

UGANDA / JUDGMENT

Tebeingana v Kwesigabo, Bamwine and Walubiri Advocates and Another (Miscellaneous Application 1132 of 2023) [2023] UGHCLD 380 (13 November 2023) [2023] UGHCLD 380

COURT

HC: Land Division (Uganda)

BEFORE

Basaza, J

CASE / FILE NUMBER

Miscellaneous Application 1132 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

[LAND DIVISION]

MISC. APPLIC. 1132 OF 2023

[ARISING FROM CIVIL SUIT NO. 0709 OF 2020]

DOEX TIBEINGANA

APPLICANT

\$V.\$

1. KWESIGABO, BAMWINE & WALUBIRI ADVOCATES

2. MUGUMYA BRIAN

(Suing as Administrator of the Estate of the Late Regina Katahirima)

RESPONDENTS

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA**RULING****Representation:**

- 1. Mr. Nsamba Abba Matovu for the Applicant
- 2. Mr. Mutebi Hannington and Mr. Kizito Ssekitoleko for the Respondents.

Introduction:

This Ruling is in respect of an application filed by the Applicant by motion \$[1]\$ brought under Regulation 4 of the Advocates (Professional Conduct) Regulations S. I 267-2, section 33 of the Judicature Act - Cap 13, section 98 of the Civil Procedure Act - Cap 71, (the CPA), and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules S. I 71 - 1 (the CPR).

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- \$[2]\$ In his application the Applicant: Mr. Tibeingana seeks for the following Orders:
- That the 1st Respondent: Kwesigabo, Bamwine & Walubiri Advocates \$i)\$ ('KBW Advocates'), is conflicting in acting for Mr. Mugumya in HCCS No. 709 of 2020 ('the Head Suit'), and therefore in violation of an Advocate -Client relationship and the Advocates (Professional Conduct) Regulations.
- ii) That the lawyers in **KBW Advocates** are potential witnesses and should be barred from representing Mr. Mugumya in the Head Suit.
- \$iii)\$ That an injunction be issued restraining **KBW Advocates** from appearing and or acting as Counsel for Mr. Mugumya in the Head suit.
- \$iV\$) That the costs of the application be provided for.

Background:

The Head suit: HCCS NO. 0709 OF 2020 was filed by Mr. Mugumya against Mr. \$[3]\$ Tibeingana and six (6) others. In that suit Mr. Mugumya contends that Mr. Tibeingana breached a Memorandum of Understanding (MoU) that the latter entered with Mr. Mugumya's late mother: the late Regina Katahirima. He contends further that through fraud and illegality, Mr. Tibeingana and the other six (6) Defendants procured the Registration of various condominium certificates of title under Condominium Plan No. KCCA No. 000183 over the suit

property comprised in LRV 4036 Folio 17, Plot 8 Chwa II Close.

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He seeks for **inter alia**; an Order of cancellation of the said Condominium titles, and for various Declarations, and a permanent injunction against the said Defendants.

- In their Defence, the Defendants variously deny the said allegations of fraud and [4] illegality, and *inter alia* contend that Mr. Mugumya is not entitled to the reliefs he seeks.
- In a counter-claim against Mr. Mugumya, the 1st Defendant: Mr. Tibeingana [5] contends that Mr. Mugumya is the one in breach of the said MoU, and that he is a trespasser onto the suit property. He seeks *inter alia* for vacant possession of the suit property, for removal of caveats lodged thereon, and for a permanent injunction against Mr. Mugumya.
- The Pre-trial hearing / scheduling conference of the Head suit to sort out; inter [6] alia points of agreement and disagreement, is yet to be taken, and has been fixed on November 14, 2023.

The Applicant's case:

- The gist of Mr. Tibeingana's present application and his affidavit in support, is: [7]
- i) That he appointed KBW Advocates, represented by Mr. Kwesigabo and Mr. Hannington, to act as mediators between him and Mr. Mugumya, and that Mr. Mugumya had forcefully taken over the suit property. That in advising and mediating for him, KBW Advocates became aware of facts which would be prejudicial to him.

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- ii) That when Mr. Mugumya filed Misc. Application No. 1249 of 2022 in the Commercial Court, he (Tibeingana) voluntarily consented to a conditional withdrawal of that application, and that the interaction with, and communication exchanged with KBW Advocates created a fiduciary relationship between him (Tibeingana) and KBW Advocates.
- iii) That when KBW Advocates accepted instructions to prosecute the Head suit on behalf of Mr. Mugumya, the said fiduciary relationship was violated, an act that gives rise to a conflict of interest.
- iv) That KBW Advocates have violated the Advocate Client relationship had with him (Tibeingana), and have acted in breach of the Advocates Act, Cap 267 and the Advocates (Professional Conduct) Regulations.
- v) That there is also need to summon KBW Advocates as witnesses if he (Tibeingana) is to properly prosecute his case. That KBW Advocates are likely to divulge some of the confidential and privileged information they obtained in their interaction with him if they are allowed to appear in the Head suit. That among other documents, the MoU (land Development agreement) he jointly drew with KBW Advocates point at their direct involvement.

Answer by the 1st Respondent:

In an affidavit in reply sworn by Mr. Johnson S. D. Kwesigabo, the 1st Respondent [8] opposes the application. They contend (the gist):

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- That Mr. Mugumya instructed KBW Advocates to file and prosecute the (i)\$ Head suit, and that throughout the failed negotiations to settle the Head suit, KBW Advocates acted solely for Mr. Mugumya.
- That Mr. Tibeingana has never been a Client of KBW Advocates and there ii) is no Advocate - client relationship between him and them. That Mr. Tibeingana has never paid any professional fees to them, nor has he had any fiduciary relationship with them.
- That KBW Advocates exclusively represented the late Regina Katahirima iii) in the MoU (land Development agreement), and solely acted as Advocate for her, and have consistently represented the same family.
- That no valid claim of conflict of interest resulting from an alleged (iv)\$ advocate - client relationship between Mr. Tibeingana and KBW Advocates exists at all.
- That it is a glaring lie that Mr. Kwesigabo and Mr. Hannington Mutebi (v)\$ were appointed to act as mediators in a matter where they were advocates of Mr. Mugumya.
- That Mr. Tibeingana unconditionally consented to allowing the grant of vi) Misc. Applic. No. 1249 of 2022.
- That in his written statement of defence in the Head suit, Mr. Tibeingana vii) did not list KBW Advocates as witnesses.

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Answer by the 2nd Respondent:

In his affidavit in reply, Mr. Mugumya essentially reiterated the averments made (9)\$ by Mr. Kwesigabo for the 1st Respondent.

Issues for determination by Court:

- Four (4) issues emerge in this application: (10)\$
- Whether an Advocate Client relationship exists / existed between KBW (i)\$ Advocates and Mr. Tibeingana? And if so, whether KBW Advocates are in breach of that relationship?
- Whether KBW Advocates acted as mediators as alleged? (i)\$

- Whether KBW Advocates are potential witnesses in the Head suit? ii)
- Whether Mr. Tibeingana is entitled to the reliefs he seeks? iii)

Submissions by Counsel:

All learned Counsel for each party filed their respective written submissions. For \$[11]\$ brevity, I will not reproduce all their arguments here. I have duly considered them, and may, in this Ruling, briefly refer to only portions thereof.

Analysis by Court of issues Nos. 1 and 2:

Regulations 4 & 10 of the Advocates (Professional Conduct) Regulations¹ provide \$[12]\$ as follows:

\$i)\$ Reg. 4:

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\$1\$ S. I 267 - 2

'An Advocate shall not accept instructions from any person in respect of a contentious or non-contentious matter if the matter involves a former client and the Advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in that matter'.
(Underlining added)

ii) Reg. 10:

> 'An Advocate shall not use his or her fiduciary relationship with his or her client to his or her own personal advantage and shall disclose to those clients any personal interest that he or she may have in transactions being conducted on behalf of those clients'. (Underlining added).

Pursuant to the said Regulations, the question of whether or not to disqualify an \$[13]\$ Advocate from legal representation of an opponent in court proceedings, should be carefully weighed against the non-derogable right of such opponent to a fair hearing under Articles 28 (1) and 44 (c) of the Constitution of Uganda. To wit: the right to a fair hearing includes inter alia one's right of choice to legal representation.

It must be shown and tangibly seen, that real mischief and or real prejudice \$[14]\$ would result unless the Advocate is restrained from acting in the matter on behalf of the opponent. The cited Regulations only apply to cases involving Advocates and their clients and or former clients.

In the present application, what must therefore, first be established, is whether the Applicant: Mr. Tibeingana, is or was a client of KBW Advocates?

\$[15]\$ Mr. Tibeingana contends that he is a client, and or former client of KBW Advocates, and seeks that the said Law Firm be enjoined from appearing and or acting as Counsel for Mr. Mugumya in the Head suit.

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On the other hand, KBW Advocates oppose the above assertion, and in rebuttal contend that Mr. Tibeingana has never been their client, and that he has never paid any professional fees to them, nor has he had any fiduciary relationship with them.

The onus of proof of any assertion, is on he who makes the assertion. To wit: \$[16]\$ 'he who asserts, must prove his / her assertion'. (Secs. 101 - 103 of the Evidence \$Act²\$).

In this present application, the assertion that Mr. Tibeingana is / was a client, or former Client of KBW Advocates was made by Mr. Tibeingana. He therefore has the onus to prove his assertion.

Before I delve further into my analysis, I will lay down the definition of 'a Client'. \$[17]\$ The interpretation section 1 of the Advocates Act³ defines a client to include:

'any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, an advocate and any person who is or may be liable to pay an advocate any costs'.

(Underlining added).

Black's Law Dictionary⁴, defines 'a client' as \$[18]\$

'A person or entity that employs a professional for advice or help in that professional's line of work'

(Underlining added)

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\$2\$ Cap. 6 of the Laws of Uganda ³ Cap 267 of the Laws of Uganda \$4\$ 9th / sup> ed. at page 289

- From the above definitions, the questions drawn are: whether it has been shown \$[19]\$ that Mr. Tibeingana ever retained or employed KBW Advocates? Is / was he ever liable to pay to the said Firm any costs? To wit: 'Costs' include fees, charges, disbursements, expenses and remuneration⁵.
- Upon carefully perusing both the affidavits for and against this application, [20] together with the attachments thereto, I find;
- First, that although it is common ground that there were negotiations and \$[21]\$ communication exchanged between Mr. Tibeingana and KBW Advocates, over the suit property, and in relation to the court proceedings referred to, there is no evidence that Mr. Tibeingana ever employed or retained KBW Advocates for professional advice, or to act on his behalf in any way.

- Annexures 'A' and 'B' attached to Mr. Tibeingana's affidavit in support; to wit: \$[22]\$ copies of the MoU, a letter dated February 13, 2023 and the attached emails, do not show, nor suggest anywhere, that Mr. Tibeingana is / was a client of KBW Advocates, or that the latter acted on his behalf. To the contrary, all the said documents clearly show that KBW Advocates acted on behalf of Mr. Mugumya, and prior to him, on behalf of his late mother Regina Katahirima.
- The MoU in particular, reflects that in that transaction, Mr. Tibeingana was [23] represented by the Law Firm of M/s Tibeingana and Co. Advocates, while the late Regina Katahirima was represented by KBW Advocates. Similarly, the court Mashmul mm 13/11.

⁵ See the interpretation section 1 of the Advocates Act.

documents in respect of Misc. Applic. No. 1249 of 2022, and of the Head suit, reflect that Mr. Tibeingana employed and retained the services of M/s KSMO Advocates and not the services of KBW Advocates. For the transfer forms referred to by Mr. Tibeingana in his affidavit, I was not able to see the same, as it was not attached to the pleadings of either party.

- In his written submissions, Mr. Nsamba Abba Matovu; learned Counsel \$[24]\$ representing the Applicant, argued that KBW Advocates witnessed the said MoU and the signing of transfer forms, and that as such they are conflicted. For that proposition, learned Counsel relied on and cited: Uganda v. Patricia Ojangole⁶, Ayebazibwe v. Barclays Bank Uganda Ltd & 3 Ors⁷, Sudhir Ruparelia v. MMAKS Advocates & AF Mpanga Advocates & 2 Ors⁸, and Namayega Barbara v. Etot Denis & 3 Ors⁹.
- I carefully considered his argument, and carefully perused the said authorities, \$[25]\$ but respectfully, I found that Mr. Nsamba Matovu's argument is without merit.

As already pointed out in this Ruling; there is no evidence that Mr. Tibeingana ever employed or retained KBW Advocates for professional advice, or to act on his behalf in any way. Mr. Tibeingana is neither a client, nor a former client, of KBW Advocates. As such, there is no conflict of interest contrary to the argument by Mr. Nsamba Matovu.

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⁶ HC. CrI. Case No. 1 of 2014 (Anti - Corruption Court)

⁷ HCCS No. 165 – 2012 (Comm. Court)

⁸ HCCS No. 1663 of 2017 (Comm. Court)

⁹ HCCS No. 939 of 2019 (Comm. Court)

- The cases cited by Mr. Nsamba Matovu do not assist Mr. Tibeingana's case. The \$[26]\$ scenarios in those cases are sharply distinguishable from the scenario in the present case in which no conflict of interest has been found.

- For instance, unlike in the present case, in *Sudhir Ruparelia v. MMAKS Advocates* [27] & *Anor* (supra), both Law Firms freely conceded to the fact that they worked for and represented Crane Bank Ltd (in Receivership), and that while they represented the latter, Mr. Sudhir Ruperalia was its shareholder with 100% shares, its Director and dominant executive who exercised close day to day control over its affairs and activities. On that basis, inter alia, Wangutusi, J., found that without Mr. Sudhir Ruperalia's say, the said Law Firms could never have been retained, and that even when retained, he could sack them without seeking anyone's approval. That under such an arrangement, a fiduciary relationship was created between Mr. Sudhir Ruperalia and the said Law Firms, and as such, they were presumed to possess confidential information learnt in earlier representation of a former client.
- Similarly, in *Uganda v. Ojangole* (supra), unlike in the present case, in that case, [28] Gidudu, J., found that the Law Firm of M/s Ligomarc & Co., which was the Firm retained by the accused's employer: UDBL, and which Firm prepared the report that the prosecution relied on to fault the accused, was in conflict in representing the accused CEO in that case.
- Second, I find that the alleged conditional withdrawal of Misc. Application No. [29] 1249 of 2022 by Mr. Tibeingana, remains only a mere assertion. That assertion

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was not supported by evidence. Neither was the alleged condition shown in the consent order in Misc. Applic. No. 1249 of 2022¹⁰, nor was it shown anywhere to have been an agreed basis for the said withdrawal.

- Third, I find that the assertion¹¹ by Mr. Tibeingana that he appointed KBW [30] Advocates as mediators 'on his behalf', or at all, was also not supported by any evidence.
- Fourth, I find that no evidence has been shown that Mr. Tibeingana was ever \$[31]\$ liable to pay to KBW Advocates any costs (fees, charges, disbursements, expenses and or remuneration).
- [32] By reason of my findings in paragraphs [21], [29], [30] & [31] above, these are my conclusions:
- \$i)\$ That Mr. Tibeingana is not, and was not, a client of KBW Advocates. The said Law Firm therefore has no fiduciary relationship with Mr. Tibeingana. No confidential or privileged information was ever imparted to the said Firm which would be used to the detriment or prejudice of Mr. Tibeingana.

A similar conclusion on the same basis was arrived at in a decision in the South African case: *Wishart v. Justice P. Blieden*¹². A decision I found to be fortifying.

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¹⁰ See Annexure 'D' to the 1st Respondent's affidavit in Reply.

¹¹ Refer to paragraph 5 of the affidavit in support.

¹² No. 659 / 13 [2014] ZASCA 120 in the Supreme Court of Appeal of South Africa

- That KBW Advocates did not act as mediators between Mr. Tibeingana ii) and Mr. Mugumya as alleged.
- That no mischief nor prejudice has been shown that would be occasioned iii) unless KBW Advocates were disqualified.
- [33] Issues Nos. 1 and 2 are accordingly answered in the negative.

Analysis by Court of issue No. 3:**Regulation 9 of the Advocates (Professional Conduct) Regulations provides that: [34]**

'No Advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit, and if, while appearing in any matter, it becomes apparent that he she will be required to give evidence whether verbally or by affidavit, he or she shall not continue to appear' (Underlining added)

- [35] The application of Regulation 9 above is contingent upon either of two factors:
- \$i)\$ The belief by the Advocate that he or she will be required as a witness,
- Where it becomes apparent, while appearing in the matter, that the ii) Advocate will be required to give evidence, whether verbally or by affidavit.
- [36] In his affidavit, Mr. Tibeingana averred that the lawyers in KBW Advocates who originated and witnessed the MoU shall be summoned as witnesses. In rebuttal, Mr. Johnson Kwesigabo, who acknowledged that he witnessed the said MoU, and participated in the transaction, averred in his affidavit in reply, that the MoU is not in issue and does not require lawyers from KBW Advocates as witnesses to prove an undisputed fact. That in respect of the transfer forms, a handwriting

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expert report was filed, and it is the said expert to appear as a witness, and not the lawyers in KBW Advocates.

- The effect of Mr. Kwesigabo's reply is that he does not believe that he, nor any [37] lawyer from KBW Advocates will be required as a witness in the Head suit. That then leaves the second factor listed in para. [35] above. To wit; that a lawyer from KBW Advocates will only be required as a witness, if it becomes apparent, in the course of Hearing the Head suit.
- From the foregoing, I hold the view that in order to finally and effectually [38] determine whether any of the lawyers from KBW Advocates will be required as a witness in the Head suit, it is prudent to reserve that question to the Holding of the pre-trial Hearing / scheduling conference in the Head suit. As it is, it is premature for this court to make a proper assessment as to whether there is any relevance and or necessity for the said testimonies, until the issues in the Head suit are framed. (Reg. 9 of the Advocates (Professional Conduct) Regulations and Order 11A Rule 7 (2) and 12 of the CPR [as amended], are applied).

Decision of Court:

- For the reasons given, this application fails. I accordingly make the following [39] Declarations and Orders:
- No Client Advocate relationship exists / existed between Mr. Tibeingana \$1.\$ and KBW Advocates. KBW Advocates have therefore not contravened

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Regulation 4 and 10 of the Advocates (Professional Conduct) Regulations S. I 267-2.

- \$2.\$ The determination of the question: whether any of the lawyers practicing with KBW Advocates will be required as witnesses in the Head Suit No. 709 of 2020, is reserved for the pre-trial Hearing / scheduling conference in the Head suit. (Order 11A Rule 7 (2) and 12 of the CPR, as amended, are applied).
- \$3.\$ The Applicant's prayer for an order of an injunction to restrain KBW Advocates from appearing and or acting as Counsel for Mr. Mugumya, is denied.
- 4. The costs of this application shall be paid by the Applicant: Mr. Tibeingana, to the Respondents.

I so Order,

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P. BASAZA - WASSWA

JUDGE

November 13, 2023

Ruling delivered electronically on the Judiciary ECCMIS system and via email to the parties.

the Applicant, and to: info@abbasadvocates.co.ug for Email to: kbwadvocates@gmail.com and kssekitoolek@gmail.com for the Respondents.

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