



Mungai & another v Cheska Agencies Limited & another (Environment & Land Case 388 of 2017) [2024] KEELC 750 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEELC 750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 388 OF 2017
LN MBUGUA, J
FEBRUARY 13, 2024**

BETWEEN

MIGUI MACHARIA MUNGAI 1ST PLAINTIFF

FLAVIA SUSAN KALANDE 2ND PLAINTIFF

AND

CHESKA AGENCIES LIMITED 1ST DEFENDANT

ELDORADO GARDENS LIMITED 2ND DEFENDANT

RULING

1. This ruling relates to the Plaintiffs' Notice of Motion application dated 22.11.2023 seeking an order barring one Nelson Gitungo Ngumbu Advocate, of Nelson Gitungo & Co. Advocates from acting for the 2nd Defendant in this suit and leave to call him as a witness.
2. The application is based on grounds on its face and on the 1st Plaintiff's supporting affidavit sworn on 22.11.2023. He avers that the Plaintiffs are the bonafide purchasers for value of LR Number Nairobi / Block 129/289 from the 1st Defendant vide an agreement for sale dated 8.9.2016. That despite this court's injunctive orders issued on 15.6.2017 restraining the 1st Defendant from dealing with the suit property, it proceeded to sell and transfer the property to the 2nd Defendant.
3. That the 2nd Defendant alleges to have sold the suit property to a 3rd party by a sale agreement dated 14.7.2022 prepared by Nelson Gatungo Ngumbu, advocate who acted for both purchaser and vendor.
4. That since the suit seeks to challenge the sale and transfer of the suit parcel to the 2nd Defendant and other alleged 3rd parties, the Plaintiffs intend to call Mr. Nelson Gatungo Ngumbu to give evidence as a key witness and thus he should be barred from acting for the 2nd Defendant.



5. It is also averred that communication between Mr. Gatungo and the 2nd Defendant is not privileged as the same was in furtherance of an illegal act.
6. In their submissions dated 20.12.2023, the Plaintiffs submit that since they shall call Mr. Gatungo as a witness, he is barred from acting under rule 8 of the *Advocates (Practice) Rules*. To this end, the case of *Jacob Muriungi Mwendwa v Mbaya M'mwendwa* [2004] eKLR is relied upon.
7. The case of *Nils Staffan Wirrel v Emily Chepkosgey* [2018] eKLR as well as the case of *Christopher Kipketer Lelei v Christopher Rotich* [2021] eKLR are cited to submit that Mr. Gatungo will be in conflict of interest if he acts for the 2nd Defendant.
8. The application is opposed by the 2nd Defendant vide a replying affidavit sworn by its director, Henry K Figondo on 13.12. 2023. He avers that he can testify to the matters surrounding the sale of the suit property, thus his evidence would have more probative value than that of his advocate.
9. He further contends that at the time of the transaction, there was no court order barring the 2nd Defendant from dealing with its property and it only became a party to the suit in March 2020 when the Plaintiff filed an amended plaint.
10. He also avers that the case belongs to the 2nd Defendant and as such, its advocates should not be barred from acting for them.
11. On its part, the 2nd Defendant filed submissions dated 20.1. 2024, where it contends that a party's choice of representation is a constitutional right protected under articles 48, 50 (1) and 159 (2) of *the constitution*. It is further argued that the Plaintiff has not shown how prejudice will arise and if it does arise whether it is substantial.
12. The case of *Dorothy Seyanoi Moschioni v Andrew Suart & anor* [2014] eKLR is cited to submit that Mr. Gatungo's testimony has no probative value than that of the parties to the suit and as such, the application has no merit and is intended to derail proceedings.
13. The question for determination is whether Nelson Gitungo Ngumbu counsel practicing in the firm of Nelson Gitungo & co.Advocates should be barred from acting for the 2nd Defendant.
14. Generally, a litigant has a right to counsel of their choice. Mindful of this, the Court of Appeal in *Delphis Bank Ltd v Channan Singh Chatthe & 6 Others* [2005] eKLR stressed that a court must be satisfied that real mischief and real prejudice is likely to occur if it is to debar a counsel.
15. Have the Plaintiffs established that they would suffer prejudice if Mr. Gitungo acts for the 2nd Defendant? In *British-American Investments Company (K) Limited v Njomaitba Investments Limited & another* [2014] eKLR, the Court stated that a party alleging conflict of interest has to demonstrate that such conflict exists.
16. The Plaintiffs contend that since Mr. Gitungo acted for the 2nd Defendant as vendor in a transaction of 14.7.2022 whereupon the suit property was sold to 3rd parties, there is mischief as the sale was conducted whilst injunctive orders were in place and the counsel may be called to testify.
17. I see no prejudice that the Plaintiffs would suffer if the counsel in question represents the 2nd Defendant since the transaction dated 14.7.2022 is not disputed by the parties who entered into it. The 2nd defendant has after all intimated that they can testify to issues regarding the sale of the properties. Further, the 1st Defendant was found guilty of contempt of court orders. To this end, the court is guided by the holding in *Serve In Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others* [2017] eKLR, in so far as conflict of interest is concerned.



18. The end result is that the application before me is not merited and the same is hereby dismissed with no orders as to court. For the upteenth time, the parties are hereby directed to focus on the main trial.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mungai for Plaintiffs

Daniel Nyakambo for 3rd & 4th Defendants

Muriithi holding brief for Githui for 1st Defendant

Munyira Wairimu

Court assistant: Eddel

