



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 90 OF 2013**

**DORRIS KANINI NDUNDA.....PLAINTIFF/APPLICANT**

**VERSUS**

**FAMILY BANK LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. Through a Notice of Motion dated 1<sup>st</sup> July 2014, Dorris Kanini Ndunda, the plaintiff herein moved this court under the provisions of Section 2A of the Civil Procedure Act, Order 2 rule 15 (1)(b)(c) and (d) of the Civil Procedure Rules, 2010 and Rule 8 of the Advocates Practice Rules (Rev 2012) under the Advocates Act, for the following orders:-

- i. That firm of Advocates on record M/S Kithi and Company Advocates be disqualified from acting for the defendant in this suit;
- ii. That all the pleadings drawn and filed by the firm of M/S Kithi and Company Advocates be hereby struck out of the court record; and
- iii. That the plaintiff/applicant be awarded costs of the application.

2. The application is supported by the grounds on the face of it and on an affidavit sworn by the plaintiff, Dorris Kanini Ndunda. Mr. Bwire Okano, Advocate, practicing as such in the law firm of Ms Kithi and Company Advocates filed a replying affidavit sworn on 5th September, 2014, on behalf of the defendant.

**Affidavit evidence and submissions**

3. In her supporting affidavit sworn on 1st July, 2014, the plaintiff deposes that she had been informed by her Advocates that the firm of M/S Kithi & Company Advocates should be disqualified from acting for the defendant as there exists a conflict of interest and that the same law firm is a primary witness in the proceedings herein. The reasons for the said disqualification are captured in the said plaintiff's affidavit and the submissions of the plaintiff's Counsel.

4. In his written submissions, the plaintiff's Counsel submitted that the defendant charged the property known as Title No. Kwale/Ukunda/3637 for Kshs. 5 Million at the request of one Nolly Kanao Musango, the chargor. The loan was guaranteed by Bulk Petroleum Limited. It was asserted that the plaintiff herein is married to the said chargor and the suit property in issue is their matrimonial home where, they live with their 3 children.

5. It was further submitted that the charge instrument was drawn and witnessed by the law firm of M/S Kithi and Company Advocates, which is on record for the defendant herein. The Counsel for the plaintiff argued that the main issue in the suit is on the legality of the charge instrument as spousal consent was not obtained under the provisions of Section 79(3) of the Land Act. It was submitted that it is trite law that where there is likelihood or possibility of conflict of interest then an Advocate who poses the threat of the conflict should cease to act. The plaintiff relied on the following authorities - Kisumu Court of Appeal No. 180 of 2018, **Oriental Bank Limited vs. Channan Singh Chatthe & 5 others** [2014], Kitale HCCC No. 3 of 2012, **Josephine Jerotich Cherop vs. John Cheruiyot Siron & 2 Others** [2013] eKLR and Nairobi HCCC No. 425 of 2008, **Industrial Plant (East Africa) Limited v Walker Kontos Advocates**.

6. In his affidavit, the defendant's deponent avers that the firm of M/s Kithi and Company Advocates merely prepared and witnessed the charge instrument but it has not at any single time acted for or on behalf of the plaintiff. He indicated that the said firm of Advocates had at all material times acted on behalf of the defendant.

7. He further contends that it is trite law that a party who seeks disqualification of an Advocate from acting for the opposing side must establish the existence of such Advocate/Client relationship that could lead such an Advocate to be in possession of confidential information which he could use to the detriment of the client seeking disqualification of an Advocate.

8. The deponent further states that the plaintiff was not a party to the charge and therefore Advocate/Client relationship cannot stand. He also contends that the Advocate who witnessed the charge has since left the firm of M/s Kithi and Company Advocates and other Advocates in the firm are not prevented from acting for the defendant.

9. Most of the defendant Counsel's submissions replicate the factual issues captured in the defendant's deponent's affidavit. Counsel submitted that the provisions of Order 2 rule 15(1) (b), (c) and (d) of the Civil Procedure Rules are not applicable herein and that the instant application is an abuse of the court process. He prayed for it to be dismissed with costs. The defendant relied on the following authorities- **British American Investment Company Kenya Ltd vs Njomaitha Investments limited and Another** [2014] eKLR, **Kenya Pipeline Co. Ltd v Raiply Wood (K) Ltd** [2008] eKLR, **Lalchand Fulchand Shah & Anor vs I & M Bank** [2014] eKLR, **Delphis Bank Limited vs Chatthe & 6 others** [2005] eKLR and **Guardian Bank Limited v Sonal Holdings (K) Ltd** [2014] eKLR.

#### ANALYSIS AND DETERMINATION

The issue for determination is whether there was an Advocate/Client relationship between the plaintiff's husband and the defendant's Advocate.

10. In Halsbury's Laws of England, 3<sup>rd</sup> Edition Vol. 3, paragraph 67, the Learned writers state as follows:-

**“The Employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel to his client’s detriment. This duty continues after the relation of counsel and client has ceased.”**

11. Rule 8 of the Advocates (practice) Rules (Rev 2012) provides as follows:-

**“No Advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration of Affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration on affidavit, he shall not continue to appear.”**

12. The proviso to the above provisions is to the effect that it does not prevent an Advocate from giving evidence whether verbally or by declaration, or affidavit on formal or non-contentious matters of fact in any matter in which he acts or appears.

13. In **William Audi Odode & Another v- John Yier & Another**, Court of Appeal Civil Application No. NAI 360 of 2004, in declining an application to bar an Advocate from acting for some of the parties in the matter therein, O’Kubasu JA (as he then was) stated at page 3 of his ruling as follows:-

**“I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.”** (emphasis added).

14. From the foregoing legal provisions and authority, an Advocate may be prevented from appearing in a matter if he may be required as a witness. It is however not an absolute bar as an Advocate can represent a party and still be a witness, so long as his evidence is confined to formal or non-contentious matters of fact.

15. The Plaintiff's list of witnesses does not disclose that the law firm of M/S Kithi and Company Advocates, its proprietor or its personnel will be witnesses in this suit. The defendant's deponent has also indicated that the Advocate who witnessed the charge instrument in issue, by the name of Patience Pili Kingi, was no longer practising as such in the said law firm.

16. It would therefore appear that nobody in the firm of M/S Kithi and Company Advocates is expected to be a witness in this matter and even if one will be required to be a witness, his/her role will most likely be confined to producing the charge instrument, since it is the said law firm that drew it.

17. It has not been alleged that the law firm of M/S Kithi and Company Advocates hold any confidential information that may have come into their hands by any interaction with the plaintiff. No evidence in the form of a letter to the client or fee notes have been produced by the plaintiff to show that there was an Advocate/Client relationship between the plaintiff or her husband and the defendant's Advocate.

18. If anything, the impression given is that plaintiff has never had any contact with M/S Kithi & Company Advocates over this matter. The mere fact that an associate in the law firm witnessed a charge in her capacity as Counsel for the defendant, does not disqualify her from being Counsel for the same party. The plaintiff has therefore failed to prove any Advocate/Client relationship existed between her husband and the defendant’s Counsel.

19. Further, it is evident that although the firm of M/S Kithi & Company Advocates as at that time had several partners and associate

Advocates, the plaintiff has failed to identify any particular partner or associate Advocate in the said firm to whom particular instructions or confidential information relevant to the matters in issue may have been given or whose presence may be necessary as a witness in this case.

20. In the case of **Delphis Bank vs Chatthe** (supra), Mr. Menezes Advocate appeared for the defendant therein as the leading counsel. It was argued that because he drew the charge instrument which was in issue in the suit, he could not appear in the matter. The Court of Appeal disallowed the said argument and stated as follows in the course of the judgment:-

**"The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties."**

21 In **Dorothy Seyanoi Moschioni v. Andrew Stuart & another** [2014] eKLR, Gikonyo J., stated thus on disqualification of an Advocate:-

**"[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that "these advocates participated in the drawing and attestation of the Deeds in dispute"; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say "I intend to call them as witnesses". What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable. In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be "their counsel" in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a law suit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and real prejudice, then a disqualification of counsel will not be ordered.**

**[23] In line with the above rendition, I do not think there was any possibility of real prejudice being occasioned to the Applicant by representation of the 1<sup>st</sup> Respondent by the said firm of advocates. And I so hold fully aware of the Applicant's desire to call them as witnesses and I suppose only the advocate who witnessed and or drafted the agreement was to be the witness. The Rules even allow such advocate to testify on matters which are not contentious."**

22. I have considered the present application and do find that the plaintiff has not demonstrated that there was any Advocate/Client relationship between the defendant and the firm of M/S Kithi & Company Advocates nor has it established circumstances justifying reasonable apprehension of likelihood of bias. I therefore find no good basis upon which to disqualify the said law firm from acting in this matter or to restrain it from acting for the defendant. I therefore find no merit in the plaintiff's Notice of Motion dated 1<sup>st</sup> July 2014. I hereby dismiss it with costs to the defendant.

**DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of January, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Magolo P., holding brief for Ms Gitari for the plaintiff

No appearance for the defendant

Mr. Oliver Musundi - Court Assistant