



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO.310 OF 2017

CHRISTOPHER KIPKETER LELEI.....PLAINTIFF

VERSUS

CHRISTOPHER ROTICH.....DEFENDANT

RULING

This ruling is in respect of an application dated 30th November 2018 by the plaintiff/applicant seeking for the following orders:

- a) This Honourable court pleased to strike out **M/S Kipkosgei Choge & Co. Advocates** for Defendant/Respondent from acting in this case for the said Defendant/respondent.
- b) That the written statement of defence dated 9th October 2017 and filed in court on 16th October 2017 by **M/S Kipkosgei Choge & Co. Advocates** for the Defendant/Respondent be struck out and/or expunged from the court record for being incompetent and unlawful.
- c) Costs of the application be provided for.

The applicant contends that Kipkosgei Choge Advocate executed a transfer form and that he intended to call him as a witness in the case.

PLAINTIFF/APPLICANT'S SUBMISSIONS

Counsel for the plaintiff/applicant submitted that the defendant in his amended defence challenges the legality of his title and therefore intends to call Choge Advocate as a witness who witnessed the transaction

Counsel further submitted that attestation is a legal requirement in terms Sections 44 and 45 of the Land Registration Act which require that any instrument such as the transfer of Land must be verified and a certificate thereto given by the prescribed persons that the transferor and transferee voluntarily and freely executed the document and understood its contents. That in this case, the parties to the transaction appeared before the said Mr. Kipkosgei Choge Advocate on 11th September 2015.

Mr Sego further submitted that Mr Choge having admitted that he attested to the transfer document, it would only be proper for him to cease acting for the defendant and be called as a witness to clarify the position of the transaction.

Counsel relied on the case of **TRUST BANK LTD VS AMIN & COMPANY LTD & ANOTHER IKLR 164 HIGH COURT MILIMANI NAIROBI CIVIL CASE 984 OF 1999** and urged the court to strike out the defence and allow the application as prayed

DEFENDANT /RESPONDENT'S SUBMISSIONS

Counsel for the defendant/respondent Mr. Kipkosgei Choge submitted the transfer form was not drawn or made by him and that he has never represented the Applicant in this Case Counsel however admitted that the transfer form was prepared by the land Registrar and was attested by him.

That the Transfer Form is not a contentious Document, and the rule "does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter which he acts or appears".

ANALYSIS AND DETERMINATION

I have considered the application and come to the conclusion that the issues for determination is whether there is a conflict of interest in the

firm of Kipkosgei Choge representing the defendant in this case, whether the defence should be struck out.

It is not in dispute that the transfer form in respect of the suit land which is in issue was attested to by Kipkosgei Choge Advocate. This is admitted by the advocate but submits that the same was prepared by the Land Registrar and attested to by him.

It is also on record that the firm of Kipkosgei Choge filed an amended defence dated 20th December 2017 where the defendant alleged fraud. The applicant submitted that since the legality of the transfer form is contested as per the amended defence, then it would only be prudent to call the advocate who attested to it to be called as a witness.

For a fair trial and justice to be seen to be done it would be in the interest of all the parties that the advocate who attested to the document be called as a witness to clarify the position and the legality of the document. This therefore means that Advocate Choge to cease acting for the defendant.

In the case of **SERVE IN LOVE AFRICA (SILA) TRUS VS KIPSANG KIPYEGO & 7 OTHERS [2017] eKLR** the court defined conflict of interest as follows; -

“.....an advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren't compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter.

A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise. To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client. This is the basis of the conflict of interest problem. The four elements of the fiduciary duty are

a. The duty of loyalty to the client.

b. The duty of confidentiality.

c. The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests

d. The duty not to put your own or anyone else's interests before those of the client.....”

The court in expounding on the applicability of the concept of conflict of interest agreed with the respondent's counsel who relied on the case of **Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR**, where Hon justice Mumbi Ngugi held as follows in respect of conflict of interest,

“...19. The legal basis of the petitioner's application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:

‘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: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.’.....”

On the issue whether the defence should be struck out on the grounds that it was filed by the firm of Kipkosgei Choge who attested to the transfer form, I find that this would be a draconian measure which would amount to miscarriage of justice. The matter has not proceeded for hearing and there will be no prejudice if the defendant gets the services of another counsel to avoid conflict of interest of his counsel.

Having said that I find that the application partially succeeds in that the firm of Kipkosgei Choge ceases to act for the defendant in this case. The application for striking out the defendant's defence is hereby dismissed with each party bearing their own costs.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE