messieurs Barclays bank Uganda limited and their legal officer Angela Namakula Ofwono on the ground that the participation of the said firm of advocates would be in conflict of interests and particularly offended rule 4 and 10 of the Advocates (Professional Conduct) Regulations SI 267 – 2.

I will start with the submissions of Counsel Richard Obonyo of Messieurs KSMO to the effect that this objection had been raised before and the court had pronounced itself upon it and therefore it cannot be raised again.

I have carefully considered the record of proceedings and previous rulings. There have been several objections so far on the question of representation of counsels in this suit. The first objection was made on the 7th of May 2013 by Mr Oundo David Wandera Counsel for the third Defendant. The third Defendant's Counsel had objected in a similar ground to the appearance of Dr James Akampumuza and Counsels Simon Tendo Kabenge on behalf of the Plaintiff. The objection was that Messieurs Akampumuza and company advocates had executed a contentious document and Dr James Akampumuza was likely to be a witness in the matter. The objection was based on rule 9 of the Advocates (Professional Conduct) Regulations (supra). The ruling of this court was delivered on the on the 14th of May 2013. When the matter was next mentioned in court on 27 June 2013 counsels Simon Tendo Kabenge Counsel for the Plaintiff objected under

regulation 9 of the Advocates (Professional Conduct) Regulations to Counsel David Kigozi Sempala, Richard Obonyo and Mulema Mukasa appearing as Counsel in this suit to represent themselves or the first and second Defendants on the ground that they were likely to be witnesses. The basis for the submission that they were likely to be witnesses was a statutory demand in issue signed by Richard Obonyo. Secondly money alleged to have been paid by the third Defendant on the sale of the suit property was received by KSMO Advocates and documentation showed that the lawyers issued cheques to the first Defendant (Messieurs Barclays Bank Uganda Limited). The lawyers Messieurs KSMO were added as Defendants. The ruling of the court was delivered on 13 September 2013.

The court overruled the objections on the ground that the said advocates of Messieurs KSMO would not be called as witnesses. Secondly they had the conduct of the Defendants defence and were not going to call any of the partners as witnesses.

Subsequently the current objection again objects to the representation of the first and second Defendants by KSMO Advocates on a different ground namely that of perceived potential conflict of interest in representing the first and second Defendants. The Plaintiff's Counsel prayed that the court is persuaded by the decision of the Anticorruption court in **Uganda versus Patricia Ojangole Criminal Case Number 1 of 2014**. The above decision of honourable Justice Lawrence Gidudu was delivered on 13 February 2014. The issue before the court was whether there is a conflict of interest if the advocates for the accused employer represented her in the court on criminal charges emanating from her duties at her workplace? The court also considered a real or seemingly incompatibility between the interests of two of the lawyer's clients. The court noted that in the case the accused had retained the firm of her employer as her advocates. The court noted that prima facie there was a conflict of interest. This is because the prosecution is seeking to adduce evidence compiled by the firm complained of which was given to the employer of the accused. According to the court in that case Messrs Ligomarc and company advocates were retained by the accused employer who had been instructed to do a due diligence of a loan Applicant. The employer did not heed the advice in the report, and upon the whistle being blown, the whistleblower was victimised and dismissed by the accused as the CEO of the employer. The accused instructed the same firm of advocates to represent her in the case where the report would also be tendered through the evidence to be adduced by her very lawyers. The court noted that there was a fiduciary duty towards the employer which would conflict with their obligation to another client. The court relied on regulations 9 and 10 of the Advocates (Professional Conduct) Regulations.

I do not need to consider regulation 9 which deals with the potential of an advocate being called as a witness in a matter in which he represents a client. The court has already ruled that Messieurs KSMO advocates/partners thereof would not be called as witnesses on the basis of the previous objection of the Plaintiff's counsel. The question of whether KSMO partners would appear as witnesses has been dealt with and the court cannot revisit the same whatever the merits of the present objection. The decision can only be revisited by an application for review or

appeal. However the current objection to KSMO Advocates on the face of it does not attempt to rely on Regulation 9 which bars an advocate from being Counsel and witness or potential witness at the same time. It would at first glance appear that the second ground of objection which considers regulation 10 and 4 of the Advocates (Professional Conduct) Regulations (supra) has not been dealt with before. However I will not conclude the matter on a preliminary point but will examine the objection meant to obtain the same order at the conclusion of this ruling. In quoting regulations 4 and 10 and from a consideration of the authorities, the Plaintiff's objection deals with the issue of whether there is a conflict of interest in representing the first and second Defendants by KSMO advocates. For the moment I will consider the issue without going into the propriety or timing of the objection after the previous objection to the appearance of KSMO Advocates which included a prayer to bar them from representing the first and second Defendants as Counsel had been overruled.

The basis of the objection on the ground of conflict of interest is partially made under regulation 10 which provides as follows:

> "An advocate shall not use his or her fiduciary relationship with his or her client to his or her own personal advantage and shall disclose to those clients any possible interest that he or she may have in transactions being conducted on behalf of those clients."

The ruling of the court in the case of **Uganda versus Patricia Ojangole** on regulation 10 is as follows:

> "Regulation 10 reinforces regulation 9. It is not permitted to use one's fiduciary relationship to gain advantage. M/S Legomarc & Co having done due diligence on behalf of UDBL is not allowed to represent the accused who is facing charges arising from a transaction they had been detailed to gather information.
>
> In other words, the accused's right to Counsel of own choice cannot be upheld where it has the effect of putting such Counsel into conflict of interest and breach of fiduciary relationship. A constitutional provision cannot be enforced if it shall result in professional misconduct.
>
> I was asked if an advocate from M/S Legomarc & Co cannot be permitted to represent the accused if he/she leaves the firm to join another. The answer would be NO. It would be unprofessional on the part of Counsel to attempt to circumvent Regulations 9 and 10 of SI 267 – 2. Such Counsel would have left with insider knowledge and cannot be permitted to pretend to have "forgotten". In fact an advocate is prohibited from representing a party litigating against his/her former client on the subject the former client has ever instructed Counsel in question."

I have carefully considered the ruling. The court dealt with an issue of fiduciary duties. Regulation 10 imposes a duty on an advocate to disclose any interest in a transaction being

conducted on behalf of a client. In this case Messrs KSMO advocates who the Plaintiff's Counsel seeks to bar from representing the first and second Defendants have been jointly sued on the same transaction with the first and second Defendants. Secondly it is the Plaintiff's Counsel who is objecting to the opposite Counsel representing their client namely the Defendants and not the Defendants themselves raising the objection. The basis of the objection inter alia is that another firm of advocates might have counselled the first and second Defendants to settle the suit or properly advised the first and second Defendants on their rights. In the case of **Uganda vs. Patricia Ojangole** (supra) the prosecutor can be said to represent the former client of the advocates namely UDBL as "the people" or complainant on whose behalf the state prosecutes the accused. That would make the authority distinguishable on the ground that KSMO are not representing a former client but I will not conclude this point until I have considered other aspects of the objection.

I have carefully considered regulation 10 cited above. The regulation does not bar an advocate from appearing on behalf of a client in a suit but only requires the advocate if he or she appears to disclose any interest in the transaction which the advocate is conducting on behalf of his client. The rule is of general application and may apply to transactions such as sale agreements. The question is whether it also applies to representation in a suit. Is a suit a transaction? Do other regulations not specifically address conflict of interests in suits? Secondly if it is applicable to suits are the advocates using their fiduciary relationship to their own personal advantage? How should such an issue be tried?

I will additionally refer to the authority of **Nileflos Minerals Ltd vs. ABMAK Associates High Court miscellaneous application number 60 of 2014** in which Honourable Justice Yasin Nyanzi considered the case of **Uganda versus Patricia Ojangole** (supra). In that case the honourable judge considered Regulation 10 of the Advocates (Professional Conduct) Regulations. The facts of the case are clearly different from the current case. In that case the Applicant sued their former advocates by way of an application under Regulation 4 of the Advocates (Professional Conduct) Regulations. In the application the advocates of the respondent Messrs ABMAK Associates are stated to be the former advocates of the Applicant and therefore barred by regulation 4 from appearing in the matter. The question was whether the respondent firm had acted for the Applicant in terms of a former advocate/client relationship. It was submitted that to do so would offend regulations 4, 9 and 10 of the Advocates (Professional Conduct) Regulations. Honourable Justice Nyanzi held as follows:

> "There is a close relationship between Regulation 4 and 10 but not others. While regulation 4 is intended to protect a former client, regulation 10 seems to cover both current clients and former ones in order for the advocate to avoid being accused of taking advantage of a fiduciary relationship for personal gain. As decided cases show fiduciary relationship is guarded in respect of both former and current clients.

> For those reasons this application is only limited to Regulation 4 and 10 of the regulations under SI 267 – 2"

The Honourable Judge found that the respondent advocate firm had acted as a firm of advocates for the Applicant no matter through which partner and that they did so is a question of fact. The court went ahead to consider regulation 4. Regulation 4 deals with having prejudicial information to a former client that an advocate gains by virtue of the privilege of advocate/client relationship. It specifically deals with a former client. In the context of that case, the question was whether the respondent firm of advocates were as a matter fact, advocates for a former client against whom they were acting in the context of regulation 4. Secondly the issue was whether they had information that would be prejudicial to the former client. Thirdly in that case the firm of advocates sought by the application to be barred from representing one of the parties were sued by the former client/Applicant by way of a formal application to bar them from acting. Regulation 4 of the Advocates (Professional Conduct) Regulations provides as follows:

> "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."

The wording of the regulation is very clear and unambiguous. It plainly 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. What is being preserved is prejudicial information which the advocate may have obtained by virtue of having acted for the former client. The question is whether the current matter involves a former client. It would be necessary to define the matter before the court. It is apparent that the matter before court does not involve a former client of KSMO. The current advocates Messrs KSMO are still Counsel for Messieurs Barclays Bank in the matter and any information that they may have would be for purposes of representing the bank. In relation to the matter at hand, Messieurs Barclays Bank is not a former client. Secondly it has not been shown that the second Defendant is a former client. In the case of **Nileflos Minerals Ltd versus ABMAK Associates** (supra) Honourable Mr Justice Yasin Nyanzi in paragraph 37 of the ruling held that regulation 4 envisages an advocate and a former client for whom he acted and as a result of acting the advocate is aware of any facts which may be prejudicial in the matter if he accepted the instructions. In the circumstances therefore the import of regulation 4 does lead to the conclusion that the matter before the court does not involve KSMO accepting instructions from another person on a matter in which they had acted for a former client. Regulation 4 is inapplicable in the circumstances of this case. Before taking leave of the matter the court also considered whether the information would be prejudicial. It is therefore material in the application of section 4 that there would be information in the hands of a former advocate of a client which would be prejudicial to the client in another matter in which the advocate acts for another person. That is not the situation in this case thereby making it distinguishable.

Notwithstanding the above conclusions I will further consider the authorities particularly in relation to regulation 10 of the Advocates (Professional Conduct) Regulations. The question is whether KSMO advocates are likely to use their fiduciary relationship for personal gain in this suit. This springs from the wording of regulation 10 which provides that the advocate shall not use his or her fiduciary relationship with his or her clients to his or her own personal advantage and shall disclose to those clients any personal interest that he or she may have in transactions being conducted on behalf of those clients.

I had paused to consider whether the matter before the court is a transaction in which KSMO advocates may have personal interest. The word "personal interest" in the context of regulation 10 deals with some pecuniary or material interest. Can it be stretched to include the interest of the firm to defend itself? What would the advocate gain materially by defending the first and second Defendants? Should the word "transaction" exclude "litigation"? It is a question of fact that Counsel David Kaggwa of Messieurs Kaggwa and Kaggwa advocates represents KSMO. KSMO advocates do not represent themselves. That would imply that the import of the Plaintiff's counsel's submission is that KSMO are likely to do something unethical or unprofessional for personal gain and at the expense of the first and second Defendants. The Plaintiff's Counsel opined that it would be ridiculous for KSMO advocates to put a document to a witness when they themselves drew the document. Secondly that the natural disposition of KSMO is to ensure that the court agrees that what they did was right. Thirdly it was contended for the Plaintiff that the court should consider the pleadings and attachments thereto before coming to a conclusion on the matter. On the other hand the Defendants Counsel submitted that the drafting of documents by a firm of advocates should not be held to debar the advocate from subsequently representing any party to the document or agreement. It was contended that to hold so would greatly prejudice advocates who draft documents from subsequently representing any parties who are privy to the documents and it would have an adverse effect on the ability of the advocates to conduct their clients matter.

I agree with Hon. Mr. Justice Yasin Nyanzi in Nileflos Minerals Ltd (supra) that regulation 10 of the Advocates (Professional Conduct) Regulations, have to be read in harmony with regulation 4. In other words they should be read together. I have already established that regulation 4 deals with accepting instructions against a former client. This conclusion is supported by authorities. Regulation 10 deals with the fiduciary duties of an advocate. This includes the duty to declare any interest that the advocate may have in a transaction to the client on whose behalf the advocate acts. Honourable Justice Yasin Nyanzi concluded that regulation 10 seems to cover both current clients and former clients in order for the advocate to avoid being accused of taking advantage of a fiduciary relationship for personal gain. The question of whether an advocate is acting for personal gain underlies the use of the phrase "personal advantage". Secondly it goes with the duty to disclose to the client any personal interests that he or she may have in the transaction. The phrase used in the head note of regulation 10 of the Advocates (Professional

Conduct) Regulations is: "Advocate's fiduciary relationship with clients." The word "fiduciary" has been defined by Osborn's Concise Law Dictionary 11th edition to mean:

> "(1) A person who holds a position of trust in relation to another and who must therefore act for the persons benefit.
>
> (2) A fiduciary relationship exists where someone is in a position of trust such as solicitors and their clients."

For the moment I do not perceive and I have not received any evidence to the effect that the first and second Defendants are not aware of the fourth Defendant's interest to defend the action. In other words the 4th Defendants would like to defend the action. The submissions of the Plaintiff's Counsel relates to several matters in the submissions. They relate to the fact that the statutory notice in the suit is drawn by KSMO advocates. An alleged notice of application for public auction was drawn on instructions of KSMO advocates. The agreement the subject matter of the sale of the suit property was drawn by the said advocates between the third Defendant and the first Defendant. Finally money was deposited on the account of Messieurs KSMO advocates. Regarding the joint defence Messieurs KSMO advocates and the second Defendant, it is averred that the second Defendant and the 4th Defendants are represented by Messieurs KSMO advocates. However after the drafting of the WSD Messieurs Kaggwa and Kaggwa advocates have taken over the conduct of the defence of KSMO advocates. The second Defendant is the Head Legal/Company Secretary of Messieurs Barclays bank of Uganda Ltd. The documents show that Messieurs KSMO advocates on 10 November 2010 wrote a statutory notice that the entire principal with interests under a mortgage was due and outstanding and had to be paid. They also wrote a demand for recovery of outstanding monies owed to the first Defendant. Subsequently the property was advertised for sale in the newspapers on their instructions. Furthermore the sale agreement selling the property to the third Defendant was drawn by KSMO advocates. The Plaintiff alleges inter alia fraud against all the Defendants. On the basis of the above facts of pleadings and averments it is the Plaintiff's case that KSMO advocates ought not to represent Messieurs Barclays Bank Uganda Limited and the second Defendant who is the Head Legal/Company Secretary of Messieurs Barclays Bank Uganda Limited. It is an assertion that the acts of KSMO advocates would be directed at getting a favourable decision to absolve them without regard to the interests of the first and second Defendants. I do not think that the Plaintiff's advocates, even if they are officers of the court, are the proper parties to object to the representation of the first and second Defendants by KSMO advocates without disclosing or demonstrating how the Plaintiff would be prejudiced by such representation. I have had regard to the submission of Counsel David Sempala that the first and second Defendants have not complained about being represented by KSMO advocates. Even if the allegation of the Plaintiff's Counsel has substance, the Plaintiff cannot be seen to argue the case of the Defendants. Neither of the Defendants were consulted other than through their Counsel namely Counsel Richard Obonyo and Counsel David Sempala who responded to the objection of KSMO advocates representing the first and second Defendants. In the absence of the actual parties being consulted

as to whether their interests are prejudiced, Counsel David Sempala and Richard Obonyo are the only proper authorised representatives of the first and second Defendants who can make representations to court on their behalf. It is quite strange for the Plaintiff's Counsel to argue that the first and second Defendants would be prejudiced by a conflict of interest on the ground of being represented by KSMO advocates without consulting them or giving them a chance to have a say in the matter. It is a fundamental rule of justice that parties should be heard on matters affecting their interests. It is the first and second Defendants on the face of the pleadings who instructed KSMO advocates to represent them in the suit. The objection to the representation of KSMO advocates was made orally. In the case of Nileflos Minerals Ltd vs. ABMAK Associates, the former client filed a formal application citing the proper parties to be heard in the matter. Messieurs Barclays Bank Uganda Limited (the first Defendant) and Angela Namakula Ofwono (the Head Legal/Company Secretary of Barclays Bank Uganda Limited) ought to have been served with a formal application. The court ought not to make any ruling concerning the conduct of their defence when their Counsel is being challenged without giving them a hearing on the question of prejudice been occasioned to them. This is especially so when the matter is being raised by the adversary Counsel in an adversarial system.

Concerning the duty not to disclose confidential information the general statement of law can be found in **Halsbury's laws of England volume 44 (1) fourth edition reissue page 123 at paragraph 150** on the subject of a solicitor acting for opposing interests. In Uganda advocates perform the role of solicitors when drafting documents and advising their clients on transactional matters. Just like the law in Uganda paragraph 150 (supra) of **Halsbury's laws of England volume 44** (supra) provides that a solicitor who is or has been retained by the client is under an obligation not to disclose confidential information which has come to his knowledge as solicitor for the client. The solicitor is duty bound to observe the utmost good faith towards his client. A court will grant an injunction to prevent any breach of those obligations and will award damages for actual breach. Underlying the above two remedies of injunction or damages is the right of the aggrieved client to complain. The Plaintiff however is not the former client but the opposite side and adversarial to the first, second and fourth Defendants. Strangely there is a clear conflict of interest for the Plaintiffs Counsel to purport to argue for the interest of the Defendant's. They in effect purport to act for the first and second Defendant without instruction on the ground perhaps of being officers of court. On any other ground it would violate the manner of acting on behalf of a client only with instructions. In Halsbury's laws of England paragraph 150 (supra) it is further provided as follows:

> "There is, however, no general rule prohibiting a solicitor who has acted in a particular matter for one of the parties from acting subsequently in the same matter for the opposite party, although where a solicitor owes a duty to someone other than a particular client with conflicts with his duty to that client, he is not thereby relieved of any duties to the client. Where a partner in a firm of solicitors which has acted for one party in litigation moves to a new firm and one of the opposing parties then wishes to employ his services

as a solicitor, the burden is on the partner to prove that there is no real risk that he has any relevant confidential information which makes it improper for his services to be so employed."

The onus is on the Plaintiff Counsel to prove that their objection holds no prejudice to the first and second Defendant on whose behalf the objection in effect is brought. It is apparent that the duty is owed to a former client. Secondly the duty is imposed when the advocate/solicitor is acting for an opposite party. Thirdly there are exceptions to the rule that the solicitor/advocate should not accept instructions to act against a former client in respect to the prejudicial facts that he or she may have. Where the information is not prejudicial, the duty ought not to be imposed. In **Re A Firm of Solicitors [1995] 3 All ER 482 Lightman J** of the Chancery Division considered in detail the duty owed by a solicitor to a former client. I find the judgment very persuasive because it considers the same principles embodied in the Advocates (Professional Conduct) Regulations when dealing with confidential information under our regulation 7. At pages 488 – 489 **Lightman J** after considering the duty not to act when possessed of confidential information gives the following compromise to the general rule:

Firstly the basis of the court's intervention is not a possible perception of impropriety but the protection of confidential information. Secondly the court is sensitive to the need to afford the fullest special protection to such confidential information. Thirdly the confidential information passing between solicitor and client and otherwise acquired by a solicitor on behalf of his client may subsequently cease to be confidential. In which case the protection does not apply. Fourthly a solicitor at one time retained by a client but not in possession of relevant confidential information, is not by reason of the fact of such past retainer precluded from subsequently acting against him. Lastly the issue whether the solicitor is possessed of relevant confidential information cannot be decided on the basis of a general allegation that the solicitor is in possession of relevant confidential information if it is in issue without sufficient particularity as to the confidential information.

In other words the court does not act on mere perception but moves to protect confidential information. As far as being aware of prejudicial facts under regulation 10 of the Advocates (Professional Conduct) Regulations is concerned, the likelihood of prejudice has to be considered and ought to be based on concrete materials. Secondly not all information is prejudicial information. The attachments referred to such as the sale agreement, statutory notice, and the attachments are not prejudicial or confidential information since they are relied upon by the defence. I further agree with Counsel Richard Obonyo that on the question of alleged fraudulent activities of the Defendants (alleged on all the Defendants) this is a matter that can be addressed through evidence either for or against the allegations.

In the premises having previously ruled that Messieurs KSMO advocates/and partners are not barred from appearing as Counsel either to defend themselves as parties or the other Defendants on the ground that they are not witnesses, and the Plaintiff's Counsel having not appealed from

the decision dated 13th of September 2013, I cannot revisit the question of appearance alleged to be contrary to regulation 9 of the Advocates (Professional Conduct) Regulations. For purposes of completeness I will quote in detail the conclusion of the court on the question of representation of the first and second Defendants by KSMO at pages 5, 6 and 7 of that ruling:

> "Regulation 9 puts the duty on the advocate to establish whether he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit. Secondly, if it becomes apparent during the proceedings that the advocate would be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear. The second leg of the regulation uses mandatory language. Secondly it does not put the duty on the advocate in terms of his or her subjective believe as to whether he or she will be required as a witness to give evidence either verbally or by affidavit. The Regulation merely provides that if it became apparent during the proceedings that the advocate would be required as a witness the advocate would not continue to represent the client. Consequently, any other party can object to the further appearance of the advocate in the matter if it becomes apparent that the advocate would be required as a witness.
>
> I need to note that the partners in the firm of advocates are entitled to represent themselves if they think this is wise. The question is whether they can continue to represent the first and second Defendants. On the first leg of the regulation, because the belief of the advocate is a subjective belief, counsel believe and have represented to the court that they are abandoning appearance as witnesses in the defence of the first and second Defendants. The question therefore is whether it has become apparent that the counsels would be required as witnesses in the suit. I must add that the duty is upon Counsel to ensure that the do not appear as witnesses on the basis of their belief and having conduct of their clients matter.
>
> I have further carefully considered the second leg of the objection. Counsel Simon Tendo Kabenge belatedly submitted that the Plaintiff would require the Defendant's partners as witnesses. I find this submission not acceptable in view of the fact that the Plaintiff's suit is against all the partners in the law firm. A suit against a law firm is a suit against the partners. He cannot sue them and at the same time require them to testify against themselves. The situation is therefore distinguishable from the ruling in the objection to Dr James Akampumuza. In the previous ruling, the court ruled that the first leg of the regulation 9 was subjective and depended on the belief of counsel. On the second aspect of the regulation when it appears from the proceedings that Counsel is likely to appear as a witness, the court did not conclude on the basis of materials on court record that Dr James Akampumuza was likely to be a witness or a material witness. The court therefore held that Dr James Akampumuza was put on notice that he might be a material witness if he had knowledge about encumbrances on the suit property at the time of the transactions

complained about in the suit. In other words Dr James Akampumuza had not been ruled out from appearing in the suit and representing the Plaintiff.

In the circumstances of Counsel David Sempala, Simon Obonyo, Mulema Mukasa, the representation is that they believe that they would not be called as witnesses and that the Defendant's have abandoned them from appearing as witnesses. I was further referred to the listing of both counsels as witnesses. I do not agree with the Plaintiff's submission that there is a need to amend the pleadings. Counsels have represented that they would not call the counsels objected to from appearing as witnesses. The conduct of the Defendants defence is in the hands of counsel. Last but not least, because counsels are also parties, they cannot be called by the Plaintiffs who had sued them as Plaintiff's witnesses. In those circumstances, the objection of the Plaintiff's Counsel cannot be sustained. It is overruled with no order as to costs."

In that ruling dated 13th of September 2013 I held that counsels David Sempala, Simon Obonyo, Mulema Mukasa believe that they would not be called as witnesses and the duty was upon them to ensure their ethical conduct. They could represent the first and second Defendants. Though the objection under consideration is grounded on an alleged conflict of interest, it is still an objection calculated to achieve the same purpose of barring Messieurs KSMO advocates from representing the first and second Defendants. The objection ought to have been raised on 27 June 2013 when the suit came for hearing. The objection could not have been generated by the decision of Honourable Justice Laurence Gidudu in **Uganda versus Patricia Ojangole criminal case number 1 of 2014** at the High Court/Anticorruption Division Court. Secondly it could not arise from the decision of Honourable Justice Yasin Nyanzi in the case of **Nileflos Minerals Ltd versus ABMAK Associates** (supra). My review of the decisions demonstrates that they are distinguishable from the current matter under consideration. In the premises the timing of the objections when PW1 had taken oath and was going to be cross examined after the Plaintiff's Counsel had put him on the witness stand is very unfortunate and likely prejudicial to the Defendants on whose behalf it purports to be brought. The case had been fixed for the 7th and 10th of April 2014 for hearing when the matter was last mentioned way back on 17 December 2013. At the worst a formal application ought to have been filed before the hearing date of 7 April and 10th of 2014.

In the premises, objection to Messieurs KSMO advocates by the Plaintiff's Counsel to bar them from representing the first and second Defendants is overruled with costs. The hearing of this suit shall proceed as had been fixed for hearing for the 7th and 10th of April 2014. It had been fixed way back on 17 December 2013. Since the scheduled hearing did not take off on the 7th of April 2014 to enable court to further consider preliminary matters, the parties should proceed today the 10th of April 2014 with the hearing.

Ruling delivered in open court the 10th day of April 2014

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Dr. James Akampumuza for the plaintiff

Plaintiff present in court

Richard Obonyo together with David Sempala for the 1st and second defendants

David Kaggwa for the 4th Defendant

David Oundo Wandera for the 3rd Defendant,

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

10th April 2014