

**REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
ANTI CORRUPTION DIVISION
CRIMINAL CASE NO. 1 OF 2014**

**UGANDAPROSECUTOR
VERSUS
PATRICIA OJANGOLE.....ACCUSED**

BEFORE HON JUSTICE LAWRENCE GIDUDU

RULING

The prosecution has since last year been complaining that the accused is being represented by advocates on private brief who also happen to be the lawyers of her employer (UBDL). This complaint was raised before the lower court and during plea taking before me. It was raised again before the hearing proper. I decided to make a ruling to deal with it finally at least in my court.

It is not in dispute that **M/S Ligomarc & Co. Advocates** are the lawyers of **UBDL** where the accused works as **CEO**. It is not in dispute that part of the evidence to be relied on during the trial, according to the summary of the case on record, was compiled by **M/S Ligomarc & Co. Advocates**.

It was the prosecution objection that if **M/S Ligomarc & Co** is permitted to represent the accused, then there will be a conflict of interest. A scenario will emerge where an advocate from the law firm will give evidence in chief and be cross examined by a partner or employee of the same firm.

Mr Nsubuga- Mubiru an Advocate from another firm of advocates also representing the accused did not argue much about this but asked what would happen if an advocate from **M/S Ligomarc & Co** left that firm and joined another. Would such a lawyer represent the accused?

The issue for resolution here is **whether there is a conflict of interest if the advocates for the accused's employer represented her in court on criminal charges emanating from her duties at her work place?**

Black's Law Dictionary, 8th edition, defines conflict of interest as:-

- 1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.***

2. *A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.*

It is both the actual and the perception that counts when tracing conflict of interest in a transaction. It is what a reasonable person would conclude while viewing the transaction from a distance that counts. It is related to rule against bias. The old adage that justice must not only be done must be seen to be done applies to conflict of interest.

Conflict of interest has also been generally defined as any situation in which an individual or corporation is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit.

Conflict of interest is founded on the existence of a fiduciary relationship between lawyer and client.

In the instant case, the accused has retained the firm of her employer as her advocates. Does this cause a conflict of interest? Prima facie it does. The peculiar circumstances in this case are that the prosecution is seeking to adduce evidence compiled by the firm complained of which was given to the accused's employer. The accused must have, as CEO, received the report on behalf of the employer and now has to cross examine her very lawyers on the contents and opinions expressed in that report. This would be a clumsy situation to say the least.

An accused appearing before court is entitled to be represented by a lawyer of his or her choice. **See Art. 28(3)(d) of the Constitution.** Can such a person present to court a lawyer from a firm representing her employer as his or her private lawyer? In my view, the answer would depend on the circumstances of the case. For example, a **CEO** of a firm would, in my view, instruct the firm's counsel to represent him or her in a case which is not related to his or her duties with the employer.

If the matter is, however, contentious the consent of the employer may be required. This is because a fiduciary is the highest standard of care at either equity or law. A fiduciary is expected to be extremely loyal to the person to whom he/she owes the duty (Principal).

She/he must not put personal interests before the duty and must not profit from that position as a fiduciary, unless the principal consents. Fiduciaries must conduct themselves at a level higher than that trodden by the crowd and the distinguishing or overriding duty of a fiduciary is the obligation of individual loyalty. **See Bristol and West May Building Society vs May May & Merrimans(a firm) and others (1996) 2 All E R 801.**

In the case before me, the prosecution case is that the firm of **M/S Legomarc & Co** which is retained by the accused's employer, instructed the lawyers to do a due diligence of a loan applicant. **M/S Legomarc & Co** did the job and filed a report. The employer did not heed the

advice in the report and upon this a whistle was blown. The blower was victimized and dismissed by the accused as **CEO**.

The accused has instructed the firm of **M/S Ligomarc & Co** to represent her in this case where its report is going to be tendered through evidence adduced by her very lawyers. Is this not conflict of interest? It must be because it cannot be anything else.

Not only must the fiduciary avoid, without informed consent, placing himself in a position of conflict, between duty and personal interest, but must eschew conflicting engagements. The reason is that, by reason of multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting with his obligation in the other. It is not to the point that the fiduciary himself may not stand to profit from the transaction he brings about the parties. The prohibition is not against the making of profit but of the avoidance of conflict. See **Commonwealth Bank of Australia vs Smith (1991) 102 ALR at 477 reported in Bristol and West (supra) at p.815**.

It follows from the above discussion that advocates from the firm of Legomarc cannot represent the accused adequately without falling in the danger of conflict. They have the background information that the prosecution wants to rely on to fault the accused. The firm has authored a document that they have to tender and then turn around to cross examine themselves as if to disown it. This must be avoided.

Further, the provisions of the **Advocates (professional conduct) Regulations, SI 267-2**, provide adequate guidance on this matter. Regulations 9 and 10 are instructive:-

9. Personal involvement in a client's case.

No advocate may appear before any court or tribunal in any matter in which 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; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears.

10. Advocate's fiduciary relationship with clients.

An 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.

Regulation 9 prohibits an advocate from representing a party in a case where he/she has knowledge that amounts to evidence that may be adduced. Mr. Kabiito of **M/S Ligomarc and Co. Advocates** has already been summoned as a witness. It cannot be argued that he is different from other lawyers from the same firm because under the Partnership Act, the acts of a partner bind the others. Besides, the instruction to a partnership of lawyers goes to the firm and not to individual advocates. An individual partner cannot practice law in a partnership firm independent of the other partners. This would be contrary to the Partnership Act.

Regulation 10 re-enforces 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 a subject the former client has ever instructed counsel in question.

On the basis of the analysis above, it is my conclusion that **M/S Legomarc & Co. Advocates** (both partners and employees) cannot ethically represent the accused in this case without falling into the danger of conflict of interest. The firm is consequently disqualified from participating in this trial as counsel for the accused.

The best way to deal with conflict of interest is to avoid it completely.

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Lawrence Gidudu
Judge
13th, Feb, 2014.