

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.442 OF 2002

EAST AFRICAN BUILDING SOCIETY PLAINTIFF

VERSUS

MURIUKI MBURU DEFENDANT

R U L I N G

Falling to be determined is the defendant's application dated 28/11/03. It was brought under SS 3A, 6 CPA for two main prayers plus costs. However, during the arguments Mr. Mogaka put forth only costs for this application but principally posited that:

a) The firm of Bowyer Mahihu & Co. Advocates be disqualified from acting for the plaintiff here.

It was stressed, and not rebutted by a replying affidavit, that M/s Bowyer Mahihu Co. Advocates did act for the plaintiff as well as the defendant on a certain charge – now the basis of this suit. That indeed one Sally Muchoki of that firm of advocates did not only draft the charge (dated 12.3.97) but that she witnessed it too, as the defendant signed his part and the plaintiff appended its seal. Reference was made to a certain case, which Mr. Odhiambo for the plaintiff brings out below.

Mr. Odhiambo referred to a certain suit HCCC 405”B”/2001 between these two same parties. It must have concerned itself with the charge here, but that in that case the present applicant did not object to m/S Bowyer Mahihu & Co. Advocates representing the present plaintiff there. That in the deal leading to the charge, now in issue here, M/s Bowyer Mahihu only acted for the present plaintiff. It was not disclosed even from the Bar as Mr. Odhiambo argued the grounds of opposition only as who acted for the defendant in that deal. But it was maintained that the plaintiff's present lawyers only acted for it as regards preparation and lodgment of the charge and no more.

The court is satisfied that from presentations made and without proper or clear refutation the plaintiff's lawyer here M/S Bowyer Mahihu & Co. Advocate acted for both litigants here in the deal that produced the charge which is the centre of dispute here. If that firm is allowed to act for one of the parties there in this dispute, the other is bound to suffer prejudice particularly if it appears as it does that the lawyers might or will use the information, material etc given to them by both litigants for the benefit of one. Who knows the defendant may decide to call M/s Bowyer Mahihu & Co. Advocate as witnesses. Then more confusion, embarrassment and prejudice will accrue. To avoid that may the plaintiff have other lawyers representing it here.

The prayer sought is granted with costs.

Delivered on 17th March 2004.

J.W. MWERA

JUDGE

