

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 47 OF 2014**

REGINA ISHEMWABURA PLAINTIFF

VERSUS

NASORO HAMIS NASORO 1ST DEFENDANT

JOHN MARTIN MWANGA 2ND DEFENDANT

FISHA MASHOO 3RD DEFENDANT

Date of last Order: 28/04/2023

Date of Ruling: 08/06/2023

RULING

I. ARUFANI, J

This ruling is in respect of the prayer made to the court by Mr. Joseph Rutabingwa, learned counsel for the plaintiff that, advocate Henry Kitambwa who is appearing in the court to represent the first defendant in the matter namely Nasoro Hamis Nasoro be disqualified from representing the first defendant in the matter. The reason given by the counsel for the stated prayer is that the mentioned advocate is working in the firm of Hamza & Co. Advocates where advocate Abraham Hamza Senguji who was representing the first defendant and withdrew from representing the first defendant in the matter is a Managing Partner.

The counsel for the plaintiff stated that, advocate Senguji was advised by the court to withdraw from representing the first defendant in the matter because of conflict of interest he had against the plaintiff. He stated that, advocate Senguji was so advised as he attended the parties

dispute when he was working in the Government as a Principal State Attorney and he agreed to withdraw from representing the first defendant in the matter.

He argued that, withdrawal of advocate Abraham Hamza Senguji from representing the first defendant in the matter was in line with Rule 34 of the **Advocates (Professional Conduct and Etiquette) Regulations, 2018** made under section 69 (b) and (c) of the Advocates Act, Cap 341 R.E 2019 which states an advocate formerly in the service of any Government or Public Agency who possess information about a person, cannot represent another person in any matter, where the information possessed by the said advocate can be used to the material disadvantage of such person.

He argued that, the reason caused advocate Senguji to withdraw from representing the first defendant in the matter is following him wherever he goes. He went on arguing that, as advocate Kitambwa is working in the firm of Hamza & Co. Advocates where advocate Senguji is a Managing Partner, then advocate Kitambwa cannot represent the first defendant in the matter because of the same reason of having a conflict of interest against the plaintiff.

He referred the court to Rule 51 (1), (a), (b) and (c) and 52 (1) of the **Advocates (Professional Conduct and Etiquette) Regulations, 2018** which provides that, where a member of a firm of an advocate

moved from one firm to another firm and he possess relevant information in respect of the former client which is confidential and which if disclosed to a member of a new firm may prejudice the former client, the new firm shall cease its representation of its client in the matter.

He went on arguing that, as the firm of Hamza & Co. Advocates was created by advocate Senguji who withdraw from representing the first defendant in the matter, the entire firm of Hamza & Co. Advocates including all members of that firm, advocate Kitambwa being one of them, cannot act for any of the parties in the present suit, including the first defendant. He submitted that, to allow an advocate from the firm of Hamza & Co. Advocates to represent the first defendant it will amount to allowing Senguji to represent the first defendant though he may not necessarily appear in the court personally.

He argued that, the stated possibility of advocate Senguji to continue acting in the case of the first defendant can be seeing in the act of advocate Senguji accepting the court summons issued to the first defendant contrary to position reached by the court on 10th November, 2015. He finalized his submission by stating that, as advocate Kitambwa is an employee, partner and or associate of advocate Senguji who was directed by the court to withdraw from representing the first defendant in the matter, the stated advocate Kitambwa cannot fairly represent the first defendant in the matter before the court.

In his response advocate Kitambwa premised his submission by stating that, it is a trite principle that "he who alleges must prove". He went on arguing that, there is nowhere in the submission of the counsel for the plaintiff established with evidence that advocate Senguji is a Managing Partner of Hamza & Co. Advocates so that it can be said advocate Senguji can pass information to him concerning the plaintiff that can prejudice the plaintiff's case.

He argued that, the counsel for the plaintiff has not only failed to show advocate Senguji is the Managing Partner and himself, advocate Kitambwa is his subordinate and therefore he can act as his proxy but also, he has failed to show which information advocate Senguji possess and if the same is handed to him will be prejudicial to the plaintiff's case. He stated this is a court of law which deals with facts, evidence and laws and not fear and assumption. He submitted that, the counsel for the plaintiff has failed to provide evidence on the presence of any conflict of interest.

He argued that, on 10th November, 2015 when advocate Senguji withdrew from conduct of the matter he was working with Jangwani Law Chambers. He argued that, advocate Verycah Gossi who was representing the first defendant in the matter was working with Hamza & Co. Advocates and there has been no objection from the plaintiff. He argued that, even when he teamed up with advocate Verycah Gossi from Hamza & Co.

Advocates to defend the first defendant at the Court of Appeal and in this court as evidenced by the first defendant's documents filed in the court there was no objection from the plaintiff.

He submitted that the objection has been raised now to require him to disqualify from representing the first defendant in the matter as he was the vocal advocate when the case was being heard at the Court of Appeal Session. He argued that, advocate Kitambwa and advocate Senguji are two different persons with no employer employee relationship. He submitted that, he cannot be punished for professional wrongs or professional conducts aimed to be exercised by or performed by advocate Senguji.

He argued that, the act of advocate Senguji to receive summons on behalf of another advocate is not an offence and that cannot be sufficient evidence to show advocate Senguji is involved in the matter at hand. He submitted each one is supposed to carry his own baggage. He submitted that, the law or rules cited by the counsel for the plaintiff are irrelevant in the matter at hand and implored the court to dismiss the prayer of the counsel for the plaintiff with costs.

In his rejoinder the counsel for the plaintiff argued that, advocate Kitambwa has not disputed in his submission that advocate Senguji is working with Hamza & Co. Advocates and he has admitted he is also with firm of Hamza & Co. Advocate. He argued that, the issue as to whether

advocate Senguji is a Managing Partner in the Hamza & Co. Advocates is not important in relation to his prayer of seeking advocate Kitambwa to be disqualified from representing the first defendant in the matter. He stated they were expecting to hear may be advocate Kitambwa and Verycah Gossi were not aware that advocate Senguji had withdrawn from the conduct of the matter upon being asked by the court to do so.

He argued that, there is nowhere in his submission it is admitted by him that they were aware that advocates Kitambwa and Verycah Gossi were working with advocate Senguji in the same law firm. He submitted the matter came to their knowledge after seeing the court summons had been received by advocate Senguji who is working at Hamza & Co. Advocates. He went on submitting that, if the two advocates went to the court while knowing their colleague advocate Senguji had withdrawn from the matter, that is a professional misconduct. He argued they have raised their concern after being aware that the two advocates namely Senguji and Kitambwa are practicing under the same firm.

He argued that, they are not saying receiving of a court summons is an offence and their prayer is not basing on the stated act. He stated it is because he is working with advocate Senguji who withdrawn from representing the first defendant in the case. He argued that, the Advocates Regulations are binding and have the force of law and they are made under the Advocates Act. He based on the stated reason to urge

the court to bar advocate Kitambwa from acting for the first defendant in the matter.

Having carefully considered the prayer made to the court by the counsel for the plaintiff and the submissions filed in the court by both sides the court has found the issue to determine in this matter is whether the prayer by the counsel for the plaintiff deserve to be granted. The court has found proper to state at this juncture that, our law is very clear that every person has a right of being represented in any matter instituted in court by or against him by his recognized agent or advocate dully authorized to represent parties in court. The stated position of the law can be found under Order III Rule 1 of the Civil Procedure Code Cap 33 R.E 2019 which state as follows: -

"Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognised agent or by an advocate duly appointed to act on his behalf or, where the Attorney-General is a party, by a public officer duly authorised by him in that behalf:

Provided that, any such appearance shall, if the court so directs, be made by the party in person."

From the wording of the above quoted provision of the law it is crystal clear that, a party in a matter filed in court of law has a right of being

represented by his recognized agent or advocate dully appointed to act on behalf of the party. However, as provided in the proviso to the foregoing quoted provision of the law there are some circumstances where the court can direct a person to appear in court in person or look for another advocate to represent him in the matter. The question is whether the court can disqualify the advocate chosen by the first defendant to represent him in the instant suit as prayed by the counsel for the plaintiff.

The court has found the sole reason advanced by the counsel for the plaintiff to support his prayer is that, as the first defendant was represented in the matter by advocate Senguji who was advised to withdraw from representing the first defendant in the matter on the ground of conflict of interest, then advocate Kitambwa who is working in the same firm with advocate Senguji cannot appear in the court and represent the first defendant in the matter because of the same reason of conflict of interest.

The court has found the alleged conflict of interest is based on the fact that, when advocate Senguji was working as a Principal State Attorney he dealt with the parties' dispute. The counsel for the plaintiff stated in his submission that, as advocate Senguji dealt with the dispute of the plaintiff and the first defendant when he was working in the Government as a Principal State Attorney, he might have obtained some

confidential information from the plaintiff which can be used in favour of the first defendant to prejudice the plaintiff's case.

The court has been of the view that, as it has not been disputed that advocate Senguji is working with advocate Kitambwa in the same firm of Hamza & Co. Advocates it is crystal clear that there is a likelihood of the confidential information obtained by advocate Senguji from the plaintiff to be disclosed to advocate Kitambwa and used for the benefit of the first defendant and prejudice the plaintiff's case. The court has come to the view that, where there is a likelihood of an information obtained from the opposite party to be used to prejudice his case the court cannot permit the successor advocate from the same firm to continue to represent the party who was being represented in the matter by the predecessor advocate who was advised to withdraw from representing the stated party on the case.

The stated view of this court is getting support from an English case of **Supasave Retail Limited V. Coward Chance & Others**, [1991] 1 All ER 668 at page 673 quoted in the persuasive case of **King Woolen Mills Ltd & Another V. Kaplan & Straton Advocates**, [1990 - 1994] 1 EA 244 where it was stated that: -

The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rukusen V. Ellis, Munday and Clerk [1912] 1 Ch 831.

The law as laid down there is that there is no absolute bar on solicitor in a case where a partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause real prejudice to the former client unhappily, the standard to be satisfied is expressed in numerous different forms in Rukusen's case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability result if the solicitor is allowed to act. As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated."

The court has found the situation stated in the above quoted case was in respect of a situation where a solicitor in a firm wish to act for the other side of the litigation which was represented in a matter by a solicitor from the same firm and the position in the case at hand is in respect of a situation where an advocate has succeeded his partner advocate who has withdrawn from representing the client because of being in conflict of interest as he had dealt with the dispute of the other party in the case. The court has been of the view that the issue to consider here is whether there is a possibility of confidential information obtained from the plaintiff

by the former advocate to be disclosed to the successor advocate and used to prejudice the plaintiff's case.

It is the further view of this court that, where there is a possibility of confidential information obtained from the opposite side to be disclosed to the successor advocate and used to prejudice the former client, it should not be permitted by the court. The stated view of this court is getting support from Rule 52 (1) of the **Advocates (Professional Conduct and Etiquette) Regulations, 2018** cited in the submission of the counsel for the plaintiff which states that: -

"Where a moving member possesses relevant information in respect of the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new firm shall cease its representation of its client in the matter ..."

If the wording of the above quoted provision of the law are used in the case at hand it will be found that, as the reason for advocate Senguji to withdraw from representing the first defendant in the matter is because he had previously dealt with the plaintiff's dispute which is subject matter in the present suit and later on after retiring from his employment he formed or joined the law firm namely Hamza & Co. Advocates, then the stated law firm is supposed to cease representing the first respondent in the matter at hand. That being the position of the law it is to the opinion of this court crystal clear that advocate Kitambwa and all other advocates

in the firm where advocate Senguji is working as a partner advocate are barred by the foregoing provision of the law from representing the first defendant in the matter.

The court has considered the argument by advocate Kitambwa that the counsel for the plaintiff has failed to establish advocate Senguji is a Managing Partner in the firm of Hamza & Co. Advocates but find that, as rightly argued by the counsel for the plaintiff, it has not been disputed advocate Senguji and advocate Kitambwa are working together in the mentioned law firm. That being the situation of the matter the court has found it cannot be said Advocate Kitambwa cannot get confidential information of the plaintiff which is in the knowledge of advocate Senguji and use the same to prejudice the plaintiff's case.

There is another argument raised by Advocate Kitambwa that, the counsel for the plaintiff has not establish which information from the plaintiff is within the knowledge of advocate Senguji which can be used by him to prejudice the plaintiff's case. The court has found what was stated in the court at the time of advising advocate Senguji to withdraw from representing the first defendant shows the way advocate Senguji had dealt with the parties' dispute it cannot be said he had no any information which he can disclosed to his partner advocate and used to prejudice the case of the plaintiff.

The court has come to the stated finding after seeing the proceedings of the court of 10th November, 2015 shows clearly that, when advocate Senguji was being advised to withdraw from the conduct of the case the court considered what had been stated by both sides and came to the view that, as advocate Senguji had dealt with the matter to the extent seen by the court it was proper for him to withdraw from representing the first defendant in the matter. That makes the court to find there is no way it can be said there is no information which can be obtained from advocate Senguji and affect the case of the plaintiff.

As for the argument that the objection raised against him by the counsel for the plaintiff was because he was a vocal advocate when the matter was being heard in the Court of Appeal, the court has failed to see any merit in it because as alluded earlier the counsel for the plaintiff has clearly stated they were not aware he was working in the same law firm with advocate Senguji. The court has found the plaintiff's advocate stated they became aware of the stated circumstances after the court summons issued to the first defendant being received by advocate Senguji. Although it is true as argued by the counsel for both sides that receiving a court summons on behalf of another advocate is not an offence, but the act of Advocate Senguji to receive the court summons issued to the first defendant shows he is in close relationship with the advocate for the first defendant.

As for the further argument that advocate Vercyah Gossi from the firm of Hamza & Co. Advocates continued to represent the first defendant without objection from the plaintiff the court has found as stated by the counsel for the plaintiff there is nowhere stated the plaintiff and her counsel were aware the stated advocate was coming from the firm where advocate Senguji was a partner and failed to object his representation of the first defendant in the matter.

In the light of all what I have stated hereinabove the court has found that, the counsel for the plaintiff has managed to satisfy the court that, as advocate Senguji who is working in the same law firm with advocate Kitambwa has withdrawn from representing the first defendant in the matter because of the above stated reason, then advocate Kitambwa cannot be permitted to represent the first defendant in the matter. Consequently, the prayer by the counsel for the plaintiff is hereby granted and advocate Henry Kitambwa is disqualified to represented the first defendant in the matter. It is so ordered.

Dated at Dar es Salaam this 08th day of June, 2023


I. Arufani
JUDGE
08/06/2023

Court:

Ruling delivered today 08th day of June, 2023 in the presence of Mr. Joseph Rutabingwa, learned advocate for the plaintiff and in the presence of Mr. Uforo Mangesho, learned counsel for the first defendant. The rest of the defendants are absent and the case is proceeding ex parte against them. Right of appeal to the Court of Appeal is fully explained.



I. Arufani
I. Arufani
JUDGE
08/06/2023