



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA CASE NO. 1 OF 2019

JEREMIAH ARNOLD OPANDE ARODI & IDA NEREAH ADHIAMBO ARODI

(Suing through their attorney NICODEMUS ATITO ARODI).....PLAINTIFF

VERSUS

WASHINGTON JAKOYO MIDIWO.....DEFENDANT

HOUSING FINANCE LIMITED.....1ST THIRD PARTY

LEGEND MANAGEMENT LIMITED.....2ND THIRD PARTY

RULING

1. The Defendant, Washington Jackoyo Midiwo has come to this court vide application dated 6/2/2019 seeking orders that the two affidavits sworn by Nicodemus Atito Arodi in verification of the plaint and in support of his application dated 09/02/2019 and equally the plaint and application of even date be struck out with costs.
2. The application is based on the grounds that **the Defendant has just discovered that the Power of Attorney No. 2371 dated 05:11:2011 registered on 07.11.2011 donated by the Plaintiffs herein to Nicodemus Atito Arodi by virtue of which they sold the suit property and through whom they filed the instant suit had been revoked by the Plaintiff on 29.09.2015 the Plaintiffs herein by Notice dated 17.07.2015. The said revocation was duly registered in the Registration Book No. 701/2015.**
3. The said Attorney committed acts of perjury **by misrepresenting to this court that he had a duly subsisting Power of Attorney and hence locus to present the suit.** There is no proper suit before this court.
4. The application is supported by the affidavit of Washington Jakoyo Midiwo who states that **the Respondents' suit against him arises from an Agreement of Sale entered into between themselves and dated 12th July, 2018 over Lr. No. Kisumu Manyatta "A"/3304 in respect of which their purported Attorney Nicodemus Atito Arodi represented to him that he was the holder of the Power of Attorney dated 05.11. 2011.** The Plaintiffs have sued him through their said Attorney Nicodemus Atito Arodi. Upon further search now being made at the Registry at the Lands office it has now been discovered that the said power of Attorney had been revoked on 17.07.2015 and he has filed a copy of the supporting Affidavit of Beatrice Rakuru to this effect.
5. According to the applicant, It is now clear that the said Nicodemus Atito Arodi has committed acts of perjury before this court by filing Affidavits verifying the plaint and in support of the application for injunction both on 09.02.2018 that he is a holder of a valid and subsisting Power of Attorney dated 05.11.2011 whose contents he actually knew to be false with a view to misleading this court.
6. In the replying affidavit of Nicodemus Atito Arodi, he states that he is the father of Jeremiah Arnold Opande and Ida Nereah Adhiambo Rodi, and the Plaintiff herein who is a holder of a general power of Attorney donated to him by the plaintiffs in respect of Land No. Kisumu/Manyatta/A3304.
7. He states that the defendant expressly admitted the fact that he was duly appointed attorney of the Plaintiffs and that the plaintiffs have informed him that they have never revoked the power of Attorney donated to him and therefore the notice of revocation is unknown to him.
8. He states that it is on the basis of the power of Attorney that the property was sold to the defendants. He states further that there is no evidence of official search through a certificate of official search to show the status of the power of Attorney. Lastly, he states that the documents relied upon are not valid.

9. The defendant further filed a notice of preliminary objection that the firm of M/s Owiti Otieno & Ragot advocates be barred from acting for both the 1st Third Party and the Plaintiff who are opposing parties in the same matter and this amounts to conflict of interest and is in total disregard of **rule 6 of the Law Society of Kenya (Code of ethics and conduct for advocates) 2015**.

10. M/s Muthee Learned Counsel for Defendant eloquently submits that the issues for determination are whether the plaintiff has locus standi and whether the court should strike out the verifying affidavit. She submits that the plaintiff has no locus as he filed the suit as a representative based on the Power of Attorney dated 5/11/2011. The defendant has learnt that the power of attorney was revoked by virtue of a notice of revocation at the Lands Registry. She relies on a photocopy of the affidavit of Jeremiah Arnold Opande sworn on 17th September 2015 that is annexed in to affidavit of Beatrice Rakuru sworn 6/2/2019. A perusal of the notice of revocation shows that it has been registered in the lands' office. Registration of the revocation denies the plaintiff the capacity to sue.

11. She relies on **Francis Mwangi Mugo vs David Kamau Gachago (2017) eKLR**, Justice Sila Munyao held **that when you don't have capacity you have no capacity and that an un-registered power of attorney does not confer any power. Secondly, a revoked power of attorney does not confer any power.**

12. On the verifying affidavit, it is sworn by Nicodemus who does not have the capacity. Paragraph 1 of the verifying affidavit Mr. Nicodemus Atito Arodi states that he is the Attorney but the same has been revoked. The applicant states that these proceedings are an affront to the rule of law. It is plain that the power of attorney to file a suit lacks capacity

13. The Defendant has filed a preliminary objection dated 30/7/2019 challenging the representation of the plaintiff and 1st 3rd party by the firm of Owiti, Otieno & Ragot advocates. The objection is premised on **rule 6 of LSK Code of Conduct**.

14. According to the defendant, by the firm of Owiti, Otieno & Ragot acting for plaintiff and 1st 3rd party amounts to conflict of interest. The defendant prays that the firm be debarred from acting for both parties. Acting for two parties is not prudent. A defendant and 3rd party can be represented by the same firm of advocates. The defendant relies on the case of **Jimmy Paul Semeya vs Aghakhan H. s. Kenyatta T/A Aghakhan Hospital and 2 others**.

15. According to M/S Muthee, the parties have a right but the court should intervene where there is a conflict of interest. If the firm is allowed to act for 1st 3rd party it is not sensible that it is necessary to have a 3rd party.

16. Lastly that amendment of pleadings cannot rectify the problem the suit should be dismissed with costs.

17. Mr. David Otieno learned Counsel for Plaintiffs submits that the question of locus is a non-issue in the suit. The plaintiffs brought the suit through Arodi as the duly appointed Attorney. The defendant has admitted the particulars of plaint paragraph 1 and 2. He relies on **Sections 24 and 61 of the Evidence Act**, and argues that the fact of Mr. Rodi's capacity to bring the action was admitted and does not require proof. The question of Mr. Rodi capacity was admitted as it was not traversed. The replying affidavit confirms the fact that the plaintiffs are joint owners of the property.

18. Mr. Otieno argues that the power of Attorney was signed on both proprietors who have denied the notice of revocation. Moreover, the notice of revocation was signed by only one proprietor and that the affidavit of revocation was done by one of the proprietors and therefore the notice of revocation is not valid.

19. The record shows that there has been a previous application in the suit. The defendant sought to have Mr. Otieno disqualify himself. The application was filed a day before this application was filed. It was argued and dismissed. The doctrine of Res-Judicata was intended for such applications. The preliminary objection, seeks to bar THEM from acting for the plaintiff and 1st 3rd party. The 3rd party and plaintiff are not on opposing sides of the suit. The dispute is between the defendant and 3rd party.

20. Under **order 1 Rules 19 and 21**, the question of liability of 3rd party comes in picture when the defendant has settled judgment against the decree holder.

21. Order 1 rule 22 there provides for directions and that the third parties case can be hear separately from the case between the plaintiff and the defendant and that since the 3rd party directions have not been given in this matter and that the application is premature.

22. On the preliminary objection, he admits that that **Rule 6 of the LSK code of conducts 2016** provided for conflicting interest but add that the applicant has not explained the nature of conflict. There is no conflict of interest. The 3rd party says that he is not liable to the defendant.

23. Mr. Ragot learned counsel for 1st and 2nd third parties submits that the issue of capacity is a non-issue as parties are bound by their pleadings. On the preliminary objection, he submits that the defendant has simply said that there is conflict of interest which is an issue of fact. Rule 6 of LSK code of Ethics and Conducts requires facts and revolves around the need to produce evidence.

24. Preliminary objection must be based on undisputed facts and pure point of law.

25. I have considered the application for striking out plaint and verifying affidavit and do find that on the 7/11/2011 a power of Attorney over the property no. Kisumu Manyatta/ "A" 3304 was registered in favour of Nicodamus Atito Arodi at the Kisumu District Lands Registry.

26. The donors of the power of Attorney were Jeremiah Arnold Opande Arodi and Ida Nereah Adhiambo Arodi.

27. The power was to do anything and everything that they could do involving the suit land. Moreover, they donated power to the donee to execute all such instruments and do all such things for expedience.

28. The donors were fully regarded as owners of the suit parcel of land and the power of Attorney was donated jointly by the two registered proprietors.

29. This court finds that for a proper and full revocation of the power of Attorney both proprietors were required to give notice and therefore the suit can't be struck out due to one of the donors revoking the power of attorney. Moreover, the verifying affidavit cannot be struck out due to the fact that it was filed by the said Nicodemus Atito Arodi who had the capacity to depone to the same as the power of Attorney was subsisting as revocation could not have been done by one proprietor. Moreover, capacity was admitted by the defendant in the defence and therefore the defendant is bound by his pleadings and that todate the defence has not been amended to deny capacity.

30. The Plaintiff has stated on oath that he is not aware of the revocation of the Power of Attorney and that he is informed by his principals that they have never revoked the power of Attorney and that the notice of revocation of the power of Attorney is unknown to them.

31. There is need to call the said Jeremiah Arnold Opande Arodi to testify under oath to state whether the allegations that he gave notice for revocation of the power of Attorney are true. I do find that the issue of capacity cannot be determined on the available evidence and that the available evidence is not sufficient to commit the plaintiff for perjury.

32. On the issue of conflict of interest, **Clause 96 Of The Law Society of Kenya Code of Standards ,2016** defines conflict of interest as an interest which gives rise to a substantial risk that an advocates representation to the client will be materially and adversely affected by the advocates own interest or an advocates duties to another client, on the face of it, it is improper for a firm of advocates to appear for the plaintiff and the same firm to appear for the third party but there is no provision in law that a firm of advocates cannot appear for the plaintiff and third party.

33. Conflict of interest can arise broadly where an advocate acts for both parties in a conveyancing or commercial transaction or where an advocate is acting for two parties on the same side of the record in litigation.

34. Conflict of interest must be alleged and proved and cannot be raised as a preliminary objection. The conflict of interest must be clearly demonstrated by affidavit. In this matter the defendant has alleged conflict of interest but has not proved the same. The upshot of the above is that the application and preliminary objections are dismissed with costs. Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 5TH DAY OF NOVEMBER, 2019.

In the presence of:

No appearance for Plaintiff

No appearance for Defendants

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE