



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC CASE NO. 11 OF 2014**

**ANNA JEBICHI SIMATWO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**THE ATTORNEY GENERAL.....ST DEFENDANT**

**THE LAND REGISTRAR ELDORET.....2ND DEFENDANT**

**THE NATIONAL LAND COMMISSION OF KENYA.....3RD DEFENDANT**

**AND**

**HANNAH CHEPKEMBOI MUREI.....INTERESTED PARTY/APPLICANT**

**RULING**

This is the ruling in respect of a preliminary objection dated 22<sup>nd</sup> September 2017 by the plaintiff/applicant on the grounds that :

- a) There exists a conflict of interest pursuant to Rule 8 of the Advocates (Practice) Rules 1966 and consequently the firm of M/S Chepkitway & Co. Advocates should withdraw from representing the interested party.
- b) The plaintiff's application dated 17/5/2017 infringes Order 9 Rule 9 of the Civil Procedure Rules.
- c) The plaintiff's application dated 17/5/2017 is an abuse of court process.

The court ordered that the preliminary objection be disposed of first and Counsel agreed to canvass the preliminary objection by way of written submissions.

**Plaintiff's Submissions**

Counsel for the Plaintiff submitted on the issue of conflict of interest by citing the case of **SERVE IN LOVE AFRICA (SILA) TRUST VS DAVID KIPSANG KIPYEGO & 7 OTHERS (2017) eKLR**, where the court described 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 are not compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honour or attempts to honour two or more duties which cannot be honoured compatibly and hereby fails to observe the fiduciary duty owed to clients and former clients '*

Counsel submitted that the issues for determination are as to whether there exists a conflict of interest pursuant to Rule 8 of the Advocates (practice) Rules 1966 and consequently the firm of M/S Chepkitway & Co. Advocates should withdraw from representing the interested party. On this Counsel submitted that Rule 8 of the Advocates (Practice) Rules 1966 is clear that no Advocate may appear in any matter in which he has reason to believe that he may be required to be called as a witness to give evidence whether verbally or by declaration or affidavit.

It was Counsel's further submission that the firm of M/S Chepkitway & Co. Advocates annexed an affidavit which was sworn allegedly by the plaintiff herein on 31/3/2015 and commissioned by Koros Henry Stanley Kiplagat. The effect of the said affidavit is that the plaintiff agreed to withdraw the suit herein. At the time of writing this ruling the said Advocate Koros Henry Stanley Kiplagat is now deceased which changes the scenario but I am not aware whether the firm is a sole practitioner firm or there are other advocates who can handle this matter. That issue is neither here nor there as the issue for determination is whether there exists a conflict of interest in the representation of the

proposed interested party.

Counsel submitted that as at 31/3/2015, the firm of M/S Onyinkwa & Co. Advocates was on record for the plaintiff and there was no notice of change of Advocates filed by the firm of M/S Chepkitway & Co. Advocates on behalf of the plaintiff herein, to enable it draft a document withdrawing a case on behalf of the plaintiff. There is therefore an existence of conflict of interest. He stated that the firm of M/S Chepkitway & Co. Advocates prepared the afore-mentioned affidavit marked as 'HCM 4' while the plaintiff was still represented by the firm of M/S Onyinkwa & Co. Advocates.

It was Counsel's further submission that the firm of M/S Chepkitway & Co. Advocates attempt to come on record for the proposed prospective interested party against the plaintiff (now a former client) is a breach of the fiduciary duty of care that the firm of M/S Chepkitway & Co. Advocates owed the plaintiff herein as well as the interested party herein.

Further, Counsel stated that the firm of M/S Chepkitway & Co. Advocates have attached a correspondence between the plaintiff and the firm of M/S Onyinkwa & Co. Advocates as 'HCM 5' in their supplementary affidavit dated 17/5/2017 sworn by the proposed interested party and yet they have not explained how they got hold of that letter. Counsel cited the case of **KING WOOLEN MILLS LTD AND ANOTHER VS KAPLAN & STRATTON (1993) LLR as cited in DELPHIS BANK LTD VS CHATTHE AND 6 OTHERS (2005) eKLR** where the court held that :-

*"I have no doubt in my mind that the respondents will consciously or unconsciously or even inadvertently use that confidential information from the appellants under the retainer during preparation of the loan agreement and the security documents as well as knowledge of subsequent events against the appellants in the main suit. The result will be that the appellants will not only be confronted with their own confidential information but will suffer great injustice and prejudice during the hearing of the main suit "*

Counsel therefore submitted that M/S Chepkitway & Co. Advocates having prepared "HCM 4" aforementioned and being in possession of confidential information from the plaintiff like "HCM 5", the firm is clearly in a position of conflict of interest and therefore the application dated 17<sup>th</sup> May 2017 is an abuse of court process.

#### **INTERESTED PARTY/APPLICANT'S WRITTEN SUBMISSIONS**

The Interested party opposed the preliminary objection by the plaintiff and gave a brief background to the case that the interested party came to notice some discrepancies on the suit property when she learnt that the Plaintiff/ Respondent had done transfer of the suit property SOY/KIPSOMBA BLOCK 8 (KOECH & PARTNERS)<sup>33</sup> which was part of the assets comprised on schedule of assets under her administration arising from the estate of the late JOHN KIPROTICH MELI-DECEASED who was her husband.

Counsel for the interested party submitted that the Preliminary Objection does not meet the criteria of what constitutes a preliminary objection. He stated that the issues raised are factual and not points of law. Counsel submitted that the plaintiff engaged the services of the firm of M/S ONYINKWA & COMPANY ADVOCATES whereas the interested party herein engaged the services of M/S CHEPKITWAY & COMPANY ADVOCATES to safeguard her interest on the suit property as the administrator of the estate of the late JOHN KIPROTICH MELI.

Counsel further submitted that there should have been a formal application made before this Honourable Court seeking the disqualification from representing the interested party and that there is no proof of mischief or real prejudice that will be visited on the part of the Plaintiff/Respondent if the said firm of the firm of M/S CHEPKITWAY & COMPANY ADVOCATES represented the interested party. Counsel therefore urged the court to dismiss the Preliminary Objection with costs.

#### **Analysis and determination**

The issue for determination is as to whether there exists a conflict of interest in the firm of M/S CHEPKITWAY & COMPANY ADVOCATES representing the interested party herein having acted for the plaintiff in this case.

The principles that guide preliminary objections are very clear as was enunciated in the case of Mukisa Biscuits. The preliminary point must be on a point of law and not facts. This is because preliminary objections if upheld can dispose of the matter by it either being struck out or dismissed altogether. Therefore courts usually uphold preliminary objections only in the clear of the clearest cases on a point of law.

An advocate should always act in the interest of his client and there is advocate client confidentiality unless it is in furtherance of a crime. From the correspondence which is annexed to the replying affidavit, there seems to be a problem with representation of the parties to the suit. The plaintiff is represented by Onyinkwa & Co Advocates while the defendants are represented by the Attorney General. At one point there was communication between Onyinkwa & Co Advocates for the plaintiff and Chepkitway & Co Advocates for the same plaintiff at the same time posing as acting for the defendants. It was not clear whose interest the said firm was representing as the defendants are government officers who are ordinarily represented by the Attorney General unless special appointment of private law firms is made.

The annexed correspondence questioned the legality of the representation of the plaintiff by the firm of Chepkitway & Co Advocates and the plaintiff's purported withdrawal of this suit. Advocates are supposed to act on instructions by clients and there are laid down procedures when a party wants to change Advocates. This was provided for to avoid parties just jumping from one advocate to another when they feel like without notice. There must be decorum and sanity in how cases are handled in our courts that is why there is an elaborate Civil Procedure Rules to guide parties and the court.

In an adversarial system an advocate cannot act for both parties, he or she must choose which side they want to represent. In a case of a conveyance where an advocate acts for both the vendor and the purchaser, when a dispute arises he cannot be seen to side with one party against the other by representing one by filing a suit. The best that he can do is to be called as a witness to shed light on the transaction that

he did. This is the current situation in this case. Chepkitway & Co Advocates cannot be seen to be jumping from representing the plaintiff to an interested party against the plaintiff. The said firm received some confidential information from the plaintiff which they want to use in support of the interested party against the plaintiff. That would be prejudicial to the plaintiff as they have unleased part of the information that they had acquired by virtue of the advocate/client relationship.

I find that the preliminary Objection has merit and is therefore upheld. The interested party is at liberty to engage the services of another law firm other than Chepkitway & Co Advocates. Costs in the cause.

Dated and delivered at Eldoret this 3<sup>rd</sup> day of July 2018.

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Miss Kesei for Plaintiff and Mr. Kandie holding brief for Miss Lagat for Interested Party and in the absence of the Attorney General.

Mr. Koech: Court Assistant.