



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC NO. 01 OF 2020**

**AFRIKASA REAL ESTATE LIMITED..... PLAINTIFF**

**VERSUS**

**SCORPIO ENTERPRISES LIMITED.....DEFENDANT**

Consolidated with

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**LC MCC NO. 18 OF 2019**

**AFRIKASA REAL ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**SCORPIO ENTERPRISES LIMITED.....DEFENDANT**

**RULING**

This ruling is in respect of a Notice of Motion by the plaintiff/applicant dated 26<sup>th</sup> March 2021 seeking the following orders:

- 1. That the counsel for the Defendant Kiarie Kariuki (& his law firm Kiarie Kariuki & Company Advocates) be disqualified from representing the Defendant in this matter.***
- 2. That the firms of M/S Kiarie Kariuki & Company Advocates be stopped from acting for the Defendant or any other party herein.***
- 3. That these orders be issued prior to the commencement of the hearing of this consolidated suit involving LCMCC No. 18 of 2019 and ELC No. 1 of 2020.***
- 4. That costs be in the cause.***

Counsel agreed to canvass the application vide written submissions which were duly filed.

**PLAINTIFF/APPLICANT'S SUBMISSIONS**

Counsel relied on the supporting affidavit of Alessandro Tentravizi dated 25 March 2021 and the following grounds:

- a) That the lease agreement in question which forms part of the record of these proceedings was prepared by Mr. Kiarie Kariuki of Kiarie Kariuki & Company Advocates.***

b) That the lease agreement prepared by the firm of Messrs Kiarie Kariuki & Company Advocates is the core of the dispute herein.

c) That the law firm of Kiarie Kariuki & Company Advocates is a potential witness and may be called or expected to appear before this court as witness to shed light on the issues touching on the contents of the lease agreement in question which was prepared by them.

d) That an advocate cannot be both an attorney and a witness in the same matter as this is contrary to the rules of practice, professional ethics and conduct.

e) That is imperative and in the interest of justice that Mr. Kiarie Kariuki and his firm Kiarie Kariuki & Company Advocates cease acting for the Defendant in this matter.

f) That it is only fair and just to have the said firm removed from the record and a neutral law firm to take up the matter.

It was counsel's submission that Paragraph 5 and 6 of the Supporting Affidavit confirms that the firm of Kiarie Kariuki & Co Advocates has a conflict of interest in the ongoing suit and that it is in the interest of justice that Mr. Kiarie Kariuki and his law firm be removed from record and a neutral law firm take up the matter as they may be called upon to testify as witnesses as to the handwritten notes and/or instructions he received from the parties to prove it was an agreement.

Counsel submitted that a conflict of interest involves deserting your fiduciary duty to your client or former client. The components 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; and*

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

Counsel further submitted that where an advocate acts for both parties in a conveyancing or commercial transaction, there is a potential conflict of interest where the transaction is disputed in court. That rule 9 of the Advocates (Practice) Rules, states that such an advocate ought to be excluded from representing either party as he or she could be a potential witness.

Counsel relied on the case of **Tom Kusienya & others v Kenya Railways Corporation & others [2013] eKLR** where Mumbi Ngugi J held thus: -

*"...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.'*

Counsel also cited the case of **William Audi Odode & Another-vs- John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04)** where, O'Kubasu J stated at page 3 as follows;

*'I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.' (Emphasis added)*

It was counsel further submission that the firm of Mr. Kiarie will be called upon to testify as a witness as to the handwritten notes or instructions he received from the parties before the lease agreement in question was concluded.

Counsel therefore urged the court to allow the application as prayed.

#### **DEFENDANT'S SUBMISSIONS**

Counsel relied on the Replying Affidavits by Simone Mancini, Kiarie Kariuki and another by Alessandro Trentavizi.

Mr. Kiarie averred in the affidavit that at all material times during the drafting of the subject sub-lease agreements, the Plaintiffs were represented by a firm known as Acumen Business Consultants Limited and annexed correspondence letters between his firm and the firm of

Acumen Business Consultants Limited.

Mr. Alessandro also averred that the firm of Kiarie Kariuki & Company Advocates acted for his company, New World Investments Limited which is also the Plaintiff's landlord herein in the subject premises as per the lease agreement dated 28<sup>th</sup> September 2014.

Counsel cited the case of **Yusuf Abdalla Ibrahim Abdi V Ibrahim Noor Hillowly [2017] (supra)**, where the court relied on the case of **Rakusen V Ellis Munday and Clarke (1912) 1 Ch. 831 (1911-1913) ALL ER Rep 813** where the court stated that;

*"The law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued adding of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client.*

*Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself Cozens-Hardy MR laid down the tests as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act...As a general rule, the Court will not interfere unless there be a case where mischief is rightly, anticipated." (Emphasis Added)*

It was counsel's submission that the issues raised in the defence and counterclaim were matters which arose between the Plaintiff and the Defendant and that the Defendant's advocate was not in any way involved as such there will be no need for the defendant's advocate to testify as a witness. Further that the handwritten notes were not attached to the application as such the same remain mere allegations.

Counsel therefore urged the court to dismiss the application with costs as the plaintiff/applicant has not met the threshold required for an advocate to disqualify himself from representing a litigant.

### **ANALYSIS AND DETERMINATION**

The issue for determination is whether the plaintiff/applicant has established conflict of interest to warrant the disqualification of the firm of Kiarie & Co Advocates from acting for the defendant in this case.

It is trite that a litigant is entitled to legal representation or counsel of his/her own choice but the same is not absolute as was held in the case of **Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR** as follows:

*"The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness... The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result."*

Rule 9 of the Advocates (Practice) Rules provides: -

**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:**

**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.**

The above rule basically prevents an advocate appearing for a litigant in a case in which it is known, or becomes apparent that counsel will be required to give evidence material to the determination of contested issues before the Court. This rule safeguards litigants from themselves and the advocate who has so acted where there may be conflict of interest.

An applicant must prove that there is likely to be conflict of interest and the threshold to be met is that there is real mischief or real prejudice against the Plaintiff to warrant counsel for the defendant to be disqualified from acting.

The Court of Appeal dealt with the issue of conflict of interest in the case of **King Woolen Mills Ltd & Another vs. Kaplan and Straton Advocates (1990-1994) EA 244** and observed as follows: -

*"An advocate who has acted for two common clients cannot later act for either party in litigation when a dispute arises between the common clients concerning the original transaction or the subject matter for which he acted for the clients as a common advocate"*.

Upon perusal of the complaints in the two matters, I note that the present dispute against the defendants arose from breach of contract or the sub-lease agreements dated 24<sup>th</sup> November 2014 and 31<sup>st</sup> December 2014. The sub-lease agreements were drafted by the firm of Kiarie Kariuki. The particulars of breach are that the Defendant made alterations on the premises without the Plaintiff's consent contrary to the lease agreements and that it was in rent arrears respectively

The defendants in their defence allege that the alterations were done since the premises were not fit for the intended hotel business, a fact the plaintiff was aware of. The applicant has not stated that they intend to call Mr Kiarie as a witness and the nature of evidence they intend him to supply the court with. Mere mention of the preparation of the lease agreements and the purported instruction notes is not sufficient to prove that there is

conflict of interest. It is incumbent upon the applicant who asserts that there is conflict of interest to provide sufficient evidence to show that such conflict interest exists. It is not enough just to say that there is conflict of interest because an advocate was part of a transaction.

In the case of **British-American Investments Company (K) Limited v Njomaiha Investments Limited & another [2014] eKLR** the court explained:

***“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.”***

I find that the plaintiff has not established that it will suffer any prejudice if the firm of Kiarie Kariuki continue acting for the defendant as litigants are entitled to representation by counsel of their choice unless it is proven that such representation amounts to conflict of interest leading to prejudice on such a party.

The Court of Appeal in Civil Appeals 286 of 2001 & 15 of 2002, **Uhuru Highway Development Ltd & 3 others v Central Bank of Kenya & 4 others [2003] eKLR** pointed that disqualification of an Advocate may occur where there is an Advocate-Client relationship. In ascertaining whether there is such a relationship, the Court stated as follows: -

***Whether the plaintiffs were the counsel’s client may be discerned from a careful consideration of the correspondence on record. A careful consideration of the same is, of course, required.***

Further in the **Delphis case** (supra) the court held that:

***“The mere fact that debentures, loan agreements, legal charges, or guarantees were drawn by the advocate may not of itself be a confidential matter between the parties because those documents would be exchanged and have common information to all parties. In sum, there is no evidence before us, as there should be, for consideration before the drastic decision of interfering with a party’s constitutional right to counsel of his choice is interfered with.”***

I have considered the submissions by counsel together with the relevant judicial authorities and find that the application lacks merit and is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2021.**

.....

**M.A. ODENY**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.