



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Case 22 of 2006

SIMBA HILLS FARM LIMITED

PLAINTIFF

VERSUS

SULTAN HASHAM LALJI 1ST
DEFENDANT

ABDULAZIZ KANJI 2ND
DEFENDANT

MADATALLY SIDI 3RD
DEFENDANT

JAMES KIMOSBEI TUWEI 4TH
DEFENDANT

ISAAC CHEPSIROR 5TH
DEFENDANT

SYLVESTER BIWOTT 6TH
DEFENDANT

R U L I N G

This suit revolves around land known as L.R. 8304, whose purchase, SIMBA HILLS FARM LIMITED claims to have negotiated with SULTAN HASHAM LALJI, (the 1st defendant), which it is alleged that the agreement was reduced into writing in 1976.

SIMBA HILLS FARM LIMITED, which is the plaintiff herein seeks orders to have Mr. Birech, advocate who is on record for JAMES KIMOSBEI TUWEI, ISAAC CHEPSIROR and SYLVESTER BIWOTT, who appear as the 4th, 5th and 6th defendants respectively, disqualified from these proceedings as ‘*he stands to suffer from conflict of interest and is likely to be called as a witness in this matter*’.

The plaintiff bases its application on several grounds and it was the submission of Mr. Okara, its learned counsel, that Mr. Birech who has acted for the plaintiff since it’s incorporation, has handled most of its transactions, and has confidential information pertaining to the said transactions will be called as a witness in the cause, so that he can clarify several pertinent issues which arise in the suit.

Mr. Birech denies having acted for the company from its inception. He has deponed that he was

instructed long after the plaintiff company was incorporated, and long after it entered into the alleged agreement for sale. It is also his ground that he acts for one of the two factions in the plaintiff company, which faction is headed by 4th, 5th and 6th defendants, and which is willing and ready to purchase the subject land. In his view it is only his clients, who paid the deposit for the purchase of the subject farm, who can plead conflict of interest.

The issues in this suit are whether the plaintiff entered into an agreement with the 1st defendant for the purchase of the subject land, and secondly, whether the parties thereto complied with its terms. The pleadings reveal that the plaintiff company was incorporated on 28/4/1970, and that a Mr. Chakava appeared as the advocate for both the 1st defendant and the plaintiff, at the Uasin Gishu Land Control Board meeting of 19/4/1979, which meeting considered an application pertaining to the subject land. Further, correspondence reveals that as at July 1982 Simba Hills Company was represented by the legal firm of Kamere & Company advocates and it is not until 17/11/1993, when the firm of Birech & Co. Advocates appear as acting for the plaintiff company, indeed that fact is acknowledged by the firm in its letter to Sultan Hasham Lalji, which I shall come back to later.

Birech & Company advocates filed suit on behalf of the plaintiff against these 1st, 2nd and 3rd defendants over the same subject matter in June 1994, after which it acted as counsel for the plaintiff company in a sale transaction when the company entered into an agreement for the sale of the subject land with the 1st defendant on 5/8/1997, and on 20/4/1998, it informed Kassam & Co. advocates, who were then acting for the 1st defendant that ‘*the members of Simba Hills Farm Limited*’ “*had disagreed and formed two opposing camps and the group had withdrawn instruction*’ from his firm.

In my humble opinion, it would appear that whatever information Mr. Birech has would be prejudicial to the company especially in view of his letter of 17/11/1993, to Sultan Hasham Lalji, which read as follows:

Re: Simba Hills Limited – purchase of LR 8304

*“We do act for the above quoted company who purchased your above quoted farm for Kshs. 1,200,000/-
.....*

Our clients paid you Shs. 200,000 leaving a balance of Shs. 1,000,000/- and this order to complete the transaction enclosed herewith is a Bankers Cheque No. 026071 dated 2.11.93 for the sum of Shs. 1,000,000/-

Could you let us have title documents to enable us prepare the transfer”.

It is trite that counsel should never enter into the arena by adducing evidence in a matter in which he has acted for either party for that would amount to conflict of interest, and it is for that reason that I have taken time to consider the events leading to this suit. I am of the view that Mr. Birech has a lot of information regarding the alleged transactions.

The upshot of all this is that I find that the company’s fears are well founded and I do grant it an order in line with its prayer 1. The costs of this application shall however be in the cause.

Dated and delivered in Eldoret this 10th day of July 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Mitei holding brief for Mr. Birech the respondent.

Mr. Okara for the applicant.