IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE N0.102 OF 2021

MEXONS ENERGY LIMITED.....PLAINTIFF

VERSUS

NMB BANK PLC ..... DEFENDANT

RULING

Date of last order: 09/11/2022
Date of ruling:05/12/2022

AGATHO, J.:

This ruling was triggered by the objection raised by the Defendant's counsel Mr. Seni Malimi that Mr. Daniel Welwel witnessed or attested the document annexed to the counterclaim that is Certificate of Title (C.T) No. 186241/59 Plot No. 401 Block C Sinza Area, Kinondoni. It is the First Deed of Variation between National Microfinance Bank Plc (the Defendant) and Joanes Jephta Mexon Sanga. That document is annexed to the counterclaim as part of annexture 7 A to I. The same document is also referred in the paragraphs 7.4 and 9.4 of the plaint.

The Defendant counsel raised the objection that the plaintiff's counsel should be disqualified because he witnessed or attested one of the security documents (Certificate of Title (CT) No. 186241/59 Plot No. 401 Block C Sinza Area, Kinondoni) signed by Joanes Jephta Mexon Sanga one of the directors of the plaintiff company and a fifth defendant to the counter claim. That document was pleaded as security for the loan subject

of this suit. There is a possibility that the counsel Welwel may be called as a witness. Also, his acting as advocate for the plaintiff contravenes Section 7 of the Notary Public and Commissioner for Oaths Act [Cap 12 R.E. 2019] as well as Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations G.N. 118 of 2018. Both require an advocate who has conflict of interest not to act as an advocate in the matter.

According to the defendant's counsel the counterclaim seeks to recover the outstanding credit facilities in which one of the securities include the above-mentioned document that was attested by Mr. Welwel, and hence conflict of interest is apparent. The counsel for the Defendant cited the case of **Curthbet Robert Kajuna t/a AC. A Kajuna & Ltd v Equity Bank Tanzania Limited, Civil Case No. 10 of 2018, HCT Moshi District Registry**. The court is of the view that at this point, it does not matter whether Mr Welwel will be a witness in the main suit or in the counterclaim. Either way conflict of interest is likely to arise as he may be called to testify by the parties or by the court. That is the import from Section 7 of [Cap 12 R.E. 2019] and Regulation 45 of G.N. 118 of 2018.

Admittedly, one can hardly grasp the basis of the submission of counsel Daniel Welwel that the objection by the Defendant counsel if found to be with merit then the preliminary objection over the counterclaim will collapse. In my view his submission is not true because whether he (Mr. Welwel) is disqualified or not the preliminary objection against the counterclaim may be raised by the Plaintiff in the main suit. She is not precluded to raise it whether with the services of Mr Welwel or by another advocate. Mr Welwel is not the only advocate out there who can handle the matter. The problem is only that he is conflicted. He attested the

annexture/a document pleased as security. He may be called to testify in the court. Contrary to what Mr. Welwel claims, and in my settled view, to determine the issue of conflict of interest prior to preliminary objection raised against the counterclaim as claimed by counsel Welwel who is alleged to have conflict of interest is not unprocedural. That should be permitted because determining the issue of Mr. Welwel's conflict of interest later will have the effect of wasting court's precious time should the said conflict of interest adjudged to exist. The effect will be grave that all the proceedings, and pleadings prepared by the conflicted advocate will be rendered worthless or expunged from court records. That is more dreadful. It is better to determine the issue of conflict of interest sooner than later. The importance of resolving the issue of conflict of interest early can also be drawn in **Jafferali and Another v Borrisow and Another [1971] 1EA 165** where the Court held that the issue of conflict of interest should have been addressed though it was raised by the way.

The key question is whether Mr. Welwel really attested the document (Certificate of Title (CT) No. 186241/59 Plot No. 401 Block C Sinza Area, Kinondoni, Dar es salaam)? The answer is emphatically yes. Mr. Welwel in his own words conceded that in the submission. He said he attested the said document. But he raised several arguments: (1) that the present objection if upheld will pre-empt the Preliminary Objection in the counterclaim. And this is connected with the Land Case No. 3 of 2021 before HCT at Morogoro which is subject of appeal to the Court of Appeal. That case is referred on paragraph 51 of the counterclaim. I agree with Mr. Welwel that that case is res sub judice hence cannot be discussed in the case at hand; (2) the impossibility of Mr Welwel being called as a witness; and (3) that Joanes Jephta Mexon Sanga is not a party to Land

Case No. 3 of 2021. But in my view, this is misleading because we are dealing with the present suit and not the case at the HCT in Morogoro. Moreover, a yardstick is not whether the person who signed the document for which the counsel attested and led to his conflict of interest is a party to suit or not, rather whether the attested document is part of the pleadings or annexture thereto and may be tendered in evidence. Consequently, the counsel/commissioner for oaths who attested it may possibly be called to testify.

To protest the allegations of conflict of interest, Mr. Welwel submitted that he is not representing Joanes Jephta Mexon Sanga. But what he did not tell the Court is that Mr. Sanga is one of the directors of the plaintiff company. Also, in this case he is the 5th defendant to the counterclaim. Further, Mr. Welwel is representing the Plaintiff who is the 1st defendant to the counterclaim. Therefore, it is easy to see the connection between the plaintiff in the main case (1st defendant in the counterclaim) and the 5th defendant to the counterclaim. The conflict can be inferred in that context. Mr. Welwel was not short of explanations, he submitted that Joanes Jephta Mexon Sanga has not filed his Written Statement of Defence in respect of the counterclaim, and he added that it is unlikely that Mr. Sanga will dispute the document he attested. This argument is without merit because it is immaterial when he filed his WSD or not. It does not matter if he will dispute the document or not. That is because it does not eliminate the risk or possibility of Mr. Welwel to be called to testify by either party or even by the court. And that is the rationale of Section 7 of Cap 12 R.E. 2019.

It is interesting to note that Mr Welwel is of the view that since the plaintiff has referred to these securities documents in paragraphs 7.4 and 9.4 of

the plaint and Mr Joanes Jephta Mexon Sanga has not denied them then they are non-issue. With respect such argument is misplaced because what we are concerned with is not admission or non-admission by Mr Joanes Jephta Mexon Sanga our concern is whether (1) Mr Welwel attested the said document; (2) whether his attesting leads to conflict of interest; and (3) and whether he may be called to testify. I am of the view that the answer to all these questions is yes.

While I concur with Mr Welwel's submission that the case of **Marungu Sisal Estate Limited v George Nicholaus Efstathiou and 2 Others, Commercial Case No. 27 of 2000, HCT Commercial Division at Dar es salaam** related to a situation where the advocate was at the same time a receiver and manager of the plaintiff and hence distinguished from the case at hand, I differ with Mr Welwel's view on the case of **Cuthbert Robert Kajuna** (supra). I am firm that even if that case the advocate in question acted for the other party by attesting his documents and that party had intimated to call him as a witness the law under Section 7 of Cap 12 R.E. 2019 and Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations 2018 for there to be conflict of interest does not requires a party to have expressed his desire to call the advocate who attested the documents as a witness. The test is whether there is possibility of calling him to testify in court on account of what he had previously attested. This certainly will depend on the circumstance of a particular case. And that is not an absolute bar as rightly held by the Court of Appeal of Kenya in **King Woolen Mills Ltd and Another V Kaplan and Straton Advocates, East African Law Reports [1990-1994] EAC page 244 at page 256**. The Kenyan Court of Appeal held that there must be a real prejudice or real mischief. Be it as it may our

law is clear under Section 7 of Cap 12 R.E. 2019 and Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations, G.N. 118 of 2018. I find it enlightening that the Court of Appeal of Tanzania has added another useful test of conflict of interest that of avoiding embarrassing the advocate when called to testify as held in **Rift Valley Co-operative Union and Another v Registered Trustees Diocese of Mbulu, Civil Appeal N. 12 of 2007 CAT at Arusha**. The embarrassment intended to be avoided can arise in the case at hand when Mr Welwel is called to testify on the document which he attested. And as the pleadings and their annextures stand in the present case the risk of embarrassment is real. I thus disagree with the view of Mr Welwel that the conflict of interest is not violated until the advocate is called to testify. That in my view defeats the purpose of Section 7 of Cap 12 R.E. 2019. The legislature in that provision addressed the risk of embarrassment of the advocate. Reading that provision, the legislature wisely guided the court not to wait until the advocate is called to testify and declare him to be conflicted. To wait until the problem materializes will be a wastage of resources especially court's precious time as the pleadings drawn by such unscrupulous advocate will be ignored or expunged from court records. Mr Welwel referred the case of **Jafferali and Another v Borrisow and Another [1971] 1EA 165**, but this case as rightly pointed out by Mr Malimi, counsel for the defendant was decided before the promulgation of Advocates (Professional Conduct and Etiquette) Regulations, G.N. 118 of 2018.

It is however true that the **Jafferali's case** was cited with approval by the Court of Appeal of Tanzania in **Rift Valley's case** (supra) to the effect that the law bars an advocate who was a commissioner for oaths from acting as the advocate and a witness in the same case. In my view their

Lordships did not hold that the rule is not violated until the advocate is called to testify. The whole spirit and purpose of the law will be defeated if the advocate who has conflict of interest is left to prosecute the case until s/he called as a witness in the said case. Along that and importantly, each case should be decided basing on its peculiar circumstance.

Mr Welwel also reacted to the citing of Section 7 of Cap 12 R.E. 2019 that the Section bars a commissioner for oaths from acting as commissioner and at the same time as advocate in the same case or in a matter s/he has interest. He submitted that the provision applies to a pending proceedings. To him the relevant law is the Advocates (Professional Conduct and Etiquette) Regulations of 2018. But with due respect to the learned counsel, it is my settled view that in Tanzania advocates are also Notary Public and Commissioners for Oaths. Consequently, Section 7 of Cap 12 R.E. 2019 binds them. Unless Mr Welwel wants this Court to assume that when he attested the document at issue, he was merely a notary public and commissioner for oaths but not an advocate, his submission lacks substance. Moreover, the argument that the provision of Section 7 of Cap 12 R.E. 2019 applies to pending proceedings match the present case because there is an impending main suit and a counterclaim before this court involving the same parties. The possibility of calling Mr Welwel as a witness is thus proximate because he witnessed the First Deed of Variation signed by the 5th Defendant to the counterclaim who is also one of the directors of the 1st Defendant to the counterclaim and the plaintiff in the main suit.

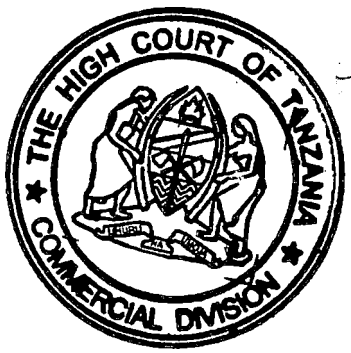
Turning to the issue of material disadvantage as voiced by Mr Welwel and examined in **DAWASCO v Robert Mugabe, Revision No. 157 of 2021, HCT, Labour Division at Dar es salaam** (unreported), in my

view that is one of the tests in determining conflict of interest. It is not the only test. There are others such as embarrassment of the advocate, etc. Mr Welwel also submitted that legal practice by the advocate is one's livelihood catering for right to work. In my view even if one could have argued for the right to be heard which embeds the right to legal representation as a constitutional right as per Article 13 (6)(a) of the United Republic of Tanzania Constitution of 1977 as amended that does not imply that the advocate is free to act as both a commissioner for oaths and simultaneously act as the advocate in the same case involving same parties. That will surely lead to his embarrassment when called as a witness to testify in the court of law with respect to what he has attested.

In lieu of the foregoing, Mr. Daniel Welwel, advocate of the Plaintiff is disqualified to continue prosecuting this case. That said the plaintiff is afforded an opportunity to engage another advocate to represent her in the matter. On the date the matter will come for mention the plaintiff ought to have another advocate. Given the nature of this case each party shall bear its costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 5th Day of December 2022.



U. J. AGATHO

JUDGE

05/12/2022

Date: 05/12/2022

Coram: Hon. U.J. Agatho J.

For Plaintiff: Daniel Welwel, Advocate

For Defendant: Seni Malimi, Advocate.

C/Clerk: Beatrice

JLA: Ms. Opportuna

Court: Ruling delivered today this 5th December 2022 in the presence of Daniel Welwel counsel for the Plaintiff, and Seni Malimi learned counsel for the Defendant.

U. J. AGATHO

JUDGE

05/12/2022