REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 232 OF 2010

WALTER NDINDI WAMBU (Suing as Administrator and Personal representative of the estate of Ruth Gathoni Wambu)…….....**PLAINTIFF**

VERSUS

1. **DR. J.R. WAMBWA**
2. **DR. LUCY MCHIRI**
3. **THE MATER HOSPITAL…….……DEFENDANTS**

RULING

1. The 1st Defendant's Notice of Motion dated 7th December, 2012 is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 11 Rule 3(2) and Order 51 Rule 1(1) of the Civil Procedure Rules, 2010 seeking that Professor Kiama Wangai be removed from appearing as Counsel for the Plaintiff in this matter. The motion is supported by the grounds on the body of the application and the supporting affidavit of Samir Inamdar sworn on 7th December, 2012.
2. He contended that after the death of the deceased Plaintiff arising from a complication owing to the negligence of the 1st and 3rd Defendant following a surgery, Professor Kiama Wangai (***'the professor'***) was appointed as the family pathologist to establish the cause of the death. He stated that the professor participated in the autopsies and there arose disagreements between the professor and other pathologists in particular, the 2nd Defendant who was representing the interest of the 3rd Defendant. As a result of the disagreements three post-mortems were carried out on the deceased with a resultant three conflicting reports. It is the 1st Defendant's gravamen that extent of the professor's involvement as a witness and advocate is detrimental there shall be conflict of interest and is in breach of Rule 9 of the Advocates (Practice) Rules.
3. The motion was opposed by the Plaintiff's grounds of opposition dated 18th December, 2012 and brought under Order 51 Rule 14 (1) (c) of the Civil Procedure Rule 2010 and Section 1A, 1B and 3A of the Civil Procedure Act and Section 134, 135 and 136 of the Evidence Act. the grounds were that; the Professor is the duly appointed advocate of the Plaintiff; that advocate client relationship is privileged; that the Professor attended the post-mortem as an observer; that the Plaintiff's pathologists are Dr. Oduor and Dr. Moses Njue; that the issue for determination before this court is the management and treatment of the deceased and the Professor never managed or treated the deceased; that liability in this matter is not in issue and that this application is an afterthought with the intention to frustrate and further delay the determination of this case.
4. From the depositions above, the issue in contention is the extent of the Professor's engagement in this suit or matters relating to this suit and whether or not the engagements amount to conflict of interest. I shall therefore while looking at the submissions and making my determination limit myself to the aforesaid aspects.
5. The motion was canvassed by way of written submissions. It is the 1st Defendant's submission that the Plaintiff's claim is for alleged negligent treatment and management of the deceased by the

Defendants whilst undergoing treatment at the 3rd Defendant. That the involvement of the Professor is evident in his witness statement dated 16th February, 2012 and letter of complaint to the 3rd Defendant dated 10th August, 2009 and the disagreement between him and the 2nd Defendant resulting to three conflicting reports. That there exists a fourth report by the Professor dated 13th October, 2009 which he sought to adduce in this proceedings. It was submitted that an advocate's duty to the court prevails over the duty to his client. Reference was made to **Rondel v. Worsley [1967] 3 WLR 1666** where Lord Denning amplified that position. To beef up that proposition the 1st Defendant quoted **Gandesha v. Killingi Coffee Estate Ltd and Others (1969) EA 299** where it was held that as follows:-

"it is well established, however, by a number of authorities that it is irregular, save in exceptional cases for an advocate both to appear as counsel and to give evidence as a witness."

6. The 1st Defendant also quoted a number of excerpts from Halsbury's Laws of England, Vol 3 para 102 and Vol 4 para 464 where the principle was summed up. The authors respectively stated:-

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"He should not accept a retainer in a case in which he has reason to believe he will be a witness, and if, being engaged in a case it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardising his client's interest."

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"There are certain occasions when a barrister should decline to accept instructions or may be obliged to withdraw from a case because of circumstances which would otherwise make his representation of the client incompatible with the best interests of justice. Thus a barrister may not accept a set of instructions or a brief in any manner with which he has previously been concerned in the course of another profession or occupation…"

7. The 1st Defendant further quoted Rule 9 of the Advocates (Practice) Rules which stipulate that:-

"No advocate may appear as such before any court or tribunal to 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 form giving evidence whether verbally or by declaration or by affidavit on non-contentious matter of fact in any matter in which he acts or appears."

8. And a recent decision of **Dr. Ritesh Nandlal Pamnani and Anor v. Dhanmwati Hitendra Hirani and two others** where Mabeya J stated as follows:-

"Applying the principles of law applicable to the applications such as the present one, I am satisfied that it may well be the case that Mrs. Samnakay will be a witness in this case, that if the firm of Mohamed and Samnakay Advocates acts for the Defendants in this case against the Plaintiffs, there is a real likelihood of a mischief or real prejudice against the Plaintiffs resulting."

9. It was the professor's submission that the cited cases relate to matters where an advocate either acted for both parties at some stage and or knew either of the parties in a dispute or was in possession of certain confidential and fundamental information that would prejudice the case as against the opposing party and that that is not the case in the present suit. The Professor relied in **William Audi Ododa & Another v. John Yier & Another Nairobi CA No. 360 of 2004 (UR)**

where it was held:-

"What is clear from these authorities is that each case must be decided purely on its facts. The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters…guarantees citizens the protection of the law and to enjoy that right fully, the right to deprive a litigant of that right, there must be clear and valid reasons for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice."

Gaveran Trading Co. Ltd v. Skjevesland (2013) 1ALL ER 1 where it was held that:-

"the court would have to consider all the circumstances carefully, and should not accede too readily to an application by a party to remove the advocate for the other party if accede to such applications too willingly, advocates would be encouraged to withdraw from cases voluntarily where it was not necessary for then to do so."

and **Delphis Bank Lt v. Channan Singh Chatte & 6 Others Nairobi CA No. 136 of 2005 (UR)** where it was held:-

"The starting point is, of course, to reiterate that most valued constitutional right to a litigant: the right to a legal representative or advocate of his choice. In some cases, however, particularly civil, the right may be put to serious test if there is a conflict of interest which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness…The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result…"

10. I have considered the depositions and arguments of the parties together with the authorities cited. Rule 9 of the Advocates (Practice) Rules is the instructive law on the issue of conflict of interest with regard to advocates. The said rule provides that:-

"No Advocate may appear as such before any Court or tribunal to 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 of affidavit, he shall not continue to appear."

11. It is however, noteworthy that the burden is on the party seeking disqualification to establish conflict that may arise. See: **HUDSON VALLEY MARINE INC v TOWN OF COURTLAND 30 AD 3d 378** where it was held:

The burden of demonstrating the necessity of the attorney's testimony is on the party seeking his or her disqualification...In determining whether the attorney's testimony is necessary, the court must consider the relevance of the expected testimony and must ''take into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence''.

12. I have also noted various authorities from which I sought guidance. Mabeya J., in **Oriental Commercial Bank Limited v. Central Bank of Kenya (2012) eKLR** observed:-

"In the English case of Gaveran Trading Co. Ltd –vs- Skjevesland (2003) 1 All ER 1 it was held, inter alia, that:-

"Although a party had no right to prevent an advocate from acting based on the code, since its content and enforcement were not matters for the court, the court had the power, under its inherent power to prevent abuse of its procedure, to restrain an advocate from representing a party if it were satisfied that there was a real risk that his continued participation would lead to a

situation where the order made at trial would have to be set aside on appeal. In exceptional circumstances, that power could be exercised even if the advocate did not have confidential information. Furthermore, it was not necessary for the party objecting to an advocate to show that unfairness would actually result, and in many cases, it would be sufficient that there was a reasonable lay apprehension that that was the case. The court would have to consider all the circumstances carefully, and should not accede too readily to an application by a party to remove the advocate for the other party. If it acceded to such applications too willingly, advocates would be encouraged to withdraw from cases voluntarily where it was not necessary for them to do so."

This English case was cited with approval by the Court of Appeal in the case of William Audi Ododa & Another –vs- John Yier & Another CA No. Nai 360 of 2004 (UR) wherein the Respondents (who were Plaintiffs in the High Court) objected to the appearance of Mr. Odunga Advocate (as he then was) for the appellants on the basis that Mr. Odunga's firm had drawn the plaint and acted for the Respondents at the inception of the suit in the High Court, that when giving Mr. Odunga instructions to file suit, the Respondents had disclosed confidential information which was in the file that Mr. Odunga was now using in the Court of Appeal against them. Dismissing the objection after reviewing various cases on the subject, the court held:-

"What is clear from these authorities is that each case must be decided purely on its facts….The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters in Section 77(1)(d) but Section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly, for a court to deprive a litigant of that right, there must be clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice."

That is therefore the law on the issue of conflict of interest by an Advocate. The principles that come out of these authorities, in my view, are that it is a party's fundamental and constitutional right to have an advocate of his choice, that 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,… that for a Court to deprive a litigant 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."

13. It was not contended that the Professor has no advocate-client relationship with the Plaintiff rather that he participated in the autopsy as the Plaintiff's pathologist. I have taken the liberty to read the Plaintiff's list of documents, in it is the Professor's deceased's forensic report and correspondences dated 10th August, 2009, 11th August, 2009 and 12th August, 2009 raising concern on the manner in which Dr. Dolan delays the post-mortem. One of the issues the Plaintiff seeks to be determined in this suit is the cause of death of the deceased. This goes hand in hand with the issue of liability. Considering that the Professor's report is intended to be used to so establish it definitely will result to conflict. The authorities cited by the 1st Defendant are quite a guide to the law in relation to conflict of interest. Applying this test, I am of the view that the 1st Defendant has demonstrated the kind of evidence that will be tendered by the Plaintiff particularly the forensic report and will have a bearing on the issue of the deceased's cause of death and liability. The upshot is that this application is allowed. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 13th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Macharia h/b for Kiama Wangai for the Plaintiff

Ogado for the 1st and 2nd Defendants