THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT)

MISC. APPLICATION NO. 1063 OF 2017

(ARISING FROM CIVIL SUIT NO. 493 0F 2017)

SUDHIR RUPARELIA :::APPLICANT

VERSUS

1. MMAKS ADVOCATES

2. AF MPANGA ADVOCATES (BOWMANS UGANDA)

3. CRANE BANK LIMITED (IN RECEIVERSHIP)

4. BANK OF UGANDA ::RESPONDENTS

<u>BEFORE: HON JUSTICE DAVID K WANGUTUSI</u>

<u>RULING</u>

In the application Sudhir Ruparelia, referred to as the Applicant seeks declarations against MMAKS Advocates, AF Mpanga Advocates – Bowman's Uganda, Crane Bank Limited (in Receivership) and Bank of Uganda, referred to in these proceedings as the 1st, 2nd, 3rd and 4th Respondents.

The declarations he seeks are:

1) That the 1st and 2nd Respondents are conflicting in acting for the 3rd and 4th Respondents and therefore in violation of the advocate client relationship and the Advocates (Professional Conduct) Regulations.

2) That the lawyers in the 1st and 2nd Respondents are potential witnesses in HCCS 493 of 2017 and should be barred from representing the 3rd and 4th Respondents in the suit.

3) An injunction and or restraining order against the appearance and or acting as Counsel for the 3rd and 4th Respondents in HCCS 493 of 2017.

The application is grounded on the following:

That before the suit, the Applicant was a client of the 1st and 2nd Respondents, and in representing and advising him they became aware of facts which could be prejudicial to him. That because of that relationship the appearance of the 1st and 2nd Respondent on behalf of Plaintiffs who have taken him to court could be a violation of the advocate – client relationship.

Secondly, that the claim in HCCS 493 of 2017 raises issues and claims that were obtained during the interaction between the Applicant and the 1st and 2nd Respondent as client and advocate. That the 1st and 2nd Respondents have divulged some of the confidential and privileged Information and are likely to divulge more if allowed to continue appearing in HCCS 493 of 2017.

Thirdly that the facts and issues as discerned in the pleadings and annexed documents many of which point at the direct involvement of the 1st and 2nd Respondents bring forth the need to summon them as witnesses if the Applicant is to properly defend himself.

Fourthly that the interaction between the Applicant and the 1st and 2nd Respondent created a fiduciary relationship which obligation was violated when they accepted instructions to sue the Applicant, an act that gives rise to conflict of interest.

Fifthly that the 1st and 2nd Respondent have acted in breach of the Advocates Act, Cap 267 and the Advocates (Professional Conduct) Regulations.

Sixthly that the 3rd and 4th Respondents are at fault for appointing the 1st and 2nd Respondents, knowing very well that the latter had all along acted for the Applicant. That such appointment was in bad faith, whose intention was to enable the 3rd and 4th Respondent get an advantage to the prejudice of the Applicant.

On these grounds the Applicant sought an injunction against the 1st and 2nd Respondent's appearance in the suit against the Applicant.

The 1st and 2nd Respondent in reply contend that they acted for the 3rd Respondent and not the Applicant. That in that case they could not have come across any facts which are prejudicial to the Applicant.

Deposing specifically on behalf of the 2nd Respondent, William Kasozi its Managing Partner in paragraph 4 of the 2nd Respondent's Affidavit in Reply states;

4. *"That prior and without prejudice to my more detailed depositions below, I wish to state the following fundamental and immutable facts:*

(a) At no time since its founding in 2003 has AF Mpanga, Advocates acted for the Applicant. None of our Partners and Associates have ever been engaged or in any way executed any instructions for the Applicant.

(b) It follows from the fact that I have stated in (a) above, that we AF Mpanga , Advocates are not aware of any facts which may be prejudicial to the Applicant in conduct of his defence of HCCS No.493 of 2017 by virtue of his having been our client.

(c) All of the facts that we know about this case are as a result of being Advocate for the 3rd Respondent upon the instructions of the 4th Respondent who is the former's Receiver and

(d) The Advocate –client relationship between AF Mpanga, Advocates and the 3rd and 4th Respondents in HCCS No. 493 of 2017 means that neither Mr. David F. K Mpanga, who has had direct day to day conduct of this matter, nor any other Partner or Associate is a competent and compellable witness for the Applicant on any of the matters that the Applicant and Azim Tharani assert in their respective affidavit."

Turning to the 1st Respondent, her contention that the Applicant was not her client and that as such she was not privy to prejudicial facts relevant to the claims the subject of this suit is brought out in the Affidavit of Ernest Sembatya a Partner in the 1st Respondent.

He deposes in paragraph 3 as follows;

> *3…… "That the Applicant SR states that he has been advised by his lawyers Kampala Associated Advocates and that he believes that advice to be true that by virtue of MMAKS Advocates having been lawyers of the 3rd Respondent (Crane Bank) in which he is a shareholder and director, MMAKS Advocates were also his lawyers. This is patently wrong legal advice and SR's belief is clearly mistaken…. SR is not and has never been a client of MMAKS Advocates."*

He continues in paragraph 4 in these words;

> *"SR states that the 1st Respondents were one of the Panel lawyers of Crane Bank and provided advice to Crane Bank's Board trainings. This is conceded and the 1st Respondent shall add that it still continues to act for Crane Bank (albeit now in Receivership). The present suit against SR is one of the matters that the 1st Respondent has been instructed by Crane Bank to conduct."*

Talking about the claim namely the five (5) monetary and one (1) property claims by Crane Bank against SR, Ernest Sembatya deposed in paragraph 6;

> *"These facts had been fraudulently concealed by SR and his associates/co-conspirators prior to the issuance of PWC's Forensic Audit Report. It cannot therefore be said and neither does SR aver in his Affidavit that he disclosed to the 1st Respondent any matters pertaining to this fraud. Accordingly the contention that the 1st Respondent is privy to prejudicial facts relevant to the extraction claims the subject of this suit and obtained other than from PWC Forensic Audit Report is untrue."*

From the foregoing excerpts, the 1st and 2nd Respondent freely concede that they worked and represented the 3rd Respondent. They also concede that all the time they have represented the 3rd Respondent, the Applicant has been a shareholder and director. Their contention however is that while they represented the 3rd Respondent which is a corporate person on its own, they did not represent the Applicant.

The issue here now is to find out whether in the course of representing the 3rd Respondent, they also handled matters with the Applicant, which are going to arise in HCCS No. 493 of 2017.

Part of the answer to the question lies in the pleadings. Paragraph 8 of the Plaint reads;

> *"The 1st Defendant founded the Plaintiff in 1995 and has been a Director and Vice Chairman of the Board of the Directors since its foundation."*

The Plaint then goes on in paragraphs 8.1, 8.2, 8.3, 8.4 and 8.6 to allege how the Applicant fully controlled the 3rd Respondent through other bodies, concluding in paragraph 8.6 as follows;

> "*By these means, at the time of the BOU's aforementioned intervention in October 2016, the 1st Defendant beneficially owned 100% of the Plaintiff's issued shares; and has all times material to this suit held and exercised a similar level of ownership and control (as defined in Section 24 of the FIA)of the Plaintiff."*

The Plaint as drafted and filed by the 1st and 2nd Respondents emphasizes the Applicant's control in paragraph 8.7 in these words;

> *"Similarly the 1st Defendant has at all material times been the dominant executive force in the Plaintiff, exercising close day to day control over its affairs and activities."*

On the Applicant's hold on the 2nd Defendant the Plaint in paragraph 8.8 reads;

> *"The 1st Defendant is also the beneficial owner of and/or controls, the 2nd Defendant. The 2nd Defendant is an associate of the 1st Defendant within the meaning of section 3 of the FIA."*

The Plaint also describes the 1st Defendant in Paragraph 9 as;

> *"The 1st Defendant's combined legal and beneficial ownership of 100% of the Plaintiff until October 2016 contravened section 24 of the FIA."*

The description given to the Applicant by the 1st and 2nd Respondent was of a person who "**exercises directly or indirectly a controlling influence over the financial institution, its major policies or strategies singly or in concert with a related person or group of related person."**

In referring to the Applicant as a "**dominant executive force in the Plaintiff, exercising close day to day control over its affairs and activities"** the 1st and 2nd Respondent paint a picture of the Applicant as one **"entitled and has power to determine the appointment of the majority of the directors of that financial institution."** In addition, **"the power to appoint or remove without concurrence of any other person, all or the majority of such directors."**

The 1st and 2nd Respondents also seem to allege when they refer to section 24 of the Financial Institutions Act, that the Applicant through his powers and authority could **"prevent any person from being appointed a director without his consent."**

In the Plaint they allege that the Applicant owned 100% shares. In my view, they suggest that the 3rd Respondent was the Applicant and vice versa.

As it stands, one can safely say that without the Applicant's say, the 1st and 2nd Respondents could never be retained and where they were retained, the Applicant could sack them without seeking any ones approval. The picture painted of the Applicant is that the instructions to the Advocate came from him more than the 3rd Respondent. Under such an arrangement, a fiduciary relationship would be created more between the 1st and 2nd Respondents and the Applicant than with the 3rd Respondent.

Furthermore, in a situation such as that one confidential material prejudicial to the Applicant are more likely to emerge.

The 1st and 2nd Respondents have stated that at no time did the Applicant ever reveal his or the 3rd Respondent's secrets. The legal position however is that the Applicant now no longer needs to

prove that he revealed any secrets because they are presumed to flow from the Applicant to the Respondents during their interaction even where the Applicant did not intend to reveal them.

The presumption is that there is a possibility of disclosure and although some authorities state that the Applicant should plead the secret information he fears his advocate will reveal, recent authorities have come up to hold that such pleadings would be contrary to the intended secrecy.

On this Judge Weinfeld in **TC Theatre Corporation VS Warner Brothers Pictures, SDNY 195** wrote;

> "*To compel the client to show….. the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the court to probe further and shift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important rule of secrecy- to encourage clients to fully and freely to make known to their attorneys all facts pertinent to their cause."*

Because of the foregoing most courts are of the view that the presumption is irrebutable. Where the relationship has been substantial the presumption is stronger.

In the instant case, the Applicant and the 1st and 2nd Respondents have had a relationship of legal and litigation interaction. In my view there exists a substantial relationship between them enough to have obtained confidential information from the Applicant to the 1st and 2nd Respondent. The advocates and their clients while chatting pass on information. Importantly too one cannot distinguish it between parties in the firm because of what is referred to as **"Canteen factor."**

By **canteen factor** is meant ideal social chat between colleagues or with client that gives away vital information. So if the interaction is between one of the partners, it will be imputed to the others.

The sum total is that in the several years that the Applicant and the 1st and 2nd Respondents have interacted, ***chat this*** and ***chat that*** about the 3rd Respondent and the Applicant certainly took place.

In my view, a lot of information must have flowed from one to the other. A fiduciary relationship having existed as I have stated above, it would be unwise to allow the 1st and 2nd Respondent to represent any party against the Applicant in this case HCCS No. 493 of 2017.

Conflict of interest may not exist between an Advocate and a party at the onset of the suit, but an amendment of the pleadings or filing of a Written Statement of Defence, or a Counterclaim or addition of a Third Party may create a conflict of interest that was not previously expected.

This realignment of the parties seems to have arisen in the instant case when the Applicant filed a Counterclaim.

Mr. Mpanga negotiated and drafted the implementation agreement that detailed a settlement of issues between the Applicant and the Plaintiff. The implementation agreement was to operationalise and ensure the smooth flow of the Confidential Settlement and Release Agreement (CSRA). The CSRA contained clauses intended to sort out the differences between the Applicant and the Plaintiffs.

The CSRA however soon developed problems and the parties seem to have abandoned it. In his Defence and Counterclaim the Applicant alleged that the Respondents had breached the Implementation Agreement and he had as a result suffered damage. In the list of witnesses he included David Mpanga.

The moment Mr. David Mpanga participated in the negotiations and even went as far as drafting the implementation agreement, he ought to have known that should the documents' implementation and implications come into issue, he and his associates in making it would opt out of the realm of counsel into that of witness. Mr. Mpanga knew or ought to have known as early as 4th April 2017 that should questions concerning the agreement and its implementation arise, he would have a testimony concerning the disputed contents of the Implementation Agreement.

The reason for that position is because he participated in its negotiations and drafting. His status as a potential witness has been known since the dispute arose. This being the position, any continued appearance in a matter where it is now obvious that he and his firm's staff are going to

be required as witnesses for the Defendant would constitute a conflict of interest and deprive the Defendant of a chance to ably defend himself.

Further more in acting as counsel, there was a high risk of the advocate leaving out what he considered was injurious to his client's case or even his own firm; **In Commonwealth v Terry L. Palterson 432 MASS 767**, the Supreme Court while considering Regulation 8. In **Uganda Development Bank versus Ms Kasirye Byaruhanga and Company Advocates - Civil Appeal 35 of 1994** had this to say:

> *"It is meant to be an act and protection to counsel. It is intended also as a safe guard for the court. If an advocate is to give evidence, then as any other witness, he should stand cross examination. If during the process, there is any lapse of honesty, accuracy, or credibility, the court would have before it an advocate appearing in the case, who was shown to be unreliable. He is an officer of the Court. He would not only spoil his general character, but it would make it difficult for him to represent his client, since the Court might not be able to trust his advocacy.*
>
> *It is therefore much better that the two roles be separated. Yet, it is not that there is an offence under Regulation 8. Regulation 8 does not provide that an affidavit becomes defective or that a proceeding must be struck out. The remedy is anodyne - simply cease to appear and impliedly, offer other evidence if necessary. The fundamental principle in Regulation 8 is that a way should be sought of presenting the case or application without overlapping roles of Counsel."*

In the counter claim, the Applicant alleges breach of contract in which he contends that Clause 12 which required a return of US $ 8 million on account of breach of contract by the Respondents has not been fulfilled. He also contends that he is entitled to release of securities namely: LFR 130 Folio 18 Plot M418 Nakawa Industrial Area and LRV 1239 Folio 2 Plot 7 Parliament Avenue Kampala as provided for in Clause 4.1 of the Confidential Settlement and Release Agreement (CSRA) and Clause 2 of the Assignment and Assumption Deed.

Evidence is abundant that Mr. Mpanga and his firm negotiated and drafted the resultant agreement. Where provisions of the Agreement come into question, it is good thinking that the author and subsequently those who undertook to implement it would be or are likely witnesses.

Mr. Kanyerezi of the 1st Respondent submitted that the 1st and 2nd Respondents' lawyers cannot be called as witnesses. While that is normally the position, there are exceptions. The exception lies in section 125(b) wherein the advocate would disclose any fact observed by any advocate in the course of his or her employment as such, showing that any crime or fraud has been committed since the commencement of his or her employment.

In this suit, a big portion of it talks of nothing but fraud and illegal extraction of money and transfer of property. In my view, these allegations place the matter in the arena of exceptions.

The sum total is that the 1st and 2nd Respondents have found themselves in an adverse position to a former client. They are rightly presumed to possess confidential information learnt in earlier representation of the Applicant which would be advantageous to their present client. In this situation the Applicant does not have to show much as the rule laid down in P.C**. Theatre Corporation vs Warner Brothers SDNY 195 clearly** states;

> "*The former client need show no more than the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to matters or cause of action wherein the attorney previously represented him- only in this manner can the lawyers duty of absolute fidelity be enforced in the spirit relating to political communication maintained."*

The understanding here is that where the matter in contention touches those that the advocate used to handle on behalf of the Applicant then the irrefutability of the presumption of imputed knowledge of confidences is enhanced and the Advocate must be disqualified.

I find that to be the position in this case and on those grounds the 1st and 2nd Respondents are disqualified from participating in the suit HCCS No.493 as advocates and or Counsel.

The Application is thus allowed, costs shall abide the final decision of the suit.

Dated at Kampala this 21 day of December 2017.

HON. JUSTICE DAVID WANGUTUSI

JUDGE

21/12/2017:

PRESENT:

- Peter Kabatsi }
- Joseph Matsiko }
- Elly Karuhanga }
- John Jet Tumwebaze } for the Applicants
- Moses Adriko }
- Bwogi Kalibala } for 1st Respondent
- Timothy Lugayizi }
- Mercy Odu } for 2nd Respondent

In Court
- Dr. Sudhir Ruparellia representing both Applicants
- Titus Mulindwa }
- Ms Lorna Gariyo } representing Bank of Uganda
- Rose Emeru Court Clerk

Kabatsi: Your Worship this is for ruling.

Court: Ruling delivered in open court.

Adriko: Your Worship we have instructions to appeal the ruling and request that court expedites the extraction and certification of records.

Court: The certified record shall be prepared and parties notified accordingly.

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LILLIAN BUCYANA

A/REGISTRAR

21/12/2017