

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE MISC. APPLN. NO. 206/2019
ARISING FROM LDR.00.277/2018

BYARUHANGA BARIGYE ENOCH

..... APPLICANT

VERSUS

TUMUSIIME KABEGA&CO. ADVOCATES

KAMPALA CEMENT CO. LIMITED

..... RESPONDENT

BEFORE:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1.MR. BWIIRE ABRAHAM

2.MAVUNWA EDSON HAN

3. JULIAN NYACHWO

RULING

This application is brought under Section 40(2) of labour Disputes (Arbitration and Settlement) Act, 2006 and Order 52r,1, 2 and 3 of the Civil Procedure Rules S.I 71-1. The application is supported by an affidavit and another in rejoinder both deponed by Mr. Byaruhanga Barigye Enoch.

REPRESENTATION

The Applicant was represented by Mr. Moses Ingura of M/S Ingura and Co. Advocates and the Respondent by Mr. Ronald Oyine of Tumusiime Kabega& Co. Advocates.

The grounds of the application are as follows:

1. That the 1st Respondent is conflicting in acting for the 2nd Respondent and therefore in violation of the advocate personal involvement in client's case contrary to The Advocates (Professional Conduct) Regulations S.I 267-2.

2. That the Advocates in the 1st Respondent are listed as potential witnesses in Labour Dispute Reference No. 277 of 2018 and should be barred from representing the 2nd Respondent in the Labour Dispute /Claim.
3. That an injunction and restraining order is issued prohibiting the 1st Respondent from appearing or acting as counsel for the 2nd Respondent in LDR No.277 of 2018.
4. The costs of this application be provided for.

The Applicant's case:

The gist of the Applicant's case as stated in the Motion and supporting Affidavit is as follows:

He is the Claimant in LDR No.277/2018, where he seeks remedies for unfair dismissal from employment against the 2nd Respondent, who is named in the Claim. According to him the 1st Respondent, her officers and himself were colleagues and co-agents at the 2nd Respondent, with overlapping roles for over 5 years. Therefore the 1st Respondent and its officers are privy to several operational activities touching the contractual relationship between him and the 2nd Respondent and are in possession of several documents, which are now contentious issues before this Court in the main claim. He further argues that, the 1st Respondent, its officers and particularly, Mr. Macdosman Kabega who is a Director and de facto in-house Counsel for the 2nd Respondent, are advocates representing the 2nd Respondent yet Mr. Kabega is named as one of his witnesses. He contends that in the circumstances, the firm and its officers should be restrained from appearing or representing the 2nd Respondent in the main claim, because to allow them to do so, would be to condone the violation of the Advocates (Professional Conduct) Regulations and it will be prejudicial to him, therefore the Application should be allowed.

The Respondent's case

Mr. Macdosman Kabega and Mr. Ritesh Joshi, in their Affidavits in opposition unanimously deny that the Applicant was ever employed by the 2nd Respondent, or that the Applicant was ever involved in any of the 2nd Respondent's legal matters, nor did he ever give any instructions to the 1st Respondent to represent him or his interests at any one time.

Kabega and Retish also contend that the Applicant had over the time known that the 1st Respondent was the 2nd Respondent's legal representative therefore, he cannot claim to use any of its officers as witnesses against their own client in the main claim(supra). Both state that it is the 2nd Respondent's right to legal representation hence its instructions to the 1st Respondent, which is duty bound to offer it legal services among other services. They depose that there is no ethical dilemma which arises out of this arrangement and be that as it may, the two are different entities carrying out different businesses hence the Applicant has no control over who the 2nd Respondent choses to employ or not.

Mr. Kabega further denied ever being engaged to do any legal work for the Applicant or 1st Respondent ever being instructed to represent him in any legal matter and therefore to allow this application, would be to deny the 2nd Respondent an opportunity to defend itself by Counsel of its own choice, which is a violation of the principles of natural Justice, as enshrined in the Constitution of the Republic of Uganda and therefore the application should be dismissed.

SUBMISSIONS

In his submissions Counsel for the applicant laid emphasis on the importance of lawyers and Advocates as officers of court being cognisant of their obligation to abide by their professional code of Conduct and to avoid being in conflict of interest situations. It was his submission that where they found themselves in any conflicted situations, rather than get tempted to twist facts, or to coaching witnesses to suit the

circumstances of their clients and mislead Court they should withdraw from such matters.

It was his submission that, evidence was led in the instant case, to demonstrate that the 1st Respondent, her officers and the Applicant were colleagues and co-agents with overlapping roles in handling matters of the 2nd Respondent for the past 5 years and therefore the 1st Respondent and its officers were privy to and in possession of several documents, witnessed several operational activities touching the contractual issues between the Applicant and the 2nd Respondent in a matter before this court under LDR 277/2018 , where he was seeking remedies for fundamental breach of his employment Contract among others against the 2nd Respondent who is the respondent in the Claim. He argued that having been privy to the illegalities and fraudulent conduct of the 2nd Respondent pertaining to the claim, the officers of the 1st Respondent are potential witnesses and they were in a position of conflict of interest. He singled out Mr. Kabega as a potential witness for the Applicant, given that Mr. Kabega is one of the Directors of the 2nd Respondent and a partner in the 1st Respondent, making him privy to issues relating to the Applicant's employment dispute against the 2nd Respondent.

He prayed that Court should therefore, restrain M/s. Tumusiime Kabega and Company Advocates and its officers from representing the 2nd Respondent who is the Respondent in the main claim.

He argued that given that the 1st Respondent's officers and particularly Mr. Kabega who is a Director of the 2nd Respondent will be called to testify for the Applicant in the main Claim, they are in a conflict of interest position, for representing the 2nd Respondent. He insisted that the memorandum of claim, indicated that many of the 1st Respondent's officers occasionally worked with the Applicant in the affairs of the 2nd Respondent and this brought them into full contact and knowledge of the nature of the relationship between the Applicant and the 2nd Respondent and therefore they

are all potential witnesses. In the circumstances therefore the 1st Respondent should be restrained from appearing or representing the 2nd Respondent in the main claim. In reply Counsel for the Respondent submitted that the 1st Respondent was indeed the 2nd Respondent's legal representative and the Applicant was always aware about it. He insisted that the 1st Respondent never represented the Applicant at any point in time nor has it ever been instructed to do so. He contended that the Applicant did not explain to court, how the conflict of interest he claims, arises. According to him the Applicant has failed to establish any link to any reason why the 1st Respondent should be prohibited from representing the 2nd Respondent.

Counsel cited the definition of conflict of interest in the Black's law dictionary 8th edition at page 319 as

"a real or 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 don't consent..."

In his opinion the intention to call Counsel MacDosman Kabega as a witness, did not create a conflict of interest because the Applicant has never been the 1st Respondent's client nor has he ever given the Respondent firm any instructions to represent him in any legal matter so as to create a conflict of interest. He cited **Ayebaziwe Raymond vs Barcays Bank Uganda Ltd and OR's, CS No. 165/2012**, whose holding was to the effect that he who alleges must prove prejudice. In his view there was no conflict of interest arising out of the 1st Respondent representing the 2nd Respondent because the Applicant has not proved any prejudice. Instead it is the 2nd Respondent which will be prejudiced, if it is not allowed its constitutional right to choose Counsel of its own choice to represent it in the main claim.

He argued that given that the 1st Respondent has always been Counsel for the 2nd Respondent, a fact well known to the Applicant, he cannot purport to list its officers as

witnesses to testify against a party they represent, because this would amount to a breach of professional confidentiality.

He further argued that the memorandum of claim did not even list the firm of Tumusiime Kabega & CO advocates, as witnesses in the main Claim, contrary to Order 6 rule 2 which makes it mandatory for the pleadings to list the witnesses to be called. According to him, the Applicant had no right to call the 1st Respondent's officers as his witnesses, because he is not party to any of the legal documents drawn by Tumusiime Kabega & Co Advocates in any legal matter in which they represent the 2nd Respondent. In any case calling them as such, would cause them to breach client confidentiality. He cited **Henry Kaziro Lwandasa vs Kyas Global Trading Co. Limited Misc. App. No. 865/2014**, in which Justice Lameck Mukasa cited **Uganda Development Bank vs Kasirye Byaruhanga and Company Advocates SCCA No. 35 of 1994**, for the legal proposition that what was material is whether Counsel was required to appear as a witness and Counsel at the same time. In this case, his Lordship overruled the application on the grounds that Counsel was not required to appear as a witness and Counsel at the same time. Counsel for the Respondent in the instant application prayed that the application is dismissed because it lacked merit.

RESOLUTION

We have carefully considered the motion, the affidavits in support and in opposition and both Counsels submissions. The Applicant's dispute as we understand it, is that, the 1st Respondent's representation of the 2nd Respondent in his Claim before this court Under LDR No.277/2018 , places it and its officers are in a conflict of interest position. This is because the 2nd Respondent's officers having been his colleagues and co-agents at the 2nd Respondent, for the past 5 years, made them privy to its several operational activities , including documents and activities touching the contractual issues relating to his claim.

It is not disputed that the right to a fair hearing as provided Under Articles 28 and 44 the Constitution of the Republic of Uganda 1995(as Amended) is sacrosanct. It is also true that Lawyers as officers of Court must abide by the Professional Code of conduct and they must not be involved in situations that place them in positions of a conflict of interest. Regulation 9 (supra), provides that:

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 noncontentious matter or fact in any matter in which he or she acts or appears."

We would like to agree with Justice Madrama's interpretation of rule 9 (supra) in **Ayebazibwe Raymond vs Barclays Bank and Ors CS No. 165/2012**, that:

"... it puts a 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 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. it does not put the duty on an advocate in terms of his or her subject belief 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 to be 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...”

In the instant case, the Applicant contends that the 1st Respondent's officers are potential witnesses; however, he only singles out Mr. Kabega, who is a partner in the 1st Respondent and a Director of the 2nd Respondent as the witness he intends to call and no other officer of the 1st Respondent. We noted that the suit under LDR 277/2018 is not against the 1st Respondent but the 2nd Respondent and it was not disputed that Mr. Kabega is one of the 2nd Respondents Directors and a partner in the 1st respondent which is retained as legal representative of the 2nd Respondent. It was the Respondent's argument that the Applicant violated O6 rule 2 when he did not name Mr. Kabega as a witness in the memorandum of claim therefore, he was barred from calling him as such. A careful perusal of the memorandum of claim, however indicated that the Applicant intended to testify himself and apply to Court for leave to call other witnesses. There is no law that bars him from seeking leave of court to call other witnesses, especially given that he would do so in the memorandum.

Therefore, the likelihood of seeking leave to call Mr. Kabega as one of his witnesses in the claim against the 2nd Respondent, given that he is one of its Directors and part of its management is not farfetched. Mr. Kabega is defacto in-house Counsel for the 2nd Respondent and therefore calling him as a witness and at the same time as Counsel for the 2nd Respondent would be a violation of Regulation9(supra). On these grounds he cannot represent the 2nd Respondent and is therefore, barred from doing so.

We believe that a law firm is engaged as a firm of Advocates, collectively and not as individual lawyers. Therefore, every Advocate in a law firm is presumed to be engaged and knowledgeable about all matters being handled by that firm. However, in circumstances such as the instant case, it is our considered opinion that, where an Advocate is singled out as an errant officer, the entire firm should not be condemned for the individual lawyers acts or omissions.

In the Instant case Mr. Kabega was singled out as one of the directors of the 2nd Respondent who is privy to the issues relating to the Applicant's employment dispute in the main claim and he did not dispute his role as Director and as already established it is likely for him to be called as a witness. Given that the Claimant did not identify any other officer of the 1st Respondent, who may be in a conflict of interest situation, in his claim, we have no reason to condemn the entire law firm.

We also do not subscribe to the assertion that given that the 1st Respondent was the 2nd Respondent's legal representative, it would be a breach of confidentiality for any of its officers to be called as witnesses in a matter against the 2nd Respondent.

We do not think that the framers of the Advocates (Professional Conduct) Regulations statutory instrument No.267-2, and particularly Regulation9(supra) thereof, were not alive to the fact that an Advocate was a party's legal representative and was privy to his or her client's confidential matters. On the contrary we believe that, this is the reason why an Advocate in a situation such as the instant case is required to recuse him or herself, if he or she is called upon to be a witness in a matter or matters in which they are in personal conduct. The breach of confidentiality in our opinion would only arise if the information required of Counsel would be prejudicial to his or her client and the prejudice has to be proved.

We do not see any reason which could create a breach of confidentiality if the 1st Respondent's officers are called as witnesses in a matter in which employment/contractual issues of an employee such as the one in the instant case, are in contention, as long as they are not in personal conduct of the same matter.

In the circumstances we do not think that any prejudice would arise against the 2nd Respondent if any other of its officers are called as witnesses and they not proved any. Even if it is an Advocate's duty to observe the utmost good faith towards his or her client, the 1st Respondent has not shown how the testimony of any of the officers of the 2nd Respondent would be prejudicial to the 2nd Respondent. We are not convinced

that the 2nd Respondent will be prejudiced in any way, given that the information regarding the Applicant's contract of employment with the 2nd Respondent in our view should not be of a confidential nature to warrant its protection by Court and even if it was, the duty is on the 2nd Respondent to prove its confidentiality and what prejudice would be occasioned by divulging it. This was not done.

In the circumstances the 1st Respondent cannot be barred from defending the 2nd Respondent except, for Mr. Kabega who is one of its partners, and a Director of the 2nd Respondent.

Therefore, the Application substantially fails, save for the directive that Mr. Kabega should not appear as Counsel for the 2nd Respondent. No order as to costs is made.

Delivered and signed by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA

PANELISTS

1.MR. BWIIRE ABRAHAM

2.MAVUNWA EDSON HAN

3. JULIAN NYACHWO

DATE. 25/02/2020

