



Bank of Africa Kenya Limited v Kikambala Housing Estate Limited & another (Environment & Land Case 355 of 2016) [2022] KEELC 15386 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 355 OF 2016
MAO ODENY, J
DECEMBER 19, 2022**

BETWEEN

BANK OF AFRICA KENYA LIMITED PLAINTIFF

AND

KIKAMBALA HOUSING ESTATE LIMITED 1ST DEFENDANT

THE LAND REGISTRAR, KILIFI COUNTY 2ND DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated May 26, 2021 by the 1st defendant/applicant seeking orders inter alia that a mandatory injunction be issued to disqualify the firm of Kairu & McCourt Advocates from representing the plaintiff in this suit; that any pleadings or documents filed herein by the said firm be struck out; and that the same firm be ordered to refund a total of Kshs 3,480,000/- debited from the 1st defendant's bank account.
2. The applicant relied on the grounds on the face of the application and the supporting affidavit of Osman Erdinc Elsek sworn on May 26, 2021 who deponed that there was attorney-client relationship between the 1st defendant and the plaintiff's advocate herein, Kairu & McCourt Advocates.
3. That on various dates, the plaintiff bank paid a sum of Kshs 3,480,000/- to the said firm and from the 1st defendant's account number 02xxxxxx2 at the plaintiff's bank, being legal fees for representing the plaintiff in this suit.
4. It was the applicant's case that the 1st defendant obtained a credit facility from the plaintiff/respondent secured by a legal charge (as it was then) on a piece of land comprised in title number Kilifi/Mtwapa/867 as financing to undertake development on the said property; the property was at that time registered as freehold property in the name of the 1st defendant/applicant.



5. The applicant stated that the actions/inactions of Anjarwalla & Khanna LLP and the delay on the issuance of leasehold title over the property, several law suits have been filed against the 1st defendant/applicant which have all been merged under the main suit in Malindi ELCC 207 of 2015 Amina Mohamed Kasinga & 22 others (plaintiffs) v Kikambala Housing Estate Limited & another (defendants) which suit is yet to be determined before this honourable court.
6. It was the applicant's case that the law firms of Kairu & McCourt and Anjarwalla & Khanna LLC have been working together since then on behalf of the plaintiff/respondent and exchanging privileged information all against the 1st defendant/applicant in the Malindi Suits Malindi ELCC 207 of 2015 Amina Mohamed Kasinga & 22 others (plaintiffs) v Kikambala Housing Estate Limited & another (defendants) and this suit and sharing information which is confidential to the detriment of the 1st respondent/applicant.
7. The plaintiff opposed the application and filed grounds of opposition dated November 12, 2021 and replying affidavit sworn by Charles Waiyaki, a senior recoveries officer at the plaintiff bank who deponed that the 1st defendant entered into financial contracts with the plaintiff in relation to a charge over the land title No Kilifi/Mtwapa/867 which is the subject of this suit.
8. That based on the said contracts, the 1st defendant agreed to the standard terms and conditions applicable to all banking facilities. Particularly, clause 13 of the said terms and conditions which provide inter alia that the borrower, the 1st defendant in this case, will reimburse the bank all legal fees incurred by the plaintiff in connection with enforcement of its rights; and that the plaintiff is entitled to debit the borrower's accounts.
9. Mr Waiyaki stated that the 1st defendant raised a similar objection on representation of the plaintiff by another firm in ELC No 207 of 2001, objection which was allowed by this court on March 21, 2018 but an appeal is still pending.
10. In rebuttal, the 1st defendant averred that it neither signed the said standard terms and conditions, nor were they presented to him during the signing of the offer letter dated August 30, 2012.
11. Parties agreed to canvas the application *vide* written submissions which were duly filed.

1ST Defendant's Submissions

12. The 1st defendant submitted that there existed advocate-client relationship between itself and Kshs 3,480,000 was debited from the 1st defendant's account without its authority and relied on the case of *King Woolen Mills Ltd & Another v Kaplan & Stratton Advocates* (1993) eKLR.
13. The 1st defendant further stated that there was confidential information between the plaintiff, 1st defendant and the firm by virtue of it representing the plaintiff in ELC No 207 of 2015, as such, there is likelihood of actual disclosure of confidential information by the firm to the detriment of the 1st defendant and relied on the case of *Esso Australia Resources LTD v Sir Darly Dawson* [1999] FCA 363 and in *Derby Magistrates Court ex parte B* [1996] 1 AC 487.
14. According to the 1st defendant, the representation of the plaintiff by the firm in this suit and in ELC No 207 of 2015 regarding the suit property would create conflict of interest and cited the cases of *Earrington v Rowe McBride & Partners* [1985] 1 NZLR 83,90; *Three Rivers District Council & others v The Bank of England* [2004] cited in *Wilson v Northampton and Banbury Junction Railway Co* [1872] LR 14 EQ 477; *Prince Jefri Bolkih v KPMG* [1999] 2 WLR 215; and *Mallesons Stephen Jaques v KPMG Peat Marwick* [1990] 4 W.A.R 357.



Plaintiff's Submissions

15. Counsel submitted that article 50 of the Constitution guarantees a right to fair hearing which is paramount to the right of a party to be represented by an advocate of their choice.
16. Counsel further submitted that the only time this right could be deprived is when an applicant establishes the existence of an advocate-client relationship that could lead to the advocate being in possession of confidential information which he could use to the detriment of the client seeking disqualification.
17. Mr McCourt cited the cases of Delphis Bank Limited v Channan Singh Chatte & 6 others [2005] eKLR; British American Investments Company [K] Limited v Njomaiitha Investments Limited & another [2014] eKLR; Rakusen v Ellis Munday and Clarke [1912] 1Ch 831 [1911-1913] ALL ER and submitted that the applicant has not established advocate-client relationship between the 1st defendant and the firm.
18. Counsel submitted that orders issued under order 40 rules 1, 2, 3 and 4 of the Civil Procedure Rules could not apply to non-parties to a suit. Further, that the 1st defendant had failed to meet the test in granting an interlocutory mandatory injunction and relied on the cases of Juja Coffee Exporters Limited & 3 others v Bank of Africa & 4 others [2022] eKLR; Kenya Breweries Ltd & another v Wabington O. Okeyo; and Nation Media Group & 2 others v John Harun Mwau.
19. Counsel further submitted that there has been no advocate/client relationship between the 1st defendant and Kairu & McCourt Advocates in respect of this suit, that Kairu & McCourt Advocates replaced Anjarwalla & Khanna Advocates who previously acted for the plaintiff in this suit which was as a result Justice J.O Olola ruling of March 21, 2018 in Malindi Environment Land Court Case No 207 of 2015 (consolidated with other suits) which ruling is being appealed in Malindi Civil Appeal No 1 of 2019.

Analysis And Determination

20. The issue for determination is whether the 1st defendant has proved advocate client relationship and whether there is conflict of interest. This is well explained in the Court of Appeal case of Delphis Bank Ltd v Channan Singh Chatthe & 6 others [supra] as follows:

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result. The authorities we allude to are King Woolen Mills Ltd & Anor v M/S Kaplan & Stratton [1993] LLR 2170 (CAK), (CA 55/93) and Uhuru Highway Development Ltd & others v Central Bank of Kenya Ltd & others (2), [2002] 2 EA 654.

In the first authority, a partner in the firm of Kaplan & Stratton, Mr Keith, participated in negotiations for offshore loan facilities between a Bank and the borrowers and he also went ahead and drew up the loan agreement, the guarantee, the debenture and the legal charge on behalf of the Bank and the borrowers, as their common advocate.



When disagreements subsequently arose and litigation commenced in respect of those transactions, the firm of advocates chose to act for the bank but the borrowers objected and sued the firm seeking an injunction to stop it from breaching client/advocate confidentiality. It was contended, and the court found, that the borrowers had imparted to Mr Keith and the bank, confidential information and their secrets in confidence under the retainer to enable Mr Keith to successfully conclude the loan transaction. The court concluded, per Muli J.A with whom the other members of the court agreed: -

“I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information acquired from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit.”

21. The applicant must prove that there was advocate-client relationship between the 1st defendant and the firm and whether real mischief and real prejudice will result if the firm represents the plaintiff, bearing in mind that each case must be determined on its own facts.
22. In this case, the 1st defendant’s contention is that there was a relationship between itself and the firm by virtue of the legal fees debited from its account to the said firm. It is also evident that the 1st defendant’s issue against the plaintiff is the same money debited from his account to pay the plaintiff’s legal fees in this suit. It is absurd for the 1st defendant to then seek a refund of the same disputed money and at the same time claim that the same created an advocate-client relationship between itself and the firm.
23. The root of this suit is a charge document in relation to the aforementioned suit property which property is the subject of another suit ELC No 207 of 2015 where another firm Anjarwalla & Khanna LLP was stopped from acting for the same plaintiff herein, for reasons that it was in charge of preparing and perfecting the leases thereto.
24. The conflict of interest in that case was evident and this court was right in giving the orders to stop the said firm from acting, but the 1st defendant argues that since the firm herein took over the matter from Anjarwalla & Khanna, then it would definitely mean that any confidential information would be passed to them.
25. I see no basis in the 1st defendant’s reasons since it would mean that any other advocate taking over the matter from Anjarwalla & Khanna would not be fit to represent the plaintiff. Further, the issue in the present case is the charge document and financial contracts between the plaintiff and the 1st defendant. There is no evidence that the firm [Kairu & McCourt] was involved in negotiations for the loan or charge in issue or whether the firm acted for both the bank and the borrower or just for one party.
26. In the circumstances, I see no merit in the notice of motion dated May 26, 2021 and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF DECEMEBER, 2022.

M.A. ODENY

JUDGE

