



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**MISC. CIVIL APPLICATION NO.63 OF 2019**

**IN THE MATTER OF SECTION 48 AND 51 OF THE CIVIL PROCEDURE RULES**

**AND IN THE MATTER OF THE ADVOCATE/CLIENT'S BILL OF COST**

**BETWEEN**

**SALE LAND OVER TITLE NO. LR 2226 OVER 900 ACRES IN THE NAME OF VERONICA SUM**

**MANANI LILAN & MWETICH CO. ADVOCATES.....APPLICANT**

**-VERSUS-**

**VERONICA SUM.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Manani, Lilian Mwetich & CO. Advocates for the applicant**

**M/S Kiarie & CO. Advocates for the respondent**

**RULING**

**Introduction & Background**

1. The applicant via a Notice of Motion dated the 11<sup>th</sup> of July 2019 primarily seeks leave to lift the advocate-client confidentiality and introduce evidence by way of supplementary affidavit.
2. The gravamen of the application as gleaned from the supporting affidavit of B.O Manani sworn on even date is that the applicant filed an application before court on the 4<sup>th</sup> of March 2019 seeking among other orders, that it be allowed to tax a bill of costs but the respondent filed a notice of preliminary Objection to strike out the application on grounds that there was no advocate-client relationship between the parties and that the application, did not meet the mandatory provisions of Sections 45(1)(a) and 48 of the Advocates Act. As a result, the applicant has filed the instant application wishing to provide supplementary evidence to show that there was advocate-client relationship and thus enable court to resolve the issue relating to the advocate-client relationship and the recovery of fees.
3. The application is opposed by the respondent through the replying affidavit of Peter Kiarie Ndarwa sworn on the 22<sup>nd</sup> of October 2019 wherein he averred that the application dated the 11<sup>th</sup> of July 2019 is misconceived, has no merit and ought to be dismissed. His main contention was that the supplementary affidavit that the applicant wishes to tender was filed without leave of court and should thus be struck out and secondly, that the email communications in issue are between the period 2008 -2012 and not 2016 and 2018 as alleged by the applicant. Furthermore, the respondent contends that the emails referred to by the applicant relate to its dealings with one Lucy Raber and not Veronica Sum-under whose instructions the applicant is alleged to have acted.
4. The court directed that the application be canvassed by way of written submissions. The applicant has filed its submissions while no submissions have been received from the respondent at the time of writing this ruling.

**Applicant's Submissions**

5. The applicant via its submissions dated the 29<sup>th</sup> of October 2019 observed that there were two issues for determination namely whether the confidential client-advocate relationship can be lifted and secondly whether this honorable court can grant the applicant the orders sought.

6. On the first issue, it was submitted that the advocate-client relationship is not absolute and can thus be lifted pursuant to Article 24 of the Constitution and Sections 134 and 137 of the Evidence Act as read with rule 7, clause 123 of the Law Society of Kenya Code of Conduct and Ethics, 2016. Reliance was thus placed in the authority in ***DPP vs Tom Ojienda t/a Prof Tom Ojienda & Associates & 3 others [2019] eKLR*** with the applicant submitting that it seeks leave of court to lift the client-advocate relationship for purposes of claiming fees.

7. On the second issue, it was submitted that Article 159 of the Constitution together with Sections 1A & B and 3A of the Civil Procedure Act obliges court to met out substantive justice rather than focus on procedural technicalities. In this regard, the applicant submitted that it stands to be highly prejudiced if the information/evidence is not put into consideration when the court is determining the issue in contention. In any event, the applicant submitted that the emails as indicated in the draft supplementary affidavit are pivotal in resolving substantively the issues in the appeal. Finally, the applicant submitted that the emails indicate Lucy Reber and not the respondent herein since the said Lucy is the respondent's daughter and at all times held herself as the agent of the respondent.

### **Analysis and Determination**

8. The single issue for determination is whether this court can lift the advocate-client privilege.

### **THE LAW**

9. It's the applicant's position that pursuant to Article 24 of the Constitution and Sections 134 and 137 of the Evidence Act as read with rule 7, clause 123 of the Law Society of Kenya Code of Conduct and Ethics, 2016, the advocate-client privilege is not absolute and can be waived. In this regard, it is instructive to reproduce the above provisions hereunder.

10. **Section 134(1)** of the **Evidence Act** provides that;

***“(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:***

***Provided that nothing in this section shall protect from disclosure– a. any communication made in furtherance of any illegal purpose;***

***(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.***

***(2) ...” (Emphasis added)***

11. On the other hand, **Section 137** of the **Evidence Act** provides as follows:

***137. Communications with an advocate No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.***

12. My reading of the above provisions, which are germane to my determination, is that an advocate is expressly prohibited from disclosing communication made to him or her by his or her client or divulging information regarding documents that come to his/her attention in the course of employment as the client's advocate. The prohibition is thus for the protection of the client and not of the advocate. All the advocate gets is the privilege on non-disclosure. See ***Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR***.

13. The client's protection is however, not absolute, as there are instances stated in the proviso, where the advocate may be required, for the stated compelling reasons to disclose such communication or content and condition of documents. That is, there can be breach of the privilege but only in two instances. First, where the communication between an advocate and the client furthers an illegal purpose and secondly, where the advocate observes that the client used the privilege to commit a crime. This position was affirmed by the Court of Appeal in ***Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd [2015] eKLR and recently reiterated by the same court in Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others (supra)***.

14. The importance of the privilege was acknowledged by the English Court of Appeal in ***Conlon vs. Conlons Limited [1952] 2 All ER 462*** with that court observing that the privilege has been zealously guarded by the courts as long as the history of the law goes and that there are only two instances in which it is lost; if something of a criminal nature is involved and if there is waiver by the client. In particular, the court observed that:

***“What is the rule [as to privilege] and what is the meaning of the rule? ...The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he***

*should be able to make a clean breast of it to the gentlemen whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to his should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.”*

15. Furthermore, in *King Woolen Mills Ltd & Another vs Kaplan & Stratton Advocates [1990-1994] E. A 244* it was held that;

*“... the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client’s consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created.”*

16. From the above decisions, it is clear that an advocate cannot claim the protection of the rule, as it belongs to the client and not the advocate. That is, the advocate-client privilege can only be waived by the client and not the advocate since that privilege belongs to the client and the right of waiving the privilege lies with the client and not the advocate as contemplated for under **Section 136** of the **Evidence Act**.

17. I am therefore of the considered view that an advocate/client privilege binds an advocate not to be compellable to disclose a client’s affairs without express authority or consent of his or her client. An advocate cannot therefore be compelled to breach the said requirement either by court or any other person. The waiver/lifting of the same can only be done by the client.

18. In the foregoing, I find that the application dated the 11<sup>th</sup> of July 2019 lacks merit and is hereby dismissed.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**