



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENTAL COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 420 OF 2011**

**KAMINDI SELFRIDGES SUPERMARKET LTD .....PLAINTIFF**

**VERSUS**

**KIAMBU MURUTANI COMPANY LTD ..... DEFENDANT**

**RULING**

The Plaintiff has filed a Notice of Motion dated 11<sup>th</sup> April 2013, seeking orders and a declaration from this court that Greg Karungo Advocate be allowed and/or permitted to testify on its behalf on the sale transaction he handled between the Plaintiff and the Defendant in his capacity as counsel for the Plaintiff. Further, that he be required to produce the original sale agreement, correspondence exchanged between him and the Defendant, and all documents he may have in his possession on the sale transaction on behalf of the Plaintiff. The Plaintiff also sought an order that the objection raised by the counsel for the Defendant that the said Advocate Greg Karungo should not testify on the behalf of the Plaintiff be overruled.

The main grounds for the application are explained in the supporting affidavit sworn on 11<sup>th</sup> April 2013 by Steven Muregi Chege, the Plaintiff's Advocate. These are that the Plaintiff has lined up Greg Karungo Advocate as its crucial key witness on the sale transaction that is the subject matter to this suit, as the said advocate is perfectly entitled under the law to testify on the sale transaction and produce the original documents in his possession by virtue of having handled the transaction.

However, that the advocate for the Defendant have indicated that they are opposed to the said advocate testifying on behalf of the Plaintiff, on the basis that he acted for both parties and is thus under privilege from so testifying. The Plaintiff states that it is willing to waive the privilege operating on the advocate, and consent to the advocate testifying on its behalf, and that no injustice will be occasioned to the Defendant by the Advocate testifying on the actual sale transaction.

The Defendant is opposed to the Notice of Motion and filed Grounds of Opposition dated 3<sup>rd</sup> June 2013 and a replying affidavit sworn on the same date by its Advocate, Paul Chuchu Njuguna. The deponent stated that the said intended witness acted for both parties herein in the conveyance transaction that is the subject matter of the dispute and cannot purport to testify against the Defendant herein contrary to the Advocate (Practice) Rules.

Further, that from the pleadings and the issues filed, the subject sale agreement is contested both on its form and validity, and was drawn and witnessed by the intended witness. It is the Defendant's contention that the intended witness cannot therefore take one side as the evidence he is to give on the validity or otherwise of the contested sale agreement would be from information acquired in his employment as advocate for both parties. It was argued by the Defendant that this information is privileged and cannot

therefore be disclosed without the consent of both parties.

The parties were directed to file written submissions and also made oral submissions during the hearing of the Notice of Motion on 24<sup>th</sup> July 2013.. The Plaintiff's counsel in submissions dated 20<sup>th</sup> June 2013 argued that the Plaintiff had consented to the disclosure by the intended witness who was its Advocate to testify on its behalf as envisaged under section 134 and 136 of the Evidence Act, and that the said Advocate is thus a competent witness.

The counsel also relied on the decisions in **H.F. Fire Africa Limited vs AMR Gharieb** reported in the e KLR, and **Naval Kishore Bhalla 7 Others vs Jugal Kishore Bhalla, NRB HCCC No. 684 of 2009** that an Advocate who has drafted an agreement for a party is a competent witness and is permitted to give evidence on the said agreement, and that only an Advocate who attested a document can give evidence on the attestation. He distinguished the decision in **King Woolen Mills & Another vs Ms Kaplan & Stratton (1993) KLR 273** on the ground that in that case the Advocate was acting for one of the parties, while in the present case the Advocate would be appearing as a witness.

The Defendant's counsel filed written submissions dated 19<sup>th</sup> July 2013 and argued that it is trite law that an Advocate who has acted for both parties in a transaction cannot be allowed to give one of the parties in the event of a dispute. He relied on the decisions in **King Woolen Mills & Another vs Ms Kaplan & Stratton (1993) KLR 273** and **Uhuru Highway Development Limited vs Central Bank of Kenya and 3 Others, Civil Appeal No 286 of 2001**. The counsel also submitted that the Plaintiff's application is intended to have an advocate produce privileged information contrary to Rule 9 of the Advocates Practice Rules and sections 134 and 136 of the Evidence Act. The counsel argued that this is because Mr. Greg Karungo Advocate acted for both parties and holds privileged information obtained during his employment, and the Defendant has not granted any consent to to the said Advocate to testify for or against it .

I have considered the pleadings and arguments made by the parties, and the main issue before the court is whether Mr. Greg Karungo Advocate should be allowed to testify as a witness on behalf of the Plaintiff. To determine this issue, this court is reminded of the mischief that is sought to be avoided when an Advocate who has acted for a party is prevented from acting or being a witness for the other party. This mischief is essentially that of the prejudice that will be caused to the other party in the event of disclosure of privileged information held by the Advocate.

This is the purpose and intent of holding Advocates to this uphold this privilege under section 134(1) of the Evidence Act which provides as follows:

**“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...”**

This protection to a client with regard to disclosure of any communication by his or her advocate continues even after the employment of the Advocate has ceased.

The leading judicial authority of the application of this principle in situations where an Advocate has previously acted for both parties in a suit is **King Woolen Mills & Another vs Ms Kaplan & Stratton (1993) KLR 273**. It was held therein that the fiduciary relationship created by the retainer between client and Advocate demands that the knowledge acquired by the Advocate while acting for the client be treated as confidential, and should not be disclosed to anyone else without their client's consent. It was also held that this relationship exists even after the end of the retainer, and that the above principle applies equally where an Advocate acts for two or more parties in the same transaction.

In the present case it is not disputed that Greg Karungo Advocate acted for both parties in the sale transaction that has given rise to the proceedings herein. The Defendant is also categorical that it has not

given any consent to the said Advocate to disclose any information acquired by him during the said retainer. Section 134 (1) of the Evidence Act and the decision in **King Woolen Mills & Another vs Ms Kaplan & Stratton (1993) KLR 273** therefore applies in this case, and there is thus the risk that by being called as a witness for the Plaintiff, Greg Karungo Advocate may disclose and/or utilize confidential information acquired from the Defendant, and thus prejudice the said Defendant.

The two decisions relied upon by the Plaintiff are distinguished in this respect on the ground that the facts therein were different from those in the present case. In **H.F. Fire Africa Limited vs AMR Gharieb**, the Advocate who it was sought to disqualify from acting had previously represented one of the parties and it was found that he could therefore be a potential witness, unlike in the present case where the intended witness previously acted for both parties. In **Naval Kishore Bhalla 7 Others vs Jugal Kishore Bhalla, NRB HCCC No. 684 of 2009** the court found that there was no Advocate/Client relationship that existed between the Advocate who was being called as a witness and the parties to the suit. In the present case the Advocate/Client relationship between the intended witness and the parties herein is not disputed.

The upshot of the foregoing is that the Plaintiff's Notice of Motion dated 11<sup>th</sup> April 2013 is denied, and Greg Karungo Advocate is hereby disqualified from acting for, and/or testifying as a witness for the Plaintiff herein.

The costs of the Plaintiff's Notice of Motion shall be in the cause.

Orders accordingly.

Dated signed and delivered in open court at Nairobi this \_\_\_\_28<sup>th</sup>\_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**