

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA , AT DAR ES SALAAM CIVIL CASE NO. 124 OF 2010 MEIS INDUSTRIES CO. LTD. . . . PLAINTIFF /DECREE HOLDER VERSUS THE GREAT SOCIALIST PEOPLES' LIBYAN ARAB JAMAHIRIYA . . DEFENDANT/ JUDGMENT DEBTOR MOHAMED ENTERPRISES TANZANIA LIMITED OBJECTOR

RULING

KARUA, J. This unusual application before me is made under Section 95 of the Civil Procedure Code, Cap 33, [RE 2002]. 1 In essence the application seeks to disqualify Mr. M paya Kamara, learned advocate and the Crest Professional Attorneys from representing their clients, Meis Industries Limited, the Decree Holder in this suit. The application was preferred and argued before me by Dr. Lamwai, learned advocate, who pursues this matter on behalf of the objector, Mohamed Enterprises (T) Ltd and is supported by the affidavit of Gulam Dewji, a Principal Officer of the Objector. The application is vehemently opposed by Mr. Kamara, the person it seeks to preclude from these proceedings and he further challenges the application on behalf of his firm. Mr. Kamara has also sworn a counter affidavit in its resistance. In the first place, let me commence by narrating a brief background note, that will piece together, what is really at stake and behind this application. The Government of the Great Socialist People's Libyan Arab Jamahiriya (GSPLAJ), the Decree Debtor in this case, undertook to assist the Decree Holder in its endeavor of constructing a cement manufacturing plant at Mahole area in Lindi Region. The Decree Debtor promised to finance the enterprise by injecting · USD 20,000,000 into the 2 I 'l project. The fund was earmarked to be drawn from the Debt Swap Agreement. What is this agreement? Briefly, the Government of United Republic of Tanzania was indebted to the Government of GSPLAJ, the Decree Debtor, the sum of USD 101,687,077.50 and the Government of GSPLAJ chose to debt swap USD 40,000,000 which the two Governments agreed to invest in projects that would be prospective and beneficial to the two Governments. One of such project was the Decree Holder's undertaking. A sum of USD 20,000,000 was apportioned for the project on loan basis. However, the Government of the GSPLAJ defaulted in performance and the Decree Holder successfully won the suit. When the execution proceedings were headway, the objector commenced these objection proceedings. The objector is also interested in the same funds and asked the Court to investigate into its claims. The objector has instituted Civil Case No 110 of 2010 against the Decree Debtor and asserts that if execution will be carried out, it will render the suit that it has instituted against the Decree Debtor, worthless in case it is adjudged the winner. 3 I 'l

When the objection proceedings were called for hearing, quite surprisingly, Dr. Lamwai, stood up and raised this unusual interjection, with the sole purpose, he says, to prevent the abuse of the process of the court, by beseeching the court, to make an order precluding Mr. Kamara and his firm, from the conduct of the objection proceedings. Dr. Lamwai alleges that Mr. Kamara once acted on behalf of the objector and therefore, he cannot act at the same time, for the Decree Holder, in relation to the same matter which he opined his legal expertise to the objector. According to Dr. Lamwai, the objector has instituted two cases, Civil Case No. 127 of 2009 and Civil Case No 110 of

2010. The later, as said, is against the Decree Debtor. The subject matter in all these cases, including the one instituted by the Decree Holder, is the same. The cases revolve around the Debt Swap Agreement and the amount involved of USD 40,000,000. The cause of action is the same. The complaint is against the Decree Debtor's breach of contract. According to Dr. Lamwai, commensurate with the agreement the two had, Mr Kamara gave his professional advised in the two cases instituted in Court by 4 the objector. He should therefore be prevented from acting on behalf of the Decree Holder in preference to the objector. Dr. Lamwai insists that Mr. Kamara knew the facts of these two cases instituted by the objector against the Decree Debtor very well by virtue of having given his professional consultations to the objector before he took the Decree Holder's brief. Mr. Kamara met the objector's officials and discussed these cases. He met the objector's principal officer, Mr. Gulam Dewji and the in house lawyer, Mrs Zakia Riazzi. In compliance with the terms of their agreement, Mr Kamara was availed with several documents relating to the dispute including draft plaint, draft chamber summons and its accompanied affidavit and made several comments or rather inscriptions on the documents. According to Dr. Lamwai, it was the duty of Mr. Kamara to maintain confidential relationship with the objector and should not have taken up the Decree Holder's brief. Dr. Lamwai believes that there is a serious conflict of interest ethically and professionally. He therefore asks Mr. Kamara to step aside and should not fight with the objector in these objection proceedings. 5 On the other, Mr. Kamara, in the first place, admitted to have worked for the objector. However he denied to have committed any wrong ethically and or professionally. He denied that the suit that the objector instituted and the present suit are identical. They are not identical, he said, and do not stem from the same root. He disagreed with the assertion that he was availed with confidential information. He conceded annotating on the draft plaint, chamber summons and its accompanied affidavit, after the said documents were brought to him by Zakia, the objector in house lawyer, for proof reading. Mr. Kamara maintained that in the cause of proof reading the documents, he came across short falls that Zakia would fill in and he would illustrate by inscribing in the documents. For instance, when he read through the documents, he noted that the account numbers were not filled in the documents and Zakia would then provide the details. Mr. Kamara rebuffed the assertion that he gave legal advice to the objector regarding the cause of action that the objector was supposed to take. Nonetheless, Mr. Kamara argued that professionally he was enjoined to represent any party. He cited the case of *Christian Vs Willson and others* (1999) Vol. 1 All ER

at P. 545. Mr. Kamara posed a question 6 ' . . whether the draft documents sent to him for proof reading were confidential. Mr. Kamara answered the question posed by saying that the documents were not confidential as they were part of annexure and pleadings in Civil Case No. 110 of 2010 and Civil Case No. 127 of 2009 and argued further that since 2009 these documents are in public domain. I have followed and considered the counsels well thought arguments and I would commence by drawing into my aid the case of the Board of Trustee TANAPA Versus Lion Safari Civil Case No. 7 of 1999, (unreported), especially the emphasis in the guiding principle, at the end of the extract, in the preface that Rutakangwa J., (as he then was) illustrated in the quoted case of Rakusau V Ellis Munday and Clarke (1912) I Ch. 831 at page 839: "You shall not disclose or put at the service of your new employer the secrets that belong to your old employer" What then is the mischief here? The key word is the secrets or rather the confidential information. Mr Kamara posed the very vital question whether the draft documents 7 sent to him for comment, were confidential information. I would respectfully answer the question posed in the negative. Dr. Lamwai himself conceded that Mr. Kamara was not entrusted with confidential information. Mr. Kamara, in my views, demonstrated uncontrovertibly that the documents availed to him were part of annexure and pleadings in the case instituted by the objector against the Decree Debtor. Therefore since 2009 these documents are in public domain. I am therefore quite satisfied that there is no mischief in this case. The objector demonstrated vividly that it was ready to let Mr. Kamara and his team pursue cases against third parties with that information, then that information cannot be confidential. Indeed, if the information complained off by the objector is that which Mr. Kamala read and commented upon in the draft chamber summons, affidavit and draft plaint, then that information, as correctly pointed out by Mr. Kamara, is no longer confidential as the information as said, was in the public domain, in Civil Case 127 of 2009 since 2009 and later in 2010 and third parties are not restricted to it. Moreover the objector's application to have Crest firm also precluded is baseless without legal justification and I 8 t I think that it was unfortunate that the application to preclude the Crest firm was ever made. Dr. Lamwai, though conceding that Mr. Kamara was not availed with confidential documentation hurriedly alighted to say that they wanted Mr. Kamara precluded from pursuing the objection, proceedings because he is seized with information which ethically precludes him from acting on behalf of the Decree Holder. However, that information was not disclosed in court. Neither did he elaborate on the nature of that information. As long as Mr. kamara is not being accused of breaching confidentiality he cannot be disqualified. This is what was held by Ratakangwa, J., in the case of TANAPA (supra) to which I fully subscribe. An advocate owes a duty to his former client not to disclose that which he has acquired from him confidentially. This duty in absolute. However, the advocate could serve another client, in that matter, provided the advocate does not breach that confidence. In the case of Rift Valley Co-op Union Versus the Registered Trustees Diocese of Mbulu, Civil Appeal No. 12 of 2007, (unreported), the Court of Appeal of Tanzania set another 9 principle. It held that an advocate who has previously acted for one party, may come to act for another party, in a dispute on the same subject matter and involving the same parties, provided that there is no conflict of interest or

embarrassment on the part of the counsel and, as usual, the onus of proving that conflict or embarrassment is on the party alleging the same. That huddle, in my considered view, has not been skipped by Dr. Lamwai. I should have ended here and dismiss this application. However, it is important that I make a comment in passing. It is my belief that these types of allegations once made, especially on judges and magistrates, even if made, as in this case, unjustifiably, and certainly wrongly; tend to erode confidence. The accusations certainly have a probable adverse effect, on the public confidence. I have ruled out that legally Mr. Kamara committed no sin. It is unfortunate and embarrassing as well, that these allegations were introduced against him and very unfortunate is the manner in which they were made. In my views, however, it is good practice for a colleague who has been muddled in such a mess to step aside and allow his colleagues who have not fallen in such unfortunate 10' .. situation to assume his responsibilities. Differently stated, it is my opinion that after declining an application, for instance, for a change of venue, made without substance, a judge or magistrate should not exercise superintendence in a case where one of the parties has no confidence in that particular judge or magistrate, unless the application for change of venue was propelled by ill motive and was geared to abuse the court's process. Judges and magistrate have a handful of cases to deal with rather than clutch hold on a single case that taints the credibility of that judge or magistrate. Likewise; the same should be said of advocates. I am also mindful that the Decree Holder has a right and indeed a constitutional right to be defended by a counsel of his own choice. I am also conscious that in this case the Decree Holder chose a firm which has also not at all been dented by the objector's accusations. I am mindful that the hearing of the objector's application might take hardly one hour. On account that justice must always be rooted in confidence and being aware that advocates are the engines in search for justice and on that account only, I suggest that Mr. Kamara should step aside and allow his colleague, who are very competent as well, the like of Mr. Matunda, to take over, for the duration for which the objectors' 11 / application will be presented. This is one of the ways that public confidence can be maintained in the judiciary. So it should be. I have spoken and pen off.

\,", _ , , _ , (11/04/2011 -:"<,~ DATED ATDARES SALAAM Appearances: For the objector: Dr. Lamwai For the respondent: Mr. Kamara assisted by Mr. Matunda 12 . . /' . .

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