IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 44 OF 2001

NATIONAL BANK OF COMMERCE LTD.....APPLICANT/PLAINTIFF
VERSUS
NABRO LIMITED .....1ST RESPONDENT/DEFENDANT
MEEDA REUBEN NABURI .....2ND RESPONDNET/DEFENDANT

RULING

KALEGEYA, J:

Mr. Kabakama, Advocate, for the Plaintiff, prays for orders, among others,

> *"That Mr. Leopold Kalunga the advocate for the Defendant be ordered to withdraw from representing the Respondents/Defendants in this case, and the Respondents take liberty to employ another advocate."*

Mr. Kalunga, Advocate, for the Defendants resists the application.

Briefly, the background to this mid-proceedings controversy, is that, until 11/4/2002 when issues were framed and the case fixed for hearing, the Defendants were being represented by the late Mr. Kapinga. Unfortunately, he passed away before hearing could commence. Thereafter, the Defendants retained another advocate, and this is Mr. Kalunga, against whom the injunctive objection is being raised for his appearance.

Mr. Kabakama, seeking support from the affidavit of Godson Killiza, the Plaintiff's Company Secretary; Halsbury's Laws of England,

3rd Edition, Para.80, and Jaferrari & another vs Borrisow & another [1971] EA 165, submitted that Mr. Kalunga cannot act for Defendants because he had earlier on been retained by the Plaintiff in relation to the same subject matter. He insisted that there is a conflict of interest because during the time, he got access to information which he will use against Plaintiff's interests, and in fact, cites the prayer for the amendment of the written statement of defence as an exposition of the same. And, indeed, immediately after taking over, Mr. Kalunga applied, unsuccessfully, to amend the written statement of Defence.

On the other hand, Mr. Kalunga challenges the application with the support of his own counter- affidavit and that of the 2nd Defendant, Meeda Reuben Naburi. The gist of the challenge can best be captured by looking at the relevant paragraphs. In paragraphs 3 – 6, Mr. Kalunga depones,

> " 3. *I state that I hold no interest of the Bank to defend or to bring into conflict with any other interests of other persons or at all as I am not their advocate or even retained by them in any way. My relationship with the Bank ceased long time ago before the Defendants retained me for their defence against the Bank.*
>
> 4. *That just as I am not entitled in law to choose for the Bank whom they should hire to protect their interests, the Bank equally has no right in law to determine or vet who should defend those they prosecute.*

5. *That the alleged conflict of interest arising out of the so called privity to the applicant's information does not exists at all as Exh.P1 contains no secret of any kind at all and has nothing to do with their exorbitant claim of the Bank of Tshs.100,253,662/= against my clients at all.*

6. *That I am free to be angaged by those who are against them as I am I completely free of any obligation to the Bank."*

while, Mr. Naburi reiterates the same in Para 5 to 7 as follows:

"5. *.....I state that I am entitled under the law to a choice of my own advocate as much as the Bank is entitled to a choice of its own advocate. I further state that Mr. Kalunga is not now an advocate or debt collector of the Bank. He has no interest in the Bank at all to protect or to be in conflict with in handling this case for me. There is no* ***conflict of interest*** *with the Bank at all in this case. This information has been supplied to me by Mr. Kalunga himself and I believe the same to be true.*

6. *Further Mr. Kalunga has confirmed to me that he is not an advocate of the bank and that he has nothing to do with the Bank. That there is no interest of the bank for him to protect at all as he does not protect in interest of the Bank in any other matter at all. There is no conflict of interest emerging at all in me engaging Mr. Kalunga to defend me in this case.*

7. *With reference to para 9, I repeat what I have stated above, that the Bank has no right absolutely to pray that I choose another advocate to defend me just as I do not have any right to choose an advocate for them to prosecute their case. I am retaining Mr. Kalunga as a matter of my constitutional right and common sense accordingly."*

Mr. Kalunga further submitted that the applicant's allegation that the application to amend the written statement of defence was made in order to utilize the information received during the retainership period by the former client is a far fetched imagination; that todate he has never been paid retainership fee by the Applicant; that the subject matter is different as the sum he had earlier on been retained to collect was Shs.60 million and not hundred million now claimed; that in any case, he was retained to collect the debt and not to represent Applicant in Court; that what is stated in Halsbury's Laws of England and referred to by Mr. Kabakama is not relevant to the issue at hand; that, constitutionally, the Defendants have a right of choosing who should defend them, and, that the application is made in bad faith.

On the question of the variation of figures from Shs.60 million to 100 million, Mr. Kabakama explained that the difference is as a result of accrual of interest.

From the above, it is clear that the only issue before us is whether an advocate who has been retained by a party for debt collection from another party, can subsequently be retained by that other party (the debtor) when

the controversy relating to the same debt, between same parties, finally lands the two parties in Court.

It is beyond controversy that at one point in time Mr. Kalunga was retained by the Applicants/Plaintiffs to collect the debt, from the Respondents. Among others, the demand note (marked as Exh.P1 to Killiza's affidavit) issued by him is a clear telling factor on this. The same runs as follows:-

"NABRO LIMITED
P.O. Box 5149
DAR ES SALAAM
Sir

Re: REPAYMENT OF TSH.68,312,188/=
TO N.B.C. [1997] LIMITED

1. This is to remind you that you are now indebted to the bank in the sum of Tshs.68,312,188/= split into as follows:-

FACILITY	***APPROVED LIMIT & EXPENDITURE***	***PRINCIPAL PAYABLE***	***INTEREST PAYABLE***	***TOTAL PAYABLE***
T/L	*65,000,000* *30/12/99*	*22,412,093* *105,000*	*45,794,295/40* *800/=*	*68,206,388/=* *105,800*
				68,312,188/=

2. Take NOTICE that unless the sum claimed above is fully paid within exactly SEVEN days from the date hereof, my instructions are to sell the collateral held by the

Bank CT No. 16673... L.O. ..... Plot No. 5

MSASANI BEACH ino MEED R. NABURI

Yours sincerely
Sgd:
KALUNGA & COMPANY
ADVOCATES

c.c. N.B.C. [1997] LTD
DAR ES SALAAM

c.c. NBC [1997] LTD
..... - Confirm payment please."

At this point, I should hurriedly add that, while I was in the process of composing this ruling, Mr. Kalunga, very commendably, brought to my attention a copy of judgement in RAKUSEN vs ELLIS, MUNDAY & CLARKE [1912] CA, 831. I should add that I have purposely made this observation using the words, *"very commendably"*. This is so because, a Counsel as an officer of the Court, should always, as and when he gets (it/them), make available to the Court all relevant legal literature for purposes of assisting the Court to reach a sound, and just decision. I am grateful for this sound approach.

The above said, let us deep our minds into the centre of contention.

Mr. Kabakama's stand is based on what is stated in **Halbury's Laws of England**, in the following wording:-

"A barrister ought not to accept a brief against a former client, even if the client refuses to retain him, if the barrister by reason of his

former engagement knows of anything which may be prejudicial to the client in the later litigation(s)",

Now, I must confess that I have not been able to get a local decision on the matter. However, the **Rakusen** case availed to me by Mr. Kalunga, discusses in details, the contending submissions, and I am persuaded to consider the same in my decision.

In the said English case **(Rakusen),** the objecting contention which was upheld by the High Court was as launched by Mr. Kabakama. On further appeal however, the Court of Appeal overturned the decision, it being held (as per summary in the headnote to the report),

"that there was no general rule that a solicitor who had acted for some person either before or after the litigation began could in no case act for the opposite side; the Court must be satisfied in each case that mischief would result from his so acting",

meaning that, the Court should only consider the existence or otherwise of dangers of any breach of confidence.

In the Court of Appeal judgment, their Lordships (Cozens – Hardy M.R, Fletcher Moultone L.J and Buckley L.J), insisted that each case has to be decided regard being had to the particular circumstances thereof and, that consideration would be whether there is a danger of the solicitor spilling over the old client's prejudicial information to the new client. For clarity, let us have a clear focus of the reasoning adopted by reproducing relevant extracts. **Cozens – Hardy M.R,** had the following to say:-

" A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidentially reposed in him. In that respect it does not very much differ from the position of any confidential agent who is employed by a principal. But in the present case we have to consider something further. It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who has acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances; and it is said that that is so much a general rule and the danger is such that the Court ought not to have regard to the special circumstances of the case.

I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act."

Further in his judgment, the M.R went on,

"In my opinion,.....the injunction granted must be discharged.....it has been admitted on both sides here, that we are dealing with solicitors of the highest position and whose honour and integrity are beyond any imputation. No possibility of the disclosure of secrets has ever been suggested, but Warrington J. merely bases his judgment on this, that it has been frequently said in this Court that a solicitor is an officer of the Court and cannot be allowed to put himself into a position in which his duty to his present client may conflict with his duty to his past client. With great respect to Warrington J. I think that goes a great deal too far. Many busy solicitors in this country would find it impossible to carry on their business at all if that was the true rule. I think solicitors of the highest honour and integrity may frequently be perfectly able to act in the same matter for a new client, and at the same time may be perfectly able to avoid disclosing secrets without putting any stain upon their memory, conscience, or integrity."

As to Fletcher Moulton L J, he had the following to say:-

"As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and

say that a solicitor shall not act. Now in the present case there is an absolute absence of any reasonable probability of any mischief whatever. It is an attempt to induce the Court to move, on the most purely technical grounds, in a matter in which it ought to deal with realities."

while Buckley L, J stated,

"There is a general principle, applicable not to solicitors only but to confidential agents of all kinds, that confidential information shall not be used against the principal from whom, or for whom, and in whose employment, it has been obtained. There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent. Whether he will be restrained from so acting or not depends on the particular circumstances..... *The question then involves the consideration of the circumstances under which a client is to be prevented from obtaining the services of a particular solicitor. The circumstances I think are these: the jurisdiction is a jurisdiction to restrain the solicitor from giving the new client any assistance against the old client by reason of knowledge acquired as solicitor for the old client. If to ensure that result it is shown to be reasonable necessary to restrain the employment of the solicitor by the new client the injunction will be*

granted, but on no other ground could such an injunction be granted as against the client";

and concluded,

"The whole basis of the jurisdiction to grant the injunction is that there exists, or, I will add, many exist, or may be reasonably anticipated to exist, a danger of a breach of that which is a duty, an enforceable duty, namely, the duty not to communicate confidential information; but directly the existence of possible existence of any such danger is negatived, the whole basis and substructure of the possibility of injunction is gone."

In reaching the decision which was overturned, Warrington J had reasoned, among others, as follows:-

"It has been frequently said in this Court that a solicitor as an officer of the Court cannot be allowed to put himself into a position in which his duty to his present client may conflict with his duty to his past client; and I think the principle which has been laid down by the Courts is that in such a case as that the Court does not inquire what information the solicitor may have or what information he may communicate. He is presumed to have been in confidential relationship with his client and he will not be allowed to put himself into confidential relationship with another client opposed to his first client."

I have produced extracts from the judgment in extenso purposely. They clearly paint the grounds upon which the contending views in the present matter, at least in substance, are also founded. Having carefully compared and considered the facts, the respective views and the environment obtaining in Britain as compared to the local conditions, with greatest respect, I am not persuaded by the general principle propounded by the Court of Appeal in **Rakusen case**.

Once we are agreed that an Advocate/Client relationship is founded on an impregnable principle of confidentiality, if we are to allow an Advocate to act for one client today and for another tomorrow, on the same subject matter, what shall we put in place, to guarantee that what he accessed confidentially, during his former retainership, will not spill over to the latter and to the former's prejudice. In the judgment, I have quoted at length above, their Lordships talk of "Courts having power" to control these Court officers, directing them not to divulge prejudicial information; of solicitors being of highest honour and integrity, but, what machinery do Courts have to put all these "guarantees" into place? Here, I should hastily add, lest I be misunderstood. I am not insinuating that Mr. Kalunga cannot strike the standard or the like. In fact, unless the contrary is proved, a Senior Counsel as he is, Mr. Kalunga is presumed to be dot-free in this aspect, but here, we are not dealing with principles which cover only Mr. Kalunga, nor of advocates of an unquestionable honour and intergrity of Mr. Kalunga's type, but with all those forming part of this legal profession – naturally including those with questionable intergrity. The principles should be broad enough to cover any eventuality. And this becomes more supported by the prevailing atmosphere, in our jurisdiction, where time and

again, the general populacy expresses reservations and doubts (however wild and possibly unsupported they may be) that some professionals double their roles between the competing parties. The profession should be saved from this mudslinging.

The above apart, in my view, the general principle pronounced in **Rakusen case** is wanting from two other aspects – one, by the time Court's assistance to bar a threatening advocate is sought, there is all likelihood that the relevant information will have been leaked to the undeserving party; and, two, even if it is not, in order to determine whether it is confidential or not, it will have to be disclosed to the Court and naturally, to the other party, thus putting asunder the very cherished principle (confidentiality).

Again, some fears being raised (as did, Cozen – Hardy, MR in Rakusen case, wherein he stated – **"many busy solicitors in this country would find it impossible to carry on their businesses at all if that was the true rule")** that advocates would have their businesses suffer because they would be barred from advocating for potential customers, in my view, would not tilt the balance. My answer to that is this, generally in this country, the situation in which Mr. Kalunga finds himself is more of an exception rather than the rule, and more importantly, but for frailty of man, for which, no one can front any scintilla of justification, justice has never been pegged on material or financial gains. And, in any case, the general principle which I accept to be ruling covers a limited ambit: new retainership in relation to old retainership, **on the same subject matter**. In our case for example, Mr. Kalunga would be free to represent any party

(including Defendants) against Plaintiff where he has never been retained in the same subject matter.

It is for the above reasons that I am on all fours with Warrington J's views quoted above (although overturned by a higher Court). Only then would the face of the profession be saved.

Deciding otherwise would punch an unbridgeable hole in the well known and guarded impregnable Advocate/client relationship which is imbued in the general principle of confidentiality save where public interests or criminality are involved. Clients' interests would be thrown into the winds as they would be left at the mercy of Advocates. On the other hand, the confidence base upon which the relationship is centered would be eroded because clients would not be sure which information to off – load to the advocate or retain. It would be disastrous to the whole machinery of justice because it would make clients have reservations leveled against the very advocates they retain.

In the case at hand, it matters not that Mr. Kalunga was retained only for debt collection from Defendants. As would generally be expected (and, no evidence let alone an allegation, has been launched to the contrary), most likely, in retaining him, the Plaintiff made available to him all the information upon which the claim is based. What we are assured of is that all his attempts (including the demand note) did not bend Defendants into paying what was demanded. What we are not aware of is the cause behind their (Mr. Kalunga and Plaintiff) falling apart let alone the extent of the information that was supplied. But for sure, the relationship got sour

otherwise Plaintiff would not have retained another advocate, and Mr. Kalunga was open enough to inform us that he has not even been paid the retainership fee, todate. In a situation as this one, it would not be proper for Mr. Kalunga to take up a brief for the very client he was once acting against because he would be armed with a lot of information which indeed can be utilized prejudicially against the former client. I should go further and say: even if Mr. Kalunga acts with due honest and intergrity, in the eyes of the former client and indeed, to the general public, it will be very difficult for him to convince them that he has so acted. Using a hypothetical case, for example, supposing the Plaintiffs were to withdraw the present case with liberty to re – institute, would it be proper for them to instruct Mr. Kalunga if they wanted to re – institute? Assuming they so did, and assuming Mr. Kalunga takes up the brief, and due to professional honour and intergrity he does not disclose even a spec of confidential information he has so far gathered from the present Defendants, would the latter believe that he didn't? How will they and the general public rate the intergrity of the profession generally? The undesirability of this kind of situation needs no orchestration.

And, I should reiterate that, in my view, in deciding the matter, it is not necessary to seek evidence regarding the nature of information supplied by the former client to the Advocate whose appearance is being challenged: what is relevant is simply to establish that **there existed that client/Advocate relationship and in respect of the same subject matter.**

In the case at hand, I have already concluded that the relationship existed. Again, on facts at hand, Mr. Kalunga was retained on same

subject matter. The difference in figures is irrelevant: and in any case, the applicant has explained that it was caused by accrual of interest taking into consideration the time which has elapsed between when Mr. Kalunga was first instructed and when the case was filed. And, it matters not that todate he has not been paid his retainership fee by the former client.

Yes, a party is entitled to be defended by an Advocate of his choice as much as an Advocate is entitled to choose a client but these same principles should have limitations which take into considerations other party's interests as well, and one of those, is the current situation.

Lastly, with all the above in mind, I should observe that it is high time our Tanganyika Law Society considered adopting, in *"The Rules of Professional Conduct and Etiquette of the Tanganyika Law Society"*, what was recommended in Canada as recent as 1998, by a Task Force established to Review the Canada Law Society's Rules of Professional Conduct and which, again for clarity, I reproduce here below:-

> *"2.04 (4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or a associated with the client in the matter:*
>
> *(a) in the same matter*
> *(b) in any related matter, or*
> *(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information*
>
> *unless the client and those involved in or associated with the client consent.*

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

2.04(5) *Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if:*

(a) the former client consents to the lawyer's partner or associate acting, or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) *the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur*

(ii) *the extent of prejudice to any party,*

(iii) *the good faith of the parties,*

(iv) *the availability of suitable alternative counsel, and*

(v) *issues affecting the public interest*

Commentary

The term "client" is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no

member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client."

I am satisfied that the application is meritorious. Mr. Kalunga should withdraw from the conduct of the matter. The Defendants are at liberty to seek services of another Advocate. Application allowed. However, I make no order as to costs because the issue seems to be very novel in our jurisdiction, and in my view, for the development of the law, each of the Counsel was justified in having it tested.

L.B. KALEGEYA

JUDGE

I Certify that this is a true an ... of the original/order Judge en. ...

.....

Registrar

Commercial Court

Dar es Salaam

Dated 4/12 of 2002