



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1196 of 2004

**RAJNI KANT NATHOO.....PLAINTIFF/
APPLICANT**

VERSUS

**EDWARD NTHULI.....1ST
DEFENDANT/RESPONDENT**

**PAUL GITHAIGA NG'ANG'A.....2ND
DEFENDANT/RESPONDENT**

**RAMJI MANJI SHAMJI.....3RD
DEFENDANT/RESPONDENT**

**COMMISSIONER OF LANDS.....4TH
DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....5TH
DEFENDANT/RESPONDENT**

RULING

1. The suit herein is a fairly protracted one. A number of applications have been filed herein, the one relevant to the present ruling being the Notice of Motion brought under a certificate of urgency and dated 4th April, 2011 filed by the Plaintiff seeking to strike out the defence and praying for judgment to be entered against the Defendants as sought in the plaint. That motion was being heard by the Hon. Mr Justice Muchelule on 25/5/2011 when in the midst of such hearing Mr Ngoge, counsel for the Plaintiff raised objection to Mr Gichuki King'ara representing the 2nd and 3rd Defendants in this case. That led to the Honourable judge's Ruling which I find prudent to reproduce hereunder:-

“.....I ask that whether or not Gichuki King'ara & Co Advocates should represent the 2nd and 3rd Defendants in the matter which issue is preliminary (sic) should be dealt with first before the present application can be heard and determined. The reason for this is that it (sic) turns out that the firm ought not to act in the matter the Defendants would be entitled to representation on this application. I direct that either side can file any further affidavits within 14 days from today on this issue of representation.”

2. It was that Preliminary point that was addressed to this court on 17th September 2012. Mr Ngoge Advocate's point was that Mr Gichuki King'ara advocate should not represent the 2nd and 3rd Defendants

herein because he also purported to have drawn the sale agreement and Transfer between and from the 1st Defendant and to the 2nd Defendant in respect of the suit land. Learned counsel's further argument was that the said Mr Gichuki King'ara was unable to explain how title changed hands from the 1st and 2nd contrary to pleadings by the 1st Defendant to the effect that he had no land to sell to the 2nd Defendant. Learned Counsel added that counsel Mr Gichuki King'ara had not annexed the said sale Agreement and Transfer to his affidavit and he also had not responded to the allegation that he acted for 1st Defendant and 2nd Defendant and therefore he had admitted the allegation. Mr Ngoge concluded that it was his duty to make the application and to avoid a delay in finalizing the case should it turn out during the taking of evidence that the advocate now on record for the 2nd and 3rd Defendants had been the advocate for 1st Defendant.

3. In reply learned Counsel Mr Gichuki King'ara for the 2nd and 3rd Defendants submitted that he had been in the case since year 2004 and saw the application for his recusal as an afterthought. He added that he had no idea whatever transpired between the 1st and 2nd Defendants and only was aware that advocate Munene of Ng'ang'a Munene & Co Advocates acted for the 1st Defendant in his transactions with the 2nd Defendant and witness summons had issued to the said Munene advocate at the instance of the 2nd and 3rd defendants. He added that he had never been served with witness summons for the period he has been on record and that he was cognizant of the provisions of Rule 9 of the Advocates Practice Rules and he was in no way conflicted.

4. The court deems it appropriate to set out the provisions of **Rule 9 – Advocates Practice Rules:-**

Rule 9.. “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 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 this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter or fact in any matter in which he acts or appears.”

Mr Gichuki King'ara advocate has denied ever having acted in the transaction between 1st and 2nd Defendant. He has named the advocate who acted therein, a matter not denied by Mr Ngoge in his submissions. It is of course not for Mr Gichuki King'ara to prove anything as he has alleged nothing. It is he who alleges that must prove and the burden does not shift in these circumstances.

5. Mr Ngoge learned counsel for the Plaintiff/Applicant did not attempt to explain why witness summons had never issued to Mr Gichuki King'ara since 2004 when suit was filed nor any other time when it was found that the said advocate would become a necessary advocate. Additionally Mr Ngoge learned counsel did not say in what way the said King'ara advocate was going to be a useful witness, the nature of the evidence he would be required to tender, and whether any confidentiality or privilege and its nature of any party would be breached to the prejudice of what party, as required by authority – see **DELPHIS BANK LTD V CHANAN SINGH CHATTHE & 6 OTHERS CA. NO. Nairobi 136 of 2005 (76/05UR).**

6. The court notes that there is no dispute, between the 2nd and 3rd Defendants whom Mr King'ara represents, arising from the transaction between them. The court found no common advocate(s) between the Plaintiff and the 2nd and 3rd Defendants and nothing alleged by the Plaintiff's counsel goes to prove, nay, remotely show, that Mr king'ara advocate may not represent the 2nd and 3rd Defendants in this case. Naturally parties are entitled to advocates of their choice and the 2nd and 3rd Defendants have chosen their advocate. More importantly nothing has been shown that brings to play rule 9 of the Advocates Practice Rules as regards Mr Gichuki King'ara. In the result the objection taken by Mr Ngoge advocate and dealt with by the court as a Preliminary point is found to be without merit and it is

dismissed with costs.

**P.M. MWILU
JUDGE**

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF OCTOBER 2012.

**P.M. MWILU
JUDGE**

In the presence of:-

Mr Ngoge - Advocate for Plaintiff/Applicant

Mr Kariuki holding brief for Mr King'ara -Advocate for 1st, 2nd and 3rd Defendant/Respondent

Anne - Court Clerk

**P.M. MWILU
JUDGE**