



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 319 of 2008

AHMED NOORANIPLAINTIFF

VERSUS

JOYCE AKINYI OCHIENG.....DEFENDANT

R U L I N G

The application which is before me is dated 24th July, 2008. It sought certain injunctive orders against the defendant. When the application came before the court for prosecution, the plaintiff through Mr. Omogeni decided to raise a preliminary issue which is that the firm of **ONESMUS GITHINJI & CO. ADVOCATES**, who presented the Defendants, should be disqualified from doing so for the reasons to be discussed hereafter. The ruling accordingly, is purely in relation to that issue and any conclusions made by this court on matters of law or fact should be restricted to that issue only.

The facts as averred by the plaintiff concerning the objection are as follows: -

The Defendant, by a letter dated 28th September, 2007, Exhibit A, made an offer to the plaintiff, Ahmed Noorani to sell to plaintiff a property, L.R. No. 3734/223 Unit No. 5. The sale price quoted therein is Ksh.17 million. The purchaser was required to pay 20% i.e. Ksh.3.4 million on accepting the terms of and signing the said Letter of Offer. The balance was to be paid within 90 days or on transfer of the leasehold property. The purchaser was obligated to pay own legal fee, stamp duty and registration charges. The Letter of Offer gave the purchaser's and Vendor's lawyer as Onesmus Githinji & Co. Advocates of Shell & BP House, Harambee Avenue, 3rd Floor Room 304, Box 61279 NAIROBI. The Vendor's lawyer was to prepare a Sale Agreement which was to be executed within 7 days of presentation. Confirmation of the above offer's acceptance was to be the signing of the duplicate copy thereof which was to be returned to the Vendor's lawyer on or before 5th October, 2007.

The record shows, and it accepted by both sides, that the Purchaser/Plaintiff, accepted the offer by signing the duplicate Letter of Offer on 1st October, 2007 when he also deposited with the Lawyers Kshs. 3.4 million as required. On 21st November, 2007 by the request of the Vendor through M/S Onesmus Githinji & Co. Advocates, the purchaser/plaintiff paid a further Kshs. One million to the Vendor on account. Thereafter the said Lawyers drew up a Sale Agreement to be executed by the purchaser of which the purchaser took a copy to study before signing. Apparently he was not happy at this stage and he engaged a different lawyer, A. F. Gross & Company Advocates, to conduct the sale for him. A. F. Gross & Company in April, 2008 wrote to Onesmus Githinji & Co. stating that they were now acting for the purchaser in the transaction and requested for copies of title documents to enable relevant searches. They requested quick action.

By June 12th 2008, Onesmus Githinji & Co. appears to have not responded hence a reminder from A. F. Gross & Company was written. The reminder deprecated the unprofessional and unacceptable conduct on the part of Onesmus Githinji & Co for failing to respond. There was no further correspondence from A. F. Gross & Co. on the issue thereafter. By 28th February 2008, however Onesmus Githinji & Co. had apparently felt that the sale agreement could be skipped and the transfer of lease documents could be executed. To that end they invited the plaintiff/purchaser to call in the lawyer's offices to do so vide their letter exhibit "C". The letter was sent directly to the purchaser/plaintiff and not through A. F. Gross & Company, Advocates who had indicated that they had been appointed to represent the purchaser.

Among the letters contents was a demand for the Advocates legal fees for preparation and registration of the lease transfer of Kshs.240,000/- plus other various additional charges which included Telephone and printing, V.A.T., Consents and Stamp Duty, all amounting to over one million Kenya Shillings. It is observed that until that point there was no dispute about the sale nor as to which advocate was acting on behalf of the plaintiff/purchaser if any dispute existed in the mind of the author of the said letter who happens to be Onesmus Githinji & Co. Advocates, the same was not betrayed.

It is upon the above facts that the plaintiff argues that Onesmus Githinji & Co. Advocates were in respect to this transaction, his lawyers who cannot now act against him in this suit arising from the same transaction. That the best part the said advocates can play is to be a witness, to resolve the dispute.

Mr. Musyoka representing the Defendant and the firm of Onesmus Githinji & Co., submitted that to raise this issue of legal representation and disqualification, the plaintiff should have filed a formal application, so that they would have sufficient opportunity to respond. He argued that the issue of disqualifying Defendant's advocates from acting in this suit is not a Preliminary Objection on a point of law within the settled legal principles.

Furthermore Mr. Musyoka argued that the Defendant has a basic right to choose a lawyer of heir choice and she chose the firm of Onesmus Githinji & Co. That should not be questioned, he opined.

He then denied that his firm has ever acted jointly or otherwise for the plaintiff in the transaction from which this suit arose nor has the firm acted unethically. Otherwise he argued, the plaintiff should have filed a complaint with the Law Society for discipline and not through this suit where the issue is now being argued in isolation or in a vacuum.

Mr. Musyoka then admitted that the firm of Onesmus Githinji indeed drew the Sale Agreement in the transaction that led to this suit, but added that after the plaintiff/purchaser took it away for study and return after executing it, the latter failed to and never returned it to date. That the failure to return the Agreement made the contract an unbinding draft that cannot form a contract in the transaction.

Mr. Musyoka denied there being any collusion between his above firm and the Defendant herein. He however, conceded that in the absence of his firm being made a defendant jointly with the defendant, the firm might now stand to be summoned as a witness to produce the draft Sale Agreement aforementioned to prove non existence of contract. Otherwise if made a defendant it might be required to produce the same as the makers thereof.

Mr. Musyoka further conceded that Onesmus Githinji & Co. indeed received the sum of Ksh.4.4 million which it paid to the defendant. He also conceded that his firm received and paid the money to the defendant on the basis of the Letter of Offer earlier referred to. However, his view was that the Letter of Offer was subject to a Sale Agreement being executed and did not create a contract of sale.

Mr. Musyoka also admitted that although the Plaintiff failed to return the draft sale agreement executed, nevertheless his firm wrote to the plaintiff, the overriding letter dated 28th February, 2008 stating that the plaintiff could execute a lease transfer subject to payment of the balance purchase funds together with the various legal charges. In respect to this aspect, Mr. Musyoka conceded also that it was his firm that drew and would register the transfer whether or not the purchaser had another lawyer acting for him.

Having said what is shown above, Mr. Musyoka nevertheless argued that there was no retainer between the Plaintiff/Purchaser herein, and that his firm at no time acted for the Plaintiff/Purchaser.

I have carefully considered the positions taken by each party above. The facts however establish the following position. The first contact between the plaintiff/purchaser arose in relation to the Letter of Offer herein marked "A" and dated 28th September, 2007. The letter was written by George Okello, a director in Face-Saver Enterprises Limited. It was copied to the firm of Onesmus Githinji & Co. Advocates. It confirms in clauses 7 and 8 thereof that Onesmus Githinji & Co. Advocates were to act as lawyers for both the Vendor and the Purchaser. The plaintiff/purchaser accepted the terms and executed the Letter on 1st October, 2007.

In my understanding, and it is logical to think so, the firm of Onesmus Githinji who were given a copy of the Letter of Offer, must earlier have agreed with the Vendor to act for the Vendor and Purchaser. Indeed it would be to their advantage to do so since both parties would pay legal fees. Secondly, if the arrangement to act for both parties as stipulated in the Letter of Offer were not acceptable to Onesmus Githinji & Co, they would have recorded a rejection to the arrangement. This they did not do, thus confirming their acceptance to act for the purchaser/plaintiff as well.

Indeed, when the legal firm accepted the deposit of Khs.3.4 million from the plaintiff/purchaser without alteration, they were telling the purchaser that they had accepted to act for him and for the Vendor as stated in the Letter of Offer. It was not surprising then that soon thereafter, the legal firm proceeded to receive a further one million Kenya shillings towards the reduction of the purchase price for which it issued its receipt of 2nd October, 2007, and hopefully passed it to the Vendor.

In my opinion and finding, any contractual obligation arising from the Letter of Offer can only be read from it. One of the issues clearly decided by the contractual terms of the said letter in relation to the transaction contained in it is the appointment of lawyers to represent the parties. In my further view and finding, the execution of the Letter of Offer by the purchaser/plaintiff, accepted the appointment of Onesmus Githinji & Co. by and through the Vendor.

As earlier mentioned, Onesmus Githinji & Co. clearly accepted this arrangement when it began operating under the Letter's terms and when in any case, it raised no objection to the said arrangement. Going even further and drawing an agreement of sale which it demanded should be executed by the purchaser, further confirms the terms of the Letter of Offer. Indeed it does not surprise anyone to note in addition, that the draft Sale Agreement drawn by Onesmus Githinji & Co. provides in clause (5) (five) that "***The Advocates for the Vendor and the Purchaser are Onesmus Githinji & Co. Advocates.....***" This further confirms the situation as accepted and intended by the said advocates all along. It is not clear when they decided to alter that situation and for what reason.

Furthermore, it is not in dispute that the purchaser/plaintiff later in February, 2008 tried to change his advocates, after being dissatisfied for one reason or another, with the performance of Onesmus Githinji & Co. A. F. Gross who had been instructed to take over the conduct of the transaction for the purchaser, promptly wrote to Onesmus Githinji & Co. on 29th April, 2008 clearly seeking relevant copies of title to enable them protect their client's interest. There is no denial by Onesmus Githinji & Co. that they received the latter. However, they failed to reply and more so, even to the reminder written in June 2008. This court would expect and ethics in the profession would indeed require that Onesmus Githinji & Co. should reply to A. F. Gross & Company to state its position, even where it might disagree with the latter's demand. This, however, was not done. The court's assumption and conclusion thereto is that Onesmus Githinji & Co. Advocates did not wish to let go the conduct of the transaction to A. F. Gross & Company.

As things stand presently, the sale transaction of House No. 5 Elegance Villas, on L. R. No. 3734/223, Lavington is now in dispute. Apart from the terms of Letter of Offer aforementioned successfully appointing Onesmus Githinji & Co. to act for both the Vendor and the purchaser, the latter lawyers not only received part of the purchase price and drew up the Sale Agreement, but they also drew up the Transfer of the Lease. All these acts are bound to be the subject of investigation by the trial court during the hearing of the suit.

There is no doubt in my mind therefore that Onesmus Githinji & Co. Advocates, not only stands in a position of a crucial potential witness but is also bound to be a witness, unless the suit is settled out of court. On what basis then could the legal firm, with all this information in its custody, decide to ignore it and become a lawyer of the Vendor against the Purchaser? Is it not the firm of Onesmus Githinji which knows when the sale transactions started, or how the letter of Offers terms were decided, or included or how it was decided, before the transaction started, that the firm must represent both the Vendor and the Purchasers? Is it not the same firm which knows why the Purchaser demanded an extra Ksh.1,000,000/- after a full contractual deposit of Ksh.3.4 million had been paid or why the firm received the additional payment? Is it not the same firm which will explain where all the kshs.4.4 million received by it from the plaintiff went? Who will explain the failure of the transaction better than Onesmus Githinji & Co from handling the same until it failed?

The issue before the court is whether or not, Advocates in the position of Onesmus Githinji & Co., as shown above, should be allowed to represent one party of the two or more in a suit arising from a conflict of interests in a transaction in which the advocates represented all the parties now in dispute.

Rule 9 of the Advocates (Practice) Rules under the Advocates Act provides: -

“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.....”

It is my view that the firm of Onesmus Githinji & Co. should from the nature of the dispute before the court, have known that it will or may be required to give evidence touching the said sale transaction. They should not therefore have decided to act for one side. If it can be argued that the said firm was and could not be so aware when the suit started, nevertheless, when the plaintiff started to raise the issue by wishing to cross-examine Mr. Githinji personally, the firm should have picked the cue.

Be it as it may, it is this courts decision in terms of rule 9 afore cited that in this matter Onesmus Githinji & Co. Advocates, stands in a clear position of a witness and is likely to be summoned to explain several issues arising from the transaction. The firm should have from the beginning, have desisted from taking sides to act for one side of the dispute. Since it did not so decide however, it befalls upon this court to declare it unethical for the firm to continue acting for either party of this suit. It is my further finding that this court has power to make such declaration at any stage of the proceedings and it is not necessary that the issue be raised by a formal application although that may be done. I hold that the advocates are here acting in breach of privileged position of the plaintiff as a client in respect of which nothing should be allowed to interfere with. It is appropriate to hold as well that Onesmus Githinji & Co. Advocates, should not be allowed to consciously or unconsciously use confidential information the firm acquired when it still acted for the purchaser/plaintiff against him as such conduct is likely to prejudice the plaintiff.

I earlier stated the issue which this ruling is intended to resolve which the court has indeed resolved. The defendant through Mr. Musyoka wondered whether the issue raised amounted to a Preliminary Objection on a point of law as now settled by the relevant principle of law. I hold that what the plaintiff through Mr. Omogeni, raised is indeed a preliminary point of objection. If properly argued and succeeds, it would terminate Onesmus Githinji & Co.’s representation of the defendant in this suit. The facts upon which the Preliminary Objection were based were common in so far as they were not denied by Onesmus Githinji & Co. They included the Letter of Offer terms, receipt of part purchase funds under the letter, the effecting of the terms by Onesmus Githinji & Co., the drawing of the Sale Agreement by the firm, the overriding of the Sale Agreement, the drawing of the lease transfer: - all these were admitted by the firm, thus confirming the crucial finding that they represented the plaintiff from the whole beginning until things went wrong at a point only known to the firm. It is only on those common or undenied facts that the point of objection was raised and was decided.

The final orders accordingly will be that the firm of Onesmus Githinji & Co. is hereby disqualified from

representing the Defendant in this suit or other suits that may arise from the land sale transaction based on the Letter of Offer from the defendant to the plaintiff herein dated 28th September, 2007. Orders accordingly.

Dated and delivered at Nairobi this 27th day of October, 2009.

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D A ONYANCHA

JUDGE