



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 1202 OF 2014

KAMAHUHA LIMITED PLAINTIFF

VERSUS

WINNIE NJERI KARIUKI1ST DEFENDANT

SAMUEL MUREITHI MURIUKI2ND DEFENDANT

RULING

1. The 2nd defendant by a Notice of Motion dated 6th March 2015 seeks orders that:-

1. The firm of P. M Kamaara & Associates be disqualified/ restrained from representing the plaintiff in this matter henceforth.

2. The costs of the application be borne by the plaintiff.

The application is supported on the grounds set out on the face of the application and on the supporting affidavit of Samuel Mureithi Muriuki the 2nd defendant herein. The following grounds are set out in support of the application.

(a) There is likely to be a conflict of interests as between the said firm of advocates of the plaintiff and the 2nd defendant in this suit.

(b) The advocate Mr. P. M Kamaara and the proprietor of the said firm of advocates acted for the 2nd defendant in the transaction which is the basis of this suit and many others and the 2nd defendant will require the said advocate to give evidence in the matter.

(c) There is likely to be great prejudice to the 2nd defendant if the advocate Mr. P. M Kamaara is allowed to continue acting for any of the parties to the suit.

(d) It is legally untenable for the said firm of advocates to continue acting for the plaintiff.

2. In the affidavit sworn in support of the application the 2nd defendant depones that the instant suit stems from a transaction involving the suit premises entered into between the plaintiff and Uncle Sam's Githurai Ltd on 6th November 1995 which transaction was handled by the firm of Ramesh Manek Advocate as per the copy of agreement of sale and transfer marked "SI". The 2nd defendant depones that advocate P. M Kamaara at the material time was working under the said firm of Ramesh Manek Advocate and was involved in handling the transaction which has given rise to these proceedings. The deponent states he

severally dealt with the advocate during the transaction and further states the said advocate while still working for the firm of Ramesh Manek was handling Milimani HCCC No. 286 of 2001 for the current plaintiff also as plaintiff in that suit against him and other parties which suit also emanated from the transaction referred to herein. The 2nd defendant avers the continued representation of the plaintiff by the firm of P. M Kamaara & Associates will prejudiced him as they are privy to privileged information the 2nd defendant shared with the firm of Ramesh Manek advocate while P. M Kamaara was working in the said firm. The 2nd defendant contends P. M Kamaara advocate was intricately connected with the 2nd defendant such that it would be prejudicial to the 2nd defendant to allow him to continue representing the plaintiff. The 2nd defendant concedes he never raised issue to the advocate representing the plaintiff in HCCC No. 286 of 2001 since, as he says, he expected his advocates Rumba Kinuthia advocates to handle all the issues. He however avers his present advocates on record have advised him there are factual issues which necessitate the making of the instant application.

3. The plaintiff filed a replying affidavit through one John Kiereni Kirika a director and shareholder of the plaintiff on 24th March 2015 in opposition to the plaintiff's application dated 6th March 2015. The deponent states that the 2nd defendant during the year 1995 approached his company, the plaintiff herein, to purchase land parcel number **Ruiru/Kiu Block 6/228** which belonged to the 2nd defendant's company, Uncle Sam's Githurai Limited which the plaintiff company agreed to purchase at kshs. 4,000,000/=. The said John Kiereni Kirika depones that he introduced the 2nd defendant to his company's lawyer Mr. Ramesh Manek advocate who acted for both the vendor and drew the agreement for sale dated 6th November 1995 which agreement was executed by both companies and the terms of the agreement are fully set out in the said agreement.

4. The plaintiff states that the transaction proceeded smoothly and the title of the land parcel **Ruiru/Kiu Block 6/228** was issued to the purchaser on 14th November 1995 after due process where a transfer was executed, stamped and registered in favour of the plaintiff free of all encumbrances. The plaintiff states the transaction was handled personally by Mr. Ramesh Manek Advocate from the beginning until it was completed and at no time did Mr. P. M Kamaara advocate handle the transaction files or attend the purchaser or the vendor in regard to the sale transaction. The plaintiff denies that Mr. P. M. Kamaara advocate handled any aspect of the sale transaction and asserts that there was no advocate/client relationship between the 2nd defendant and/or his company, Uncle Sam's Githurai Ltd with Mr. P. M Kamaara.

5. The plaintiff states Mr. P. M Kamaara advocate only got involved in 2001 when it became apparent the 2nd defendant may have been involved in some fraudulent dealings with the plaintiff. It came to light that the property the 2nd defendant had transferred to the plaintiff through his company was charged to Standard Bank and apparently the 2nd defendant held a title to the suit property in his own name while his company, Uncle Sam's Githurai Ltd held another title to the same property in its name at the time of the sale of the property to the plaintiff. The plaintiff asserts that the title deed held by the bank as security dated 18th March 1994 was registered in the 2nd defendant's personal name while the title transferred to the plaintiff was registered in the company's name. The plaintiff avers that the 2nd defendant executed both the sale agreement and the transfer in favour of the plaintiff as a director of Uncle Sam's Githurai Ltd.

6. The plaintiff states that the existence of the two titles in respect of the same parcel of land has never been explained by the 2nd defendant yet he was a key participant in regard to the property either as the registered owner and or through his company which also held title to the property. The plaintiff avers that the existence of two separate titles over the same property at the same time irresistibly points to criminal acts having been committed in regard to which the 2nd defendant would have been privy.

7. The plaintiff states that Mr. P. M Kamaara advocate came into the matter when the potential criminal actions were revealed in 2001 after the bank issued notices for the sale by public auction of the suit property for nonpayment of the loan borrowed by the 2nd defendant from the bank on the security of the

suit land. Mr. P. M. Kamaara acted for the plaintiff by filing HCCC No. 286 of 2001 which suit was heard before various judges namely **Ochieng J.** in 2006, **Koome, J** in 2011 and **Havelock J** in 2013 and that at no time did the 2nd defendant ever intimate he would wish to call Mr. P. M Kamaara as his witness in the case and neither did he at any time protest or object to the representation of the plaintiff by Mr. Kamaara advocate. The plaintiff asserts the fraudulent acts have remained the same save that further fraud has been perpetrated on the title by the transfer of the parcel of land to the 4th defendant who is the 2nd defendant's wife. The plaintiff states Mr. P. M Kamaara advocate has acted for them since 2001 and they have confidence in him and he is seized of the full facts of the case having represented them now for over 14 years and the 2nd defendant has over all those years been an active party in all the court proceedings. The plaintiff avers the 2nd defendant's instant application is devious and mischievous and is intended as a diversionary tactic to shield focus on the fraudulent and criminal activities by the 2nd defendant.

8. The plaintiff states the suit land was decreed in favour of the plaintiff and in order to save the property from being auctioned by the bank, the plaintiff had to pay kshs. 5,500,000/= and costs of kshs. 241,860/= which sums were payable by the 2nd defendant. The 2nd defendant instead of having the property transferred to the plaintiff as ordered by Koome, J has fraudulently transferred the property to the 1st defendant, his wife, who has further gone ahead to have the same charged to Unaitas Sacco. The plaintiff avers that by the 2nd defendant transferring the suit land to his wife, the 1st defendant, has initiated a fresh round of fraud which precipitated the present case where inter alia the plaintiff seeks to have the new title issued to the 1st defendant nullified on the ground that it is fake and fraudulent. The plaintiff asserts no valid reason has been given to have Mr. P. M Kamaara advocate disqualified from acting for the plaintiff in the suit. It is the plaintiff's position that no conflict of interest has been disclosed and no professional impropriety on the part of Mr. P. M Kamaara has been demonstrated to warrant the grant of the orders sought by the 2nd defendant.

9. The parties filed written submissions to canvass the application by the 2nd defendant dated 6th March 2015. The 2nd defendant/ applicant filed his submissions dated 24th April 2015 on the same date while the plaintiff/respondent filed his submissions dated 8th May 2015 on the same date. I have reviewed and considered the application together with the affidavits sworn in support and in opposition together with the submissions and the issue for the court to decide is whether on the basis of the material placed before the court the applicant has demonstrated that there is potential for likelihood of conflict of interest and/or any real or perceived likelihood of the applicant suffering any prejudice in the event Mr. P. M Kamaara advocate continues to represent the plaintiff in this suit.

10. As I understand this matter the 2nd defendant's application for Mr. P. M Kamaara advocate is predicated on the ground that he acted for the plaintiff's company Kamahuha Limited and the 2nd defendant's company, Uncle Sam's Githurai Limited in the agreement for sale dated 6th November 1995 where the 2nd defendant's company contracted to sell land parcel **Ruiru/Kiu Block 6/228** to the plaintiff at the consideration of kshs. 4,000,000/=. This agreement has been the subject of litigation in HCCC No. 286 of 2001. Ochieng, J dealt with an interlocutory application in the suit and on 16th November 2005 inter alia made the following orders:-

(i) An injunction shall issue forthwith to restrain the 2nd and 3rd defendants from selling, alienating, assigning, transferring, auctioning, advertising for sale, leasing out, occupying or otherwise howsoever from dealing with or interfering with the suit property, title number Ruiru/Kiu Block 6/228, until the hearing and determination of this suit.

(ii) If the plaintiff should redeem the mortgage which was executed by the 2nd defendant in favour of the 1st defendant, the said 1st defendant shall hand over to the plaintiff the title documents together with a duly executed discharge of charge, over the said suit property. The plaintiff will then hold the said documents in safe custody until this court determines who is entitled to the said suit property.

11. The veracity of the sale agreement dated 6th November, 1995 was put directly in issue before **Koome J**, while considering an application by the plaintiff dated 18th September 2001 to strike out the defence by the 3rd defendant and the 2nd defendant to be ordered to execute the transfer of title number **Ruiru/Kiu Block 6/228** in favour of the plaintiff. **Koome, J** in her ruling delivered on 10th January 2011 observed at paragraph 8 thus:-

“8. The agreement entered into between the plaintiff and the 3rd defendant dated 6th November, 1995 is not denied. That agreement was executed by the 2nd defendant on behalf of the 3rd defendant. Parties also exchanged correspondences to confirm the same. That correspondence was signed by the 2nd defendant on behalf of the 3rd defendant. Even a transfer was signed in the same manner. However, it turns out that the 2nd defendant had fraudulently issued to the plaintiff a fake title because the genuine title had been charged by the Standard Bank to secure a loan. The plaintiff was made to pay the outstanding loan in order to salvage the title from being sold by the bank....”.

The judge went on to hold further that:-

Upon evaluation of the defence contained in the 2nd and 3rd amended statement of defence, it is not denied that the agreement was entered into and a transfer and charge were executed in favour of the plaintiff. Consideration was paid and the defence does not give an explanation of the origins of the fake documents which were given to the plaintiff.

The judge finally held:-

“The agreement, transfer, charge and possession of the suit premises were signed and given to the plaintiff. The 2nd defendant was the director of the 3rd defendant when he executed the documents under the 3rd defendant’s seal. I am satisfied that the plaintiff’s case as presented in the plaint, the supporting affidavit and the ruling of Ochieng, J all present a clear case for the plaintiff. It is clear that no useful purpose would be served by proceeding to hold a trial on the matters/issues raised in the amended defence.”

The judge proceeded to order the 2nd and 3rd defendant’s amended defence to be struck out and made an order that:-

“The 2nd defendant to execute the transfer of title No. Ruiru/Kiu Block 6/228 in favour of the plaintiff within 30 days failure to do so the deputy registrar of this court to sign, seal, execute the transfer in favour of the plaintiff.”

12. I have referred to the ruling by **Koome, J** extensively to demonstrate that all issues surrounding the agreement dated 6th November 1995 were fully dealt with and there are no aspects relating to that agreement that this court can deal with in the instant suit. As far as I am able to ascertain HCCC No. 286/2001 was fully disposed off by the ruling of **Koome, J** of 10th January 2011 and all that remained was the execution of the orders emanating therefrom. Specifically the court virtually ordered the specific performance of the agreement entered into on 6th November 1995. In my view this court cannot properly reopen the consideration of the issues determined by **Koome, J** and the validity and enforcement of the agreement dated 6th November 1995 was one such issue which was clearly adjudicated upon. The instant suit has been triggered by the entry of the 1st defendant into the fray as a registered owner of the same suit property. The 1st defendant was not party in the earlier suit and I do not see how the issue relating to the agreement of 6th November 1995 would be relevant to the transaction involving her since she only became registered owner of the property on 16th May 2014.

13. I have considered the authorities referred to me by the parties but with respect I do not consider that

they would be of any application in the instant application. The issue relating to the agreement of 6th November 1995 having been disposed off in HCCC No. 286 of 2001 there will be no live issues respecting that agreement that will call for determination in the present suit. Mr. P. M Kamaara advocate all along acted for the plaintiff in the earlier suit and the 2nd defendant was represented by counsel and no objection was taken to the advocate representing the plaintiff. At any rate there is no demonstration that indeed Mr. P. M Kamaara Advocate was in fact personally involved in the sale transaction. The plaintiff states it was in fact Ramesh Manek Advocate who handled the transaction and that Mr. P. M Kamaara only came into the picture when the issue of the 2nd title held by the bank surfaced.

14. Apart from what the agreement provides, the 2nd defendant does not state there was any other privileged or confidential information was passed to the advocates. The court in HCCC No. 286 of 2001 interrogated the agreement and was satisfied the same was duly performed resulting in the court ordering specific performance. Hon. Justice Kimaru in the case of **Charles Gitonga Kariuki –vs- Akuisi Farmers Co. Ltd [2007] eKLR** while considering a preliminary objection where the defendant sought the disqualification of the plaintiffs' advocate from acting observed thus:-

“...It is trite law that an advocate cannot act for and against a client in a suit or in subsequent suits where he could utilize the information that he acquired in the cause of his work as an advocate to the detriment of that client. In Uhuru Highway Development Ltd –vs- Central Bank of Kenya [2002] 2 E. A 654 at pg 661, the Court of Appeal held that an advocate would not be allowed to act against a client where he could consciously or unconsciously or even inadvertently use the confidential information acquired when he acted for such a client to his detriment. The court held, that where it was established that such a client would suffer prejudice then the court would have no alternative but to order that such an advocate ceases to act for the opposing party. An applicant, who is seeking the disqualification of an advocate from acting for the opposing party in the circumstances contemplated above, 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 the disqualification of an advocate.”

15. In the present case, I am not satisfied the applicant has demonstrated the advocate is placed in a situation where conflict of interest could arise. He has not shown that the advocate personally handled the transaction and/or that the advocate had any confidential information that could be used to the applicant's prejudice or detriment. I see no evidence or material that could lead me to hold a situation of conflict of interest arises. Indeed I see the application by the 2nd defendant as an afterthought and as an attempt by the 2nd defendant to have the advocate who no doubt has knowledge of all the happenings in the previous case HCCC No. 286 of 2001 excluded in these proceedings with a view of distracting the focus in having the decision in the earlier case executed and/or implemented. I see no basis of finding a situation of conflict of interest exists and I accordingly decline to grant the application by the 2nd defendant which I find to be devoid of any merit. The application by the 2nd defendant dated 6th March 2015 is ordered dismissed with costs to the plaintiff.

Ruling dated and signed at Kisii this 15th day of February 2016.

J. M MUTUNGI

JUDGE

Ruling delivered at Nairobi this 17th day of March 2016.

S. OKONG'O

JUDGE

In the presence of:

Mr. Kamara for the plaintiff

Mr. Kioko for the defendants

Kajuju Court Assistant

S. OKONG'O

JUDGE