



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCC NO. 11 OF 2002

JACOB MURIUNGI MWENDWA PLAINTIFF

VERSUS

MBAYA M'MWENDWA DEFENDANT

RULING OF THE COURT

On 17/11/04 when the plaintiff's case was due for hearing the plaintiff's counsel, Mr. J. Mwangi raised a preliminary objection on a point of law arguing that by reason of Rule 9 of the Advocate's (Practice) Rules, the advocates for the defendants, namely Mr. Arithi of Kiautha Arithi & Co. Advocates and Mr. Omayo of Mbaabu M'Inoti & Co. Advocates should not be allowed to appear for the defendants in this matter. The gist of the preliminary objection was that both firms drew agreements of sale touching on the suit land and that since the circumstances surrounding the making of the said agreements were allegedly fraudulent, it was likely that both Mr. Arithi's and the firm of Mbaabu M'Inoti advocates would be called as witnesses for the plaintiffs. Rule 9 of the Advocates (Practice) Rules provides as follows:-

“9. No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence, whether verbally or by declaration or affidavit, he shall not continue to appear.....”

In the amended plaint filed in court on 8.10.2002, the plaintiff, who is a younger brother to the 1st defendant, Mbaya M'Mwendwa stated that he and the 1st defendant are sons of one M'Mwendwa Karigicha, now deceased. Of importance to the matter before me for determination are the following paragraphs of the plaint:-

“4. During the period of land adjudication and consolidation in Nkuene location, the deceased father of the plaintiff gathered his land at Nteremene village and registered the same in the name of the 1st defendant to hold in trust for other members of his family including the plaintiff who was an infant at the time.

PARTICULARS OF TRUST

- (a) Causing the family land to be registered in the name of the 1st defendant.
- (b) Settling the plaintiff in the suit land.
- (c) Informing the 2nd defendant he should share the land with the plaintiff.

5. As a result of the said trust, the 1st defendant was registered as the proprietor of LR NO. NKUENE/KATHERA/719 on his own behalf and on behalf of other family members and in particular the plaintiff.

6.

7.

8. In 1994 the plaintiff learnt that the 1st defendant wanted to sell the said land and to protect his interests, the plaintiff cautioned the same.”

The plaintiff goes on to state that consequent upon his placing a caution on the land, the 1st defendant convinced him to remove the caution to pave way for subdivision of the land into two separate portions being NKUENE/KATHERA/1668 and 1669 and on the understanding that the plaintiff would have transferred into his name LP No. NKUENE/KATHERA/1669 while the 1st defendant would retain 1668 which parcel the 1st defendant proposed to sell to the 2nd defendant so that he (1st defendant) could buy land elsewhere. That the subdivision was indeed done in the presence of the 2nd defendant who clearly indicated that he was buying the 1st defendant’s share and that NKUENE/KATHERA/1669 would be registered in the name of the plaintiff, though the said parcel was actually never transferred to the plaintiff. From paragraphs 14 and 15 of the amended plaint the plaintiff states:-

“(14) On or about 25th November 2001 the plaintiff received a letter dated 20th November 2001 from the 2nd defendant’s advocates demanding that he vacates the suit land and on checking with the lands office the plaintiff discovered the 1st defendant transferred both parcels to the 2nd defendant on 13th July, 2001.

(14a) Subsequently and upon realization that he could not retain his defective title to the suit land, the 2nd defendant sold and transferred the same to the 3rd defendant on or about the 11th day of June, 2002.

(15) The plaintiff avers that this transaction was fraudulent and in total breach of the trust.

PARTICULARS OF FRAUD AGAINST BOTH DEFENDANTS

(a) Dealing with LR No. NKUENE/KATHERA/1669 without the knowledge of the plaintiff.

(b) Failing to honour the trust created by the plaintiff’s deceased father.

(c) Dealing with the suit land contrary to the interests of the plaintiff.” The reliefs sought by the plaintiff as against the defendants jointly and severally were:-

(a) A declaration that the defendants’ dealing with LR No. NKUENE/KATHERA/1669 that transferred the same to the 2nd defendant was fraudulent.

(b) Declaration that the 1st defendant held LR NO. NKUENE/KATHERA/1669 by ordering the Land registrar Meru to cancel the registration of the 2nd defendant, 3rd defendant therein as the proprietor and substituting the same with the name of the plaintiff.

(c) Costs and interest.

On 10/1/2003, the firm of KIAUTHA ARITHI & CO. ADVOCATES entered appearance on behalf of the 3rd defendant, SILAS MWITI M’MUGWIKI and on 31/1/2003, the said firm filed defence and counterclaim on behalf of the said 3rd defendant.

In the meantime he plaintiff filed a chamber summons on 21/1/2003 under certificate of urgency seeking inter alia, an order of temporary injunction to restrain the defendants, their servants or agents from

evicting the plaintiff from LR NO. NKUENE/KATHERA/1669 or in any other way from interfering with the plaintiff's quiet and peaceful possession occupation and user thereof until the suit was heard and determined. The said application was premised on the grounds that the said parcel of land which had been held in trust by the 1st defendant for the plaintiff had been fraudulently transferred to the 2nd defendant to defeat the plaintiff's interest in the same and that the 2nd defendant had since transferred the same parcel to the 3rd defendant.

In reply to the plaintiff's chamber summons for the injunction, the 3rd defendant swore a replying affidavit on 31/1/03 and at paragraph 3 thereof, the 3rd defendant deposed thus:-

“(3) THAT vide agreements dated the 2nd day of April 2002, and 7th June 2002, I bought land parcels Nos. NKUENE/KATHERA/1668 and 1669 from one SILAS GICHURU MUTHAMIA and the 2nd respondent respectively for Kshs. 200,000/= each. Annexed and marked “SMI” and “SM2” respectively are copies of the said agreements.

(4) THAT we attended the Nkuene Divisional Land Control Board, obtained consent and the two parcels were transferred to me on 15/5/2002 (No. 1668) and 11/6/2002 (No. 1669) respectively. Annexed and marked SM 3 and 4 respectively are copies of the registers of the two pieces of land.”

It is to be noted that the agreement dated 2.4.2002 was drawn by the firm of KIAUTHA ARITHI & CO. ADVOCATES concerning the sale of LP No. NKUENE/KATHERA/1668 measuring 0.41ha or thereabouts by Silas Gichuru M'Muthamia to the 3rd defendant. The sale price was Kshs. 250,000/=. On the other hand, the agreement dated 7.6.2002 was drawn by the firm of Mbaabu M'Inoti & co. Advocates. The agreement for sale is between James Mwenda Murwithania the 2nd defendant herein and Silas Mwitii M'Mugwika the 3rd defendant. The sale is for land parcel No. NKUENE/KATHERA/1669 for the purchase price of Kshs. 250,000/=.

These are the agreements that have given rise to the preliminary objection by the plaintiff. Mr. J. Mwangi for the plaintiff has submitted that since the two agreements were drawn by the firms of advocates of which Messers Arithi and Omayo are partners/employees, then the two advocates should not be allowed to act for their respective clients. That his objection is made stronger by the fact that the circumstances surrounding the sale of the two parcels of land were allegedly fraudulent and that chances of advocates being called as witnesses in the case are high. In this regard, Mr. Mwangi cited Meru HCCC No. 337 of 1990 – PAUL KIREMA V. M'IBUTU NTOBARI & 2 OTHERS. In that case, the facts were that the former legal firm of Mithega & Arithi Advocates of which Mugambi Mithega & Kiautha Arithi were partners was dissolved sometime in the year, 2001. It was not disputed that by the time of dissolution, the said firm had represented the plaintiffs in the case for a long period of time. The case in which the said firm represented the plaintiffs was infact completed and judgment obtained. When the old law firm was dissolved, each of the partners formed their own new law firms with the suit file remaining with the new law firm of Mithega & co. Advocates as Mr. Mithega had been the one appearing for the plaintiffs most of the time whenever the case came up in court. Consequent upon execution of the decree by the firm of Mithega & Co. Advocates, Mr. Kiautha Arithi filed a notice of appointment to act for the wife to one of the defendants who had filed an objection to the attachment. Following the filing of other applications by Mr. Arithi the firm of Mithega & Co. Advocates filed an application for an order barring the firm of Kiautha Arithi & Co. Advocates from appearing for any of the parties to the suit.

After considering all the facts and submissions by both counsels, the court found that it would be unethical for the firm of Kiautha Arithi & Co. Advocates to act for or represent the defendants or those claiming under them. Mr. Mwangi drew much strength from this decision.

The preliminary objection is opposed. Mr. Omayo for the 1st and 2nd defendants submitted that the objection was misplaced and that the same was a disguised application for an adjournment. That the plaintiff does not aver any denial that the respective suit lands were actually sold and further that the prospect of the advocates who prepared the agreements being called upon and/or required to testify in this case is far fetched. That the continued representation of the 1st and 2nd defendants by the firm of Mbaabu M'Inoti

would not occasion any prejudice to the plaintiffs. Commenting on the authority cited by Mr. Mwangi, Mr. Omayo submitted that the case was irrelevant to the matter before the court now and is infact distinguishable from the present case in that in that case, the two firms of advocates were once one firm acting for the plaintiffs and that it was therefore proper for the court to find that one of the new firms could not now act against a party they had represented before the split.

Mr. Arithi for the 3rd defendant also submitted that the preliminary objection was motivated by mischief and that the same was infact an indirect way of asking for an adjournment so that the plaintiff can continue to enjoy the defendant's land following the injunction granted to the plaintiff on 3.4.2004. That the agreements referred to cannot and should not disentitle the firms of Kiautha Arithi & Co. Advocates and Mbaabu M'Inoti & Co. Advocates from representing the defendants in this matter. That in fact there is no contest over the agreement drawn by his firm in April, 2002 and particularly that since the agreement is between the 3rd defendant and a third party who is not a party to these proceedings, then there is no reason why his firm should be restrained from acting for the 3rd defendant. That the particulars of fraud in the amended plaint have nothing to do with the agreements which are not contested. That Rule 9 of The Advocates (practice) Rules is not applicable in this case and finally that the authority cited by Mr. Mwangi has no application to this case. That the facts in that case are distinguishable from the facts in this case. Neither Mr. Omayo nor Mr. Arithi cited any authority to support their respective positions in the matter.

In his reply, Mr. Mwangi submitted further that both Mr. Omayo and Mr. Arithi should not push themselves into the arena of litigation lest they get mixed up in its dust. That the chances of calling the two advocates as witnesses are not far fetched especially so because, as Mr. Mwangi saw it, since the plaintiff has pleaded fraud against the defendants jointly and severally, counsels involved in drawing the sale agreements were placed on notice. That both agreements touch on the suit land. That NKUENE/KATHERA/1668 and 1669 were before subdivision, one unit which plaintiff alleges was held in trust by the 1st defendant for himself and the plaintiff. That if the two counsels are not restrained from acting for the defendants, then the plaintiff will suffer prejudice on grounds of partiality.

I have already referred to Rule 9 of the Advocates (Practice) Rules which provides that an advocate may not appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence. The further reading of that rule would seem to suggest to me that it need not necessarily be the plaintiff calling the advocate as a witness – even the defendants for whom the advocates appear could require the advocates to give evidence against the allegations of fraud by the plaintiff. In this case, Mr. Arithi has argued that since the agreement his firm drew was between the 3rd defendant and an innocent third party who is not party to these proceedings, then the same should not concern these proceedings. Mr. Omayo's stand is that the plaintiff would suffer no prejudice even if he continues to act for the 1st and 2nd defendants.

I have considered in great detail submissions by all the three advocates. I have also taken trouble to peruse the entire pleadings and from those pleadings, I have found that there is a nexus between the two agreements and the plaintiff's claim before this court. It has not been denied that the firms of Kiautha Arithi & Co. Advocates and Mbaabu M'Inoti drew the respective agreements. There is also no dispute that the agreements were for sale of NKUENE/KATHERA/1668 and 1669 which were originally one parcel of land registered in the name of the 1st defendant who is alleged to have held the said parcel of land in trust for himself and the plaintiff who is his brother. Though it is not expressly admitted, it is common knowledge that the two firms must have been paid professional fees for the services rendered in drawing up the agreements. It is also not disputed that the plaintiff has pleaded fraud against all the three defendants. In my view, this is a case where both Mr. Omayo and Mr. Arithi may be required as witnesses either for the plaintiff or the defendants. I expect therefore that it should have been apparent from the outset that they could be required as witnesses to give evidence. Where this reality of being required as a witness becomes apparent, then any advocate who may be so required to testify shall not continue to appear. As I have stated earlier, the plaintiff's claim hinges directly on those two agreements which are alleged to have been fraudulently entered into thereby depriving the plaintiff of his entitlement to his share of the suit land and in particular to LP No. NKUENE/KATHERA/1669. It is my considered view therefore that it would be unethical and unprofessional for the firms of Mbaabu M'Inoti and Kiautha

Arithi & Co. Advocates to continue to appear for the defendants whose interests are at cross-purposes with those of the plaintiff who may desire to call the advocates from the two firms to testify in his behalf. It would therefore be in the interests of justice that the two firms of advocates be restrained from appearing for the defendants in this matter. In this regard, I invoke the provisions of section 3A of the Civil Procedure Act which provides that:-

“(3A) Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Whether or not the preliminary objection was motivated by a desire to get the case adjourned, I am persuaded that the same has merit and should be allowed for the ends of justice. Consequently, I make the following two orders:-

(a) The firm of Mbaabu M’Inoti & co. advocates, partners and/or agents is hereby restrained from acting for/and/or representing any of the defendants herein or those claiming under them in this particular suit or any applications arising from this suit.

(b) The firm of Kiautha Arithi & Co. Advocates, its partners and/or agents is hereby restrained from acting for and/or representing any of the defendants herein or those claiming under them in this particular suit or any applications arising from this suit.

(c) Each party shall bear its own costs.

It is so ordered.

Dated and delivered at Meru this 20th day of Dec. 2004

RUTH N. SITATI

Ag JUDGE

20.12.04