

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 97 of 2007

CHARLES GITONGA KARIUKI.....PLAINTIFF

VERSUS

AKUISI FARMERS CO. LTD.....DEFENDANT

RULING

The firm of Karanja Mbugua & Company Advocates were instructed by the plaintiff, Charles Gitonga Kariuki to file suit against the defendants, Akuisi Farmers Company Limited. In the said suit, the plaintiff sought to be paid the sum of Ksh.3 Million which he claimed was owed to him by the defendant on account of money which he loaned to the defendant. The defendant filed a defence. It denied that it owed the plaintiff the said amount. The defendant counterclaimed against the plaintiff seeking orders of the court to compel the plaintiff to surrender certain financial documents to it. The plaintiff made an application seeking to strike out the defendant's defence and counterclaim.

At the hearing of the application, the defendant's counsel Mr. Okeke raised a preliminary objection challenging the appointment of the firm of Karanja Mbugua & Company Advocates to act on behalf of the plaintiff. Mr. Okeke submitted that the said firm of advocates had acted for the defendant in several other cases. He submitted that the said firm could not therefore act for and against the defendant at the same time. He maintained that the defendant was apprehensive that the said firm of advocates would use the information which it acquired as its advocates to its detriment. He submitted that a case of conflict of interest arose when the said firm of advocates took instructions from the plaintiff to act against the defendant. He explained that the advocate could inadvertently use information which he acquired in the course of acting for the defendant to the disadvantage of the defendant. He urged the court to allow the preliminary objection and order the said firm of advocates to cease to act for the plaintiff.

Mr. Karanja for the plaintiff opposed the preliminary objection. He submitted that the said preliminary objection was improperly raised as it was not a pure point of law. He submitted that the defendant ought to have filed an appropriate application with a supporting affidavit which could have set out the particulars of the alleged conflict of interest. He admitted that he had acted for the defendant but denied that he had acquired information that he could use against the defendant in the present suit. He reiterated that he had acted for the defendant when the defendant was being managed by a board of directors which was voted out of office. He submitted that it was not sufficient for a party to allege that there would be conflict of interest where an advocate acts against his client in a suit. He maintained that the said conflict of interest must be established. He reiterated that the defendants were his former clients and therefore he could not use information gained from them to their detriment. He submitted that if this court were to allow the application, it would be in breach of the Constitutional provisions that gives freedom to a party to appoint an advocate of his own choice to act for him in a suit. He urged the court to disallow the preliminary objection.

I have carefully considered the rival argument made by the parties to this preliminary objection. The issue for determination by this court is whether the defendant established a case to enable the court uphold the preliminary objection. It is trite law that an advocate cannot act for and against a client in a suit or in subsequent suits where he could utilize the information that he acquired in the course of his work as an advocate to the detriment of that client. In **Uhuru Highway Development Limited vs**

Central Bank of Kenya [2002] 2E.A 654 at page 661, the Court of Appeal held that an advocate would not be allowed to act against a client where he could consciously or unconsciously or even inadvertently use the confidential information acquired when he acted for such a client to his detriment. The Court held that where it was established that such a client would suffer prejudice, then the court would have no alternative but to order that such an advocate ceases to act for the opposing party. An applicant, who is seeking the disqualification of an advocate from acting for the opposing party in the circumstances contemplated above, must establish the existence of such advocate-client relationship that could lead such an advocate to be in possession of confidential information which he could use to the detriment of the client seeking the disqualification of an advocate.

In the present case, Mr. Karanja does not deny that he acted for the defendant in certain suits. He however maintains that the present suit does not lead to a situation where there would be conflict of interest. I have noted the sentiments expressed by Mr. Karanja. I have also perused the documents that the plaintiff is relying in support of his application to strike out the pleadings filed by the defendant. The applicant was required to produce evidence to establish that Mr. Karanja was intimately involved with the defendant's affairs in respect of the matters in dispute in this case.

It is not enough for the applicant to allege that because an advocate acted for it in several matters, such an advocate was barred from acting against it in other matters. The fact that an advocate acted for a litigant does not, *per se*, lead to a situation of conflict of interest. The applicant was required to establish, and present to the court evidence that would persuade the court to reach a conclusion that indeed there was a possibility that a conflict of interest would arise were the advocate is allowed to act for the opposing party against such a litigant. In the present case, apart from stating that Mr. Karanja had acted for it in several matters, the defendant did not present to the court material upon which this court could make a determination that indeed there were grounds upon which this court could reach a determination that there exist a possibility of conflict of interest.

In the circumstances therefore, I do hold that the defendant failed to present evidence to this court that, in this particular case, Mr. Karanja had acquired information from the defendant that he could use to the detriment of the defendant when acting for the plaintiff in this case. For the said reasons, this court finds the preliminary objection lacking in merit. The same is dismissed with costs to the plaintiff. This court finds no reason to disqualify Mr. Karanja from acting for the plaintiff. No conflict of interest has been established by the defendant.

It is so ordered.

DATED at NAKURU this 4th day of December 2007

L. KIMARU

JUDGE