

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 40 of 2006

AUSTIN SALMON KATOLOLO.....
PLAINTIFF

VERSUS

MIDDLE EAST BANK

LTD.

ROSEMARY NJERI

WAWERU

SULEIMAN MASUD

SHAHCO INVESTMENTS LTD.....
DEFENDANTS

RULING

Pursuant to Rule 9 of the Advocates (practice) Rules of the Advocates Act, the Plaintiff herein, Austin Salmon Kitololo took out a motion in which he sought for an order to have the firm of Esmail & Esmail Advocates to be disqualified from continuing to act as advocates for and on behalf of the 1st Defendant in this suit. Austin Salmon Kitololo swore an affidavit in support of the motion.

When served with the motion, the firm of Esmail & Esmail Advocates filed grounds of opposition and a replying affidavit sworn by Akber Abdullah Kassam Esmail to oppose the same.

It is the submission of Mr. Mutula Kilonzo Junour that the firm of Esmail & Esmail Advocates should be disqualified from participating in this case on behalf of the 1st Defendant because that firm of advocates prepared the charge dated 18th March 1999 which is registered against title numbers C.R.23120 23119, 23118, 10286, 12485, 12486 and 13765. The Plaintiff further averred that the aforesaid charge which is highly disputed was signed in the presence of A.A.K. Esmail a partner in the firm of Esmail & Esmail Advocates. It is the argument of the plaintiff that one of the partners in the firm of Esmail & Esmail Advocates will be required to testify in this matter hence the aforesaid firm should be barred from representing the 1st Defendant or any party in this suit.

I have already said that Akber Abdullah Kassam Esmail swore an affidavit to resist the Plaintiff's motion. He does not deny the fact that he prepared and witnessed the execution of the charge dated 18th March 1999. It is the argument of Mr. A.A.K. Esmail that he will not be required to testify because the document is not contentious. It is not also disputed that A.A.K. Esmail is a director and advocate of the 1st Defendant.

I have carefully taken into account these issues. I have also considered the authorities cited by the learned advocates on both sides. The truth of the matter is that the charge dated 18th March 1999 was drawn by the firm of Esmail & Esmail Advocates. Its execution was witnessed by A.A.K. Esmail

Advocate, a partner with Esmail & Esmail Advocate. The Plaintiff disputes having executed the agreement. It is the submission of the aforesaid firm that the matter is not contentious hence no one from that firm will be required to testify.

In my humble view I do not think this argument holds water because it is quite clear that the execution of the charge which is the backbone of this case has been disputed. The process of its execution will require a thorough investigation. The investigation can only be complete when the person who prepared and witnessed its execution has testified. In this case the Respondent firm of advocates has not shown how many partners or employees were not involved in the preparation and execution of the disputed charge. In that regard it is only fair and just to bar the firm of Esmail & Esmail Advocates from appearing in this suit as representing any party. This alone will prevent the process of court being embarrassed and prejudiced. In exercise of my inherent power I hereby allow the motion as prayed. To rule otherwise would negate the spirit of Rule 9 of the Advocates (practice) rules in that the aforesaid firm of advocates would put itself in a position in which the partners or employees' mind would not be clear from the knowledge he obtained while appearing for one of the parties in the disputed transactions.

Costs of the application shall be met by the 1st Defendant

Dated and delivered this 3rd day of November 2006

J. K. SERGON

JUDGE