



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 126 of 2007

KENYA PIPELINE CO. LTD.....PLAINTIFF

=VERSUS=

RAIPLY WOOD (K) LTD.....DEFENDANT

RULING

The Plaintiff, the Kenya Pipeline Company Limited filed this suit against the Defendant Rai Plywood (Kenya) Limited on 23rd July, 2007 seeking the following orders:-

- (a) A permanent injunction directed at the Defendant to restrain it from constructing a perimeter wall or fence, digging, removing or otherwise blocking the access road situated on plot No. 239 i.e. Eldoret Municipality Block 15/239 in Eldoret Municipality.
- (b) A mandatory injunction directed at the Defendant to compel it to restore the access road situated on L.R. No. 239 Eldoret to the condition it was prior to 15/07/2007.
- (c) **In the alternative** and **without prejudice** to the foregoing a Declaration that the Plaintiff has a permanent right of way over plot No. 239 as per the road constructed upon Eldoret Municipality Block 15/239 and is the right proprietor of the said access road.
- (d) Costs of the suit
- (e) Any other or further relief as the Honourable Court may deem just and fit to grant.

The Plaintiff simultaneously took out an application by way of Chamber Summons seeking to obtain Interim Injunctive Orders pending the hearing of the suit. The application is dated 20th July, 2007. Upon service of the application and Ex-parte Order obtained, the Defendant instructed the firm of Kiplenge & Ogola Advocates of Nakuru to act for it. The said firm prepared and filed the following on 30th July, 2007 between

1. Memorandum of Appearance,
2. Defence and Counter-claim & Replying Affidavit sworn by a director of the Defendant Philip Varghase,
3. Grounds of Opposition,

4. A Notice of motion to discharge, vary and /or set aside the ex parte Orders issued by this Court on 23rd July, 2007.

Before the hearing of the two applications, the Defendant filed an Amended Defence and Counter-claim on 21st August 2007 and a Notice of Preliminary Objection on 15th October 2007.

At the hearing of the two application, the Plaintiff raised the Preliminary Objection set out in the said Notice. The grounds of objection raised were:-

1. The firm of Kiplenge & Ogola Advocates should be disqualified from acting for the Defendant in this suit on account of conflict of interest by the said firm.
2. All pleadings drawn and filed by Kiplenge & Ogola Advocates on behalf of the Defendant be struck out on the basis of conflict of interest by the said law firm.

Mrs. Masika for the Plaintiff/Applicant submitted that the firm of M/S Kiplenge & Ogola Advocates acted for the Vendor of the suit property, His Excellence Daniel Arap Moi in existing Civil Suits in this Court, H.C.C.C. NO. 122/119 of 2006. In the said Suit, the said Vendor was the 1st Defendant. The Plaintiffs in the said Suit sought to obtain injunctive Orders against the 1st Defendant as owner of the property from selling the properties in this suit to any other person including the Defendant herein. The application in the said suit was subsequently dismissed by the Court and the 1st Defendant therein went ahead to sell the property to the Defendant in this Suit. This dispute has arisen after the Sale of the property to the Defendant and its taking of possession thereof.

According to the Amended Defence, the Vendor sub-divided the property unto three portions giving rise to the new plots referred to in the Amended Defence, namely, Eldoret Municipality Block 15/2369, 2370 and 2371. The Defendant purchased the first two portions of the land from the Vendor, His Excellence Daniel Arap Moi.

It is common ground that in the previous Suit, the firm of Kiplenge & Ogola Advocates represented the Vendor in HCCC No. 122 and 119 of 2006. The Defendant contends that due to the said relationship and participation of the law firm in the said cases, they acquired inside knowledge of all the facts and must be deemed to have had notice of the Plaintiff's claim over the road of access herein. The Plaintiff's claim that the firm of Kiplenge & Ogola Advocates acted for His Excellence Daniel Arap Moi, the Vendor and are now representing the Defendant who purchased the land from Moi. They claim that they intend to enjoin Moi and the Attorney General in this Suit. In essence, what the Applicant is contending inter alia, is that:-

1. The said Law firm acted for Moi in defending the Suit against the original intended buyers.
2. That in the said capacity the firm must have acquired all the material facts relating to the land including the alleged acquisition of the road of access by the Plaintiff.
3. That the Law firm is now acting for the Defendant which acquired the original suit property.
4. That the Defendant's case and pleadings which have been prepared by the Law firm give rise to a conflict of interest as they are not true yet the law firm knows or ought to know the correct position.
5. That the Plaintiff intends to enjoin the Vendor from whom the law firm acted in the other suits.

I have considered the Preliminary Objection raised on grounds of alleged conflict. First and foremost, strictly the Preliminary Objections do not raise pre points of law. The alleged potential or actual conflict of interest is based on factual allegations. The Plaintiff has not set out the facts in an affidavit:- i.e,

1. Whether the said law firm prepared the Sale Agreement between the Defendant and the Vendor,

Moi,

2. What material facts came to the knowledge of the law firm,
3. The true nature and extent of the conflict of interest.

The allegations are made from the bar during Submissions. This Court does not know whether indeed the said law firm actually drew and prepared the Sale Agreement, did Searches and procured the registration of the Suit lands as advocates for the Vendor and / or the Defendant as Purchaser. The fact that the law firm defended the Vendor does not prove that they actually prepared the agreement and Conveyances leading to the acquisition of the suit properties by the Defendant. The Court was not shown any document relating to these transactions. As a result, I am unable to determine the knowledge of the law firm and the extent of any conflict if any.

The other Civil Proceedings were between the Vendor of the land and other parties claiming purchaser's interest. The said Vendor Moi and the other parties in the other Suits are not parties in this Suit. In this Suit, the firm of Kiplenge & Ogola are acting for the Defendant in this Suit. The Plaintiff is claiming that it purchased a portion of the original land, plot NO. 239, which was owned by a company called Great Rift Transporters to construct an access road to its Pipeline Terminal and Depot. The said Company is not a party in this Suit and there is no allegations that the firm of Kiplenge & Ogola Advocates acted for the said Company or in respect of the said transactions. His Excellence Daniel Arap Moi is not mentioned in the Plaint as being the owner of the original Suit Land, L.R Eldoret Municipality Block 15/239. The Plaintiff's Counsel stated from the bar that they intend to enjoin Moi as a party in the Suits. This has yet to happen. Whether the amendments will change the situation and / or Character of the Suit and the Cause of action is unknown.

It is not being claimed that the firm of Kiplenge & Ogola has ever acted for the Plaintiff and acted in the transaction between the Plaintiffs, Great Rift Valley Transporters and / or Moi such that it had special or knowledge that would prejudice the Plaintiff's case, if the firms continued to act for the Defendant in this Suit. The Plaintiff does not state what prejudice it will suffer if Kiplenge & Ogola Continue to act for the Defendant.

It is the view of this Court that a party in Civil proceedings has the right to legal representation of is /her/its choice. For the Court to bar an advocate from acting for a litigant / party, there must be overriding and exceptional facts and / or circumstances to justify of such an action. That right to choice of legal representation cannot and should not be easily taken away.

In the present case, I see no conflict of interest at this stage. The Applicant has not established that there is and will be a conflict of interest on the part of the law firm of Kiplenge & Ogola Advocates in acting for the Defendant or against the Plaintiff. There is and has been no relationship of advocate/ client that has been claimed or disclosed between the Plaintiff and the said law firm.

The firm's involvement in HCCC No. 122 and 119 of 2006 does not disqualify them from acting for the Defendant in this Suit. There is no bar that if an advocate or law firm acts for a party in a Conveyance or Commercial transaction, then it cannot defend his client if litigation arises. To the Contrary, who would be better placed to effectively defend a suit where the law firm prepared the documents. Each case must be determined considering its special facts and circumstances. In the present case, apprehensions of the Applicant are misplaced as the alleged conflict of interest is remote if not non-existent.

I do hereby dismiss the Preliminary Objection with costs to the Defendant.

DATED AND DELIVERED AT ELDORET ON THIS 5TH DAY OF FEBRUARY 2008.

M.K. IBRAHIM,

JUDGE. 5/02/08.