



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 134 OF 2019

PAUL MERO.....APPELLANT

VERSUS

WASO TRUSTLAND PROJECT.....RESPONDENT

JUDGMENT

(Being an Appeal from the Ruling of the Principal Magistrate Hon. E. Ngigi

in ELC Case No. 64 of 2013 (Isiolo) Delivered on 12th November 2019)

Introduction

This Appeal arises from the decision/Ruling of the trial Court in a Notice of Motion dated 23rd April 2019 brought under *Section 1A, 1B and 3A of the Civil Procedure Act Cap. 21 Laws of Kenya* and all other enabling provisions of the law. The Applicant who was also the plaintiff in the dispute before the trial Court sought to have the firm of MUKIRA MBAYA & CO. ADVOCATES be disqualified and directed to withdraw from the record and cease acting for the 10th defendant/Respondent in that matter. The Applicant/plaintiff also sought the costs of the application to be costs in the cause.

The gist of the application is that the said firm of MUKIRA MBAYA & CO. ADVOCATES had previously acted for and on behalf of the plaintiff/Applicant. The plaintiff/Applicant argued that the said law firm has now been engaged by his adversary who is the 10th defendant. According to the affidavit in support of the said application, the applicant contends that as a result of prior engagement, the said firm of Mukira Mbaya & Co. Advocates became privy to privileged information which the said law firm can apply as against him. In prove of this, the applicant annexed copies of documents including pleadings and instructions with receipts evidencing payments for instructions given.

In opposing the said application, the respondent filed grounds of opposition and a replying affidavit. According to him, he admitted drafting pleadings which initiated the present suit. However, he stated that by then, the 10th defendant/Respondent was not a party in these proceedings. The respondent further argued that the documents drafted are part of the pleadings and no other confidential information was passed onto counsel during the retainer. He also contended that there is no rule prohibiting a party from being represented by an advocate of his choice merely because the same advocate had acted for another party in the

same matter. The respondent also argued that the Applicant has not stated what prejudice he stands to suffer if the counsel was to continue acting in the matter.

The trial Court took directions and the parties agreed to have the said application canvassed by affidavit evidence and written submissions. Upon considering the materials placed before him and the submissions by counsels for both parties, the trial magistrate rendered himself in a ruling delivered on 12th November 2019 in which he allowed the application as prayed. Aggrieved by the said decision, the appellant exercised his undoubted right of Appeal and filed the present Appeal on the following nine (9) grounds:-

- 1. The learned principal magistrate erred and misdirected himself in law and fact by not considering the submissions on part of 10th defendant now the appellant and the facts of the case relied upon.*
- 2. The learned magistrate erred in law and fact in not finding that no prejudice, mischief or conflict of interest are visible or apparent to the respondent to warrant the firm of Advocates being barred from continuing to act in the suit.*
- 3. That the learned magistrate erred in law and fact by being directed by the plaintiff/Applicant's written submissions whose Applicant has never revealed the salient features of the suit.*

4. That the proceedings giving rise to the Ruling were irregular and a nullity in law in that the learned Principal Magistrate failed to consider the Constitutional rights of the Appellant who has a right to be represented by counsel of his own choice which is inherent.

5. The Principal Magistrate erred in law and misdirected himself by finding merit on only one of the Authorities relied upon by the appellant namely *British American Co. Vs Njomaiha Investments* while ignoring the other more relevant authorities favouring the Appellant's position.

6. That the findings of the Principal Magistrate were based on mere suspicion, speculation and conjecture.

7. That there was no evidence that the appellant's firm of Advocate held any confidential information or evidence, more so since summary of evidence to be presented had been previously filed, served and known by the opposite party (The Appellant much in advance).

8. That the learned Principal Magistrate erred and misdirected himself on the facts by bringing into his Ruling matters which were not contested in evidence thereby engendering injustice to the Appellant.

9. That the learned Principal Magistrate erred in law by failing to evaluate the issues canvassed, particularly by the Appellant.

Submissions by the Appellant

The Appellant submitted generally on the issues, the grounds and the law and stated that it is not in contention that the firm of Mukira Mbaya & Co. Advocates instituted the case, drew the plaint and other pleadings in the original suit before the trial magistrate. The suit is related to a determination of rights to ownership of a plot of land. He also submitted that the respondent withdrew instructions from the firm of Mukira Mbaya and instructed a new firm of Alfred Kitheka & Co. Advocates who filed a Notice of Change of Advocates and amended the initial plaint and added new defendants in 2018 including the Appellant herein. The Appellant being part of the additional defendants (10th) included in the amended plaint instructed the firm of Mukira Mbaya & Company Advocates to act for them. According to the Appellant, the most valued Constitutional right to a litigant is the right to a legal representation of an advocate of his choice as guaranteed under *Article 50 (1) (g) of the Constitution of Kenya 2010*. However, he contends that the right is not absolute but would be limited where it is shown that the interest of justice would not be served where a particular advocate is shown to have acted for one of the parties thereby compromising the principles of confidentiality in advocate/client fiduciary relationship. However, the appellant stated that as a general rule, an advocate could act for one party and subsequently an opposing party unless it could be shown one party was likely to suffer real prejudice if he continued to act for one person. According to the appellant, there were no clear and valid reasons as to why the right to representation should be limited as the respondent's assertion was mere suspicion and apprehension of a possible conflict of interest. He submitted that the trial Court never interrogated whether **REAL PREJUDICE** would in all humanly possible occur but rather chose to put all their weight on "**likely**" and therefore overlooking arguments and authorities fronted by the appellant and thus engendering injustice to the appellant.

In summary therefore, the appellant submitted that the conclusion by the trial magistrate to bar the firm of Mukira Mbaya & Co. Advocates was reached merely on the basis that the Advocate has previously acted for the plaintiff and therefore would have been seized of undisclosed secrets imparted by the plaintiff. That conclusion was hypothetical since there was no evidence in support and that it was founded on mere speculation. The appellant also submitted that in reaching that conclusion, the magistrate wholly ignored their submissions as well as the several legal authorities quoted, and that if he had considered them, he would in all probability have arrived at a different conclusion.

The appellant further submitted that the primary test to be considered whether to allow the application or not is the absence of real mischief and prejudice and the onus was on the plaintiff/Respondent to bring out the same and that there was no such evidence. On the issue of confidentiality, the appellant submitted that the procedural requirement for a party to file in advance summary of his evidence and documents to be relied on and served on the opposite party, erodes completely the rule on confidentiality. He stated that upon disclosure, there would be no other necessary evidence and materials left in possession of the advocate for him to guard against the opposite party. He submitted that in his application before the trial Court, the plaintiff himself had not averred what residue of secrets had been reposed to the Advocates subsequent to the filing of the suit.

As regards his position as an additional defendant in the amended plaint, the appellant submitted that he had been joined in the suit several years after the filing of the suit at the instance of the Advocates who took over the conduct of the suit. He stated that the process of joining the suit as the 10th defendant is relevant in that he had been joined with 7 others following an application by the succeeding Advocates for the plaintiff, but without stating the basis of the 10th defendant's alleged liability. He submitted that it would therefore not have been possible for the Advocates to know what allegations or evidence the plaintiff had against the 10th defendant at the time of his being joined and that if the Advocates had sought to represent the initial 7 or so defendants, the result would probably have been different.

On his Constitutional right to be represented by an advocate of his choice, the appellant submitted that they cited cases both on the new and old Constitutional dispensation to show that a party's right of representation by counsel is fundamental. However, the magistrate ignored those authorities. In light of the said clear authorities and in the absence of evidence of there being likelihood of conflict of interests as between the 10th Defendant/Appellant and the Plaintiff/Respondent barring the Advocates from acting was grossly erroneous. In conclusion, the appellant submitted that *Article 159 (2) (d) of the Constitution* stipulates that justice should be administered without undue regard to procedural technicalities. He cited the following authorities:-

1. *Delphis Bank Limited Vs Chattne & 6 Others Limited (2005) 1 K.L.R 766.*

2. *Serve in Love Africa (SILA) Vs David Kipsang Kipyego & Others E & L Case No. 21 of 2017 quoted with approval in the case of Dorothy Seyanoi Moschioni Vs Andrew Stuart & Another (2014) e K.L.R.*

3. *British American Investment Company (K) Limited Vs Njomaiha Investments & Another, Civil Case No. 570 of 2011.*

4. *Concord Insurance Limited Vs NIC Bank Limited, Nairobi High Court Case No. 175 of 2011 (2013) e K.L.R.*

5. *Andrew Ouko Vs Kenya Commercial Bank Limited & 3 Others (2014) e K.L.R.*

6. *Richard Nchapi Leiyagu Vs I.E.B.C & 2 Others (2013) e K.L.R quoted with approval in the case of Mohamed Ali Mursal Vs Saadia Mohamed & 2 Others (2013) e K.L.R.*

Respondent's Submissions

The respondent through the firm of M/S Kitheka & Ouma Advocates LLP submitted on three issues as follows:-

a. *Whether a conflict of interest arises if the firm of Mukira Mbaya & Co. Advocates who previously represented the respondent is allowed to represent the appellant in the same matter?*

b. *Whether the present Appeal is merited based on the grounds of Appeal raised by the appellant?*

c. *Who should bear the costs of the Appeal?*

(a) Whether a conflict of interest arises if the firm of Mukira Mbaya & Co. Advocates who previously represented the Respondent is allowed to represent the appellant in the same matter?

On this issue, the respondent submitted that there is a plethora of case law to the effect that an advocate must be disqualified from acting for a party as against a former client of the same Advocate where it can be demonstrated that real mischief and real prejudice is likely to occur due to the arising conflict of interest if the said advocate be allowed to continue to so act. The respondent submitted that in the present case, they have demonstrated that a real mischief and a real prejudice will imminently occur in the following terms:-

i. *The Advocate purported to act for opposing parties in one and the same matter and **NOT** a different **subsequent matter**.*

The respondent argued that the real prejudice and mischief that would imminently occur in the trial matter is the use and abuse of privileged and confidential information exchanged between the plaintiff (now the Respondent) and the Firm of Mukira Mbaya & Co. Advocates when the two were still on the same side of the legal battle at trial Court. He submitted that all the information that was disclosed to the firm of Mukira Mbaya & Co. Advocates by the respondent are potentially prejudiced since the same are likely to be used by the said Advocates as against his former client/the Respondent.

He cited the case of *Rakve Vs Ellis, Munday & Clerk (1912) 1 Ch D 831.*

ii. *The firm of Mukira Mbaya & Co. Advocates has full instructions and information from the Plaintiff in this matter.*

The respondent urged this Honourable Court to take Judicial Notice of the fact that Advocates usually draft and file pleadings and their accompaniments after receiving full instructions and virtually all available information from their clients. Accordingly, the firm of Mukira Mbaya & Co. Advocates had received all the privileged and confidential information from the said former client/the Respondent regarding the disputed matter and must not be allowed to act for the appellant in the same matter. The respondent further submitted that together with the firm of Mukira Mbaya & Co. Advocates, they exchanged correspondences in confidentiality regarding this same matter as demonstrated by the letters attached to the respondent's supporting affidavit sworn on 23rd April 2019 and marked "LG - 4".

(b) Whether the present Appeal is merited based on the grounds of Appeal raised by the Appellant?

On this issue, the respondent submitted on each and every ground of Appeal as follows:-

Ground No. 1

The respondent submitted that this ground of Appeal is factually wrong since the learned trial magistrate thoroughly analyzed the facts of the case and made a legally sound ruling upon considering the submissions of both parties.

Ground No. 2

As regards ground No. 2 the respondent submitted that he has demonstrated that a real mischief and a real prejudice will imminently occur.

Ground No. 3

The respondent submitted that his submissions before the trial Court were sound and that he demonstrated the particular correspondences that were exchanged in confidentiality between him and the firm of Mukira Mbaya & Co. Advocates.

Ground No. 4

As regards the 4th ground, the respondent submitted that the right of the appellant to be represented by an advocate of his choice is limited. Under the circumstances of the present case, a conflict of interest arises which limits the said right.

Ground No. 5

On this ground, the respondent submitted that the same is factually wrong in that the learned trial magistrate considered the authorities cited by both parties in their written submissions.

Ground No. 6

The respondent submitted that this ground is misleading since the impugned decision clearly show the real prejudice which would occur if the firm of M/S Mukira Mbaya & Co. Advocates is allowed to change sides and represent the appellant in the same matter.

Ground No. 7

The respondent urged this Court to take Judicial Notice of the fact that Advocates don't file in Court all the documents they receive from their clients and neither do they disclose all the information to the third party. Therefore, whatever was previously filed and served upon the opposite party was strategically selected to prosecute the respondent's case.

Ground No. 8

The respondent contends that the counsel for the appellant is clearly on a fishing expedition here. Where any decision making body is faced with a dispute, facts that are not contested are key in determining the issues in the dispute. He submitted that in the present matter, it was not contested that the firm of Mukira Mbaya & Co. Advocates acted and drew pleadings for one party then crossed over to the opposite party in the same matter. How was the learned trial magistrate supposed to ignore that key **"uncontested fact"**?

Ground No. 9

On this ground, the respondent submitted that his submissions before the trial Court was legally sound and showed the particular correspondences that exchanged in confidentiality with the firm of Mukira Mbaya & Co. Advocates. He also submitted that the trial magistrate considered all the materials placed before him particularly the authorities cited in the submissions filed in the matter.

(c) Who should bear the costs of the Appeal?

The respondent concluded by submitting that the appellant should be condemned to bear the costs of this Appeal.

Legal Analysis

I have considered the submissions by both counsels for the appellant and the respondent. I have also considered the record of Appeal and the applicable law. The role of this Honourable Court as the first appellate Court is re-evaluate, re-assess and re-analyze the extracts on the record to determine the conclusions reached by the trial Judge based on the facts and the applicable law. The role of the appellate Court was put into perspective in the Court of Appeal decision in the case of **Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates (2013) e K.L.R** where it was held thus:-

"This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way".

It is not in dispute that the subject of the present appeal was an application to have the firm of Mukira Mbaya & Co. Advocates disqualified from acting for the 10th defendant/Appellant. The grounds for the said application are contained in the supporting affidavit of one Liban Golicha sworn on 23rd April 2019 and grounds sworn on the face thereof. The said application was opposed with grounds of opposition and a replying affidavit dated and sworn on 24th July 2019. When the said application came up for directions, it was agreed by consent to have the same canvassed by affidavit evidence and written submissions.

It is trite law that in an application whether an advocate should be disqualified from acting for a party as against a former client of the same advocate, the Court must be satisfied that real mischief and prejudice is likely to occur due to the arising conflict of interest if the said advocate be allowed to so act. In the case of **Woolen Mills Limited (Formerly known as Manchester Outfitters Suiting Division Ltd & Another Vs Kaplan & Stratron Advocates (1993) e K.L.R**, the Court of Appeal held:-

"In Rakve Vs Ellis Munday & Clerk (1912) Ch. P. 831 Conzens – Hardy M.R. as he then was put the principle as follows Page 835:-

"I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which has confidentially obtained from his former client, but in my view, we must treat each of the cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client but, as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human

probability, result if his solicitor is allowed to act” (Emphasis added).

In the same case of **Rakve Vs Ellis, Munday & Clerk** (supra), the Court further held thus:-

“..... A Solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secrets which are confidently reposed in him. In that respect, it does not very much differ from the position of any confidential agent who is employed by the principal. But in the present case we have to consider something further. It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who has acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances, and it is said that that is so much a general rule and the danger is such that the Court ought not to have regard to the special circumstances of the case”

The facts of the case under review is that the firm of M/S Mukira Mbaya & Co. Advocates acted for the respondent in the drafting of the plaint and other correspondences including the demand letter dated 8th August 2012. The said firm of Advocates was also involved in the preparation of the list of documents which contains all confidential documents and information required in the determination of the suit before the trial Court. These documents are indeed privileged information which comes into possession of an advocate is what the law requires absolute obligation not to be disclosed. The test in determining whether to exercise the Courts special jurisdiction is the likelihood of real mischief and real prejudice. In the circumstances of this case, I am satisfied that the firm of Mukira Mbaya & Co. Advocates and the respondent who were his former client in the course of Advocate –client fiduciary relationship exchanged correspondences in confidentiality regarding this same matter as demonstrated by the letter attached to the respondent’s supporting affidavit sworn on 23rd April 2019 and marked **“LG – 4”**. From those correspondences exchanged in confidentiality, I am satisfied that there is real prejudice and mischief that would imminently occur if the said firm of Mukira Mbaya & Co. Advocates are allowed to continue acting for the appellants.

Consequently, I find that the trial magistrate properly directed his mind to the facts and the applicable law in arriving at the impugned decision. Regarding the case law and authorities cited by the appellants, I find the same distinguishable and irrelevant to the instant case.

Disposition

For the foregoing reasons, the Court does not find merit in this Appeal and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Appellant/Advocate- Absent
2. Respondent/Advocate- Absent
3. Fardowsa ; Court Assistant- Present