



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Suit 3 of 2012**

**JOSEPHINE JEROTICH CHEROP.....PLAINTIFF**

**VERSUS**

**JOHN CHERUIYOT SIRON**

**PHILIP KIPTALA.....DEFENDANTS**

**WILLIAM ARAP CHEBURKOMOL**

**R U L I N G.**

At the hearing of an application dated 27th January, 2012 Mr. Yano raised a preliminary objection on behalf of the 3rd defendant on the ground that Mr. Okile advocate for the plaintiff should not continue acting for the plaintiff as the said Mr. Okile is the one who prepared a sale agreement between the 3rd defendant and Christopher Kiptarus Kiprop who is the son of the plaintiff herein. The sale agreement was for sale of 2 ½ acres comprised in LR. No. Cherangany/Koitugum/252 which is registered in the name of the plaintiff. Mr. Yano submitted that the 3rd defendant intends to call Mr. Okile as a witness for the 3rd defendant and as such it will not be in order for Mr. Okile to continue acting for the plaintiff as this will be in contravention of the provisions of Rule 9 of the Advocates Practice Rules.

Mr. Okile opposed the preliminary objection on the ground that he had never acted for the 3rd defendant and that in the pleadings, the 3rd defendant is William Arap Cheburkomol whereas in the agreement, the purchaser is William Rotich. He further contended that the parcel number in the agreement is Cherangany/Koitoguru/252 whereas in the pleadings, the LR. No. is Cherangany/Koitugum/252. In response to Mr. Okile's submissions, Mr. Yano submitted that William Rotich and William Cheburkomol refer to one and the same person and that the land reference number is LR. No. Cherangany/Koitogum/252 which was misspelt as Koituguru.

I have gone through the submissions by counsel for the parties herein as well as the pleadings and filed statements and document. I must now decide whether the preliminary objection should be upheld or not. The preliminary objection is based on Rule (9) of the Advocates practice rules. The said rule provides as follows:-

Rule 9, ***“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.”***

I am alive to the fact that a party has a constitutional right to be represented by an advocate of his/her choice. This right is however subject to accepted practices and norms. In the case of advocates, there are rules guiding the conduct of advocates when it comes to certain matters or situations. The Advocates Practice Rules were made with the drafters being aware that a party is entitled to a lawyer of his/her own choice. In the present case, I have no doubt that Mr. Okile is the one who drafted the agreement between Christopher Kiptarus Kiprop and William Rotich. I have also no reason to doubt the fact that William Rotich and William Cheburkomol refer to one and the same person. The 3rd defendant has listed Mr. Okile as one of the witnesses in the defendants list of documents. This list was served upon Mr. Okile. It is therefore clear that Mr. Okile knew that he will be required as a witness. The reason why he will be called as a witness can be discerned from the pleadings and the documents filed in the pleadings.

The plaintiff contends that the 3rd defendant and two others went to her home and claimed that they had bought land from 3rd parties and that they want to settle on the land which belongs to her. The 3rd defendant in his defence contends that he bought the land from Christopher Kiptarus Kiprop who is son of the plaintiff. There are documents filed in the pleadings which show that the plaintiff had applied to Kapcherop Land Control Board for subdivisions of LR. No. Cherangany/Koitugum/252. One of the beneficiaries of the sub-division is Christopher Tarus Kiprop who was to have 2.5 acres. Since the sale agreement shows that the said Christopher Tarus Kiprop sold 2 ½ acres to the 3rd defendant, and that the agreement was drawn by Mr. Okile, there is no doubt that, this agreement will be a subject in the proceedings herein and it is apparent that Mr. Okile will have to be called to testify as to whether he drew the agreement or not and whether the 2 ½ acres being sold to the 3rd defendant was part of LR. Cherangany/Koitugum/252.

This therefore becomes a contentious matter in which the proviso to Rule 9 of the Advocates Practice Rule cannot save Mr. Okile from not being asked to get out of representing the plaintiff. The proviso to Rule 9 of the Advocates Practice Rules provides as follows:-

***“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 appears.”***

The postal address given in the agreement as well as the one given in the pleadings of Mr. Okile is the same. He cannot therefore, claim that he has never been involved in any sale agreement involving the 3rd defendant. Mr. Okile should have seen from the pleadings that he had been marked as one of the witnesses and should have stepped aside from representing the plaintiff. As he did not do so and as I have found that he is the one who drew the agreement, I find that his continued representation of the plaintiff will bring a conflict of interest. He should not be allowed to continue to appear for the plaintiff as he definitely has information from both the plaintiff and the seller of 2 ½ acres to 3rd defendant which

information might prejudice the case of the 3rd defendant.

I therefore find that the preliminary objection has merits. The same is herein upheld with the result that Mr. Okile is hereby barred from continuing to represent the plaintiff in this matter. The plaintiff is at liberty to hire another lawyer of her choice to represent her.

It is so ordered.

**[Dated and signed at Kitale on this 28<sup>th</sup> day of January, 2013.]**

**E. OBAGA.**

**JUDGE.**