



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC NO. 85 OF 2021 (OS)

(Formerly at Environment and Land Court at Kisii Case No. 42 of 2020 (OS))

ZIRUEL ONDICHO BWANA.....PLAINTIFF

=VRS=

SAMWEL MOGAKA MAMBOLEO.....1ST DEFENDANT

THOMAS AREBA MAGARE.....2ND DEFENDANT

RULING

This suit proceeded for Hearing on 19/01/2021 when the Plaintiff testified and closed his case after the Defendants' Applications for adjournment were disallowed by the court. Before the Plaintiff filed his Submissions, there was change of Advocates and the process of writing the Judgment was arrested by Mr. Maroko who had now come on record for the 2nd Defendant and who made the following prayers vide Notice of Motion dated 24/01/22 brought under Sections 1A, B, 3A & 63 (e) of the Civil Procedure Act.

- 1. The instant Application be certified urgent and the same be heard on priority basis and in any event ex-parte in the first instance.**
- 2. The Honourable Court be pleased to review, rescind, vary and/or set aside the orders of this Honourable court made on the 19th day of January, 2022 whereby the Honourable Court proceeded to hear the Plaintiff/Respondent without the participation of the 2nd Defendant/Applicant**
- 3. Consequent to prayer (2) hereinabove being granted, the Honourable court be pleased to set aside the proceedings of the 19th day of January, 2022 and order that the plaintiff herein be recalled for the purpose of Cross-Examination by the 2nd Defendant/Applicant's Advocate.**

The same seems to have been abandoned and a new Application dated 15/02/2022 was filed on 16/02/2022 under the same Provisions with the following prayers:

- 1. THAT the firm of OGUTTU MBOYA, OCHWAL & PARTNERS ADVOCATES be disallowed for representing the Plaintiff and/or any other party in this matter.**
- 2. Costs of the Application be borne by the Plaintiff.**

The grounds relied upon were indicated as: -

- (a) THAT, sometime in 2012, the 2nd Defendant/Applicant instructed the firm of OGUTTU MBOYA & Co. ADVOCATES (as it then was) to represent him in Kisii Criminal Appeal No. 144 of 2012 where he was appealing against a conviction on counts of robbery with violence, rape and defilement.**
- (b) The complainant therein is the Plaintiff's 2nd witness, RAEL BOCHABERI MOMANYI.**
- (c) One of the grounds of Appeal was that the trial court failed to take into consideration the fact that there was a grudge between the complainant therein and the Appellant, to wit unresolved land issues relating to LR. NO. MWONGORI**

SETTLEMENT SCHEME/146 (hereinafter referred to as the suit land).

(d) The trial court in its Judgment had indeed noted the said unresolved land issue while the Appellate court took judicial notice of the land dispute in its Judgment which was a factor that led to the acquittal of the Appellant.

(e) Similarly, in 2014, the appellant gave instructions to the firm of OGUTTU – MBOYA & CO. ADVOCATES to represent him in recovering a portion of the suit land measuring 37 Ares from the 1st Defendant.

(f) The said firm accordingly instituted the said proceedings vide demand letter dated 25/10/2014 addressed to the 1st Defendant herein whereupon negotiations commenced for an out of court settlement before the matter could be filed in court.

(g) It is therefore the Applicant's contention that the firm of OGUTTU- MBOYA, OCHWAL & PARTNERS ADVOCATES having acted for him with regard to the suit land herein which is the core subject of the instant suit is conflicted and that the ends of justice will not be met if the said firm is allowed to prosecute him in the instant suit.

(h) It thus in the interest of justice that the instant notice of motion be allowed so that the Applicant's right to have a fair hearing can be upheld.

(i) This Application has been brought timeously and is thus ripe for granting of the prayers sought.

In a nutshell the 2nd Defendant deponed that sometime in 2012 he did instruct the firm of **OGUTTU MBOYA & COMPANY ADVOCATES** before it was renamed **OGUTTU MBOYA, OCHWAL & PARTNERS ADVOCATES** to represent him in Kisii Criminal Appeal No. 144 of 2012 where the counts were robbery with violence, rape and defilement. The complainant in the Criminal case aforementioned was the Plaintiff's 2nd witness herein, **RAEL BOCHABERI MOMANYI**. One of the issues that came out in the Criminal case trial was the unresolved land dispute relating to **LR. NO. MWONGORI SETTLEMENT/146**. The land dispute led to the acquittal of the 2nd Defendant herein. In 2014, the 2nd Defendant gave instructions to the firm of **Oguttu – Mboya & Co. Advocates** to represent him in recovering a portion of the suit land from the 1st Defendant and accordingly a Demand letter dated 25/10/2014 was written to the 1st Defendant. Afterwards a suit was commenced on behalf of the Plaintiff against the 1st and 2nd Defendants. The same was filed through the firm of **Oguttu Mboya & Co. Advocates** by way of an originating summons dated 23/11/2020 and filed on 02/12/2020 about 6 years after the Demand letter was written by the 2nd Defendant to the 1st Defendant. The Applicant expresses fears that since he did disclose confidential information regarding the suit land the subject matter herein to his aforesaid Advocates such confidential information may be used to his disadvantage. He therefore urges this court that in order for him to be accorded a fair trial in this suit it is only incumbent upon this court to have the firm of **Oguttu Mboya, Ochwal & Partners Advocates** to be enjoined from representing the Plaintiff or any other party in the suit against him.

In response, the Plaintiff decided to rejoin through his Advocate, **WINNY ADHIAMBO OCHWAL** who swore an Affidavit on 16/02/2022. The aforesaid Advocate admits that her firm was indeed approached by the 2nd Defendant to write a Demand letter to the 1st Defendant which Demand letter was actually written but that the Plaintiff's name was not mentioned anywhere in the said Demand letter. The Advocate further admits that the Plaintiff herein testified as the 2nd Defendant's witness DW4 and that his evidence was limited to the fact that he was a neighbour to the Applicant herein and the complainant in the Criminal Case. She concludes by saying that the Applicant has not disclosed any evidence of conflict of interest and that the Applicant is intent on curtailing the Plaintiff's constitutional right of representation by an Advocate of his own choice without lawful basis. Consequently, the Plaintiff prays for dismissal of the Application.

I have considered the rival submissions. Save clarifying that the firm of **Oguttu Mboya & Co. Advocates** ceased to exist upon the incorporation and/or registration of the firm of **Oguttu Mboya, Ochwal & partners Advocates** after the managing partner of the former was appointed to the Bench, Ms. Ochwal did not disclose to the court whether she was working for the firm that ceased to exist before she joined the current firm either as a partner or an associate. Consequently, the authority in **Shalimar Ltd & 2 Others =vrs= Sadrudin Keirji & Another (2015) e KLR** acknowledging and applying the principle laid down in **National Bank of Kenya Ltd =Vrs= Peter Karat & Another, Civil Case no. 77 of 1997** where it was provided that the court will disqualify only the Advocates who were previously working in the earlier firm of **Oraro & company** and not the entire new firm (**Hamilton Harrison & Mathew (incorporated, Oraro & company)**) is therefore distinguishable from the current case. I further agree with Justice E.K.O Ogola where he acknowledges the test in the case of **Rakusen =Vrs= Ellis Marclay Clurke (1912) CH 831** that;

“.....we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.....there is no general rule that an Advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the court of Appeal is whether real mischief or real prejudice will in all human probability result.....”

Judge Ogola also went ahead to quote with approval the case of **County Oil Trading Ltd =Vrs= Kenya Shell Ltd. HC Misc. 1561 of 2007.**

“.....As for the circumstances in which the court will intervene by granting an injunction, it will not intervene if it is satisfied that there is no risk of disclosure.....”

This Principle is also found in the case **of Delphis Bank Ltd =Vrs= Channan Singh Chatthe & 6 Others** listed as Plaintiff's authority No. 2, **William Audi Ododa & Another =Vrs= John Yier and Another** Civil Application No. 360 of 2004 Court of Appeal at Kisumu.

Finally, Ms. Ochwal has urged this court to follow the case of **Charles Gitonga Kariuki =Vrs= Akusi Farmers Co. Ltd (2007) e KLR** where

Kimalu J quoted the case of *Uhuru Highway Limited v Central Bank of Kenya (2002) E.A. 654 at page 661* where the Court of Appeal held as follows: -

“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 cease to act for the opposing party. An applicant, who is 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.”

It is common knowledge that in most cases a client, while instructing his Advocate, is normally very confident with his Advocate and freely pours his heart to the latter. When he is giving instructions, he does not imagine that the Advocate he is instructing will one day act for his adversary. A client may not be able to confine himself to the subject matter because he cannot tell what is relevant to the case or not. They cannot even remember everything they told their Advocates. He would therefore be very uncomfortable to find in court that his yester year Advocate is now his adversary's Advocate. *In Uhuru Highway Devt Ltd & 3 others v Central Bank of Kenya & 4 others (2003) the court observed that*

“.....the counsel under a retainer may have more confidential information than was apparent on the charge which could be used against the other parties who were his former clients.....”

We do not know how much information the 2nd Defendant had revealed to the firm of Oguttu Mboya & Co. Advocates and any requirement to the client to disclose the specific information would prejudice him further. It is enough for the client to satisfy the Court without specificity that the subject matter of discussion in the earlier brief contains confidential information that relates to the subject matter before the Court that may be used by the former Advocate to prejudice him in the current case. To demand otherwise would mean that if the Client discloses the details of his communication to his Advocate, then the Advocate would also have to respond which may then amount to going against the provisions of Section 134 of the Evidence Act that

(1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.

It is not improbable that in the course of giving instructions to the Advocate to write a Demand letter, documents or copies thereof relating to the subject matter of this suit were availed to the said Advocates. Any Advocate who is receiving instructions would always want to go to the root of the matter and documents explain one's case more than word of mouth. Whether Ms Ochwal ever took instructions to write the Demand letter or not, the documents must have been left in the firm's offices. What would prevent the firm from using those documents to the advantage of their new-found client?

In fact, majority of the litigants feel betrayed when they meet their Advocates in social places with their adversaries' Advocate. They consider such Advocates sellouts. The only time they feel appreciative is when they see their Advocates (in Criminal Cases) talking freely with the prosecutor. They believe the Advocate is negotiating their acquittal. It is this confidence of a litigant that Courts are protecting when they are asking an Advocate who has acted for a client not to act for the latter's adversary. We are not saying that the Advocate will invariably use confidential information to the detriment of his former client. There may even be no confidential information to protect save what is in the public domain. But the court has a duty to accommodate the litigant's fears and weigh the same against what information the Advocate could be holding and which the client would not want brought to the attention of anybody else.

In GUARDIAN BANK LIMITED V SONAL HOLDINGS (K) LIMITED & 2 OTHERS [2014] e KLR the Court enumerated the issues to be considered in making determination whether to disqualify an Advocate from representing a party in a matter as follows:

“..... I will not re-invent the wheel.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. 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.

In the case of ***DOROTHY SEYANOI MOSCHIONI (SUPRA)*** the Court observed thus:

The party applying must show there is real possibility of the advocate concerned using the privileged information to the detriment of the said party and or to the advantage of the other party. Whether real mischief will result unless the advocate is disqualified from acting for a party in the cause.

By stating in his Grounds supporting his Application that One of the grounds of Appeal was that the trial court failed to take into consideration the fact that there was a grudge between the complainant therein and the Appellant, to wit unresolved land issues relating to

LR. NO. MWONGORI SETTLEMENT SCHEME/146 (hereinafter referred to as the suit land), it is clear that the background of the land issue must have been discussed at length between the Advocate and his client so that the same could inform the Advocate whether to do the Demand letter or not.

The Law Society of Kenya (LSK) Code of Conduct and Ethics for Advocates 2016 Rule 6 paragraph 87-91, deals with the issue of conflict of interest. Paragraph 87 – 88 thereof defines, what conflict of interest entails while Section 89 gives the rationale for the rule against conflict of interest. Paragraph 91 cites the incidents where conflict of interest may arise:

“Situations in which a conflict of interest might arise include:

(a) Where the interests of one client are directly adverse to those of another client being represented by the advocate or the firm, for instance in situations where the representation involves the assertion of a claim by one client against another client;

(b) Where the nature or scope of representation of one client will be materially limited by the advocate’s responsibilities to another client, a former client, a third person or by the personal interests of the advocate;

(c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.”

In *Serve in Love Africa (Sila) Trust the* court held that each case must be considered on its own peculiar facts and that the court will intervene to stop counsel from representing a client if satisfied that real prejudice is likely to be caused to the former client. The court also considered representation by an Advocate of their own choice as being a Constitutional right **which can only be taken away in exceptional circumstances.**

In *William Audi Odode & another v John Yier & another, the Court of Appeal Nairobi Application No.360/2004*, stated as follows:

“I must state on 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 interest 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.”

How then do we juxtapose this right against the right to fair trial which includes the right to be represented by an Advocate of one’s choice? And is this right absolute?

Article 25 of the Constitution of Kenya, 2010 provides for Fundamental Rights and freedoms that may not be limited:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a)

(b)

(c) the right to a fair trial; and

Under Article 50 of the Constitution of Kenya, 2010 under the sub-heading Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Sub-Article (4) of the Constitution would come into play in our case.

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

Under Article 40 of the Constitution of Kenya, Protection of right to acquire and own property in any part of Kenya is a fundamental Right.

Accordingly, Article 50 (4) of the Constitution of Kenya, 2010 comes into play in that there is a likelihood that Evidence obtained by the firm of Oguttu Mboya & company Advocates in the course of representing the 2nd Defendant.

It is indeed true that a party should not be denied a right to representation of Counsel of his choice but that right should not be exercised to the detriment of another party in a subsequent dispute or suit. Consequently, it is my considered view that the information given to Oguttu Mboya & company Advocates in the cause of writing a Demand letter touching on the suit land precludes the firm from acting for a party on the opposite side. To do so would allow the firm to breach the advocate/client fiduciary duty to the detriment of the 2nd Defendant. It is inappropriate to make the Applicant disclose the exact instructions he gave Oguttu Mboya & company Advocates when the hearing of the case has not commenced.

I believe I have said enough to justify the granting of the 2nd Defendant's Application dated 15/02/2022. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 14TH DAY OF MARCH, 2022

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Were holding brief for Mr. Ochwal

Defendant: Mr. Maroko for 2nd Defendant/Applicant