THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 444 OF 2019

M/S QUALITY UGANDA LIMITED

T/A QUALITY SUPERMARKET :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. UGANDA PERFORMING RIGHTS SOCIETY (UPRS)

2. UGANDA REGISTRATION SERVICES BUREAU (URSB)

3.KABIITO KARAMAGI

4. RITAH BIRUNGI BAGUMA

5. ASP ALEX TUMUHAIRWE :::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING ON A PRELIMINARY OBJECTION

Introduction

[1] The Plaintiff brought Civil Suit No. 444 of 2019 ("the Suit") seeking several declarations and orders against alleged conduct of the Defendants based on an allegation that the Plaintiff had infringed musical (copyright) works of the 1st Defendant's members. When the matter came up for scheduling conference, Counsel for the Plaintiff raised a preliminary objection based on alleged conflict of interest on the part of the law firm of M/S Ligomarc Advocates which was representing the 1st Defendant (UPRS), the 3rd Defendant (Mr. Kabiito Karamagi), and the 4th Defendant (Ms. Ritah Birungi Baguma).

Brief Background

[2] It is alleged in the suit that on the 7th day of August 2019, the 1st Defendant (Uganda Performing Rights Society Limited) posted a Notice of Intended Enforcement that was dated the 5th day of August 2019 against the Plaintiff

(Quality Uganda Ltd T/A Quality Supermarket) characterizing it as a defaulter of license fees. The Notice was issued on the 1st Defendant's official social media platforms on Facebook and Twitter. On the 13th day of August 2019, the 3rd and 4th Defendants (Kabiito Karamagi and Rita Birungi Baguma) acting as Caretaker Managers of the 1st Defendant wrote enforcement notices to the Plaintiff claiming for a total sum of UGX 71,646,172/= for alleged licensing fees for use of musical works and sound recordings at the Plaintiff's branches for the period dating 2014 – 2019. On the 29th of August 2019, the Plaintiff through their advocates responded to the notices of enforcement disputing the claims. It is alleged that the Defendants did not respond to any of the issues raised by the Plaintiff in the letters written by the lawyers of the Plaintiff. Rather, on the night of 6th September 2019, the Defendants carried out a joint operation at the Plaintiff's premises at Lubowa branch to establish whether the Plaintiff was infringing on any copyright/musical works of the 1st Defendant's members. It is this operation that led to the allegations contained in the plaint in the main suit. The Defendants respectively filed their written statements of defence in which they denied the allegations.

Representation and Hearing

[3] At the scheduling conference, the Plaintiff was represented by Mr. Amos Masiko from M/S Ortus Advocates; the 1st, 3rd and 4th Defendants by Mr. Innocent Ddamulira on brief for Mr. Kakuru Martin from M/S Ligomarc Advocates; and the 2nd and 5th Defendants by Ms. Mpoza Cynthia on brief for Ms. Buhikire from the Legal Department of the Uganda Registration Services Bureau (URSB). It was agreed that the preliminary objections be raised and argued by Counsel by way of written submissions which were duly filed and adopted by the Court. I have taken the respective submissions into consideration in the course of determination of the preliminary point of law raised by the Plaintiff's Counsel.

Submissions by the Plaintiff's Counsel

[4] Counsel for the Plaintiff submitted that M/S Ligomarc Advocates was tainted with conflict of interest and, as such, it cannot represent the 1st, 3rd and 4th Defendants. Counsel stated that the 3rd and 4th Defendants were being sued in their official capacity as Caretaker Managers of the 1st Defendant and as joint tortfeasors for several causes of action relating to their exercise of the caretaker powers against the Plaintiff. Counsel submitted that the particulars of conflict of interest were set out in paragraphs 2.1 to 2.4 of the Plaintiff's reply to the Defendants' written statement of defence. Briefly, these are that;

a) The 3rd and 4th Defendants are partners in M/S Ligomarc Advocates which firm was appointed as a caretaker manager of UPRS.

b) There is a real and apparent conflict of interest on when the firm will be acting as caretaker managers on the one hand and as advocates in the matter on the other hand.

c) The 3rd and 4th Defendants are potential witnesses in this matter and their legal firm in which they are managing partner and associate partner respectively is barred by **Regulations 9 and 10 of the Advocates (Professional Conduct) Regulations SI 267-2** from participating in the present proceedings as counsel.

[5] Counsel relied on the case of ***Uganda V Patricia Ojangole (Criminal Case No. 1 of 2014 (2014) UGHCACD 3*** for the definition of conflict of interest as adopted by Justice Lawrence Gidudu basing on the Black's Law Dictionary, 8th Edition. Counsel submitted that the position of a caretaker is akin to that of a trustee and carries with it several fiduciary duties and obligations. Counsel stated that the rule against "self-dealing" would come into play to prevent and restrain the same advocates from private profiteering as remunerated counsel by the same firm that was Caretaker Manager when the present suit arose. Counsel argued that a Caretaker cannot make a contract with themselves and retain themselves as Counsel in a matter challenging how they exercised their

caretaker powers. Counsel relied on the case of ***Hollis & Others v Rolfe & Others [2008] EWHC 1747 (Ch)***.

[6] Counsel further stated that the facts on record clearly show that the 3rd and 4th Defendants are partners in the law firm of Ligomarc Advocates; that Ligomarc Advocates was appointed as Caretaker Manager of the 1st Defendant; and that the 3rd and 4th Defendants were appointed nominees to carry out the assignments of caretaker managers. Counsel stated that the notices of intended enforcement in issue herein were issued by the 3rd and 4th Defendants in their capacity as appointed nominees of the firm; and the notices were issued on behalf of the 1st Defendant. Counsel therefore concluded that basing on the evidence on record, the firm of Ligomarc Advocates is conflicted in as far as its partners/employees and itself participated in a series of actions that led to the dispute that is before the Court.

[7] Counsel for the Plaintiff also submitted that the 3rd and 4th Defendants are potential witnesses in the matter as the Plaintiff intends to call them to prove certain claims in the suit. Counsel relied on the provision under Regulation 9 of the Advocates (Professional Conduct) Regulations. Counsel further cited Regulation 10 of the same Regulations which forbids an advocate from using his/her fiduciary relationship with his/her clients to his/her own personal advantage. Counsel argued that by retaining his law firm where he is the managing partner, the 3rd Defendant was abusing his fiduciary duty as a caretaker of the 1st Defendant for his personal advantage contrary to the said Regulation 10. Counsel therefore prayed to court to find that there was a demonstration of both actual and potential conflict of interest on the part of Ligomarc Advocates and that the firm is professionally bound not to participate in the current matter. Counsel prayed that the application be granted with costs to the Plaintiff.

Submissions in reply by the Defendants' Counsel

[8] In reply, Counsel for the Defendants submitted that the preliminary objection raised by the Plaintiff's Counsel basically raises two issues, namely; whether Ligomarc Advocates is conflicted in its representation of the 1st, 3rd and 4th Defendants; and whether the 3rd and 4th Defendants are potential Plaintiff's witnesses. Counsel submitted that to establish conflict of interest on the part of Ligomarc Advocates, the Plaintiff has the burden to prove existence of a fiduciary relationship between the Plaintiff and the Firm and that, by virtue of that relationship, the Plaintiff is prejudiced by the Firm's representation of the 1st, 3rd and 4th Defendants; such prejudice (the exploitation of a professional or official capacity for their personal or corporate benefit) being real or apparent. Counsel argued that it is such prejudice that is the basis for conflict of interest.

[9] Counsel submitted that **Regulation 9 of the Advocates (Professional Conduct) Regulations** and the cases cited by the Plaintiff's Counsel are inapplicable to the matter at hand and have been cited out of context. Counsel argued that an objection to an advocate's representation of an adversary based on conflict of interest ought to be raised by a party that is prejudiced by the firm's representation of its adversary. Counsel submitted that in the present matter, there is no relationship of any kind between the Plaintiff and the Firm. As such, the Plaintiff would not be prejudiced by the Firm's representation of the named defendants. Counsel further argued that the Plaintiff's allegations of self-dealing were speculative and hypothetical.

[10] Counsel also submitted that although the 3rd and 4th Defendants are witnesses; they are not witnesses for the Plaintiff that the plaintiff shall call in support of its case. Counsel stated that the appearance of the 3rd and 4th Defendants in this suit is not in their capacity as advocates but rather as parties to the suit, entitling them to representation of their choice, unless the

Court finds reason to believe that the representation of the defendants by the Firm will not achieve the ends of justice. Counsel therefore prayed that the Court dismisses the preliminary objection with costs against the Plaintiff.

[11] Counsel for the Plaintiff filed submissions in rejoinder which I have also taken into consideration.

Court Determination

[12] Counsel for the Plaintiff based their allegation of conflict of interest upon the combined application of *Regulations 9 and 10 of the Advocates (Professional Conduct) Regulations S.I 267 – 2*. The gist of the argument by the Plaintiff's Counsel is, first that because it is apparent that the 3rd and 4th Defendants will be required as witnesses in this matter and they are members of M/S Ligomarc Advocates, a Firm that was appointed as Caretaker Manager of the 1st Defendant, the entire Firm is conflicted on basis of the application of the said Regulation 9. Secondly, that on basis of Regulation 10 of the said Regulations, the Firm was using its fiduciary relationship with the 1st Defendant to their personal advantage and to the prejudice of the Plaintiff.

[13] Conflict of interest is defined in the Black's Law Dictionary, 8th Edition, as: -

a) **A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.**
b) **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.**

[14] In ***Uganda vs Patricia Ojangole (Criminal Case No. 1 of 2014) [2014] UGHCACD 3***, **Justice Lawrence Gidudu** had this to say on the subject:

"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 [but] 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 a lawyer and client."

[15] On the facts of the present case, it is clear that we are not concerned with any incompatibility between the interests of two of a lawyer's clients. There is no allegation by the Plaintiff that it is or has ever been a client of M/S Ligomarc or any of its advocates. As such, the second part of the definition of conflict of interest as above set out does not apply to the present case. It follows therefore that our concern in the present case is an allegation of existence of a real or seeming incompatibility between one's private interests and one's public or fiduciary duties. The Court therefore has to analyze whether the facts of the present case present such incompatibility. It is alleged by the Plaintiff that they do and the Plaintiff's Counsel bases this contention upon the application of Regulations 9 and 10 of the Advocates (Professional Conduct) Regulations.

[16] *Regulation 9 of the Advocates (Professional Conduct) Regulations* provides as follows:

"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."

[17] The above provision has been subject of interpretation in a number of cases. In ***Uganda Development Bank vs. Kasirye, Byaruhanga and Company Advocates SCCA No. 35 of 1994***, it was held that the regulation aims at distinguishing between an advocate practicing before the court and a witness. In such cases the advocate has to choose either to be a witness or Counsel in contentious matters and not both. The sole criteria are whether the advocate before appearing, has reason to believe that he would be a witness in the case; or having appeared, and finding himself a witness, he ought not to continue to appear.

[18] In ***Henry Kaziro Lwandasa vs Kyas Global Trading Co. Ltd, HCMA No. 865 of 2014***, **Madrama J.** (as he then was) held thus:

"The regulation bars an advocate who may be required to appear as a witness to give oral or affidavit evidence in any contentious cause or matter from appearing before any court or tribunal hearing the matter. The regulation is permissive on one part and mandatory on another part ... The first duty is placed on an advocate and is subjective in that it is upon the advocate, based on his or her belief about the facts and circumstances of the case that he or she will be required to appear before the court or tribunal as a witness, to decide whether to represent a party in the proceedings. This first part of the regulation is couched in permissive terms and imposes a duty on an advocate to step down once he or she believes that he or she will be required to appear as a witness ... The second part of regulation 9 however makes it

imperative for an advocate to cease appearing for a client when it appears or becomes apparent during the proceedings that he or she will be required to give evidence in the cause or matter before the court or tribunal. When it becomes apparent, the advocate shall not continue with the representation of a client in the cause or matter."

[19] Clearly to me, the rule is straight forward where an advocate who will be required to appear as a witness also wishes to appear before the court as an advocate. The options are clear in that regard. But that is not the issue before the Court in the present matter. In this matter, two advocates are defendants in the matter (the 3rd and 4th Defendants). They are not listed as witnesses on the pleadings of any of the parties. However, in the Joint Scheduling Memorandum filed on 19th May 2021, endorsed by Counsel for all the parties, the 3rd and 4th Defendants are included on the Plaintiff's list of witnesses. In my view, if the 3rd and/or 4th Defendants were appearing as advocates in this matter, such would have been sufficient to make them believe that they would be required to give evidence in the matter and they would be obliged to step down.

[20] In this case, however, the 3rd and 4th Defendants are not appearing as advocates; they are simply parties to the suit. Nevertheless, the argument herein by the Plaintiff is that since the said defendants are partner and associate respectively in the Firm (M/S Ligomarc Advocates), which Firm was appointed as Caretaker Manager for the 1st Defendant, and the said advocates were appointed as nominees of the Firm, the conflict created by the necessity of the two advocates to act as witnesses extends to the entire Firm. Counsel for the Plaintiff relied on Section 5(2) of the Partnership Act 2010 which is to the effect that every partner is an agent of the firm and his or her other partners for the purpose of the business of the partnership. Counsel argued that as such, the Firm is bound by the actions of the said two partners and there

would be an ethical risk where the said partners will give evidence in chief and be cross examined by a partner or employee of the same firm. This argument is opposed by Counsel for the Defendants.

[21] The above argument by Counsel for the Plaintiff appears to be based on the notion that evidence is given by a witness in a collective or representative capacity. However, under the law, being a witness is based on knowledge of particular facts and a person who is competent is the only person to testify on matters of fact of which he or she saw, heard or participated in. In ***Henry Kaziro Lwandasa vs Kyas Global Trading Co. Ltd (supra)*** the Court agreed with the above proposition when it held that the entire partnership cannot be excluded on the basis of regulation 9 of the **Advocates (Professional Conduct) Regulations SI 267 – 2**. The court held the view that the regulation deals with individuals as required witnesses and not the firm. As such, it is only an individual who can be a witness and not the firm. Indeed, as a matter of principle, Justice Madrama was of the view that **Regulation 9** of the **Advocates (Professional Conduct) Regulations** deals with incompatibility of the role as advocate and witness in the same case and not conflict of interest.

[22] I am persuaded by the above finding by the Learned Judge (as he then was). It is not a correct legal proposition that where two advocates in a firm are witnesses or potential witnesses in a matter that the entire firm is thereby conflicted. Indeed, I would agree that the principle raised under Regulation 9 is not one of conflict of interest but of avoidance of personal involvement in a client's case. This is because, as pointed out herein above, the role and competence of a witness is personal and would not raise any incompatibility between one's private interests and one's public or fiduciary duties especially in the circumstances such as in the present case.

[23] Therefore, in as far as the application of Regulation 9 of the Advocates (Professional Conduct) Regulations is concerned, the objection by the Plaintiff's Counsel is not made out and it fails.

[24] Concerning Regulation 10 of the Advocates (Professional Conduct) Regulations, it provides as follows:

> ***"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."*

[25] Where a fiduciary relationship exists between parties, conflict of interest will easily be traced. Fiduciary duties are imposed upon a person or an entity who exercises some discretionary power in the interests of another person in circumstances that give rise to a relationship of trust and confidence. In the famous case of ***Bristol and West Building Society v Mothew [1996] EWCA Civ 533; [1998] Ch 1; [1997] 2 WLR 436*** [**Per Millett LJ**], it was held that the expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.

[26] The court in ***Bristol and West Building Society v Mothew (supra)*** went ahead to define a fiduciary as someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. It pointed out that the distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust;

he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. Such are some of the defining characteristics of a fiduciary.

[27] In the instant case, it is clear that as between the 3rd and 4th Defendants and the Firm (M/S Ligomarc Advocates) on the one hand and the 1st Defendant on the other hand, a fiduciary relationship existed. There is, however, no evidence of such a relationship as between the Firm and its advocates on the one hand and the Plaintiff on the other. The Plaintiff, therefore, cannot enforce a relationship where none exists. The argument by the Plaintiff appears to be that the Firm and its advocates were exploiting their fiduciary relationship with the 1st Defendant to the prejudice of the Plaintiff. The question, however, is whether a third party can base a claim on a fiduciary relationship to which it is not a party and in a situation where none of the parties to the relationship is complaining?

[28] The answer to the above question appears to be a No. As seen from the above exposition based on the decision in ***Bristol and West Building Society v Mothew (supra)***, a fiduciary relationship is between and binds two persons; the fiduciary and the beneficiary. The duties placed upon the fiduciary are owed to the beneficiary. Where the beneficiary is not complaining, a third party cannot base on alleged breach of fiduciary duties to lay a claim.

[29] In the instant case, the relationship existed between the Firm (M/S Ligomarc Advocates) and its advocates on the one hand and the 1st Defendant (UPRS) on the other. Given that there is no allegation by the 1st Defendant (the beneficiary/client) of breach of any fiduciary duty, a claim of conflict of interest based on alleged breach of any fiduciary duties cannot be sustained by the Plaintiff, a third party to the relationship. As such, the objection by the Plaintiff in as far as it is based on alleged breach of fiduciary duties and based on the

application of Regulation 10 of the Advocates (Professional Conduct) Regulations cannot be sustained and is not made out by the Plaintiff. The objection in as far as it is based on that account would fail.

[30] However, there is a matter, though subtly argued by the Plaintiff's Counsel, that comes out of the Plaintiff's argument and is highly pertinent. Indeed, the same appears to be the actual gist of the grievance by the Plaintiff only that it was obscured by reliance by the Plaintiff's Counsel on the application of Regulations 9 and 10 of the Advocates (Professional Conduct) Regulations. The matter is to the effect that the appointment as Caretaker Manager was issued to the Firm (M/s Ligomarc Advocates). The Firm was asked to nominate individuals to execute the assignment. The Firm nominated the 3rd and 4th Defendants who are said to be Managing Partner and Associate Partner respectively in the Firm. The letter of appointment dated 26/7/2019 is on record as Annexture D to the WSD filed for the 1st, 3rd and 4th Defendants. As nominee caretaker managers, the 3rd and 4th Defendants executed the enforcement operation that is the subject of the suit.

[31] Counsel for the Plaintiff argued that as a Caretaker Manager, the Firm could not make a contract with themselves and retain themselves as Counsel in a matter challenging how they exercised their caretaker powers. The argument of the Plaintiff's Counsel in that regard is that the 3rd and 4th Defendants being nominees and agents of the Firm, their acts were done for and on behalf of the Firm; and they thus bind the Firm. This is correct going by the principles both of partnership law and of the agency-principal relationship. That being the case, the Firm is, in effect, a party to the suit. The real issue therefore is whether the Firm can be a party/litigant on the one hand and advocate on the other, particularly in a contentious matter. The answer appears to be a No. Rule 2 of the Advocates (Professional Conduct) Regulations provides for the manner of acting on behalf of clients. Sub-rule (1) thereof provides as follows:

"Manner of acting on behalf of clients.

(1) No advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorised agent."

[32] The questions that arise are; first, if the Firm is permitted to act as both a party/litigant and advocate, how did the Firm receive instructions and from whom? Secondly, is it possible for a person to act as both advocate and client in the same matter? Under Section 2(a) of the Advocates Act Cap 267, "advocate" means any person whose name is duly entered upon the roll. While under Section 2(b) of the Act, "client" includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, an advocate and any person who is or may be liable to pay to an advocate any costs. Clearly from the above definitions, if a firm of advocates was allowed to represent itself in a contentious matter, it would be in a position of principal and agent at the same time.

[33] In my view, the above scenario would be inconsistent with the professional duties of an advocate or the firm of advocates for that matter. Under the law, advocates are officers of the court and owe a duty to the court to see that justice is done. One justification for prohibiting such a fusion of roles is that if an advocate or a firm of advocates are left to act as their own advocates, they may carefully select the evidence which will only support their case strategy to serve their own interest. In such circumstances, their duty as advocates to the court will certainly be compromised. As stated by Justice Madrama in ***Henry Kaziro Lwandasa vs Kyas Global Trading Co. Ltd (supra)***, such a situation evokes the American saying that "a lawyer who represents himself has a fool for a client". Such will certainly not be in the interest of justice.

[34] In light of the foregoing, I find sufficient reason to believe that the representation of the 1st, 3rd and 4th Defendants by the Firm of M/s Ligomarc Advocates will not achieve the ends of justice and will run counter to the Advocates (Professional Conduct) Regulations. For this reason, the Firm ought to have disqualified themselves from professionally handling this matter and should have appointed other advocates to represent them. Since they did not and have not seen reason to do so, the Court has to disqualify them. I accordingly order that the Firm of M/S Ligomarc Advocates is disqualified from representing any of the Defendants in the suit herein. The objection by the Plaintiff is therefore partly upheld with costs against the 1st, 3rd and 4th Defendants.

It is so ordered.

Dated, signed and delivered by email this 16th day of December 2021.

Boniface Wamala
JUDGE