



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO.53 OF 2005

FRANCIS GITHINJI KAROBIAPLAINTIFF/RESPONDENT

VERSUS

STEPHEN KAGENI GAITU.....DEFENDANT/APPLICANT

RULING

1. The Motion before Court is that dated 2nd June 2017 in which the Court is asked to Stay Proceedings herein pending the hearing and determination of the Appeal by the Plaintiff against the Order made by the Court on 4th May, 2011.
 2. It is common ground that the Plaintiff has filed its Notice of Appeal on 18th May 2017 and for purposes of an Application for Stay under the provisions of Order 42 Rule 6 there is deemed to be an Appeal to the Court of Appeal (order 42 Rule 6(4)).
 3. Stay of proceedings will not be granted unless the Court is satisfied that substantial loss may result to the Applicant unless the Order is made and that the application has been made without unreasonable delay. In some instances, the Court may ask for security to be furnished by the Applicant as a condition for grant.
 4. When delivering its Ruling on 4th May 2017, the Court granted informal Stay for 30 days. This would lapse on or before 5th June 2017 and this Application was presented on 5th June, 2017. Clearly, there was no delay in presenting it. One test is easily satisfied.
 5. In a nutshell the Decision of the Court barred Mr. Maina Murage from acting for the Plaintiff on the ground that he may or will be required to give evidence herein on some contentious issue. The Decision aggrieves the Plaintiff who has exercised his undoubted Right of Appeal.
 6. The Plaintiff is apprehensive that he will be seriously handicapped and prejudiced in presentation of his case if this matter proceeds before his appeal is heard. Counsel Murage argues that his Client's Right to Legal Representation is a Constitutional Right and his loss would be irreversible if the client were to proceed without Counsel of his choice. This, it is submitted, would amount to substantial loss.
 7. The Defendant on the other hand argues that the Plaintiff will not suffer any substantial loss because:-
 - a. It is only Mr. Maina Murage who has been barred and not his firm (Maina Murage & Co. Advocates) and anyone from the said firm can represent the Plaintiff.
 - b. The Plaintiff is at liberty to appoint another firm of Advocates if he so wishes in place of the firm of Maina Murage & Co.
- The Defendant also makes the point that he is the one who will suffer substantial loss because he is old and of poor health and it is therefore in the interest of both sides for this old matter to be expedited.
8. The Court has given a thought to the rival positions and makes the following observations.

9. It is of course true that in the Ruling it is only Mr. Maina Murage and not his firm that was barred from conducting the matter on behalf of the Plaintiff. Yet it has turned out that Mr. Maina Murage is the only Advocate in his firm and so the bar for all intents and purposes could be a bar on his entire firm not unless the firm will be instructing Counsel to act in its name. Secondly, it is not lost on this Court that at the hearing of the application for the disqualification of Mr. Murage, the Plaintiff had deponed that he had made and committed himself to certain fees arrangements with his Lawyers (Mr. Murage) and that it would be a travesty of justice if he was compelled to look for a new

Lawyer and forced to spend more money. Moreover, that Mr. Murage was his Advocate of choice as he is his personal friend of more than 37 years and has been his Lawyer for more than 30 years.

10. Although Article 50(2)(9) grants a Right of representation by Counsel of choice to an accused person, this Right is implicit in Civil matters. As underscored by the Court of Appeal in the case of Delphis Bank Ltd vs. Channan Singh Chalttle & 2 others [2005] eKLR, the Right to a Legal Representation or Advocate of choice is a most valued Constitutional Right to a litigant. Although this Court found that this matter disclosed clear and valid reasons for depriving the Plaintiff of this Right in respect to Mr. Murage, the matter is under Appeal and the Court of Appeal may take a contrary view. Given that the Plaintiff has plausible reason for insisting on Mr. Murage, and this is within his Constitutional Right, this Court would hold that the Plaintiff will suffer substantial loss if the Proceedings were allowed to proceed in the absence of Counsel of his choice before the issue of Representation is settled with the finality that a Court of Appeal decision brings to an issue. The inclination to grant a Stay of Proceedings is therefore strong.

11. On the other hand, it is not disputed that the Defendant is elderly and of ill-health and there is every reason for the Hearing of this matter to be expedited. As a matter of fact, the Defendant had sought that, in the event the matter could not be heard on priority, he be allowed to tender his oral evidence first. There is no knowing how long it would take to dispose of the Appeal and whether the delay would jeopardise the Defence hearing. The possible loss to the Defence is therefore not insubstantial.

12. This Court has to weigh these competing interests. While they seem intractable, the Court can think of a possible solution that accommodates both sides. The solution may not be perfect and may only be suitable to the unique circumstances of this case.

13. The reason why this Court barred Mr. Murage was because he is a potential witness in these proceedings on a contentious question and his continued appearance would be in conflict with the Provisions of Rule 9 of The Advocates (Practice) Rules, which provides,

“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 or 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 or affidavit, he shall not continue to appear; Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears”.

There could be various objects of this Rule. One is that as the role of an Advocate is to advance the cause of his client, and that of a witness is to state facts objectively, a lawyer-witness may be more easily impeached as a witness when he also serves as Counsel to the party for whom he testifies (see Article by Charles Kindregan “Conflict of Interest and Lawyer in Civil Practice” available at: <http://scholar.valpo.edu/vulr/vol10/155/2>). The other is the risk of bringing the proceedings into disrepute by Counsel changing roles from Counsel to witness and back in the course of proceedings. In this regard it has been said,

“The problem with that is lawyers are also officers of the Court and as any witness will tell you, entering the witness box immediately puts your credibility into play. Not only does this carry with it the risk that the court finds the lawyer-witness to not be credible, but the lawyer also has the professional conduct obligation to never mislead the Court! It’s paradox no lawyer should put a court through”

14. Given the reason that the disqualification of Mr. Murage was on the basis of Rule 9 of the Advocates (Practice) Rules and the rationale of those Rules, I take a view that in the difficult circumstances that this matter presents, Mr. Murage can be allowed to act only for purpose of the evidence of the Defendant being received. In this way, the evidence of the Defendant can be taken quickly and preserved and at the same time Mr. Murage can be allowed to act in that limited role. At least in the meantime.

15. The Order I grant is that I allow the Application for Stay as sought in the Application of 2nd June, 2017 but on condition that should the Defendant be minded to having his evidence heard first and in priority to the Plaintiffs case, then Mr. Murage will be permitted to act for the Plaintiff in that limited session. Cost of the Application shall be in the cause. Those are the Orders of this Court.

Dated, Signed and Delivered in Court at Nairobi this 21st day of June, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Murage for Plaintiff

Waigwa for Defendant

Nixon - Court Assistant