

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION No.507 OF 2020

WINDING UP PETITION

(Pursuant to section 281(1) of the Company Act [Cap.2012])

IN THE MATTER OF THE COMPANY ACT [CAP.212]

BETWEEN

JANGID PLAZA LIMITED..... PETITIONER

AND

SOBAI ASANJA LIMITED.....1ST RESPONDENT

EQUITY BANK (TANZANIA) LIMITED2ND RESPONDENT

I & M (TANZANIA) BANK LIMITED3RD RESPONDENT

RULING

22/05/2023 & 13/06/2023

POMO, J

The integrate of an advocate representing the petitioner is put in question as to whether is conflicted or not in the matter herein, and if so, what are the consequences.



ADCA Veritas Law Group, Advocates & Consultant, drew and on 7th October, 2020 vide ERV No.24844531 filed in this court for the petitioner, JANGID PLAZA LIMITED, the herein petition for winding up the 1st Respondent company, SOBAI ASANJA LIMITED. The filing of the petition prompted the 2nd and 3rd Respondents, who are the allegedly 1st Respondent's creditors, to apply in court to be joined as interested parties and on 24th March, 2022 by leave of the court they were so joined

When the petition was on 25/11/2022 called on for hearing this court *suo motu* raised three pertinent issues against the petition which needed the parties to address it, to wit: -

- 1. In presence of the contract between the Petitioner and the 1st Respondent which clearly provides for the rights of the parties in case of breach of the said contract, then whether it is proper to file the herein winding up petition instead of a normal suit on breach of contract*
- 2. Whether the petitioner, taking into account the nature of the contract between her and the 1st Respondent, qualifies to be a creditor in terms of section 280 of the Company Act, [Cap.212 R.E.2002] to file petition for winding up the 1st Respondent*
- 3. Whether it is proper to file a petition without naming the petitioner on the petition*

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On 27/3/2023 in the cause of hearing the said *suo motu* issues raised, Mr. Laurent Leonard, learned counsel for the 1st Respondent, prompted this court that the law firm representing the petitioner, ADCA Veritas Law Group and Legal Consultants, to which Mr. Adronicus Byamungu, learned counsel belongs, transacted legal documentations for the petitioner and the 1st Respondent from which the dispute herein emanates as such is conflicted in the matter, pointing out clause 10 of annexure P3 to paragraph 6.2 of the petition. Based on that, the hearing was adjourned to afford parties time for preparations to address the court on this new and critical issue on allegations of conflict of interest in representation of the parties.

22/5/2023 is a date on which parties addressed the court. Addressing the court, Mr. Byamungu denied the claim that at any point in time to have ever been instructed by the 1st respondent in any matter pertaining to be duties enumerated in clause 10 of annexure P3 to Para 6.2 of the petition.

Also, denied to have received any fees leave alone the amount claimed in the said clause 10 of that annexure. That, be himself or any partner or employee in his firm no one has ever been instructed by the 1st respondent or received any fees from the 1st respondent unless the 1st respondent or her counsel who made the claim has proof of the same and invited such



proof be produced. That, the claim by the 1st Respondent's counsel is made from the bar and hasn't produced any proof of the claimed instruction and payment of fees to my firm. That, it is a statement made from the bar which has no evidential value to be acted upon by the court and no proof that Mr. Adronicus Byamungu or his firm was instructed or received fees from the 1st respondent.

That, it is a very serious allegation because it undermines himself and his law firm's ethical foundation for it will be highly unethical for a firm to receive instruction and fees from one party and act against her arguing that it is a matter not to be taken lightly. It has to be fully investigated and evidence given on the same.

That, with respect to transfer duties, it was Mr. Byamungu's contention that, with this, first of all it is not an issue in the petition however, secondly, if it is meant to be made an issue in this petition, it should be specifically raised and at that point, as counsel for the petitioner who were instructed by the petitioner to handle those transfers, be in position to weigh on whether is conflicted or not. That, this petition was filed in 2020, three years ago, with all these annexures and no such issue had ever been raised despite filing of all the respective pleadings. That, it should have been at the

1st Respondent's first glance if he had ever been instructed by her or received the claimed money from her. That, the 1st respondent should be aware that it is not the case that he has instructed us or paid the fees, that is why the allegation do not appear anywhere in the documents filed by the respondents and asserted that it is the creation of the counsel from the bar hence challenging him to produce proof of the asserted allegation.

That, clause 10 of annexure P3 to para 6.2 of the Petition is not a proof at all that they were instructed or paid fees by the 1st Respondent, the counsel stressed adding that in absence of proof, the allegations has no basis, and therefore should be dismissed.

Arguing in alternative, Mr. Byamungu submitted that, if the court finds that clause 10 of annexure P3 to Para 6.2 of the Petition is sufficient from his law firm's disqualification it should say so and end there. That, the court should not base his firm's disqualification on the unfounded allegation from the bar that he was instructed and paid by the 1st respondent. That, if he is disqualified, the petitioner should be given an opportunity to find alternative representation to take over from where the proceedings stand on the date of making of an order; including rejoining to the respondent's submission on the three issues raised *suo motu*.

That, as to the fate of the petitioner's petition and the proceedings thereof, Mr. Byamungu argued that, will remain intact up to the date he becomes adjudged to be conflicted. The disqualification of counsel on the grounds of perception of conflict of interest do not vitiate the proceedings and the pleadings up to the date when he is disqualified. That, this is more so because the point is raised by the adverse party who has been participating in the proceedings including exchanging the proceedings up to the time the point is raised and decided. That, he is aware of the position of the court of Appeal and this court that disqualification of counsel on ground of conflict of interest does not vitiate the pleadings and proceedings. In the end, he cited to this court the following decisions of this court: **Kagera Education Promotion Co-operative Society Limited Vs Morities Corporation Ltd & Another, Civil Case No.6 of 2019, High Court at Bukoba; Mexon Energy Limited Vs NMB Bank PLC, High Court (Commercial Division) at Dar es Salaam; Gaslamp Holdings Corp Vs Percy Beda Mwidadi & 4 Others, High Court (Land Division) at Dar es Salaam; and lastly, Fatman Abdallah Salum & 4 Others vs Melchisedeck Sangalali Lutema & 2 Others, High Court (Land Division) at Dar es Salaam; (All unreported)**

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On the other hand, Mr. Zacharia Daudi, learned advocate for the 3rd Respondent, argued that clause 10 of annexure P3 to Para 6.2 of the petition particularly last sentence speaks out clearly that ADCA Veritas Law Group shall handle the processing of right of occupancy and the agreed fee for the work and receipt of it is acknowledge. He then argued having that document on record which is the gist of this winding up petition prepared by the same law firm ADCA Veritas Law Group shows a clear conflict of interest. In support of the argument he referred the decision of this court in **Jitesh Chandulal Ladwa vs. Bhavesh Chandulal and 5 others**, Misc. Civil Application No.101/2020 High Court at Dar es Salaam (unreported), in which Hon. Y.J. Mlyambina, J facing similar conflict of interest in line with **Rule 45 of the Advocates (Professional Conduct & Etiquette) Regulation, 2018** GN.118/2018 underscored sub rule 2 of Rule 45 which prohibit the counsel to act in conflicted interest unless consent is obtained and argued the court to take the stance taken in the said Jitesh case which was struck out on the ground that it was drawn and handle by counsel who is conflicted. Again, cited the case of **Issa Dihando @ Makusekuse and Another Vs R, Criminal Appeal No.265 of 2005 CAT at Mtwara (Unreported)**

In his rejoinder, Mr. Leonard S. Joseph, learned counsel for the 1st Respondent fully adopted the 3rd Respondent's counsel submission and asked this court to be guided by Regulation 2 of the **Advocates (Professional Conducts and Etiquette) Regulations, 2018 GN. 118/2018** read together with regulations 35; 36 and 45. Also **S. 136 of the Evidence Act, [Cap.6 R. E. 2019]** arguing that these provisions of the laws speak on the conflict of interest as initiated in the property sale agreement at clause 10 of annexed P3 to para 6.2 of the petition. That, these are not mere allegations but facts initiated in the sale agreement. That, whether the petitioner's counsel or his law firm, ADCA Veritas Law Group, was paid or not that is not a matter before the court, Mr. Leonard argued. That, such conduct put the law firm to be called as a witness thus automatically disqualifies the petitioner's counsel to represent her in this petition. That, the issue of conflict of interest can be raised at any stage of a matter. In the end, he prayed the petition herein be struck out with costs

Having heard the rival submissions from both sides of the petition, the issue for determination is whether the counsel for the petitioner is conflicted or not? And in case the issue is positively answered, the next issue is what is the fate of the petition drawn by a conflicted counsel

In resolving the first issue, my starting point will be clause 10 of annexure P3 to paragraph 6.2 of the Petition. It provides thus: -

*"TRANSFER FEES. The buyer agrees and acknowledges that certain fees and costs shall be payable in order to transfer the Right of Occupancy for the property from the Seller to the Buyer, and in respect of the issuance of a sub-title for the Property and that such fees and costs, including legal costs, fees, taxes, duties and disbursements, but not to include any capital gains tax, shall be the Buyer's responsibility. The transfer of the Right of Occupancy for the property and related legal documentations shall be handled by the Seller's legal advisors, **ADCA Veritas Law Group, Advocates and Legal Consultants**, and legal fees (but not to include any government fees, taxes, duties and disbursements) of United States Five Thousand (US \$20,000.00) have been paid to Seller by the Buyer, receipt of which is hereby acknowledged."*

From the above excerpt of contractual agreement between the Petitioner and the 1st Respondent, **ADCA Veritas Law Group, Advocates and Legal Consultants**, is the law firm which was tasked to transact transfer of the Right of Occupancy for the property and related legal documentations now the subject of the petition herein.

Again, Mr. Adronicus Byamungu, learned advocate for the petitioner admits to belong to **ADCA Veritas Law Group, Advocates and Legal Consultants**, the firm which is representing the petitioner herein.

In my view, once an advocate or his/her law firm is involved in whatever transaction between the contending parties in a suit which transaction in future becomes party of the suit irrespective of such transaction being made an issue or otherwise, then such an advocate or law firm becomes conflicted in legal representation of either side. Such findings is founded on **regulation 35(2) of the Advocates (Professional Conducts and Etiquette) Regulations, 2018 GN. 118 of 2018** which provides as follows: -

*"Reg.35(2) – An advocate **shall not enter into** or continue a business transaction with a client **where it is reasonably obvious that a contentious issue between them may arise or that their interests will diverge as the matter progresses**".*

The counsel for the petitioner's has vehemently submitted in denial to have been paid the amount stated under clause 10 of annexure P3 to paragraph 6.2 of the petition while admitting the law firm mentioned therein belongs to him. In my considered view, the said law firm ought to have seen

this likelihood of arising the contention herein in the cause of determining the petition.

It has to be understood, the process of determining as to whether an advocate or a law firm is conflicted or otherwise in handling a particular matter before a court of law is ascertainable at a time the client engages the legal services of an advocate or law firm. This is rooted from the duty of confidentiality vested in any advocate worthy the title. Waiting to be disqualified by the court is the worst risk the advocate can take against his client as the time he drew the documents forming the suit did so not by acting on what was supplied to him by the petitioner rather on the information he possessed in both parties. Under the circumstances, I fully subscribe to the stance taken by my fellow learned brother, Hon. Y.J. Mlyambina, J in **Jitesh Chandulal Ladwa case (Supra)** that where an advocate or law firm drew and file legal documents for a party while conflicted then the time the court declares him to be conflicted then the entire pleadings drawn by him become vitiated liable to be struck out.

Since, the petition herein was drawn and filed by **ADCA Veritas Law Group, Advocates and Legal Consultants**, the firm to which advocate Adronicus Byamungu belongs, the firm which under clause 10 of the



annexture P3 to paragraph 6.2 of the Petition was involved in a sale agreement between the petitioner and the 1st Respondent the non performance of which has led to the petition herein, I find Mr. Adronicus Byamungu, learned advocate to be conflicted in representing the petitioner herein. He is a fit person to testify on the transaction and not otherwise.

in the upshot, I sustain the objection raised against the petitioner's advocate and hereby struck out the petition with costs.

It is so ordered

Right of Appeal explained to any aggrieved party

Dated at Dar es Salaam this 13th day of June, 2023


MUSA K. POMO
JUDGE
13.06.2023

Ruling delivered in chamber on this 13th June, 2023 in presence of Mr. Laurent Leonard for the 3rd Respondent and in absence of the rest of the parties




MUSA K. POMO
JUDGE
13.06.2023