

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT KASAMA/NDOLA**

2017/HW/01

(Civil Jurisdiction)

BETWEEN:

LEWIS MUSONGOLE

PLAINTIFF

AND

STANSLAS MUMBA KALIMAPOSO

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE M.C. MULANDA IN
CHAMBERS.

For the Plaintiff:

Mr. E. Sichone

Legal Aid Board

For the Defendant:

Mr. D. Libati

Messrs Abha Patel and Associates

Agents for M & M (Advocates)

RULING

CASES REFERRED TO:

1. **In Re A Firm of Solicitors (1992) 1 All ER 353.**

2. Hotelier Limited and Ody's Works Limited Vs Finsbury Investments Limited 2011/HP/260 (Unreported)

LEGISLATION REFERRED TO:

Legal Practitioners' Practice Rules, 2002, Statutory Instrument No. 51 of 2002, Rules 32 (3) and 33 (1) (g) and (f).

On 9th January, 2017, the Plaintiff in this matter, Lewis Musongole, commenced an action against the Defendant, Stanslas Mumba Kalimaposo, claiming, among other things, the following reliefs:

- (a) Specific performance of the contract relating to the sale by the Defendant to the Plaintiff of a 500 hectare portion of LOT 2466/M, Kasama.
- (b) An injunction restraining the Defendant from evicting the Plaintiff from the 500 hectare portion of LOT 2466/M, Kasama.

An interim order of injunction was granted against the Defendant on 15th March, 2017, at Kasama, and the *interparte* hearing was scheduled to be heard at Ndola on 28th April, 2017.

On 30th March, 2017, before I could hear the *interparte* application for an injunction, the Defendant filed into Court, at the Kasama District Registry, a Notice of Objection to Legal Aid Representing the

Plaintiff. This Notice of objection was made pursuant to Order III Rule 2 of Cap. 27, and was accompanied by an Affidavit in Support.

According to the Defendant, in his Affidavit in Support of Notice of Objection, the reason for his objection to Legal Aid Board Representing the Defendant is that in 2014, Legal Aid Board represented him in an action against some individuals who had occupied his land at Lot No. 2466/M, Kasama, without his permission, which Lot Number is also the same farm referred to in the Plaintiff's Writ and statement of Claim against him. He produced exhibits marked 'SMK1', 'SMK2' and 'SMK3', being true copies of letters from Legal Aid Board and the Affidavit in Support of the Originating Summons in that cause. The Plaintiff is, therefore, surprised that Legal Aid Board has now turned against him when they have his file relating to the same farm, and, further, fears that they can use information from his file in these proceedings.

On the 28th April, 2017, the day I was supposed to hear the inter parte application for an injunction, Mr. E. Sichone from the Legal Aid Board Office in Ndola stated that before hearing the application for the interlocutory injunction, the issue of the Objection should be addressed. He informed the Court that this is a Kasama matter and that it was the Legal Aid Board in Kasama that received instructions from the Plaintiff. However, he had a chat with Mr. Japhet Zulu from the Legal Aid Board in Kasama, who has conduct of this matter, who confirmed that, indeed, the Defendant was, in 2014, being represented by the Legal Aid Board in Kasama. Mr.

Sichone informed the Court that he was further informed by Mr. Zulu that, although in that matter it was the same Plot No. 2466/M, Kasama, which was involved, the Plaintiff now, Mr. Lewis Musongole, was not the Respondent in the 2014 matter, even though he is now suing over the same plot and claiming an injunction.

According to the information that Mr. Sichone was given by Mr. Zulu, the justification for Legal Aid Board, Kasama, to receive instructions from the Plaintiff, Mr. Lewis Musongole, was that it is the only legal aid institution in Kasama where people who cannot afford private legal services can run to, as there is not a single law firm in Kasama. Be that as it may, Mr. Sichone agreed with the Defendant on the issue of the fears that he expressed in his affidavit concerning the representation of the Plaintiff by Legal Aid Board in view of the fact that they have his file, relating to the same Lot number 2466/M, Kasama and that they might use the information from his file against him in these proceedings. Mr. Sichone, however, indicated to the court that the instructions that Legal Aid Board received, do not cast a stone that they can go on and represent the Plaintiff in the midst of the concerns raised by the Defendant. He undertook, to this Court, that Legal Aid Board in Ndola would send back the case file in this matter to Legal Aid Board, Kasama, to enable them to file the necessary documents and liaise with the Plaintiff on the issues raised by the Defendant, and perhaps, with the view that they may withdraw from representing the Plaintiff in this matter.

Mr. Sichone further told the Court that, in this regard, the application for an interlocutory injunction cannot be heard until the issue of the objection is resolved.

In response to Mr. Sichone's submissions, Mr. Libati from Abha Patel and Associates, in his submissions on behalf of the Plaintiff, acknowledged that Legal Aid Board did, in fact, at that time, represent the Defendant herein, as Plaintiff, over the same piece of land for which the application for an interlocutory injunction was before this Court. He strongly felt that Legal Aid Board should not represent the Plaintiff in this matter, as doing so, would amount to professional misconduct on their part. He argued that, to try and justify Legal Aid's actions by asserting that Legal Aid Board is the only institution available to take up instructions from would be clients would be asking this court to endorse wrongs. To this end, Mr. Libati prayed to this court to uphold his client's objection and condemn the Plaintiff in costs.

In responding to Mr. Libati's submissions, Mr. Sichone saw no reason for Mr. Libati to request this court to uphold the objection, and further condemn the Plaintiff to costs, since Legal Aid Board did not file an affidavit in opposition to the objection and did not insist that they should continue representing the Plaintiff in this matter. Accordingly, Mr. Sichone asked to have the matter adjourned so that the issue of the objection is addressed by his colleagues at the Kasama Office, who, according to him, may insist

or withdraw from this matter since they are the ones who have conduct of this matter.

I have perused the affidavit filed in this matter, and the arguments by both Counsel.

In addressing the issue of the objection, I wish to state that this matter is currently before this Court for determination of the same. I have, however, noted, as stated by Mr. Sichone, that Legal Aid Board has not filed an affidavit in opposition, and that, from what Mr. Sichone told this Court that Legal Aid Board are not insisting that they continue representing the Plaintiff in this matter, although I gather, from Mr. Sichone's submission, that there is a possibility that Legal Aid Board, Kasama, might insist on representing the Plaintiff.

Having looked at the affidavit in support of the Notice of Objection, it is clear that Legal Aid Board, at one point, represented the Defendant in this matter in 2014 in Cause No. 2014/HW/06, in relation to the same Lot No. 2466/M, Kasama. In that matter, which was commenced by Originating Summons, the Defendant was the Applicant against five Respondents and beseeched the Court to grant him possession of the part of the same Lot No.2466/M which the Respondents had illegally occupied, and to order them to vacate. According to that affidavit, the Defendant was the bonafide beneficial owner of the said Lot and held the Lot for the unexpired residue of a term of 99 years from the 1st day of

February 1980 under Certificate of Title No. 191912. In the current proceedings, Legal Aid Board is representing the Plaintiff over the same piece of land, being Lot No. 2466/M, Kasama, to which representation the Defendant herein is objecting.

I have looked at case law which deals with a case such as the one before me. I will start with an English case of **IN RE A FIRM OF SOLICITORS** ⁽¹⁾ where it was held that:

(1) There was no general rule that a firm of solicitors who had acted for a former client could never thereafter act for another client against the former client, but a firm of solicitors would not be permitted to act for an existing client against a former client if (per Parker LJ and Sir David Croom-Johnson) a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or (per Staughton LJ) there was some degree of likelihood of mischief, i e of the confidential information imparted by the former client being used for the benefit of the new client....."

Further, in the case of **HOTELIER LIMITED AND ODY'S WORKS Vs FINSBURY INVESTMENTS LIMITED** ⁽²⁾, the affidavit evidence of one Odysseas Mandenakis, the Managing Director of the Plaintiff Companies, alleged that the Plaintiffs were involved in the litigation before the High Court at Lusaka, against the Defendant company which was represented by Messrs Simeza Sangwa and Associates. Previously, Messrs Simeza Sangwa and Associates had

represented the Second Plaintiff in other matters, in particular, the cases involving the land dispute for the plots on which the subject matter of that dispute is located. In so doing, the dealing counsel rendered advice to Odysseas Mandenakis on the issue on various occasions. Further, that he had represented him and his companies in other matters such as the case of *Fred Matipa-Vs-Ody's Works Limited*.

The affidavit revealed further that in October, 2010, Odysseas Mandenakis lodged a complaint against the practitioner which was adjudicated upon by the Legal Practitioners' Committee of the Law Association of Zambia. The Committee found that it was wrong for the practitioner or indeed Messrs Simeza Sangwa and Associates to take instructions against his or their former client, the Second Plaintiff. Arising from the content of the ruling, the Plaintiffs and their advocates wrote a letter to Messrs Simeza Sangwa and Associates to find out if they would continue to act against the Second Plaintiff in this matter in the wake of the ruling of the Legal Practitioners' Committee. The Plaintiffs' advocates also spoke to the practitioner to state his position on the matter and he indicated that he would continue to represent the Defendant in this matter against the Plaintiffs, despite the ruling of the Legal Practitioners' Committee, because he saw no conflict of interest. Pursuant to the foregoing facts, it was contended that there was a conflict of interest resulting from the practitioner acting for the Defendant, whose effect was evident during cross examination of Odysseas Mandenakis as the Plaintiffs' witness. Further that, the said conflict

of interest was prejudicial to the interests of the deponent and was in clear breach of the practitioner's duty as an advocate towards him.

In the affidavit in opposition, the practitioner confirmed that he was counsel practising in the firm of Messrs Simeza Sangwa and Associates and that he had conducted that matter on behalf of the Defendant. He also confirmed that he was the Respondent in proceedings before the Legal Practitioners' Committee instituted by Odysseas Mandenakis and the Second Plaintiff.

As my Learned Senior Brother Honourable Justice Mutuna, High Court Judge (as he then was) said in the Hotelier Limited case, this objection raises a very important issue, which is counsel's duty to his client or former client. That being the case, it does not matter whether it is Legal Aid Board or a private practitioner that is involved, as long as they represent clients. Further, it does not matter which Office for Legal Aid Board is involved, whether it is the Kasama or Ndola office or, indeed, any other office for Legal Aid Board in Zambia. The affidavit evidence as well as the arguments by both Counsel reveal that it is not in contention that Legal Aid Board once represented the Defendant in a 2014 case where he was Applicant against Evaristo Chipangila and Four Others, concerning the same Lot No. 2466/M, Kasama and that the Applicant in that case, who is the Defendant in the current matter, filed an objection against Legal Aid Board representing the Plaintiff in this matter. It is further not in contention, from what Counsel Sichone submitted,

that it is likely that Legal Aid Board, Kasama Office, may or may not decide to continue representing the Plaintiff in this matter. I am now required to adjudicate upon this objection. The question that I have to ask myself is “should Legal Aid Board continue representing the Plaintiff in this matter?”.

Rule 32(3) of the Legal Practitioners’ Practice Rules, 2002, Statutory Instrument No. 51 of 2002, provides as follows:

“A practitioner shall act towards a client at all times in good faith.”

Further, rule 33(1) (f) states as follows:

“A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) there is or appears to be some conflict or a significant risk of some conflict either between the interest of the practitioner, or of any partner or other associate of the practitioner, and some other person or between the interest of any one or more of their clients.”

The foregoing rules clearly set out the duty that counsel owes to a client and how he should conduct himself when dealing with his clients. That is, he must at all times be faithful to his client and

must ensure that there is no conflict of interest on his part as regards the interests of his client. This also applies to his former clients in as far as the same case that he represented his client in, is concerned. Counsel must, therefore, protect his client's or former client's interests in this regard.

In the Hotelier Limited case, Honourable Mr. Justice Mutuna found that the practitioner having been counsel for the Second Plaintiff in another matter and dealt with Odysseas Mandenakis, as its representative, ought not to have taken on instructions against the Second Plaintiff. He further found that the expression of the hope by Legal Practitioners' Committee that that was the last time such a thing would occur was a directive to the practitioner that he should desist from taking instructions against former clients.

In the current case, the Defendant has, in his Affidavit, given a background to the client/lawyer relationship that existed between Legal Aid Board and himself. Counsel Sichone has not denied that such a relationship existed. Although he has said that the current Plaintiff was not the Respondent in the 2014 case, he has admitted that the two cases concern the same Plot No. 2466/M, Kasama. That being the case, the Legal Aid Board is clearly in breach of rule 33(1)(f) of the **Legal Practitioners Practice Rules** and they should, therefore, not have taken on instructions from the Plaintiff in this matter. In addition, I must state that since, according to the Defendant's deposition in his affidavit, Legal Aid Board still has his case file with them, I cannot rule out the possibility of them using

the information contained in that file against him and to the benefit of the Plaintiff in the current case, as the current case involves the same piece of land which was the subject of the Defendant's 2014 case against Evaristo Chipangila and Four Others, in which legal Aid Board had represented him. To this effect, Rule 33 (1) (g) of the Legal Practitioners' Practice Rules, cited above, provides as follows:

"33. (1)A practitioner shall not accept any brief if to do so would cause the practitioner to be professionally embarrassed under the following circumstances:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) the matter is one in which there is a risk of a breach of confidences entrusted to the practitioner, or to any partner or other associate, by another client or where the knowledge which the practitioner possess of the affairs of another client would give an undue advantage to the new client."

Further, Legal Aid Board cannot be justified to say that they took up the Plaintiff's instructions in this matter because Legal Aid Board in Kasama is the only legal institution, in Kasama, to represent people who cannot afford private legal services. They could simply have declined to take up the Plaintiff's instructions in this matter. This is because, for as long as they had acted for the Defendant in a case involving the same subject matter, they are not

allowed by rule 37(1)(f) to take an instruction from a client who is against the Defendant. It is not up to Legal Aid Board in Kasama to decide whether to continue representing the Plaintiff, or not.

Having said this, I find that Legal Aid Board should not have taken on instructions against the Defendant in this matter. I accordingly find merit in the Defendant's objection and direct that Legal Aid Board immediately stops representing the Plaintiff.

I make no order as to costs.

Leave to appeal is granted.

DATED THIS^{11th}..... DAY OF MAY, 2017.



**M.C. MULANDA
JUDGE**

