



**Kairanya v Jessel Ranching Co. Ltd (Environment & Land Case
16 of 2021) [2022] KEELC 161 (KLR) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 16 OF 2021**

AK BOR, J

APRIL 21, 2022

BETWEEN

EDWARD MUGAMBI KAIRANYA PLAINTIFF

AND

JESSEL RANCHING CO. LTD DEFENDANT

RULING

1. The Plaintiff brought the application dated 22/11/2021 seeking to have the firm of Mwangi Kariuki and Company Advocates barred from representing the Defendant in this matter. The application was made on the grounds that this firm acted for both the Plaintiff and the Defendant in the sale transaction and that the firm shall be called as witness in the case.
2. The Plaintiff swore the affidavit in support of the application and attached the sale agreement which he averred was prepared and executed by the firm of Mwangi Kariuki and Company Advocates. He averred that this firm prepared the transfer which is at the core of this dispute. Further, that during the sale transaction he disclosed all confidential information regarding the subject matter to the firm including his rights and interest over the suit land and that the firm being seized of such information, it would be prejudicial to the fair trial of his case if this firm continued to represent the Defendant owing to conflict of interest.
3. Mwangi Kariuki Advocate swore the Replying Affidavit opposing the application and averred that the application was made after inordinate delay which was not explained since his firm has been acting for the Defendant in this suit from 30/3/2021. Mr. Kariuki denied acting for the Plaintiff in the sale transaction. He pointed out that the sale agreement was blank on the part of the purchaser's advocate. He deponed that the Plaintiff did not disclose the nature of the confidential information which he claimed to have disclosed to his firm outside what was in the sale agreement and the transfer document. He mentioned that he was not listed as a witness and that his witness statement had not been sought by the Plaintiff if indeed the Plaintiff intends to call him as a witness.



4. The Plaintiff swore a further affidavit on 25/1/2022 reiterating that Mwangi Kariuki Advocate acted for him in the sale transaction and that counsel was conflicted and could not wear two hats at the same time. Mr. Mwangi Kariuki responded to the averments in his further affidavit dated 28/1/2022. He maintained that if he was privy to the terms of the contract as the Plaintiff contended, then that related to a formal non-contentious matter in respect of which the proviso to Rule 9 of the *Advocates (Practice) Rules* bails him out. He averred that the issue of whether or not the Plaintiff executed the transfer was to be determined at the hearing and that the circumstances under which the Defendant obtained the lease was within the knowledge of the Land Registrar and not the advocate.
5. Parties filed written submissions which the court has considered together with the application and the affidavits filed. The Plaintiff relied on Rule 8 of the *Advocate's (Practice) Rules* in support of his argument that the Defendant's advocate was conflicted in this matter. He also relied on the decisions in *Uhuru Highway Development Limited & 3 Others v Central Bank of Kenya Limited & 4 others* [2003] eKLR and *Serve in Love (Sila) Trust v David Kipsang Kipyegon & 7 thers* [2017] eKLR on conflict of interest. The Plaintiff argued that the firm of Mwangi Kariuki and Company Advocates acted for both parties in the sale transaction and that the sale agreement was the subject matter of this dispute.
6. The Respondent submitted that the instant application was premised on the ground that the firm of Mwangi Kariuki and Company Advocates acted for the Plaintiff in the transaction and that he disclosed confidential information to this firm so that its involvement in this suit would be prejudicial to the Plaintiff.
7. The Respondent contended that the application was made with inexcusable delay in that the Plaintiff became aware of this firm's representation of the Defendant when it filed and served the memorandum of appearance in March 2021 but waited until 2/11/2021 to file the application seeking to bar the firm of advocates from acting for the Defendant.
8. The Defendant submitted that the Plaintiff only indicated that the sale agreement was executed before Mwangi Kariuki Advocate but did not claim that he instructed this firm of advocates to act for him.
9. The Respondent submitted that the Court of Appeal had occasion to interpret Rule 9 of the *Advocates (Practice) Rules* in Nairobi Civil Application No. 136 of 2005 (76/05 UR) - *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* where the Court cited Civil Appeal No. 55 of 1993- *King Woolen Mills Ltd & Another v M/s Kaplan and Stratton* and restated that the test was whether real mischief or real prejudice would result. The Defendant urged this court to uphold the decision in the Delphis case.
10. Counsel denied acting for the Plaintiff in the sale transaction and pointed out that the part in the sale agreement regarding the Plaintiff's advocate was blank. He maintained that he only received instructions from the Defendant. Further, that if the Plaintiff were to call the Defendant's counsel as a witness to confirm the contents of the sale agreement such evidence would merely be formal in the sense of the proviso to Rule 9 of the *Advocates (Practice) Rules* and should not be a bar to the advocate continuing to act for the Defendant.
11. It was argued that the Plaintiff did not state the nature of the confidential information in the hands of the Defendant's advocates which the Plaintiff feared would prejudice his case. Further, that the Plaintiff's rights and interest over the suit land could not be a matter of confidentiality since he had to disclose this to the Defendant before the Defendant decided to enter into the sale transaction. That in any event, the conveyance would ordinarily be a matter of public knowledge once deposited at the Lands Registry.
12. The Defendant distinguished the facts of the Uhuru Highway Development case while pointing out that those facts were different from the facts of this case.



13. The Plaintiff filed further Submissions in response to the Defendant's submissions. He submitted that in this case he seeks the determination of how the land was transferred to the Defendant. The Plaintiff quoted the decision in *East Africa Foundry Works (K) Ltd v Kenya Commercial Bank Ltd* [2002] eKLR extensively in his further submissions.
14. The issue for determination is whether this court should bar the firm of M/s Mwangi Kariuki and Company Advocates from representing the Defendant in this suit. The test to be applied is whether real mischief and real prejudice will result to the Plaintiff if this firm is allowed to continue acting for the Defendant in this dispute.
15. The Defendant submitted that the application was brought after inordinate delay. In the Uhuru Highway case the court observed that where an advocate is acting in breach of privileged protection, the delay in bringing an application for such advocate to be barred from acting did not change or defeat the duty or obligation of the common advocate of the parties. Going by this finding, the delay as the Defendant contends is not material for the determination of the issue in this application.
16. The Plaintiff did not adduce any evidence to show that the Plaintiff instructed the firm of Mwangi Kariuki Advocate to act for him in the transaction or that he was a client of the firm in the context of the definition of a client under Section 2 of the *Advocates Act*.
17. The court agrees with the Defendant that the Plaintiff ought to have disclosed the nature of the confidential information which he disclosed to the counsel which he contends will prejudice him in this suit. All that the court can discern from the documents exhibited by the Plaintiff is that the Plaintiff executed the sale agreement in the presence of Mr. Mwangi Kariuki Advocate.
18. At the time of filing suit, a party is required under Order 3 Rule 2 of the *Civil Procedure Rules* to file the list of the witnesses to be called at the trial together with the written statements signed by the witnesses. Looking at the documents which the Plaintiff filed in court on 7/7/2020 it is apparent that he only filed his own witness statement and did not indicate that he would be calling Mr. Mwangi Kariuki advocate as a witness. Under Order 3 Rule 2 of the Rules, he ought to have taken Mr. Mwangi's witness statement and filed it alongside the suit to confirm that he will be a witness at the trial.
19. The Plaintiff has failed to demonstrate the real prejudice or real mischief he stands to suffer if the Defendant's counsel continues to act for the Defendant in this suit. He failed to prove that he had previously retained this advocate or the firm as its client.
20. The court declines to grant the orders sought in the application dated 22/11/2021. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NANYUKI THIS 21ST DAY OF APRIL 2022.

K. BOR

JUDGE

In the presence of:

Mr. Muia Mwanzia for the Plaintiff

Mr. Mwangi Kariuki for the Defendant

Ms. Stella Gakii- Court Assistant

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