



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT 47 OF 2006

KIPKOECH MAIYO.....PLAINTIFF

VERSUS

JACKSON KIPTABOT KOSKEI.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

CHAIRMAN LAND DISPUTES TRIBUNAL

KABIYET DIVISION.....3RD DEFENDANT

RULING

The Plaintiff filed a Notice of Motion application dated 20th January 2009 seeking an order that the firm of Gicheru and Company Advocates be disqualified from acting for 1st Defendant. The application was based on the grounds that Mr. Gicheru had been practicing in the firm of Kalya and Company advocates; that there are documents allegedly prepared by Kalya and Company advocates relating to the Plaintiff and the 1st Defendant; that Mr. Gicheru is a potential witness and or is privy to confidential information; and that it serves the ends of justice. The application was supported by the affidavit of Elijah Momanyi Mogona who is counsel practicing in the firm of Anassi Momanyi & Co. The affidavit reiterated the grounds in support of the application and annexed an agreement for sale dated 18th April 1995 between Kipkoech Arap Maiyo and Jackson Kiptabut Koskei. The agreement was drawn by Kalya & Company Advocates.

Mr. Paul Gicheru the proprietor of Gicheru & Company filed a replying affidavit on 5th March 2009. He deposes that it is true he worked in the firm of M/s Kalya & Company Advocates between 1998 to 2005. That the agreement dated 1995 was therefore prepared while he was not an advocate in the firm. That he does not deny that the file for the transaction was kept in the office while he was an advocate in the firm. That he was therefore willing to step aside should the Plaintiff strongly feel that he is a potential witness in the matter by reason of the file having been accessible to him or that his presence will not afford him a fair hearing.

The parties did not make any oral submissions and urged me to make my ruling based on the documents on record. I have considered the application. An application for counsel to disqualify himself in a matter should not be easily made unless there is genuine need to call counsel as a witness. Such an application would be grounded on the provisions of rule 9 of the Advocates Practice Rules. It provides:

“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.

Provided that 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 cats or appears.”

The practice rule requires counsel to assess by himself whether his role as counsel is in conflict with his role as a means to justice. Where it is clear to him that surely the evidence is necessary for the court to administer justice then he should step aside and if he does not do so then the court can restrain him from continuing to act by virtue of its exercise of powers over officers of the court. Counsel in this case has stated that he has no problem to step aside if it pleases the Plaintiff. Counsel has not directed himself to the Constitutional right of client to be represented by an advocate of his choice. The other practical consequence is what happens to instructions fees already paid or due to the firm of Gicheru & Company. On the other hand the Plaintiff has not laid basis for inferring that Paul Gicheru Esq is a witness. It is not stated what role he played in the agreement and that makes it necessary for them to call him as a witness. I have looked at the Plaint and the claim of the Plaintiff is that the 3rd Defendant lacked jurisdiction to preside over a claim relating to title to land and was wrong in awarding the 1st Defendant 8 acres out of land parcel number Nandi/Cheptil/305. To me the issues are purely questions of law. The Plaintiff also contends that he has never entered into any sale agreement with the 1st Defendant over land parcel number Nandi/Cheptil/305 Mr. Paul Gicheru is not the advocate who attested the sale agreement. He was not working for the firm of Kalya and company in 1995.

I am not convinced that the Plaintiff has laid any basis for seeking disqualification of the firm of Gicheru & Company in this matter. For these reason the application dated 20th January 2009 is lacks merit and is dismissed with costs to the 1st Defendant.

Dated and delivered at Nairobi on this 22nd day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 19th day of SEPTEMBER 2012.

F. AZANGALALA
Judge

In the presence of: Mr. Maruro holding brief for Mr.Awandi for Plaintiff

Mr. Kiplimo for the respondent