



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION, MILIMANI LAW COURTS
CIVIL APPEAL NO. 21 OF 2015

NAOMI KANYUA MUSYOKIAPPLICANT/PLAINTIFF

-VERSUS-

SILVANUS MUSYOKI MULI1ST RESPONDENT/DEFENDANT

JACQUILINE MUENI KYENGO.....2ND RESPONDENT/DEFENDANT

R U L I N G

1. The Notice of Motion before me is brought under **Section 3A** of the **Civil Procedure Act, Rule 9** of the **Advocates (practice) Rules**. It is dated 6th July 2015 and was filed under certificate of urgency. It mainly seeks for orders that Wandaka Stanley Mwangi Kinuthia (Advocate) as well as the firm of Kinuthia Wandaka & Co. Advocates its partners, associates, employees and or agents be barred from acting for the Defendant/Respondents in this suit. The application relies on the grounds on the face thereof and on the supporting affidavit sworn by the Applicant/Plaintiff on 6th July, 2015.
2. The grounds of the application are that Wandaka Stanley Mwangi Kinuthia Advocate whilst trading as Wandaka, Gathaara & Co. Advocates and later as Kinuthia Wandaka & Co. Advocates, has previously represented the 1st Respondent and the Applicant jointly or otherwise since 1980s. That the said firm of Advocates has acted for the 1st Respondent and Applicant in respect of matrimonial property, which is the subject of this suit, and there is a high likelihood that the aforesaid Advocates or their representative may be required to give evidence in this suit.
3. The Applicant further states that the Advocates (Practice) Rules prohibit an Advocate from acting in a matter where there is a likelihood of being called upon to give evidence. That in the process of acting for the Applicant and in particular in the matrimonial matter, the aforesaid Advocates are privy to information that they may prejudicially use against the Applicant in breach of their duty of confidentiality towards the Applicant. She asserts that despite being given notice and ample opportunity to cease acting, the Advocates have continued to act for the Respondents, and that their disqualification will not prejudice the Respondent's case.
4. The Applicant swore a supporting affidavit and reiterated her application.
5. Mr. Magut learned counsel for the 1st Applicant filed submissions and stated submitted that the Advocate(s) may be required to give evidence in this suit given that they have been the family lawyers for the 1st Respondent and the Applicant and have in particular acted for the 1st Respondent in the acquisition

of the matrimonial property, which is the subject matter of the suit. That the Advocates may use in this suit confidential information to the prejudice of the Applicant, which information may have been acquired whilst representing the Plaintiff, particularly in respect of the matrimonial property which is the subject matter of this suit.

6. He cited Rule 9 of the Advocates (Practise) Rules, and asserted that:

That the Advocates are appearing in this matter in breach of the above Rule.

7. Mr. Magut further submitted that L.R. No. 13768/57, Land title No. Mwala/Kyawango/478 and Land title No. Mwala/Kyawango/494 are the matrimonial properties over which the Advocates gave their services. That the Advocates are currently acting for the 1st Defendant and the Plaintiff in Machakos High Court Civil Case No. 299 of 2012, in which both are claiming interest in respect of matrimonial property Title No. Kajiado/Kaputie Central/2345, which they jointly acquired.

8. Mr. Magut also referred the court to the decision by Mabeya J, in **Ritesh Nandlal Pamnani & Another -vs- Dhanwanti Hitendra Hirani & 2 others [2012] eKLR** where, upon finding that the Defendant's Advocate(s) may be required as witness(es) in the matter, the judge disqualified the said Advocates from appearing in the matter. Mr. Magut also cited **Carnevali Fausto & Another -vs- Gianluigi Cernuschi & 2 others [2008] eKLR, Gichuki King'ara & Company Advocates -vs- Mugoya Constructions & Engineering Limited [2013] eKLR** in which the advocates were barred from appearing in the matters, upon the courts finding that the information acquired whilst acting for the clients in the underlying transactions, could have been used to the prejudice of the clients, and in breach of the duty of confidentiality owed to the said clients.

9. Mr. Kinuthia learned counsel for the 1st Respondent, resisted the motion quoting the Advocates (Practice) Rule 9 as did the Applicant/Plaintiff's counsel, together with the proviso to the said Rule. He argued that the proviso does indicate that there is no bar placed on bar advocates, from acting in non-contentious matters of fact, in any matter in which they act, such as the contracts listed by the Applicant/Plaintiff.

10. Mr. Kinuthia argued that the Defendant's advocate simply witnessed the acquisition of property. That the terms of contracts quoted by the Applicant in her supporting affidavit are not the core subject matter of this case. That acting for the parties in Machakos High Court Case No. 299 of 2012 would not cause any prejudice to the Applicant, but would be beneficial to her, as this is a matter in which the parties claim adverse possession. Mr. Kinuthia also submitted that the Applicant's claim that the Respondent hid the particulars of the property is misleading because she was privy to the case and its contents which sets out the particulars of the Kajiado property.

11. Mr. Kinuthia further contended that under **Article 50(2)(g) of the Constitution**, every person has a constitutional right to have legal representation of their choice, and the court can only intervene if there are exceptional circumstances warranting such an interference. That in her application the Applicant has not illustrated the manner in which she would suffer prejudice, nor produced any evidence of breach of contractual, fiduciary duty or negligence on the part of the Respondent's advocate if they continue to act for him.

12. Mr. Kinuthia referred the court to a list of authorities in which the courts have held that it is of paramount importance for the applicant to demonstrate conflict of interest if a case of disqualification of an advocate is to succeed:

British American Investments Company (K) Limited vs Njomaiha Investments Limited & Another [2014]Eklr

Delphis Bank Limited vs Chatthe & 6 Others (Supra)

Guardian Bank Limited vs Sonal Holdings (K) Limited & 2 others [2014] eKLR.

It is his argument that the Applicant has not satisfied her burden of proof as to the precise circumstances that would justify a reasonable apprehension of the likelihood of bias.

13. It is not disputed that the firm of Kinuthia Wandaka and company Advocates have previously acted as the Advocates of the Applicant and the first Respondent jointly. The complaint before this court is that the information they came into contact with while so engaged may be used in a manner that may be prejudicial to the Applicant and in breach of their duty of confidentiality towards the Applicant.

14. The legal position regarding such disputes is to be found in rule 9 of the Advocates (practice) Rules as adverted to by the two counsels on record. The said rule states 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 it, 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.”

The proviso to this rule is 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.

15. The law regarding Advocate – client relationship as stated in **Halsburys Laws of England 3rd Edition Vol. 3 paragraph 67** is as follows:-

“67. Duty not to disclose or misuse information. 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.”

It is evident therefore that the confidentiality duty lives on long after the advocate has parted ways with his client.

16. In **King Woolen Mills Ltd vs Kaplan & Stratton Advocates (1990-1994) EA 244** a dispute arose as to the validity of security documents prepared by the Defendants, the Court of Appeal rendered itself thus:

“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 the client’s consent. That fiduciary relationship exists even after conclusion of the matter of which the retainer was created.”

In that case the court restrained the firm of Advocates from continuing to act against its former client.

17. In **Uhuru Highway Development Ltd vs Central Bank Ltd (2002) 2 EA 654**, whilst considering an application for injunction against a firm of Advocates that had prepared security documentation that was a subject of challenge, the Court of Appeal observed at page 661 thus:-

“We are satisfied that the real mischief or real prejudice were not rightly anticipated. (sic) We have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by Counsel in bringing about the first and second Plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will no doubt be prejudice.”

In that case, the appellants had pleaded duress against the Advocate and had indicated that the advocate was a possible witness in the proceedings. The court restrained the Advocate from continuing to appear

against his former client.

18. The court is alive to the provisions of **Article 50(2)(g)** of the **Constitution** under which every person has a constitutional right to have legal representation of their choice. Again the Applicant has not asserted that the breach of fiduciary duty has already occurred, but rather that such an eventuality is a likelihood.

19. The principles that provide guidance are that it is a party's fundamental and constitutional right to have an advocate of his choice, but that right is to be balanced against the hallowed principle of confidentiality in an advocate-client relationship and more so, where an advocate will double up as a witness. The nature of the confidential or privileged information imported to the Advocate which may be prejudicial should be disclosed to the court. There is however no general rule that an Advocate cannot act against his client in a subsequent litigation. The test is whether real mischief or real prejudice will, in all probability result if an Advocate is allowed to act. For a Court to deprive a litigant of his right to representation of his choice there **MUST** be a clear and valid reason for so doing and finally that each case must turn on its own facts to establish whether real mischief and real prejudice will result.

20. In the present case it is not disputed that the subject firm of advocates, in different permutations, has previously had an advocate-client relationship with the first Respondent and Applicant jointly or otherwise and have been their family lawyers over a long period of time spanning decades. It is also not disputed that the said firm of Advocates acted for the first Respondent and Applicant in respect of the matrimonial property which is the subject of this suit. Indeed the said firm of Advocates is currently acting for both parties in the Machakos High Court case No. 299 of 2012, a suit which also involves their matrimonial property.

21. I have considered the various authorities to which I was referred by the counsels on record, together with their rival arguments. Mr. Kinuthia learned counsel for the 1st Respondent, resisted the motion quoting the Advocates (Practice) Rule 9 which Mr. Magut for the Applicant/Plaintiff had referred to.

22. Applying the principles of law applicable to applications such as the present one, I am satisfied that it may well be the case that Mr. Kinuthia will be a witness in this case. That if the firm of Kinuthia Wandaka & Co. Advocates acts for the first Respondent in this case against the Applicant, there is a likelihood of mischief or real prejudice against the Applicant resulting. The said firm may inadvertently use information that may have passed on between the Applicant and the said firm for the benefit of the first Respondent and to the detriment of the Applicant

Accordingly, I am satisfied that the Applicant's Notice of Motion dated 6th July, 2015 is meritorious and I allow it as prayed.

SIGNED DATED and **DELIVERED** in open court this **21st day of June, 2016.**

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L. A. ACHODE

JUDGE