



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC. CIVIL SUIT NO. 12 OF 2015

SALIM JUMA NDORO & 24 OTHERS.....PLAINTIFFS

-VERSUS-

MEHTA SON (AFRICA) LTD & 2 OTHERS.....DEFENDANTS

RULING

1. In the notice of motion dated 17th March 2015 brought under Section 1A, 1B and 3A of the Civil Procedure Act Order 51 Rule 1 of the Civil Rules and Rule 8 of the Advocates (practice) Rules Cap 16 of the Laws of Kenya. The 3rd defendant/applicant seeks for an order that the firm of Messrs Mwaniki Gitau & Co Advocates and the partners thereto be restrained from acting or representing the Plaintiffs in this suit or any applications arising from the suit. He also prayed for costs of the application. The application is supported by the four grounds listed on the face of it and the affidavit sworn by Divyanshu Panchal and such other grounds as may be adduced during the hearing.
2. One of the grounds listed is that Mr Joseph Mwaniki Advocate has elected to give evidence by way of affidavit which was filed in Court on 9th March 2015 thus exposing himself to cross – examination. It is deposed by Mr Panchal that it will be imperative that Mr Mwaniki be cross – examined on the contents of the aforesaid affidavit and therefore the firm of Mwaniki Gitau a& Co advocates cannot continue to act for the plaintiffs.
3. The application is opposed by the Plaintiff/Respondent. By a replying affidavit sworn by Mr Joseph Mwaniki, the deponent stated that Mr Panchal as project Manager of the 3rd defendant is not a competent witness in the matter and his affidavits offends the provisions of Order 19 rule 3(1) of the Civil Procedure Rules. Mr Mwaniki denies acknowledging that the application of 7th November 2014 seeking injunctive reliefs is contentious. He deposed further that no basis has been laid for his cross – examination as there is non – disclosure of the contentious matter. He also stated that the annexure as demonstrated is a matter of public knowledge gratuitously furnished by the 2nd defendant. The counsel deposed that he relies on what is on record and in paragraph 14 of his affidavit stated that A. B Patel & Co Advocates have a tale to tell and should not point fingers at him. He urged the Court to dismiss this application.
4. In submission, Mr Kagram for the applicant stated that Mr Mwaniki's affidavit has annexed a report of a review done by the 2nd defendant which questions the title in dispute thus making him Mr Mwaniki a potential witness. He cited the cases of

2. **Francis Mugo & 22 Others vs James Bress (2005) eKLR ;**
3. **Nicholas Kipchirchir vs Wilson Kibet (2014) eKLR ;**
4. **Small Enterprise Finance vs Gikubu NBI HCC 3088 of 1994.**

He asked the Court either strike out the affidavit or order the advocate to step aside. Mr Kagram submitted further that Mr Mwaniki advocate cannot swear there is no contentious matter yet the dispute questions the defendant's title. He wondered why the plaintiff/applicant did not personally swear the contested affidavit.

5. Mr Mwaniki in opening submissions wondered why the 2nd defendant was not served with the present application. He continued that he did not mention the contents of that report in his affidavit neither is it submitted that he obtained the report illegally. He therefore does not see what kind of evidence he will be called to adduce as the report annexed is a public document. In support of his submissions, he referred to the following cases and urged the Court to dismiss the application

1. **Delphis Bank vs Chathe & 6Others (2005) IKLR**

2. **Paul Nduati vs Stephen Ngotho (2015) eKLR**

3. **Tom Kusienya & Others vs Kenya Railways (2013) eKLR**

6. Although the motion is premised on rule 8 of the Advocates (practice) Rules, I have looked at both rule 8 and 9 and I have formed an opinion the objections raised relate to rule 9. Rule 9 provides thus

“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 while appearing if 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”.

7. This provision has been cited in several Court decisions which when deciding on objections under rule 9 have taken into account the provisions of a right of a litigant to representation by Counsel of his choice as provided for under Section 77 and 70(a) of the old constitution (repealed) and now article 50 of the Constitution 2010. The issue the subject matter of this application is a document marked as **“JMGI”** in the affidavit of Mr Joseph Mwaniki dated 9th March 2015 and filed on the same date. Paragraph 3 of that affidavit reads ;

“That I was informed with a public copy of the official report of the official report of the review of grants and disposition of public land held at Kenya School of Government Mombasa on 26th January 2015 a copy of which is annexed hereto and marked “JMGI”.

On the face of that document it is shown that it has been prepared by the National Land Commission who is the 2nd defendant herein. Mr Mwaniki submitted that it is a public document. The National Land Commission is a statutorily constituted body and it follows that all documents prepared by them are public documents.

8. Mr Kagram's contention is that the report is that the report questions their client's (the 3rd defendant's) title thus making it a contentious matter which the plaintiffs' advocate should not have sworn the affidavit annexing it as they may require to cross – examine Mr Mwaniki. The document clearly shows Mr Mwaniki is not the author thereof. The author is sued as second

defendant in these proceedings. This Court is at a loss what will form the basis of the cross – examination on a document that the advocate being sought to be barred from acting did not prepare. In the case of Ahmed Nassir Abdikadir & Co advocates *Supra* Fred Ochieng J. said thus ;

“In my considered view, any party who seeks to cross – examine a deponent must satisfy the Court that there is a good reason for the proposed cross-examination. In other words the party ought to lay a proper legal foundation to justify his leave to cross – examine the deponent”.

Further on the Judge stated that in his reading of rule 9, it does not give rise to an automatic bar to affidavits being sworn by advocates who then appear before Court for the hearing of that matter.

9. The case of Francis Mugo *supra* is distinguishable as the document in issue was prepared by the advocate sought to be barred. In comparison to the Small Enterprises Finance Co. Ltd case, Mr Mwaniki has disclosed in paragraph 2 of his affidavit that he went to the offices of the 2nd defendant to serve them with Court documents. In the process he was informed by being given a public copy of the report of the review. In my view, he disclosed the source of his information and therefore does not constitute matters of fact deposed to be within his knowledge making this case distinguishable.

10. In the case of Delphis Bank *supra*, the Court of Appeal held that the right to a legal representative or advocate of his choice is a most valued constitutional right to a litigant. In some cases however the right may be put to serious test if there is a conflict of interest which may endanger the hallowed principle of confidentiality in advocate/client fiduciary relationship. In the instant case no such relationship (fiduciary) exist. No basis has been laid by the 3rd defendant why he would wish to cross examine counsel for the plaintiff on a public document. I find the application to have the firm of Mwaniki & Partners as without merit because the document in question is a public document and the makers thereof are joined in these proceedings. Secondly whether to have that paragraph of the affidavit struck out, no basis has been laid. In any event the 3rd defendant does have the opportunity to ask the 2nd defendant to confirm the veracity/authenticity of the questioned document at any stage of these proceedings I do not find any prejudice that will be occasioned to the 3rd defendant by the plaintiff retaining their advocates on record. Consequently I dismiss the notice of motion dated 17.3.15 with costs to Mr Joseph Mwaniki advocate.

Ruling dated and delivered at Mombasa this 30th day of **October 2015**

A. OMOLLO

JUDGE