THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISCELLANEOUS APPLICATION No.1047 OF 2018

ARISING FROM HCCS No. 109 OF 2018

CRANE MANAGEMENT SERVICES LIMITED ..... APPLICANT

VERSUS

1. SEBALU & LULE ADVOCATES
2. DFCU BANK LIMITED ..... RESPONDENTS

**RULING**

**BEFORE HONORABLE JUSTICE GADENYA PAUL WOLIMBWA**

**1.0. Introduction**

This application is brought under section 33 of the Judicature Act, section 98 of the Civil Procedure Act, sections 1 and 77 (1)(a) of the Advocates Act, Regulations 4,7 9 and 10 of the Advocates (Professional Conduct ) Regulations and Order 52 of the Civil Procedure Rules.

**The application seeks declarations that:**

1. There exists an Advocate - Client relationship between the Applicant and the 1st Respondent, herein covering the subject matter of HCCS No. 109 of 2018 and matters incidental thereto;
2. In view of the Advocate - Client Relationship between the Applicant and 1st Respondent, the latter are potential witnesses in HCCS No. 109 of 2018 and are therefore barred from representing the 2nd Respondent / Defendant in the said suit filed by the Applicant.
3. In view of the Advocate - Client Relationship between the Applicant and 1st Respondent, the latter's continued participation as defense counsel for the 2nd respondent herein, which is the defendant in HCCS No. 109/2018, against the Applicant/ Plaintiff is prejudicial to the Applicants head suit.
4. In view of the Advocate – Client Relationship between the Applicant and the 1st Respondent, the latter are conflicted, rendering the continued representation of the 2nd

Respondent and their continued participation in HCCS No. 109 of 2918 a violation of the Advocates - Client Relationship and the Advocates (Professional Conduct) Regulations.

5. In view of the Advocate – Client Relationship between the Applicant and the 1st Respondent, a fiduciary relationship exists through which the Applicant exchanged and discussed vital and confidential information, not only covering the subject matter of the suit but other matters incidental thereto, which render the continued participation of the 1st Respondent as defense counsel in HCCS No. 109 of 2018 and all the applications arising therefrom prejudicial to the Applicant.

**The Application seeks orders that:**

- A permanent injunction and or restraining order does issue restraining the law firm of Sebalu and Lule Advocates , the 1st Respondent from appearing in and or, acting as Counsel for the 2nd Respondent in HCCS No. 109 of 2018 and all applications arising therefrom .
- The respondents pay costs of the Application.

The application is supported by the affidavits of Mr. Rajiv Ruparelia, the director of the Applicant. The 1st Respondent through Mr. Sebugenyi, swore two affidavits in reply and the 2nd Respondent through Mr. Muhammad Senoga swore an affidavit in opposition to the application.

**The grounds of the Application are briefly that:**

- There exists an Advocate-Client relationship between the Applicant and the firm of M/s Sebalu & Lule Advocates.
- That the 1st Respondent has over time received instructions from the Applicant including instructions to cause a thorough review of the applicants then existing tenancies which form the foundation of the claim in the head suit.
- That the Advocate-Client relationship between the Applicant and the 1st respondent necessarily called for exchange of vital, material, confidential and privileged documents and information including existing tenancies and relationship between the Applicant and the second predecessors in title which are now in issue in the head suit and which were

the subject of extensive discussions and consultations between the Applicant and the 1st Respondent.

- That the 1st respondent are potential witnesses as counsel who reviewed and guided the Applicant on reviewing tenancy agreements against allegations of fraud, illegality and unconscionable bargains

- That the 1st Respondent is in breach of a fiduciary obligation he owes the applicant as his previous counsel; and that it is in the interests of justice that the orders sought in this application are granted.

**2.0. Background to the case:**

Crane Management Services (the Applicant) is a company dealing in the business of real estate and letting as the duly authorized letting agent of Meera Investment Limited, which owns several buildings throughout Uganda. Crane Management Services was the chief renter of buildings to Crane Bank Limited, which was taken over by DFCU Bank Limited.

Sometime in 2018, Crane Management Services Limited sued the DFCU Bank Limited under HCCS No. 109 of 2018 for recovery of USD 385,728.54 and UGX 2,998,558,624 as rental arrears arising from breach of tenancy agreements involving the following properties:-

1. Plot 9 Market Street – Crane Bank Branch
2. Plot 9, Market Street – Crane Bank ATM
3. Plot 1-13 Jinja Road Crane Bank
4. Plot 47, Republic Street Mbale
5. Speke Hotel – Crane ATM,
6. Plot 19 , Copper Road - Crane Bank Branch'
7. Plot 20 , Kampala Road – Crane ATM
8. Apartments at Bombo Road , Kiira Road, William Street, market Street, Nkrumah Road
9. Plot 28 Luwum Street
10. Plots 1, Sinay Bin Street- 8 apartments.

11. Plot 22/24/26 Crane Bank Limited -Staff Flats.

Each of the properties were let out in tenancies for different fixed terms where rent was paid annually in US dollars as indicated in the pleadings.

Problems however, arose when Bank of Uganda closed Crane Bank Limited and sold the same to DFCU Bank Limited. Under the terms of the agreement of sale, DFCU Bank Limited acquired the assets and liabilities of Crane Bank Limited including taking over the tenancies of the buildings specified above. DFCU Bank Limited used the said premises for some time but vacated and handed them back to Crane Management Services. Crane Management Services, contends that DFCU did not fully comply with the tenancy agreements at the point of termination and therefore owes it arrears and unpaid rent for the uncompleted terms for the remaining period for buildings that were rented out under fixed rental terms.

DFCU Bank Limited engaged the services of M/s Sebalu & Lule Advocates to defend it against the claim by Crane Management Services Limited. M/s Sebalu & Lule Advocates filed a Written Statement of Defense and Counter Claim to the claim.

DFCU Bank Limited in its Written Statement of Defense contended that Bank of Uganda transferred certain asset and liabilities of Crane Bank Limited, including contractual obligations under tenancies for premises the bank was occupying with all pre-paid rent previously received by Meera Investments Limited. It also contended that; some of the claimed rent arrears had been fully paid, some tenancies had been lawfully terminated, some properties had been vacated with the consent of Crane Management Services, and some tenancies were terminated by frustration.

DFCU Limited also filed a Counter Claim against Meera Investments Limited and Crane Management Services for declarations that the Bank is entitled to U$ 55,390.07 being pre-paid rent to Crane Bank Limited and transferred to Meera Investment being double rent paid in respect to a warehouse at Kyambogo and 6th Street Industrial Area.

DFCU Bank Limited filed HCMA No. 939 of 2018 for leave to amend its Written Statement of Defense and Counter Claim.

At the beginning of the trial of HCCS No. 109 of 2018, Crane Management Services (the Applicant), filed the present application opposing the participation of M/s Sebalu & Lule Advocates as counsel for DFCU Bank Limited on the grounds that there exists an Advocate-Client relationship between them and the advocates for the reason that in 2016, the advocates were to review tenancy agreements, which are now the subject of litigation in HCCS No. 109 of 2018. The applicant contends that there exists an Advocate-Client relationship between itself and M/s Sebalu & Lule advocates and that by virtue of this relationship, M/s Sebalu & Lule Advocates have confidential and privileged information, which they obtained and on that account, fear that they may pass over the same to DFCU to its detriment. Crane Management Services says M/s Sebalu & Lule are conflicted and cannot therefore ably act as counsel in the matter.

M/s Sebalu & Lule Advocates, on their part said that it is true that in 2016, Rajiv Ruparelia engaged them to review templates of draft tenancy agreements for various tenancies, and that the scope of work was limited to inserting in missing contractual terms and simplifying the tenancy agreements so that they can read by a simple trader in Kampala, without the aid of an advocates. The agreements were six and that they were paid UGX 750,000 per contract.

M/s Sebalu & Lule Advocates admitted that they previously did some work for companies under the Ruparelia Group of Companies on leases and consolidation of titles for their property at Munyonyo, but they say these were one off assignments that are not related to the matters in controversy . M/s Sebalu & Lule also referred to two cases i.e. CA 188 and HCCS No. 577, under which they have acted as opposite counsel in cases where companies under the Ruparelia Group were sued and the Applicant never objected to their participation.

In summary, Ms. Sebalu & Lule denies the existence of an Advocate-Client relationship between them and Crane Management Services that would stop them from representing DFCU Bank in HCCS No.109 of 2018. They also denied having received any privileged and confidential

information from Crane Management Services that would make them conflicted to serve as counsel for the 2nd Respondent.

DFCU Bank Limited on its part, contends that they are entitled to choose counsel of their own choice and that having reviewed the tenancies in question, they do not see any evidence to show that M/s Sebalu & Lule Advocates participated in either drawing or negotiating them that would make them conflicted. They also asserted that Crane Management Services has not particularized or identified the confidential and privileged information that M/s. Sebalu and Lule have in their possession, which would constrain their participation as counsel in the suit.

### 3.0. Representation

Crane Management Services was represented by Mr. Kyazze. The 1st Respondent, was represented by Mr. Walubiri and the 2nd Respondent was represented by Mr. Kalenge Bwanika.

### 4.0. Arguments by the Parties

**The Applicant**

Mr. Kyazze, counsel for the Applicant, submitted that there exists a longstanding Advocate-Client relationship between the 1st Respondent and Applicant, dating as far back as 2012 and that as a result of this relationship, the 1st Respondent is aware of facts or obtained information which is prejudicial to the applicant that could harm his clients interest in the pending litigation. According to the pleadings, the 1st Respondent was engaged by companies belonging to the Ruparelia Group of Companies to handle conveyancing assignments; amalgamation of leases; and in 2016, to review tenancy agreements of Crane Management Services. Mr. Kyazze, submitted that by virtue of this relationship, the 1st Respondent received and is aware of privileged and confidential information that can be used to harm the applicant.

To demonstrate his point, counsel referred to the Written Statement of Defense and the amended Written Statement of Defense and Counter Claims, in which the 2nd Respondent is saying that the tenancy agreements in question are based on illegalities, fraud and insider

dealing, that can only be known or obtained by someone who is conversant with the applicant's state of affairs.

The draft amended Written Statement of Defense says that the tenancies are illegal unconscionable and therefore unenforceable.

He submitted that the applicant is required to prove an Advocate-Client between itself and the 1st Respondent and to determine whether an Advocate-Client relationship exists between a party and an advocate, one has to look at the correspondences; existence of a fee note; and the conduct of the advocate Vis a Vis the client. He relied on **Uhuru Highway Development Limited and Others vs. the Central Bank of Kenya and Others 2002 EA 654** to support his supposition. In this case, the Court of Appeal of Kenya held that:

> *Whether the plaintiff were the counsel's client may be discerned from a careful consideration of the correspondences on the record. A careful consideration of the same is, of course, required. We refer to the fee note and notice of taxation and conclude that the relationship emanating from these exchanges is that of an advocate and client or else the counsel should have sent these notes through DV Kapila and Company Advocates, alleged by counsel as acting for the plaintiffs.*

He submitted that there was evidence on the record to show that the 1st Respondent has done work for the Applicant and its associated companies for which they received remuneration.

Turning to the case at hand, he submitted that the properties in question are owned by Meera Investment Limited, which is a counter defendant. The Applicant is the letting company of the property owned by Meera Investments Limited. The Applicant let the said properties to Crane Bank Limited, which was taken over in receivership by DFCU Bank Limited. What is common in the three companies is that they have the same shareholders and director and they are like one company if the corporate veil of incorporation were to be removed. He submitted that by virtue

of this close relationship between the companies, if counsel acts for one of the companies it is like he acted for all the companies in the group.

He submitted that there is evidence on the record to show that the 1st Respondent has acted for the Group Members of the Ruparelia Group inclusive of Crane Management, Meera Investment Limited and Speke Hotel Limited since 2012. He submitted that the applicant retained the 1st Respondent in 2016 because of previous relationship to review the tenancy agreements and that it was not therefore a one off transaction.

He referred to the letter of 26th February 2016 – which was to review several tenants' agreements and the telephone conversations that ensued between the parties. In the scope of work, he was to review 6 tenancy agreements and give advice on the terms of each agreement. They were to identify the missing clauses and insert them into the contracts.

He submitted that the intentions of the contracting parties is a matter that remained confidential between the advocate and the applicant.

He submitted that by redrafting the tenancy agreements into their simplest form, there were already existing tenancy agreements which they were reviewing so that they comply with the instructions.

He submitted that whereas the scope of the work was to review and simplify the existing tenancy agreements, a letter by Mr. Sebugenyi, dated 26th February 2016, suggests that the scope of work was beyond what was agreed on in the emails.

The letter of 4th March 2016 – says to review several tenancy agreements involving Crane Management Services Limited. He submitted that this letter again extended the scope of the instructions.

Furthermore, Mr. Kyazze submitted the 1st Respondent was remunerated for the services rendered and at the end of the work, the 1st Respondent indicated his willingness to provide consultations and advice. See E 1 to E6. Counsel argues that the most important aspect here is that the lawyers indicated that they were available to discuss further if need arises – meaning that the advocate- client relationship between the parties was not terminated at the close of the assignment.

He submitted that given that the tenancies are a subject of the suit, a need has arisen for the 1st Respondent to render legal advice for the Applicant instead of working for the 2nd Respondent. He submitted that the above chronology of events and engagements shows that there is a longstanding Advocate-Client relationship between the Applicant and the 1st Respondent and that relationship subsisted up to the time the 1st Respondent took instructions to represent the 2nd Respondent against the Applicant and a group member of the Meera Investment Limited.

The 1st Respondent should never have accepted instructions when the tenancies became the subject of dispute because – the applicant was entitled to refer to the 1st Respondent concerning the disputes.

On the issue of whether the 1st Respondent is conflicted to serve as counsel for the 2nd Respondent, counsel submitted that the real test is whether the interests of justice would not be served and that the real mischief or prejudice will in all human probability result if the 1st Respondent is allowed to continue representing the 2nd Respondent. Counsel for the Applicant referred to the case of **Uganda vs. Patricia Ojangole Criminal Case No.1 of 2014**.

He submitted that conflict of interest may arise from amendment of pleadings, filing of Written Statement of Defense and Counter Claim, and from the nature of instructions and interactions between the advocate and former client. He referred to Sudhir Ruparelia vs. MMARK Advocates **and Three Others HCMA No.1063 of 2017.**

He submitted that the conflict of interest can be demonstrated from the following:

Firstly, the subject matter in the head suit relates to tenancies between the Applicant and Crane Bank now in receivership. It is not in dispute that there are the same tenancies that were taken over by the 2nd respondent.

Secondly, the 2nd Respondent has filed a defense and Counter Claim against the Applicant and Meera Investments Limited and the defense is filed through the 1st Respondent, who is a former lawyer of the applicant.

Thirdly, annexures H2 (the amended WSD), says that the Ruparelia Group is inclusive of the Applicant and Crane bank and that they are one and the same because they have the same shareholders and directors and that therefore, if a lawyer acts for one, it is like acting for the others since the shareholders and directors are the same.

On whether the 1st Respondent is in possession of confidential and privileged information, Mr. Kyazze submitted that there is evidence in the correspondences and discussions which the applicant and 1st Respondent shared that would exclude the 1st Respondent from representing the 2nd Respondent

Secondly, that the 1st Respondent received further instructions in telephone and email conversations as par the letters of 26th February 2016 and 4th March 2016. These letters show that these were not one off assignments.

He submitted that the Applicant gave the 1st Respondents work to review existing tenancy agreements that went beyond a mere casual look at the templates. He submitted that according to Black's Law Dictionary, review connotes a reconsideration of what is existing with the view of refining it or making it better.

It was Counsel's submission that in reviewing the tenancy agreements, the 1st Respondent asked for existing tenancies for review and that the copies that existed are some of the copies which are subject of the main suit. He noted that the revised tenancy agreements which the applicant

executed with Crane Bank are part of the suit. Mr. Kyazze informed Court that he has read through the agreements marked G- and there are similarities as well as difference but they are substantially the same with the tenancies the 1st Respondent prepared for the Applicant.

Counsel thus insisted that the 1st Respondent obtained confidential and privileged information from the Applicant and is therefore conflicted to represent the 2nd Respondent. *See* **Republic vs. Silas Mutuma Marimu and 2 Others Criminal Case Number 5 of 2016**, the case highlights the relevant parts of evidence

On whether the relationship between the 1st respondent and the applicant give rise to a prejudicial relationship, Mr. Kyazze submitted that the 1st Respondent had a relationship of confidence with the applicant which is now being abused by them in taking up instructions from the 2nd Respondent.

On the issue of whether the applicant had provided enough information to show that the 1st respondent is in possession of confidential information, Mr. Kyazze submitted that the applicant is only required to raise a rebuttable inference otherwise full disclosure would mean that the applicant would be exposing themselves further to the 2nd Respondent. He relied on the case of **Prince Jefri Bolikiah vs. KPMG (a Firm) HL 16 Dec 1998**, to buttress his arguments.

On whether there was a breach of the Advocates' Regulations, Mr. Kyazze submitted that Regulation 9 and 10 of the Advocates (Professional Conduct) Regulations bar the 1st Respondent from appearing as legal counsel for the 2nd Respondent. *See:* **Ayebazibwe Raymond vs. Barclays Bank Uganda Limited and 3 Others Civil Suit Number 165 of 2012.**

Further, he said there is clear conflict of interest since the 1st Respondent acted as counsel for the applicant and for the 2nd counter defendant Meera Investments; they gave advice on the tenancies which are the subject of the main suit and by switching sides, they are acting against the interests of their former clients. He submitted that based on **Partricia Ojangoles case (supra),** the 1st Applicant cannot ethically represent the 2nd Respondent because of the confidential and

privileged information in their possession. In conclusion Mr. Kyazze, asked the Court to disqualify and injunct the 1st Respondent from representing the 2nd respondent.

**The First Respondent**

Mr. Walubiri, counsel for the 1st Respondent, opposed the application on the grounds that:

1. The applicant is confused about the legal principles which are applicable about the case. While he refers to conflict of interest, he too refers to breach of fiduciary duty, breach of advocate's regulations, breach of confidential information as if they all mean the same thing.
2. An advocate has a right to practice his trade as protected and provided for under article 42 of the Constitution.

3. A client has a right under article 28 of the Constitution to be represented by an advocate of his choice. And that If you have to restrict this right, you cannot do it lightly. The court has to balance two public interests that is the right of the client's fullest confidence that his solicitor will not disclose confidential information and the freedom of the solicitor to obtain instructions from any member of the public. There has to be sufficient reason to deprive the client of the solicitor of his choice.

4. The grounds for deprivation is not possible perception of impropriety but protection of confidential information. Confidential information is information originally communicated in confidence.

5. Mere representation of a client does not bar the advocate from taking instructions against an adversary of the client. See Rakusen vs. Ellis Munday and Clerk (1911-18) ALLER 813

6. The client must go beyond making general assertions / allegations that the advocate is in possession of relevant confidential information. He must particularize the confidential information. He cited the case of **Simon Winters Vs Mishcon De Reya (2008) EWHC 2419**

(Ch), where the judge took evidence in camera to understand and appreciate the confidential information that was being referred to.

7. The applicant must lead court to show the confidential information and the court looks at it with the evidence of the lawyer in question.

8. The burden of proof that the solicitor is in possession of confidential information lies on the client. Counsel Walubiri argued that in the USA, courts assume that confidential information has been past and you don't have to prove it but in the UK, South Africa, you have to particularize and prove.

In **Sudhir Ruparelia case (supra),** Justice Wangutusi took the American view that you do not have to disclose the evidence in the court. But Justice Mugenyi in the case of American **Enterprises Limited and two others vs. Nyanzi, Kiboneka and Mbabazi Advocates HCMA 533 of 2018**, held that an applicant must prove that the respondent is in possession of confidential information.

On the evidence presented, Mr. Walubiri submitted that the 1st Respondent has never acted for Ruparelia Group generally other than getting specific instructions to handle, such as when he was given work to review tenancy agreements and to simplify them for an ordinary city trader to understand. He submitted that Annexure D is an email to Sebugenyi- the email has attached agreements for review but it does not mention any specific tenant. Annexures E1- E6 are the submissions of edited templates. He never sent any other documents.

He also submitted that there was no confidential information disclosed as counsel never negotiated the terms of the tenancy with the actual tenants. The 1st respondent did work on and off for various clients such as renewing lease agreements and consolidating titles for Meera Investments, which are totally unrelated to the subject matter.

He submitted that to prove that there was no strong Advocate-Client relationship between the Applicant and the 1st Respondent, the 1st Respondent even represented an adversary of the

Applicant in Ben Mushari in CA 188 and HCCS No. 577, without any complaints from the Applicant.

In his concluding remark, he submitted that neither Mr. Sebugenyi nor the firm are conflicted and can therefore act as counsel for the Respondent. He prayed that the suit be dismissed with costs to the 1st respondent.

**The Second Respondent's**

Mr. Kalenge, counsel for the second respondent opposed the application and associated himself with the arguments of Mr. Walubiri.

He submitted that although Rajiv says that there has been overtime instructions from the applicant who has been consulted on various matters, what has been established is that the work the 1st respondent did, was to review the 6 specific tenancy agreements. The applicant has to prove evidence of a longstanding instructions, which he has not proved. DFCU should be given chance to be represented by a lawyer of their choice.

Mr. Kalenge further submitted that there must be positive evidence of the allegations and that confidential information has been acquired and that the confidential information is related and relevant to the litigation. He referred to the case of **Prince Jefri (supra),** which says that, *"a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client has to establish that a solicitor is in possession of information which is confidential to him and to the disclosure of which, he has not consented to and that the information is relevant to the new matter in which the interest of the other client or may be adverse to his own."*

He concluded his submissions on the note that the scope of work given to M/s Sebalu & Lule, was clearly described and it related to simplifying the tenancy agreements for city traders and not Crane Bank Limited. And in any case the fee of 750,000 paid per tenancy agreement was too low to support the alleged longstanding relationship between the applicant and M/s Sebalu & Lule.

The Applicants Response

In response to the respondents arguments, Mr. Kyazze, counsel for the applicant , submitted that the right to practice as an advocate which is protected in article 42 of the Constitution cannot be read in isolation to regulations 9 and 10 of the Advocates(Professional Conduct) Regulations.

Secondly that the right of a client to appoint an advocate of his own choice under article 28 of the Constitution is also circumscribed – when there is a risk of the advocate using confidential information obtained during his relationship with a former client.

Thirdly, with regard to failure to provide relevant and confidential information, he referred to a letter dated 26th February 2016, marked as annexure D, the emails of 17th February 2016, the letter dated 26th February and another one dated 4th March 2016. All these letters explain the nature of transactions and the telephone conversations that followed between Rajiv and Sebugenyi. Whatever was discussed remained confidential between the parties.

Lastly, he referred to the case of **Prince Jefri Supra**, which says that, *"whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case."*

With regard to the issue that there were no names of contracting parties, that cannot be true because the letter of 26th April 2016 clearly shows who the contracting parties were. This letter of the 26th April 2016, also shows evidence of a long standing relationship between the Applicant and 1st Respondent.

Lastly, he submitted that the head suit is about the legality and none legality of the tenancies. Sebugenyi as the person who advised on those tenancies that were subsequently adopted is therefore a potential witness.

## 5.0. Issues for determination

At the hearing of the application, the issue framed was whether in acting for the 2nd respondent in the suit and Counter Claim as against the applicant, the 1st respondent is conflicted in breach of a prejudicial relationship with the applicant and as such, has violated the Advocates (Professional Conduct) Regulations. However, after hearing the application, I have based on the dispute before the court and reframed the issues as follows:

1. Whether the 1st Respondent is in possession of privileged and confidential information that would prevent him from acting as counsel for the 2nd Respondent? This issue intern has sub issues as shall be seen below.
2. What remedies if any are available to the parties?

**Issue 1: Whether the 1st respondent is in possession of privileged and confidential information that would prevent him from acting as counsel for the 2nd respondent?**

To resolve the above issue, I will first handle the sub issues that arouse.

**Is the right to practice as an advocate absolute?**

By way of introduction to the issue, the right to a fair trial is protected by the Constitution in articles 28(1). Under this right, a person is entitled to be represented by an advocate of his or her choice at his personal expense. Equally, article 40(2) of the Constitution gives every person including an advocate, the right to practice his or her trade. Article 40(2) of the Constitution provides that:

**Every person in Uganda has the right to practice his or her trade and to carry on any lawful occupation, trade or business.**

This right however, is not absolute. This right must be enjoyed subject to article 43(1) of the Constitution which provides that:

**In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.**

The import of this provision to the matter under consideration is that whereas an advocate is free to practice his or her trade as a lawyer, he/ she must do so without prejudicing the rights of others. Indeed, this is the reason, why the Advocates (Professional Conduct) Regulations, have imposed certain limitations on advocates, purposely, to ensure and guide advocates to practice their trade in a manner that does not injure the rights of others.

The limitations to the Advocates appear in the Advocates (Professional Conduct) Regulations. The relevant ones are:

**Regulation 4**: 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.

**Regulation 7**: An advocate shall not disclose or divulge any information obtained or acquired as a result of his or her acting on behalf of a client except where this becomes necessary in the conduct of the affairs of that client, or is otherwise required by law.

**Regulation 9** : 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 a matter it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit , he or she shall not continue to appear ; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or no contentious matter or fact in any matter in which he or she acts or appears.

**Regulation 10**: An advocate shall not use his or her fiduciary relationship with his or her clients 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.

As I explained above , while a client has a right to choose counsel of their own choice under article 28(1) of the Constitution, this right to have a particular advocate as his counsel may be limited, if the advocate is prevented by the Professional Regulations cited above from taking on those instructions. It is the responsibility of the individual advocate to satisfy himself or herself before taking on the instructions that they are not prohibited or limited by the Advocates (Professional Conduct) Regulations or any other law from taking up the instructions. Therefore, an advocate who is caught up by the Advocates (Professional Conduct) Regulations , cannot therefore plead the aid of article 40 (2) of the Constitution, without running afoul to article 43(1) of the Constitution which places limitations on the enjoyment of the derogable rights.

Is the first respondent in breach of the Advocate's Professional Regulations?

The gist of the case is that the 1st Respondent is conflicted as an advocate from acting for the 2nd Respondent because there is an Advocate-Client relationship between them and the Applicant and that that relationship has a created a fiduciary duty that would limit and prevent the 1st Respondent from representing the 2nd Respondent in the case against the Applicant.

In dealing with this matter, I will consider first whether there is an Advocate-Client relationship between the Applicant and the 1st Respondent and if I find that there is an Advocate-Client relationship between the Applicant and the 1st Respondent, I will secondly deal with the issue of whether the 1st Respondent received confidential information from the Applicant, which would make them conflicted as counsel and lastly, whether there are limitations on the 1st Respondent.

Was there a client advocate relationship between the Applicant and the 1st Respondent?

Counsel for the Applicant gave two scenarios to demonstrate that there was a client advocate relationship between the Applicant and the 1st Respondent. The first scenario was that prior to 2016, the 1st Respondent was given different assignments by companies belonging to the Ruparelia Group of Companies to work on leases , consolidate titles and renew leases. The second scenario is that the Applicant was assigned work in 2016 to review tenancy agreements.

With regard to the work done prior to 2016, I have found that the 1st Respondent did various work for Meera Investments, a company belonging to the Ruparelia Group. The scope of work involved extension of leases and consolidation of titles for plot 2-12, 6, 42 and 107 Munyonyo Prince Mawanda Drive; amendment of lease for Speke Hotel 1996 and Meera Investments , Leases for Kyadondo Block 256 plots 152, 153, 2-12 , 6, 42 and 107; lease extension for Plot 109, plot 110. Plot 127 – Kyadondo .The 1st Respondent was sought out by Meera investment on a case by case basis and not as an inside counsel on a retainer. The work was specific and the relationship was terminated at the conclusion of the work as the 1st Respondent were not kept on a retainer.

With regard to the dispute in this court, the work done prior to 2016, is only useful in explaining, firstly, why the 1st Respondent were given work to review the tenancy agreements. The 1st Respondent had done previous work for some of the companies under the Ruparelia Group and had the confidence of the group. Secondly, that companies under the Ruparelia Group though are supposed to independent and distinct, they are run as one and the same company as they have the same shareholding, directorship and decision-making apparatus. Lastly, this work is useful in explaining the habit of these companies in engaging an advocate on a case by case basis. Apart from the above, there is no other useful information obtained by the 1st Respondent from the Ruparelia Group that is useful to the dispute under consideration.

With regard to the work done in 2016 in reviewing tenancy agreements, there is irrefutable evidence on the record that Mr. Rajiv instructed the 1st Respondent through Mr. Sebugenyi, to review templates of tenancy agreements. The 1st Respondent did the work and billed the Applicant seven million shillings. Indeed Mr. Sebugenyi, in his affidavit in reply and several emails to Mr. Rajiv confirmed that he executed the work. I also saw a fee note submitted by the 1st Respondent to the Applicant demanding for payment for work done. As to whether the interaction between the 1st Respondent and the Applicant created an Advocate-Client relationship, such a relationship may be confirmed by the presence of a fees note, correspondences between a client and an advocate, and the conduct of the parties. In **Uhuru**

Highway Development Limited and Others vs. the Central bank of Kenya and Others 2002 EA 654, the Court of Appeal of Kenya held that:

> Whether the plaintiff were the counsel's client may be discerned from a careful consideration of the correspondences on the record. A careful consideration of the same is, of course, required. We refer to the fee note and notice of taxation and conclude that the relationship emanating from these exchanges is that of an advocate and client or else the counsel should have sent these notes through DV Kapila and Company Advocates, alleged by counsel as acting for the plaintiffs.

Accordingly, the question of whether there is an advocate / client relationship can be gathered from a careful consideration of the dealings between the two parties including examination of correspondences , existence of any fee notes and any other evidence that might be available.

As I have found above, Mr. Rajiv instructed the 1st Respondent to review templates of tenancy agreements, the 1st Respondent did and billed the Applicant for the work. The Applicant paid for the work and some of it was exhibited in court in annexures E1-E6. Annextures E1-E6 are copies of the work done by the 1st Respondent for the Applicant in 2016.

Based on the work done and the principles in the Uhuru Highway case (Supra), I find that there was an Advocate-Client relationship between the Applicant and the 1st Respondent, when the former instructed the latter by email and telephone conversations to review templates of tenancy agreements and a fee note of 7 million Shillings was generated by the 1st Respondent and directed to the Applicant.

It is however, not true that there is still a subsisting Advocate-Client relationship between the Applicant and the 1st Respondent. While it is true that Mr. Sebugenyi, in his last email to Mr. Rajiv, made it clear that the 1st Respondent would be available to do future work for the Applicant, there is no evidence that the Applicant accepted Mr. Sebugenyi's offer. Therefore, in the absence of clear evidence that the Applicant accepted the offer and any evidence of

additional work given to the 1st respondent by the Applicant, after the 2016 assignment, and given the habit of the Applicant sourcing advocates on a case by case basis, I cannot conclude that the 1st Respondent is still the Applicant's advocate. The only obligation that the 1st Respondent owes to the Applicant is a fiduciary relationship that was created between the two, when the former was instructed to review tenancy agreements in 2016.

Did the 1st Respondent obtain confidential information from the applicant?

This now leads me to consider the heart of the issue of whether the 1st Respondent by virtue of having been counsel for the Applicant received privileged and confidential information from them that would prevent them from acting as counsel for the 2nd Respondent?

The gist of the Applicant's case is that Mr. Sebugenyi was given instructions to review tenancy agreements , which are now the subject of dispute in HCCS No. 109 of 2018 and that by virtue of this relationship, Mr. Sebugenyi and Mr. Rajiv, shared a lot of information regarding these tenancies both in their email and telephone conversations. Counsel for the Applicant relied on the letter dated 26.2.2016; the email of 17.2.2016, the letter of 26.2.2016 and the letter of 4.3.2016 to show that Mr. Rajiv shared a lot of information with Mr. Sebugenyi. He also submitted that the proposed amended Written Statement of Defense and Counter Claim, in which the 2nd Respondent is claiming that the tenancy agreements in question are based on illegalities, fraud, insider dealings and related issues, all point to the fact that the 1st Respondent is using privileged and confidential information that he obtained as counsel for the Applicant when he was reviewing tenancy agreements to harm his previous client.

The case of the 1st Respondent is to the effect that the Applicant has not made out a case to show that they are in possession of privileged and confidential information as alleged by the Applicant. To prove their points they say that:

- The Applicant has failed to disclose or particularize the said confidential information as required by case law.
- The instructions were one off instructions given to them where they were asked to review template of tenancy agreements

- The tenancy agreements in issue were made before 2016, when they were not yet counsel for the Applicant.

The 2nd Respondent associated themselves with the arguments of the 1st Respondent but added that the amended Written Statement of Defense and Counter Claim is based on information they received after reviewing files concerning the tenancies in dispute.

As a general rule, an advocate is not precluded from representing another person against a former client except if the advocate is in possession of privileged and confidential information. This position of the law has been extensively discussed in several cases many of which were relied on by counsel. I will refer to just but a few of them.

In **Ayebazibwe Raymond vs. Barclays Bank Uganda Limited and 3 Others Civil Suit Number 165 of 2012**, Justice Madrama as he then was, while discussing the limitations that may be imposed on counsel who has previously represented a party had this to say:

> Firstly the basis of the court's Intervention is not a possible perception of impropriety but the protection of confidential information. Secondly the court is sensitive to the need to afford the fullest special protection to such confidential information. Thirdly, the confidential information passing between solicitor and client and otherwise acquired by a solicitor on behalf of his client may subsequently cease to be confidential, in which case the protection does not apply. Fourthly a solicitor at one time retained by a client but not in possession of relevant confidential information , is not by reason of the fact of such previous retainer precluded from subsequently acting against him. Lastly, the issue whether the solicitor is possessed of relevant confidential information cannot be decided on the basis of a general allegation that the solicitor is in possession of relevant confidential information if it in issue without sufficient particularity as to the confidential information.

**The Judge continued to say that:**

"In other words the court does act on mere perceptions but moves to protect confidential information."

This was also said in **Re a Firm of Solicitors (1995)2 ALLER 482, 489,** where Lightman J held that:

> The law is concerned with the protection of information which (a) was originally communicated in confidence, (b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable , on the memory being triggered; and (c) relevant to the subject matter of the subsequent proposed retainer.

**The judge added that on the issue of whether a solicitor possessed of relevant confidential information:** (a) it is in general not suffice for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required.

The burden of proof that the information is confidential is on the applicant who must prove it on a balance of probabilities.

In **Prince Jefri Bolkiah vs. KPMG (a Firm) 1999 ALLER517 527,** it was said that;

> Accordingly, it is incumbent on the a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to (i) establish that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own . Although the burden of proof is on the plaintiff, it is not a heavy one: The former may be readily inferred; the latter will often be less obvious. .... Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case.

The gist of the law cited above is that the law is concerned with protecting the confidentiality of information that is in possession of an advocate arising out of an Advocate-Client relationship between an advocate and former client, so that the Advocate does not use it to harm the former client. However, for the information to be protected, it must be current; relevant to the head dispute; and that the advocate concerned is capable of remembering the information. The burden of proof lies on the applicant to show that the respondent is in possession of privileged and confidential information. There is divided opinion in different jurisdictions whether the applicant must particularize the confidential information. Generally, within the American jurisdiction, there is no legal obligation to particularize the information. In the United Kingdom, there is an obligation to particularize the confidential information. See: **Prince Jefri Bolkiah vs. KPMG (a firm) 1999 ALLER517 52.**

In Uganda, there are two conflicting decisions on the matter. In **American Enterprises Limited and two others vs. Nyanzi, Kiboneka and Mbabazi Advocates HCMA 533 of 2018**, Justice Anne Mugenyi, held that, *"the applicant must particularize the confidential information."* While in **Sudhir Ruparelia vs. MMAKS and 3 others (supra),** Justice Wangutusi, said, *"It was enough for the applicant to raise a strong rebuttable inference that the Respondent is in possession of confidential information."* He held that:

> The presumption is that there is a possibility of disclosure and although some authorities state that the Applicant should plead the secret information he fear his advocate will reveal, recent authorities have come up to hold that such pleadings would be contrary to the intended secrecy.

On this, Judge Weinfield in **TC Theatre Corporation vs. Warner Brother Pictures, SDNY 195** wrote:

> To compel the client to show .... The actual confidential matter previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer – client relationship. For the court to

problem further and shift the confidences in fact revealed would require the disclosure of the heavy matters intended to be protected by the rule. It would defeat an important rule of secrecy – to encourage clients too fully and freely to make known to their attorney all facts pertinent to their cause.

**Justice Wangutusi concluded that:**

"Because of the foregoing, most courts are of the view that the presumption is irrefutable. Where the relationship has been substantial the presumption is stronger."

I agree with the learned judge's finding particularly, with regard to the strong policy reasons behind the protection of confidential information, which the law seeks to protect, otherwise the law would fail in its duty. In the final analysis, the applicant is only required to lay out such sufficient information that gives the respondent adequate notice to enable him or her file an appropriate defense. In the case before me, the information provided by the applicant to wit: that the 1st Respondent reviewed templates of tenancy agreements; that Mr. Rajiv and Mr. Sebugenyi discussed the instructions in telephone and email conversations; and the complaint against the proposed amendment to the Written Statement of Defense and Counter Claim has given the respondents adequate notice of the confidential information that they are seeking to protect.

I now come to the issue of whether the 1st respondent by virtue of this relationship received privileged and confidential information from the applicant?

The applicant's case is that the 1st Respondent received confidential information from the applicant in the course of taking instructions to review the tenancies. The Respondents on the other hand contend that the scope of work given by the Applicant was to review 6 templates of tenancy agreements and simplify them so that they can be understood by an ordinary business person.

I have reviewed the evidence on the record on whether the applicant ever supplied or provided confidential information to the 1st Respondent.

The first area to start from, is the instructions that were given to Mr. Sebugenyi.

In an email dated 17th February, 2016, Mr. Rajiv wrote to Mr. Sebugenyi and asked him to among other things, review 6 draft templates of tenancy agreements. The scope of the review was to find and insert missing clauses and to simplify them so that an ordinary trader in Kampala could easily internalize them without the aid of a lawyer.

While the Respondents over emphasized the requirements for simplification, they missed the point that the simplification was to be done after reviewing the tenancy agreements. The harder part of the said instructions was to review the tenancies and come up with better tenancies. The Oxford Advanced Learners Dictionary, 8th Edition, Pg 1267, defines the word review as **"a formal assessment of something with the intention of instituting change if necessary'**. Black Law Dictionary defines review as, **"consideration, inspection, or re-examination of a subject or thing."** Review therefore involves a critical appraisal of a document with the overall objective of making it better or in compliance with a standard or set objective (of a client).

A reasonable and diligent advocate, if given a document to review, like the 1st Respondent was given templates to review, would have among other things read through the documents, interviewed the client to establish exactly what the client wants including the mischief to be addressed by the review and armed with this information, they would now use their legal skills to implement the clients instructions and ensure that the agreements satisfy the requirements of the law.

The 1st Respondent, noting the importance of the work/assignment indicated to Mr. Rajiv that the review would involve 12 Associate hours at an hourly rate of USD 200 and 3 partner's hours. The 1st Respondent, I am sure raised the point with the Applicant because they had a professional

obligation to do the work in compliance with the highest legal standard pertaining to preparation of tenancy agreements.

In furtherance of carrying out the instructions, Mr. Sebugenyi and Mr. Rajiv had other discussions on the work both by email and telephone conversations. Please see annexure C, an email from Rajiv to James where the former writes, "...as per our tele- conversation, please find attached the Tenancy agreements to be edited from shillings to Dollars..." What the two discussed may never be known because it was a discussion involving an advocate and client regarding the scope of work. A client in the presence of his or her advocate talks freely on the consideration that he is free to speak what they want based on the understanding that his or her advocate will find a solution to the problem at hand. The client also expects that the advocate will use the information to further his or her interests and not harm him.

In the ordinary work of a client/ advocate relationship, the court takes judicial notice that a lot of information is said and passed on by the client to the advocate, some passively and the other purposefully. Perhaps the scope of judicial notice could have been be restricted if they were written minutes regarding instructions to the 1st Respondent. The confidence that the client has in his advocates and the freeness in communicating between the two is what creates a fiduciary duty between a client and an advocate and that is why Regulations 4 expressly prohibit an advocate from taking instructions from another if the matter involves a former client.

Given the discussions both by email and telephone, that went on between Mr. Sebugenyi and Mr. Rajiv, it can be safely concluded that the Applicant and 1st Respondent shared more information than the initial limited information in the email of 17th February 2016, which gave the scope of work. Furthermore, the letter of 26th February 2016, from M/s Sebalu & Lule to Rajiv Ruparelia, clearly laid that the scope of work as "being to advise on the particulars of the terms of each agreement in accordance with the intentions of the contracting parties."

The applicant also argued that the proposed amendment to the Written Statement of Defense and Counter Claim, raised a red flag that the 1st Respondent was exploiting his previous

relationship with him to hurt them. The 2nd Respondent on its part denied that they had relied on information from the 1st Respondent to prepare the proposed amendment to the WSD. They argued that they had reviewed files regarding these tenancies from the files that came into their possession as successors in title to Crane Bank Limited.

In matters where an advocate is accused of being conflicted, the court is given latitude to look at all materials available before it including proposed amendments to pleadings. This principle was applied in the **Sudhir case (supra),** where Justice Wangutusi held that:

> the court is entitled to look at both the pleadings and any proposed amendment to the pleadings to determine whether these pleadings- raise the inference of a former advocate misusing his fiduciary relationship.

I am therefore going to refer to the proposed amendments to the WSD to determine whether any inference can be drawn from the proposed amendment to the WSD and Counter Claim, to determine whether there is a possibility that the amended defense is based on information obtained by the 1st Respondent out of his previous dealings with the Applicant.

I find it difficult to believe that the respondents were able to infer fraud and other illegalities by simply reviewing the tenancy agreement files. In issues involving fraud, insider dealings and illegalities by their nature involve more than a casual perusal of documents. It is the story behind the documents and intentions of the parties that will show and tell the fraud. So documents are useful but the persons behind those documents or those who know the workings of the concerned persons are very important. So I find it difficult to believe the Respondents that the proposed amendment to introduce fraud and other illegalities in the pleadings are only founded on reviewing files about the tenancies. Evidence of fraud, insider dealing and illegalities can be gathered from people, who have dealt with the concerned party and where legal documents are involved like in the instant case, counsel, who has become aware of the dealings of a particular client or done some work for the client involving the questioned work and gained some insights into the workings of a client are normally handy sources of information.

In this case, I have found that Mr. Sebugenyi, in reviewing tenancy agreements, received, communicated and exchanged information with the Applicant on the subject of tenancies. Some of the information was by email while the other information was by telephone. Since the assignment given to the 1st Respondent was to review the tenancy agreements, they must have obtained more information either passively or actively through interaction with Mr. Rajiv to give effect to the instructions of the Applicant. The information received possibly included background information about the existing tenancies that gave an insight into affairs and dealings of the applicant, to which a reasonable bystander – would say, put him in position to know more than what he is willing to share.

Before, taking leave of this point the 1st Respondent argued that the tenancy agreements in the head suit were not done by the 1st Respondent and that they cannot be imputed to have confidential information regarding them. The 1st Respondents are correct to the extent that all the tenancies with the exception of two tenancies in annexure G, were done before 2016 before the Respondents came into the picture. The 1st Respondents are connected to the pre 2016 tenancies because they were asked to review templates of old existing tenancies that covered the pre 2016 tenancy agreements.

It is even more worrying that if it is true that fraud and illegalities were involved in these tenancies, then the 1st Respondent and specifically, Mr. Sebugenyi, is a likely to be called as a witness to shed more light to two tenancy agreements signed after 2016 that are based on their prepared templates and are also about the how the applicant operates its business. **Regulation 9** the Advocates (Professional Conduct) Regulations provides that:

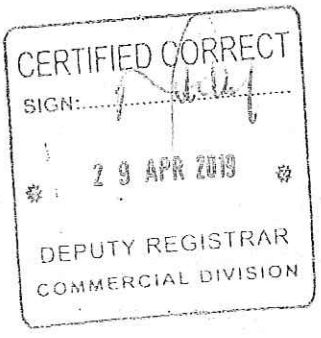
> No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit , and if, while appearing in any a matter it becomes apparent that he or she will be required as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

that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or no contentious matter or fact in any matter in which he or she acts or appears.

In view of the foregoing , I hold that the Applicant has made out a case that the 1st Respondent's are in possession of confidential information, which is relevant; current; and related to the head suit in HCCS No. 109 of 2018, that would make them conflicted to act as counsel for the 2nd Respondent against the Applicant. For the record, the engagement of the 1st Respondent as counsel for the 2nd Respondent violated Regulation 4, 9 and 10 of the Advocates (Professional Conduct) Regulations.

**Issue 2: What remedies are available?**

I have found that the 1st respondent is in possession of privileged and confidential information that came into his possession by virtue of being counsel to the applicant. The information is relevant and current and relates to matters in HCCS No. 109 of 2018 involving the Applicant. The 1st respondent is therefore conflicted and cannot ably represent the 2nd Respondent. I accordingly grant an injunction stopping the 1st Respondent from acting as counsel for the 2nd respondent in this case.




Decision

The application is allowed with the following orders:

1. An injunction shall issue against the 1st Respondent from representing the 2md Respondent in all matters in HCCS 109 of 2018.
2. The Respondents will pay the costs of this Application.

**Hon. Gadenya Paul Wolimbwa**
**Judge**
**29th April 2019**

This ruling will be read by Mr. Festo Nsenga , the Deputy Registrar of the Commercial Court on 29th April 2019 at 9.30 am.

**Hon. Gadenya Paul Wolimbwa**
**Judge**
**29th April 2019**

CERTIFIED CORRECT
SIGN:.....
29 APR 2019
DEPUTY REGISTRAR
COMMERCIAL DIVISION

Ruling delivered in the presence of:

1. Mr. Mubiru Kalenge Stephen for the 2nd Respondent.
2. Mr. Walubiri Peter for the 1st Respondent.
3. Mr. Kyazze Joseph, Mr. Sserunjogi Nasser, and Ms Natukunda Jackline for the Applicant.
4. The 1st Respondent' Partners Mr. Munanura Andrew and Mr. Mafabi Michael.
5. The Applicant's Directors Mr. Sudhir and Mr. Rajiv Ruparelia.
6. The Applicant's Legal and Compliance Manager Ms Ouko Eunice.

C/C - Ms Nansubuga Sauda.

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**Festo Nsenga –**
**Deputy Registrar**

29th April, 2019 – 10:18 a/m.

CERTIFIED CORRECT
SIGN:.....
29 APR 2019
DEPUTY REGISTRAR
COMMERCIAL DIVISION