REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MILIMANI LAW COURTS

COMMERCIAL & ADMIRALITY DIVISION

CIVIL CASE NO. 39 OF 2017

YUSUF ABDALLA IBRAHIM ABDI…….PLAINTIFF

VERSUS

BRAHIM NOOR HILLOWLY……..DEFENDANT

RULING

1. The Defendant (herein "the Applicant") filed the notice of motion application herein dated 18th April, 2017, under the provisions of section 3A of the Civil Procedure Act. Rule 9 of the Advocates' (Practice) Rules, and all other enabling Provisions of the Law. The Application is supported by an affidavit dated 10th April 2017 sworn by the Applicant and on the grounds on the face of it.

2. The Applicant is seeking for orders, that the firm of M/s Jaleny & Company Advocates be stopped from acting for the Plaintiff ("herein the Respondent") or any other party by virtue of Rule 9 of the Advocate (Practice) Rules and that, all Pleadings filed through the said firm on behalf of the Respondent be struck out for reasons that they are prejudicial to the Applicant's rights to a fair and honest trial. The costs of the Application be in the cause.

3. The Applicant's case is that the said firm of Jaleny & Company Advocates was involved in the drawing of the agreement executed by the parties herein dated 5th December 2016, and which is the basis of the dispute herein. Therefore the firm which is now engaged by the Respondent is privy to all facts surrounding the Agreement, and there will be apparent conflict of interest. That the Applicant's counsel is likely to be called as a potential witness to give evidence by either party. In that case, it is only fair and just to have the firm removed from the record and all Pleadings filed by it be struck out. The Applicant argued that, it is contrary to the Rule of Practice; professional ethics and conduct for the firm to remain on record, as they cannot prosecute this case.

4. However, the application was opposed by the Respondent based on grounds of opposition filed and a replying affidavit sworn by the Respondent dated 24th May, 2017. The Respondent argued that the brief to the law firm was strictly to draw an Agreement whose terms and conditions had already been agreed upon by the parties, in the presence of the Applicant's Advocate Messrs Sheikh & Company Advocates. It is therefore very clear from the onset that the Applicant's Advocate did not participate in the negotiations of the terms of the loan agreement. The Respondent further argued that, for the Applicant to succeed on the allegation that the Advocate is likely to be called as a witness in the matter, he has to plead to the circumstances that may support the same.

5. These circumstances include inter alia, a claim of fraud has been pleaded where firm of Jaleny & Company Advocates might be called to testify about, the validity of the terms and conditions of the loan

Agreement which is the subject matter herein should have been raised in any of the pleadings and an issue or allegation of coercion raised by the Applicant in any of the pleadings. That the Applicant has not raised any issue that would require the Respondent Advocate to be summoned as a witness in the matter, nor has he vide his notice of motion application and supporting affidavit, brought out any substantial issue that will result into a conflict interest or untenable or shall not warrant the continued appearance of the Plaintiff's Advocates in the matter. That, as aforesaid the Respondent Advocate was not a party to the negotiations of the terms of the instant loan Agreement.

6. Therefore in the absence of these circumstances the application can only best be described as being speculative and only meant to waste time and stall the speedy hearing and disposal of the matter. The Respondent averred that Rule 9 of the Advocates (Practice) Rules envisages a situation where a conflict between the Applicant and the Respondent has raised a pertinent issue which ultimately would require an Advocate to be called as a witness by either party. That in the instant matter, no such or any allegation has been raised by either party, likely to suggest that the counsel for the Respondent shall be required to give evidence in Court, pursuant to such an allegation, as such the like hood of the counsel being called as a witness for either Party in this instant case is farfetched

7. The parties filed written submissions to dispose of this matter. I have considered the same and I find that the issue to determine is whether the Applicant has met the threshold of Rule 9 of the Advocates (Practice) Rules, and whether the orders sought can be granted.

8. The subject rule clearly states that:
"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"

9. Therefore the salient issues which the Applicant has to prove are that, there exist a good reason to prove that the Advocate may be called as a witness in relation to an allegation made by either party.

10. The Applicant submitted that conflict of interest herein arises as the Respondent's law firm drew the subject agreement. The Respondent's claim is for a sum of Kshs 213,000,000, allegedly advanced by the Applicant to the Respondent, it is quite obvious that evidence on how the agreement came into existence will be led and an Advocate from the firm that drew the Agreement will be critical in proving the legitimacy or otherwise of the Agreement, should a dispute arise.

11. The Applicant relied on the cases of;

i)Jacob Muriungi Mwenda vs Mbaya M'mwenda HCCCNo. 11 of 2002;

ii) King Woolen Mills Ltd vs M/S Kaplan & StratON Advocates Civil Appeal No. 55 of 1993, and

iii) Uhuru Development Ltd vs Central Bank of Kenya & 4 other, Civil Appeal No. 286 of 2001.

12. These cases were cited to support the argument that where there is likelihood of conflict of interest the Advocate must be barred from appearing in the matter.

13. However the Respondent's law firm conceded that they indeed drew the subject agreement but argued that the three cases cited are the distinguishable in that they involved issues of fraud and misrepresentation affecting counsels being disqualified. That the onus of proving that the Respondent's Advocates shall be required to appear in Court as a witness squarely lies with the Applicant and in the absence of the same in the pleadings as aforesaid, this Application ought to be dismissed with cost.
14. However, in the event that the continued acting of the Respondent's Advocate in the instant matter was to be founded in Law to be untenable and likely to lead to a conflict of interest, the pleadings therein

remain standing as the prayer to strike out the same is not founded on the legal basis.

15. In considering this matter I find that the law on disqualification of counsel on allegation of conflict of interest is now established. A conflict of interest exists, if there is a substantial risk that the counsel's representation of the client would be materially and adversely affected by the counsel's own interests or by the counsel's duties to another current client, a former client, or a third person. The key issue is whether the counsel's exercise of independent professional judgment is likely to be unduly influenced by other interests. In this regard I shall make reference to some of the cases that have considered this issue.

16. In the case of; William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04 O'Kubasu J stated as follows; "I must state on (sic) 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."

17. In the Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 -1913) ALL ER Rep 813, the Court observed that: "The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act…..As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated."

18. Similarly, the Court had this to say in the case of; Dorothy Seyanoi Moschioni v. Andrew Stuart & another (2014) e KLR: "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 conveyance 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 prejudice, then a disqualification of counsel will not be ordered".

19. It is clear therefore that there are circumstances under which an Advocate may be disqualified due to allegations of conflict of interest. However there are exceptions thereto and this include where the testimony will relate solely to: uncontested matter, matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony or relate solely to the nature and value of the legal services rendered in the case by the counsel or his firm to his client or as to the matter if the disqualification will work substantial hardship on the client because of the distinct value of the counsel or his law firm as the counsel in a particular case.

20. In the instant case the Respondent filed a plaint and notice of motion application dated 26th January 2017 seeking for injunction orders restraining the Applicant from dealing with Land Registration Number 3734/1094 and security for the sum demanded. Before the application was heard, the Applicant filed a notice of preliminary objection to the effect that the Court lacks jurisdiction to hear this matter as the same is a subject of Arbitral proceedings. The Court ruled on the preliminary objection and dismissed it whereupon the Applicant filed a notice of motion application dated 18th April 2017, seeking for stay of this proceeding pending Arbitration, followed by the current application.

21. The Applicant has not filed a statement of defence in this matter to enable the Court appreciate the contested substantial issues. Their application of stay is still to be heard. The Court is therefore not able to appreciate at this stage the circumstances under which if any the alleged conflict of interest may arise and the need to disqualify the law firm or strike out the pleadings filed. Be that as it were, the Applicant has applied the matter be referred to Arbitration and if the said order is granted the Court may not have to deal with the issues of hearing witnesses.

22. Having regard to the aforesaid and the legal principles stated herein I find that the Applicant has not discharged the onus of proving that any counsel from the firm of M/S Jelany & Company advocate may be called as a witness herein to testify on any contentious matter. Again, one should not lose sight of the fact that a party to a suit has a right to choose an Advocate of his choice, and the Advocate is entitled to practice and earn a living out of his professional skill of life.

23. The upshot of all this is that I find that the notice of motion application herein dated 18th April, 2017, lacks merit and I dismiss it with costs to the Respondent.
It is so ordered

Dated, signed and delivered on this 18th day of October 2017 in Open Court at Nairobi.

GRACE L. NZIOKA

JUDGE
In the presence of:

Mr. Anyoka for the Defendant/Applicant

Mr. Jelany for the Plaintiff/Respondent

Teresia Court Assistance