



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC CASE NO. 550 OF 2008

JOSEPH MWANDAGHA MWAWUDA.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY

PENSION SCHEME.....1ST DEFENDANT

HAHIMA ALI AHMED ZEIN.....2ND DEFENDANT

RULING

1. The Plaintiff applicant herein **Joseph Mwandagha Mwavuda**, has brought this Notice of Motion under **Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rules 1 and 14 of the Civil Procedure Rules, and Rule 9 of the Advocate (practice) Rules** under the **Advocate Act** and all other enabling provisions of the Law. The Applicant has sought for these Orders:-

(i) That the Law Firm of **Nyiha, Mukoma & Co .advocates** be and is hereby disqualified or restrained from acting further for the 1st Defendant or any other party whatsoever in this suit.

(ii) That costs of this application be provided for.

2. The application was supported by the grounds on the face of the application and on the supporting affidavit of **Joseph Mwandagha Mwavuduma**. Among the grounds in support of the application are :-

(i) The Law Firm of Nyiha, Mukoma & Co. Advocates had acted for both the Plaintiff and the Defendants herein, in the preparation of the sale agreement as well as the registration of the transfer of the suit property.

ii) That the said Firm acted for the 1st Defendant and the 2nd Defendant herein in purported resale of the suit property to the 2nd Defendant.

(iii) That **Nyiha, Mukoma & Co. Advocates** particularly **James Nyiha** and **Ibrahim Gichuru Mwangi** will be required as witnesses in the transactions mentioned and are accordingly prohibited under **Rule 9 of the Advocates Practice Rules** from acting for any party in this dispute.

(iv) That there is a conflict of interest on the said law Firm and it is in the interest of justice and fairness that the orders sought be granted.

3.The application was opposed. One **James Nyiha** an advocate practising in the Firm of Nyiha, Mukoma & Co. Advocates swore a Replying Affidavit.He averred that the application is misconceived as the Firm of Nyiha, Mukoma & Co. Advocate did not represent both the 1st Defendant and the Plaintiff in the alleged Sale Agreement.

That Nyiha, Mukoma & Co. Advocates only acted for the 1st Defendant and **Nyawara & Co. Advcoates** acted for the Plaintiff's evident from "**JMM1**". That parties have already filed list of their witnesses and no party has indicated that either Ibrahim Mwangi Gichuru and James Nyiha will be called as witnesses.Further that, 1st Defendant has constitutional right to be represented in a legal dispute by an advocate of their choice.

4.The parties herein canvassed this application through written summons which I have considered.The parties alsocited various authorities and the relevant law. The main contention is that that law Firm of Nyiha , Mukoma & Co. Advocates should be disqualified from acting for the Defendants as he acted for both the 1st Defendant and the Plaintiff herein. Section 9 of the Advocates (practice) Rules provides as follows:-

“ 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 affidavit ; and, if while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally of by declaration or affidavit , he shall not continue to appear”.

5.The above position was held in the case of **King Woolen Mills and Another Vs Kaplan & Straton Advocates** (1990 – 1994) EA , 244 cited by the Plaintiff herein).The Court of Appeal in the above case held that :-

6.In the instant case, did the said firm of Nyiha, Mukoma & Co. Advocates act for both the 1st Defendant and the Plaintiff herein?.

I have considered the Sale Agreement which forms of the basis of the dispute.On clause 1.7 it states:-

From the above provisions it is therefore very clear that the Firm of Nyiha, Mukoma & Co. Advocates acted for 1st Defendant and Nyawara & Co. Advocates acted for the Plaintiff.It is therefore not true that Nyiha Mukoma & Co. Advocates acted for both parties in the said Sale Agreement.

7.It was further alleged that either James Nyiha or Ibrahim Mwangi Gichuru Advocates of the Firm of Njiha , Mukoma & Co. Advocates may be called as witnesses in future and thus there would be conflict of interest.However, as it has been rightly submitted by the Defendants counsel, the parties have already filed their witness statements and none of them have indicated that James Nyiha or Ibrahim Mwangi Gichuru as their witnesses.

The 1st defendant has also explained the circumstances that led to the plaintiff paying legal fees in the Law Firm of Nyiha, Mukoma & Co. Advocates.That Ibrahim Mwangi Gichuru only witnessed the execution of letters of offer and that did not create any advocate client relationship.

8.The court will rely on the case of **Ododa and Another Vs Yier. Civil Appeal No. 350 of 2004**, where the Court held that,

“ 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 matters. 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 chose their own advocates”.

The applicants herein have failed to demonstrate that the Firm of Nyiha , Mukoma Advocates acted for

both parties in the sale agreement 'JMM1'.

9. In conclusion, the court finds that there are no sufficient reasons advanced to warrant the granting of the Orders sought. The court consequently, declines to disqualify the law firm of Nyiha, Mukoma & Co. Advocates from acting for the 1st Defendant herein or any other party whatsoever in this suit.

The upshot therefore is, the applicant /Plaintiffs Notice of Motion dated 18th March, 2013 is not merited. The same is dismissed entirely. Costs to the Defendants.

It is so ordered.

Dated and signed this 2nd day of **September**, 2013.

L.N. GACHERU

JUDGE