



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 605 of 2010

ANNE NJERI MWANGI.....PLAINTIFF

VERSUS

NJOMAITHA INVESTMENTS LIMITED.....DEFENDANT

RULING

1. This Ruling relates to two applications. The first one is the Defendant's Notice of Motion dated **30th January 2012** and filed in court on **2nd February 2012**. It is expressed to be brought under **Rule 9** of the **Advocates Practice Rules, Advocates Act Cap 16 Laws of Kenya**. The Defendant is seeking for orders that the firm of Wafula Simiyu & Company Advocates be restrained by an order of injunction from representing Ann Njeri Mwangi in this matter or any proceedings therefrom.

2. The Application is supported by the affidavit of **SAMUEL N. KANGAU** sworn on **30th January 2012**. It is based on the grounds that Mr. Wafula Simiyu was previously a legal assistant in the firm of Gichuki King'ara & Co. Advocates which was then acting for the Defendant and so he had access to documents, making him privy to confidential information. The Defendant avers that since Mr. Wafula was part of the legal team of the Defendant, he cannot now act against it.

3. It is the Defendant's case that Mr. Simiyu was the maker and originator of the receipt with the amount of Kshs. 6,940,000/= which is a disputed document that will need to be produced by him. It is further the Defendant's case that Mr. Simiyu is a necessary witness in relation to the disputed agreement dated **24th October 2008**.

4. The Application is opposed vide the Replying Affidavit of the Plaintiff sworn on **7th February 2012**. The Plaintiff denies that Mr. Simiyu ever dealt with the Njomaiitha Investment File as alleged or at all. Apparently, the Defendant Advocate was at the material time representing the Defendant against Barclays Bank. The Plaintiff avers that Mr. King'ara used to keep the Defendant's file in his safe within his chambers and that none of the other associates then namely Gachie, Goi, ithondeka and or Simiyu used to handle the said file.

5. The second Application is the Plaintiff's Notice of Motion dated **3rd February 2012** and filed in

Court on **8th February 2012**. It is expressed to be brought under **Sections 3 & 3A** of the Civil Procedure Act and **Rule 9 of the Advocate Practise Rules** under the **Advocates Act**. The Application is seeking for orders that the firm of Gichuki King'ara & Co. Advocates be disqualified from acting for the Defendant in this matter. It is based on the grounds stated on the face of the application and is supported by the affidavit of the Plaintiff sworn on **3rd Febraury 2011**.

6. The Plaintiff avers that the firm of Gichuki King'ara & CO. Advocates has had an Advocate Client relationship with the Plaintiff before. The said firm represented the Plaintiff in **Milimani HCCC No. 824 of 2003** between the Plaintiff and Housing Finance Company Limited. It is the Plaintiff's case that the subject matter of the said suit was **L.R No. 209/390/4** Nairobi which is the same property that is the subject matter between the Plaintiff and the Defendant in this suit.

7. It is further the Plaintiff's case that the firm of Gichuki King'ara & Co. Advocates is acting in Conflict of interest. The Plaintiff avers that the said law firm is using confidential information it accessed from the Plaintiff when acting for her to her prejudice in contravention with professional ethics.

8. The Application is opposed vide the Replying Affidavit sworn on **29th February 2012** by **MICHAEL N. MUIGAI**, who is described as a director and shareholder of the Defendant. The deponent avers that the Plaintiff has not demonstrated that real mischief and real prejudice will occur if the Defendant firm of Advocates is allowed to act. It is also averred by the Deponent that the Plaintiff has not shown any nexus between the previous cause of action and the current suit. It is further averred that for the duration that the Plaintiff was a client to the Defendant Firm of Advocates, she was attended to exclusively by Mr. Simiyu who was then an assistant in the said firm and that Mr. King'ara did not attend to her even once on the said matter.

9. I have considered the pleadings herein, the written submissions filed by Counsel and the authorities cited therein. The main issue for determination in both applications is whether the Advocates in this matter should be restrained from representing their respective clients in this suit and any proceedings therefrom.

10. 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 is whether real mischief or real prejudice will in all human probability result. See **RAKUSEN VS ELLIS MUNDAY & CLARKE 1912 1 Ch. 831** where the Court of Appeal, reversing the decision of Warrington J, and overruling the decision of **Hall VC in Little Vs Kingwoods & Co (1882)** held:-

“That there is no general rule that a solicitor who acted for some person either before or after litigation began could in no case act for the opposite side. The Court must be satisfied in each case that a mischief would result from his so acting; that there could be no danger of any breach of confidence if the solicitor acted for the company and that the injunction must be refused (i.e. reversing the decision of Warrington J)”

11. In **Uhuru Highway Development Limited vs Central Bank of Kenya [2002] 2E.A 654** at page 661, the Court of Appeal held that 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 ceases to act for the opposing party.

12. Having stated the above, I must state that each case must be decided on its own facts to determine whether real mischief and real prejudice will result.

13. With regard to the first application, it is the Defendant's case that Mr. Simiyu had access to confidential information concerning the Defendant when he was working at the Defendant's Advocates firm as a legal assistant. It is apparent that at the material time the said firm was representing the Defendant against Barclays Bank. The Defendant has not established the nexus in the issues between the

Defendant and Barclays Bank with the issues in the current case. The Defendant has also not disclosed the confidential information that Mr. Simiyu was privy to and how it may cause prejudice to the Defendant in this matter.

14. It has also been argued on behalf of the Defendant that Mr. Simiyu is a necessary witness in this matter as he was the maker and originator of the disputed documents namely the agreement dated **24th October 2008** and the receipt of **Kshs. 6,940,000/=**. It is not disputed that Mr. Simiyu was the maker of the said documents. The Defendant, in its Defence dated **11th October 2010** admitted to executing the agreement dated **24th October 2008**. Therefore, its validity or existence is not in question.

15. With regard to the said agreement, it is the Defendant's position that the repayment was premised on the guarantee and on the understanding that the Plaintiff was not in a position to repay the outstanding liability with the Bank. It is common ground that whatever is in the agreement is the clear intention of the parties and they should not be allowed to say more on the same. In that case the Plaintiff's position should be captured in the said agreement. Having said so, it is difficult to decipher at this point whether Mr. Simiyu would be a necessary witness in this case. It is not clear to this Court what evidence would be required of the said advocate as regards the agreement. In any case, the Defendant has not given any notice to the Plaintiff's Advocate that he will be required to testify.

16. The Defendant has not disclosed what confidential information was acquired by the Plaintiff's advocate in drafting the said agreement. It was an agreement common to the Plaintiff herein and the Defendant and is therefore in the public domain. In the case of **Delphis Bank Ltd -vs- Channan Singh Chattel & 6 others CA No. Nai 136 of 2005 (UR)** the Court of Appeal stated as follows:-

“The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties.”

The Defendant has also not established how it will be prejudiced if Mr. Simiyu continues acting for the Plaintiff.

17. The second application is the Plaintiff's seeking to disqualify the Defendant advocate from acting in this matter. It is the Plaintiff's case that there was an Advocate-Client relationship between her and the Defendant's Advocate in HCCC No. 824 of 2003 between the Plaintiff and Housing Finance Company Limited. It is the Plaintiff's case that the subject matter of the said suit was L.R No. 209/390/4 Nairobi which is the same property that is the subject matter between the Plaintiff and the Defendant in this suit. The Plaintiff is apprehensive that the said advocate will use confidential information obtained from her to her prejudice.

18. The Plaintiff's claim herein is for damages for breach of an agreement between herself and the defendant. Her property was used as security for a loan from Prime Bank Limited. Without going further, it is plain that the issues herein are different from the previous case which was between the Plaintiff and the Housing Finance Company Limited of Kenya. As was noted in the Defendant's case above, the Plaintiff has not disclosed the nature of information she considers confidential and what prejudice it may cause her in this matter.

19. In conclusion the two applications, that is the Defendant's Notice of Motion dated 30th January 2012 and the Plaintiff's Notice of Motion dated 3rd February 2012 are hereby dismissed. Each party to bear their own costs.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 26TH DAY OF APRIL 2013

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Kevindu holding brief for Simiyu for Plaintiff

Kairuki for Defendant

Teresia – Court Clerk