

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 45 OF 2008

MBEYA CEMENT COMPANY.....PLAINTIFF

VERSUS

AGNES CHARLES KIANGO.....DEFENDANT

RULING

BUKUKU, J.

In the cause of hearing into the matter, namely, Commercial case No. 45 of 2008, Mr Semu, Counsel for the plaintiff has raised a concern from his client regarding Mr. Massawe, Counsel appearing for the defendant. Mr. Semus' concern is grounded on two points. First, that, at the time when the transaction which has brought about this case arose, Mr. Massawe was then employed by the plaintiff company as Head, of Legal Department. Secondly, that, if he was so employed by the plaintiff company at that time, can he now appear to act as Counsel for the defendant?

To substantiate his submission, Mr. Semu produced in this court some documents which showed that Mr. Massawe was first employed by Mbeya Cement Company (The plaintiff) as a legal officer from 1st May, 1995 up to 12 November, 2002 and thereafter, from 13th November, 2002 his position changed to that of Employees Relations Manager up to his voluntary retirement on August, 2007. The documents further shows that, during his employment, Mr. Massawe represented the plaintiff company as an advocate in various cases that were closed before his retirement. He also continued to represent the plaintiff company after his retirement.

It is the contention of Mr. Semu that, as a legal officer of the plaintiff company, one of Mr. Massawe's duties was to ensure that the company's contracts with its customers/clients are in order. Mr. Semu contends that this case relates to a customer of the plaintiff's company. Mr. Massawe who now represents the defendant was the legal advisor of the plaintiff company and therefore there is a relationship which, according to his client, they see the act of Mr. Massawe representing the defendant to be unprofessional and unethical. On the second issue whether Mr. Massawe can act as Counsel for the adverse party, it is Mr. Semu's conviction that, he cannot because, he sees this as a question of integrity and law. He however did not point out specifically what relevant law the Court should address its mind. All what he prays is for directions of this court.

Mr. Massawe for the defendant has disagreed. Though he admits that he was employed by the plaintiff company at that time, it is his submission

that, the company had a plant in Mbeya and the headquarters was based in Dar Es Salaam. He was stationed in Mbeya, at the plant, and the headquarters was used to making its own decisions without involving the plant. On whether he as a legal officer in the plaintiff company can now act as Counsel for the defendant, Mr. Massawe submitted that there is no legal provision or case law cited by the Counsel for the plaintiff to bar him to represent the defendant. He argued that, there is nowhere in the documents produced by plaintiff which shows his involvement with the defendant. There is no proof of his signature in any document which can prove that he was involved, or any other document to show that it was filed or acted by him, or even an affidavit or counter affidavit signed by him to show that he was involved in the transaction. He therefore contends that, he cannot be barred from representing the defendant in the Court just because of mere suspicion. He therefore prayed the matter to proceed as scheduled.

The issue before this court is basically whether Mr. Massawe having previously been employed by the plaintiff company as a legal officer and now representing the defendant in this case should be barred from representing the defendant now. This issue hinges on conflict of interest and it also touches on the issue of ethics. With regard to conflict of interest, it is a fact that, a person who has an interest in a matter cannot handle it properly or even professionally, and the rules require that where such a person has interest in the matter, he/she should disqualify him/herself from the conduct of the matter. For example, an advocate who

witnesses a sale agreement, if the parties disagree on its provision, such person cannot become an Advocate of one of the parties. At most, he can become a witness. Again, if an Advocate finds that he is in possession of confidential information as a result of having previously advised another person in regard to a matter which is placed before him, such Advocate should be justified to withdraw from the conduct of the case because of conflict of interest. As for ethics, I can say these are principles that control, influence or guide a person's conduct or behavior so as to gain respect for himself/ herself. Adherence to the basic legal ethics is generally required of all those who practice law. Ethics being a moral conduct is a personal matter and therefore it all depends upon the Advocate himself to gauge his behavior in conducting his legal practice.


This application has been made when the suit is ripe for hearing. According to the records from the file, Mr. Massawe made his first appearance as Counsel for the defendant on 13th May, 2009. From then on he continued to represent the defendant. At no material time did the plaintiff object to his representation of the defendant on the grounds of conflict of interest. It is quite interesting for Counsel for the plaintiff to raise this issue now. One could have expected that, this issue could have been raised and solved way back before the scheduling order, which was conducted on 19th October, 2010. Both parties had declared that pleadings were complete and that there were no further applications to be made.

Now, back to the issue. Looking at the documents submitted by Counsel for the plaintiff, it is not disputed that from 1st May, 1995 up to 12th November, 2002, Mr. Massawe was employed by plaintiff company as a legal officer and thereafter, from 13th November, 2002 up to his voluntary retirement in August, 2007, he worked as manager Employees Relations. Mr Semu had contended that, when the matter in dispute ensued, Mr. Massawe was the legal officer and as legal officer, he had the duty to ensure that company contracts with customers are in order. In that regard therefore, in his legal duties then, Mr. Massawe could have come across information which could be prejudicial to his client. Be that as it may, it is my conviction that, it is not enough to allege that having worked with the plaintiff company, Mr. Massawe had all the knowledge regarding this matter and therefore he has conflict of interest. I think it must be established that he really had that knowledge of all circumstances of the case.

In order for this court to act on such allegations against this Counsel there must be proved beyond reasonable doubt. In the premises, I am not satisfied that in the instant case, the allegations against Mr. Massawe have been established to that standard. I am saying so because, upon perusing further, it is evident from the plaint that, the cause of action arose between 22nd June, 2006 and 10th March, 2008. During this time Mr. Massawe was no longer a legal officer of the plaintiff company. By then he was the Manager Employees Relations since 13th November, 2002. His main duties were to supervise healthy and safety measures to all employees of the company. Mr. Semu might be right to suspect about Mr. Massawe's

knowledge on the issue, but suspicion alone cannot justify the grave and drastic step of this court not allowing the advocate to represent the defendant. I would expect the Counsel to conduct his professional affairs in a manner which would not be prejudicial to the other party. It is his conviction which will guide him.

Having considered the facts surrounding this case, I hold the view that, much as Mr. Massawe was employed by the plaintiff company at the material time when the matter ensued, there is no proof to show any conflict of interest in this matter. The fact that he previously worked with the plaintiff does not in itself bar him from acting as Counsel for the defendant. Had it been that there is glaring evidence to show that indeed he was involved in the issue one way or the other, then it could have been unethical for him to represent the defendant before this Court. I have traversed though the Rules of Ethics guiding members of the Tanzania bar. Unfortunately, they are silent on this aspect. Mr. Semu has failed to convince this Court the existence of knowledge or conflict of interest that Mr. Massawe has in this particular case and for that matter, this Court finds no justification for barring Mr. Massawe to continue representing the defendant in this case. It is accordingly ordered.

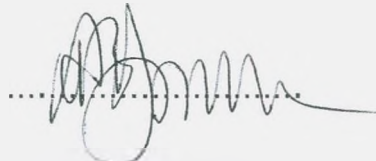
A handwritten signature in black ink, appearing to read 'A.E. Bukuku', is written over a horizontal dotted line.

A.E BUKUKU

JUDGE

05 OCTOBER, 2011

Ruling delivered this 05th day of October, 2011 before Mr. Semu Leaned Counsel for plaintiff and Ms. Kiango, defendant in person.

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A.E BUKUKU

JUDGE

05 OCTOBER, 2011

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