



Exclusive Estates Limited v Telkom Kenya Limited & another; Afraco Limited & another (Interested Parties) (Commercial Case 1158 of 2001) [2024] KEHC 4745 (KLR) (Commercial and Tax) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 1158 OF 2001
MN MWANGI, J
APRIL 12, 2024**

BETWEEN

EXCLUSIVE ESTATES LIMITED PLAINTIFF

AND

TELKOM KENYA LIMITED 1ST DEFENDANT

POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED 2ND DEFENDANT

AND

AFTRACO LIMITED INTERESTED PARTY

ZEHRABANU JANMOHAMED INTERESTED PARTY

RULING

1. The plaintiff filed a Notice of Motion application dated 13th December, 2023 under the provisions of Articles 10, 48, 50, 159, & 165 of *the Constitution*, Sections 1B & 3A of the *Civil Procedure Act*, Order 19 Rule 2 & Order 46 Rule 16(3) of the Civil Procedure Rules, 2010 and Sections 108, 112, 113, 114, 115, & 117 of the Penal Code and Sections 55 & 56 of the *Advocates Act*, seeking the following orders -
 - i. Spent;
 - ii. That pending the determination of the application and until further orders of the Court, there be a stay of highlighting submissions or the Preliminary Objections dated 23rd November and 7th December, 2023 filed by the 1st defendant and the 1st interested party until after the cross-examination of Salim Sadru and Wangechi Gichuki in open Court in respect of their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019 and the Court be



pleased to determine if they should be investigated for suppression of evidence, fabrication of evidence, perjury, conspiracy to defeat justice and giving contradictory statements;

- iii. That the firms of Iseme Kamau & Maema Advocates and Ahmednassir, Abdikadir & Company Advocates as officers of the Court are conflicted and should be barred from representing the 1st defendant and 1st interested party for filing pleadings containing fabricated evidence, and suppressing documents from 2017 and the Deed of Settlement regarding the settlement of the dispute; and
 - iv. That costs be in favour of the plaintiff.
2. The application is brought on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Francis Mburu Mungai, the plaintiff's Director. In opposition thereto, the 1st defendant filed a replying affidavit sworn on 22nd January, 2024 by Nelson Mogaka, the 1st defendant's Legal Manager. The 1st interested party filed a replying affidavit sworn on 7th January, 2024 by Salim Sadru, one of the 1st interested party's directors.
 3. The instant application was canvassed by way of written submissions which were highlighted on 29th February, 2024. The plaintiff's submissions were filed by the law firm of Wamae & Allen Advocates on 6th February, 2024, the 1st defendant's submissions were filed on 16th February, 2024 by the law firm of Iseme Kamau & Maema Advocates, and the 1st interested party's submissions were filed by the law firm of Ahmednasir Abdullahi Advocates LLP on 16th February, 2024.
 4. Mr. Allen Gichuhi (SC), learned Counsel for the plaintiff submitted that new evidence had emerged necessitating cross-examination of Salim Sadru and Wangechi Gichuki, as very serious issues have emerged that point to perjury and gross interference in the administration of justice. He further submitted that it is not disputed that both Telkom Kenya Ltd and Afraco Ltd were in possession of the Deed of Settlement since 1st August, 2019 but they deliberately withheld its existence from the Court when they applied to set aside the Arbitral Award. Further, that neither Exclusive Estates Ltd, Postel Housing Co-operative Society Ltd or the Arbitral Tribunal were made aware of the existence of the Deed of Settlement, thus they could not have been in a position to seek its production. He urged this Court to draw an adverse inference for the deliberate suppression of the Deed of Settlement.
 5. Mr. Gichuhi (SC), cited the provisions of Sections of 112, 113, 114, 115 & 117 of the Penal Code and the Supreme Court case of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) and stated that both Salim Sadru and Wangechi Gichuki testified under oath before the Arbitral Tribunal and contradicted their testimonies in their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019, respectively, and deliberately suppressed the Deed of Settlement dated 1st August, 2018 from the plaintiff and the Arbitral Tribunal, that was executed during the pendency of the arbitration, thus committing a criminal offence.
 6. The plaintiff's Counsel relied on the case of Khen Kharis Mburu & another v James Karong Ng'ang'a & another [2021] eKLR and stated that Salim Sadru and Wangechi Gichuki must be cross-examined in open Court in respect of their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019 so as to explain why they gave contradictory evidence in the High Court, which evidence contradicted their sworn evidence before the Arbitral Tribunal, why they materially failed to disclose the existence of the Deed of Settlement before the Tribunal and the High Court, why they acted in contempt of two orders safeguarding the property, and why they accused the Arbitrator of misconduct



- when they made admissions during the arbitral proceedings and later filed contradictory statements to aid in the unlawful setting aside of the Arbitral Award.
7. The plaintiff's Counsel asserted that the firms of Iseme Kamau & Maema Advocates and Ahmednasir, Abdikadir & Company Advocates were aware of the terms of the Deed of Settlement but failed in their duties as officers of the Court to bring it to the Court's attention and that of the plaintiff's Advocates when applying to set aside the Arbitral Award. He referred to the provisions of Sections 55 & 56 of the Advocates Act and submitted that this Court has the requisite jurisdiction to order the two law firms to cease from representing their clients forthwith. To buttress the said submission, Mr. Gichuhi (SC), relied on the Supreme Court case of Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR, where the Court elaborated on the duty of an Advocate.
 8. Mr. Karori Kamau (SC), learned Counsel for the 1st defendant cited Articles 48 & 50(2)(g) of the Constitution of Kenya, 2010, and the case of Silvana Mukwairo Mwiandi & another v Severino Gitonga Njoka [2021] eKLR and submitted that the right to legal representation by Counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice, and it is only in very exceptional circumstances that this right should be taken away. He further submitted that the test of whether conflict of interest arises in an Advocate's representation of a client was set by the English Court of Appeal in Rakusen v Ells Munday & Clarke [1912] 1 CH 831 ALL ER, which was cited with approval by the Court of Appeal in Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR. He contended that the instant application has not met the test for conflict of interest to warrant this Court's exercise of its discretion to bar the impugned firms from representing the 1st defendant and the 1st interested party.
 9. It was stated by Mr. Karori (SC) that the plaintiff has not demonstrated that any of the documents and evidence filed by the firm of Iseme, Kamau & Maema Advocates were fabricated as alleged at all, and/or that the said firm was aware of the Deed of Settlement before the plaintiff filed it in Court, and that it deliberately opted to suppress it. He stated that in any event, the plaintiff in its affidavit in support of the instant application confirmed that the Deed of Settlement in question was drafted by the law firms of Hamilton Harrison & Mathews and Robson Harris Advocates. He further stated that the terms set out in the Deed of Settlement between the 1st defendant and the 1st interested party were not relevant to the arbitration proceedings involving the plaintiff, as confirmed by the plaintiff in opposing the consolidation of the two arbitral proceedings. Senior Counsel contended that based on the above, the plaintiff cannot now accuse the 1st defendant & 1st interested party of failing to disclose the terms of how the arbitration before A.F Gross was concluded.
 10. Mr. Karori (SC) submitted that the above notwithstanding, the plaintiff was at liberty to seek discovery and production of the relevant documents, if it was interested in getting a copy of the full terms of the Deed of Settlement. He stated that the said Deed is not new information which could not have been produced at the time of hearing the applications for setting aside the Arbitral Award after exercise of due diligence.
 11. He further stated that the issue of non-disclosure of material evidence, being the Deed of Settlement, was heard and determined by the Court in Nairobi ELC Petition No. 11 of 2021 where the parties herein were heard on the issue, and the Court dismissed the said allegation. Mr. Karori Kamau (SC) relied on the case of Mohamed Dado Hatu v Dhadho Gaddae Godhana & 2 others [2017] eKLR and asserted that in view of the foregoing, the doctrine of estoppel and res judicata are applicable in this case.
 12. Mr. Ahmednasir (SC), for the 1st interested party submitted that the Deed of Settlement between the 1st defendant and the 1st interested party is not a document that was suppressed as alleged, and if the plaintiff was interested in getting a copy of the full terms of the settlement, it would have



sought for discovery and production of the said document. He further submitted that the allegation of suppression of the Deed of Settlement by the 1st defendant and the 1st interested party, had been raised before by the plaintiff in ELC Petition No. 11 of 2023, where the said issue was determined with finality by the Court therein. He stated that the said issue having been heard and determined by a Court of competent jurisdiction is res judicata and cannot be argued before this Court.

13. He pointed out that the plaintiff is asking this Court to stay the hearing of the two Preliminary Objections filed by the 1st defendant and the 1st interested party, but it is trite that where a Preliminary Objection has been filed, it ought to be heard and determined first. He submitted that the said prayer is legally unsound and goes against the overriding objectives of the Civil Procedure Act and Rules. He asserted that the core issues raised in the said Preliminary Objections touch on the Court's jurisdiction which ought to be interrogated at the very inception, as without jurisdiction the Court must down its tools. He cited the case of the Owners of The Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.
14. Mr. Ahmednasir SC submitted that the right to legal representation by a Counsel of one's choice is a fundamental aspect of the right to a fair trial and access to justice, thus upholding this right ensures that individuals can effectively assert their legal rights and interests, participate meaningfully in legal proceedings, and safeguard their liberty and rights under the law. He referred to the Court of Appeal case of William Audi Odode & another v John Yier & another Court of Appeal Civil Application No. Nai 360 of 2004 (KSM33/04) and stated that it is only in exceptional circumstances that a party's right to Counsel of their choice should be taken away. He posited that in this case, the plaintiff has not adduced any evidence in support of the prayer seeking the law firms representing the 1st defendant and the 1st interested party to be restrained from representing them for fabricating evidence.
15. In a rejoinder, Mr. Allen Gichuhi (SC) submitted that the judgment of the Court in ELC Petition No. 11 of 2023 does not bar this Court from proceeding with matters that are live before it. He stated that the compulsory acquisition of the suit property is still an issue before this Court, and the caveat still protects the suit property. Further, that the application for setting aside of the Arbitral Award was filed after they became aware of the existence of the Deed of Settlement and after the filing of ELC Petition No. 11 of 2023.

ANALYSIS AND DETERMINATION.

16. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavits by the 1st defendant & the 1st interested party, as well as the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the issue of suppression of the Deed of Settlement dated 1st August 2018, fabrication of evidence, perjury and giving of contradictory statements by one Salim Sadru and Wangechi Gichuki is res judicata;
 - ii. Whether Salim Sadru and Wangechi Gichuki should be cross-examined in open Court in respect of their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019, respectively; and
 - iii. Whether the firms of Iseme Kamau & Maema Advocates and Ahmednasir, Abdikadir & Company Advocates should be barred from representing the 1st defendant and 1st interested party, respectively.
17. The plaintiff in its affidavit in support of the instant application deposed that the recital of the Deed of Settlement recognized the pending arbitral dispute before Zehrabanu Jammohamed, but the 1st



- defendant failed to settle the matter with the plaintiff and the 2nd defendant as provided for under Clauses 3.2, 3.3, 3.5, & 3.6 of the said Deed. The plaintiff averred that the 1st interested party filed an application to set aside the Arbitral Award, despite the fact that Clause 3.5 of the Deed of Settlement only provided an avenue for the 1st defendant to file the said application. The plaintiff deposed that neither the 1st defendant nor the 1st interested party brought out the terms of the Deed of Settlement to the Court.
18. It was stated by the plaintiff that there was material concealment by the 1st defendant and the 1st interested party of correspondence showing that the Government in 2017 directed the 1st defendant to reach a settlement of the dispute with the plaintiff, following the compulsory acquisition of the suit property. That the two parties concealed correspondence over the compulsory acquisition from the plaintiff, deliberately withheld the letter dated 7th March 2017 from the Cabinet Secretary of ICT informing the CEO of Telkom to inform the arbitration process of the intended acquisition and thereafter submit a limited consent regarding whom the amount of compensation should be paid to. That they also concealed the Deed of Settlement during the pendency of the arbitral proceedings and in the application to set aside the Arbitral Award.
 19. The plaintiff contended that suppression of the Deed of Settlement was a criminal offence as it had material impact on both applications. The plaintiff expressed concern that the 1st defendant and 1st interested party's Advocates were involved in the drafting of the Deed of Settlement and failed to bring this to the attention of the plaintiff's Advocates, to the Arbitral Tribunal and the Court. The plaintiff confirmed that over the years the 1st defendant has appointed different law firms to represent it in the dispute. It asserted that had the plaintiff and the 2nd defendant been aware of the Deed of Settlement, the applications were unlikely to succeed.
 20. The plaintiff deposed that Wangechi Gichuki and Salim Sadru made statements on oath that contradicted their evidence under oath before the Arbitral Tribunal in contravention of Section 122 of the Penal Code, and by swearing affidavits. The plaintiff contended that to depart from the sworn evidence before the Tribunal is tantamount to fabricating evidence, and that demands their immediate cross-examination to establish if an offence has been committed under Section 113 of the Penal Code. The plaintiff asserted that they must be cross-examined in open Court in respect of their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019 with a view of explaining why they gave evidence in the High Court that contradicted their sworn evidence in the Arbitral proceedings, and why they materially failed to disclose the existence of the Deed of Settlement before the Tribunal and the High Court, and why they acted in contempt of two orders in respect to safeguarding the property.
 21. The plaintiff averred that the law firms of Iseme Kamau & Maema Advocates and Ahmednassir, Abdikadir & Company Advocates were aware of the terms of the Deed of Settlement but failed to bring it to the attention of the plaintiff's Advocates, the Arbitral Tribunal and the Court when applying to set aside the Arbitral Award. The plaintiff further averred that this Court has jurisdiction under Sections 55 and 56 of the *Advocates Act* to order the said law firms to cease representing their clients forthwith, as they may be subjected to cross-examination as officers of the Court for failing to disclose the terms of the Deed of Settlement when they filed the application to set aside the Arbitral Award.
 22. The 1st defendant in its replying affidavit deposed that the prayer for cross-examination of Wangechi Gichuki and Salim Sadru should not be granted since their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019 were in support of the 1st defendant's application to set aside the Arbitral Award dated 6th September, 2019. That in response to the said application, the plaintiff filed a replying affidavit sworn on 21st November, 2019 where it raised similar allegations of perjury, conspiracy to defeat justice, false swearing and deception of witnesses at paragraphs 8, 9, 10, 11, and 12. The 1st



- defendant averred that the plaintiff also raised the said allegation and the applicability of the doctrine of *lis pendens* to this matter, at paragraph 12 of the said replying affidavit, and that the Court of Appeal in Civil Appeal No. 135 of 2013 reinstated a caveat. The 1st defendant stated that the Court in its ruling delivered on 22nd April, 2021, considered those allegations at paragraphs 39, 40, 47, 48, 54 and dismissed the plaintiff's case and allowed the 1st defendant and 1st interested party's applications.
23. The 1st defendant averred that a perusal of the proceedings taken before the 2nd interested party show that the 1st defendant and the 1st interested party disclosed at the arbitral proceedings that there was a sale agreement entered into between the 1st defendant and the 1st interested party in July 2011 in respect of the suit property. That thereafter, a dispute arose between the 1st defendant and the 1st interested party regarding performance of the sale agreement, resulting in the dispute being referred to arbitration before A.F. Gross, Arbitrator. That later, the 1st defendant made an application for consolidation of the two arbitral proceedings to the Court, but the plaintiff successfully opposed it on various grounds including that the plaintiff had no interest in the dispute relating to the 1st interested party and the 1st defendant.
 24. The 1st defendant also averred that the plaintiff was now prevaricating and flip flopping by changing tune and alleging that the agreement, subsequent arbitration between the 1st defendant and 1st interested party as well as the terms of settlement of the said dispute were so key that they should have become disclosed when it opposed consolidation of the arbitration proceedings.
 25. The 1st defendant deposed that the 1st interested party disclosed to the Court vide its application dated 31st October, 2022 (sic) (on referring to annexure NM-4 attached to the 1st defendant's replying affidavit sworn on 22nd January, 2024, opposing the present application, the correct date of the interested party's application was 31st October, 2019), at paragraphs (d), (e), (f), (g) and (h) of its application that the 1st interested party entered into a sale agreement with the 1st defendant for the suit property in July 2011. That it also disclosed that following a dispute with the 1st defendant, the said dispute had been referred to arbitration before A.F. Gross, Arbitrator, and it was resolved by consent settlement between the 1st defendant and the 1st interested party.
 26. The 1st defendant deposed that if the applicant was interested in getting a copy of the full terms of the settlement at the time, it ought to have sought discovery and production of the relevant documents. It averred that the Deed of Settlement is therefore not new information which could not have been produced at the time of the hearing of the applications for setting aside with due diligence. That in any event, the terms of the said settlement between the 1st defendant and the 1st interested party were not relevant to the arbitration proceedings involving the plaintiff, as confirmed by the plaintiff itself in opposing the consolidation of the two arbitral proceedings.
 27. The 1st defendant deposed that the plaintiff has not demonstrated that if the Deed of Settlement had been produced, the outcome of the applications for setting aside the Arbitral Award would have been different, and that the findings of this Court regarding the Arbitrator's misconduct would not have been made. The 1st defendant stated that in the circumstances, cross-examination of Salim Sadru and Wangechi Gichuki in respect thereof, would be completely unnecessary and a waste of precious judicial time.
 28. The 1st defendant contended that by seeking stay of highlighting of submissions in respect of the application dated 3rd October, 2023, the plaintiff is also seeking stay of consideration of the prayer to cross-examine Salim Sadru and Wangechi Gichuki, thus rendering prayer No. 2 of this application self-contradictory, which is a violation of the sub-judice doctrine, an abuse of the Court process and incapable of being granted.



29. The 1st interested party in its replying affidavit deposed that on 18th December 2023, the Court issued directions specifically directing the parties to address prayer No. 3 of the application herein. The 1st interested party averred that the alleged material suppression of the Deed of Settlement dated 1st August, 2018 is false and an attempt to mislead this Court. Further, that vide an agreement dated 5th July, 2011, the 1st defendant agreed to sell to it all that piece of land known as LR No. 7656 Nairobi situated for Kshs.1,520,000,000/=. That subsequently, it paid 10% of the purchase price under the sale agreement as deposit which has been retained by the 1st defendant.
30. The 1st interested party stated that on or about 19th July, 2011, which was during the subsistence of the sale agreement, the 1st defendant informed it that it had been served with a Court Order issued in Judicial Review No. 69 of 2011 which frustrated the said agreement and purported to try and rescind the contract. That it rejected the said contention and filed a suit HCCC No. 440 of 2011, seeking inter alia specific performance under the sale agreement, and the Court therein referred the said dispute to arbitration before Arbitrator A.F. Gross, but the arbitral proceedings were compromised by a consent of the parties under a Deed of Settlement dated 1st August, 2018, which the plaintiff herein is purporting to be new evidence.
31. It was averred by the 1st interested party that during the arbitration proceedings before Ms. Zehrabanu Janmohamed, Arbitrator, she was aware of the proceedings before A.F. Gross, Arbitrator, and that the 1st defendant sought an order for consolidation of the two arbitrations but the said application was successfully opposed by the plaintiff herein. The 1st interested party further stated that the plaintiff being fully aware of the dispute between the 1st defendant and the 1st interested party which had been referred to arbitration, and the fact that the said arbitral proceedings were settled via a Deed of Settlement between the said parties, and if it was interested in knowing the terms of the said settlement, it could have requested for the said documents.
32. The 1st interested party deposed that the allegations that there was suppression of evidence, fabrication of evidence, perjury and giving contradictory statements by one Salim Sadru and Wangechi Gichuki who the plaintiff now wants to cross-examine are not based on any facts or evidence presented before this Court, thus it ought to be dismissed. The 1st interested party averred that it is entitled to representation of an Advocate of its choice, and this should not be taken away from it based on unfounded allegations.

Whether the issue of suppression of the Deed of Settlement dated 1st August 2018 fabrication of evidence, perjury and giving contradictory statements by one Salim Sadru and Wangechi Gichuki is res judicata.

33. The doctrine of res judicata is provided under Section 7 of the *Civil Procedure Act*, 2010 which states as follows-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



34. In the case of Gurbachan Singh Kalsi v Yowani Ekori Civil Appeal No. 62 of 1958, the former East African Court of Appeal when dealing with a similar issue held that -

“The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

35. The 1st defendant and 1st interested party contended that the issue of suppression of the Deed of Settlement dated 1st August, 2018, fabrication of evidence, perjury and giving contradictory statements by one Salim Sadru and Wangechi Gichuki is res judicata since it was heard and determined by this Court in its ruling delivered on 22nd April, 2021 and the ELC Court in ELC Petition No. 11 of 2023. None of the parties herein attached a copy of the judgment that was delivered in ELC Petition No. 11 of 2023. On perusal of the cross petition filed by the plaintiff herein, in the said petition, I note that the issue of suppression of the Deed of Settlement dated 1st August, 2018, fabrication of evidence, perjury and giving contradictory statements by one Salim Sadru and Wangechi Gichuki was raised at paragraphs 13, 14 & 15 of the cross-petition and in response to the amended petition.

36. The ruling delivered on 22nd April, 2021 was with respect to the 1st defendant and 1st interested party's applications seeking to set aside the Arbitral Award dated 1st November, 2019 and 31st October, 2019, respectively. In response to the said applications, the plaintiff filed a replying affidavit sworn by its Director, Francis Mburu Mungai on 21st November, 2019. In the said affidavit, the plaintiff raised the issues of suppression of the Deed of Settlement dated 1st August, 2018, fabrication of evidence, perjury and giving contradictory statements by one Salim Sadru and Wangechi Gichuki at paragraphs 7, 8, 9, 11, 12, 15. However, on perusal of the Court's ruling delivered on 22nd April, 2021, I note that these issues were not determined by the Court. The Court at paragraphs 39, 40, 47, 48, 54 summarized and/or reproduced the contents of the party's affidavits. Those paragraphs do not constitute the Court's findings.

37. The principles to be established by a party relying on a plea of res judicata were laid down by the Court in the case of Abok James Odera v John Patrick Machira Civil Application No. Nai. 49 of 2001 as hereunder:

- “(i) a previous suit in which the matter was in issue;
- (ii) the parties were the same or litigating under the same title;
- iii. a competent court heard the matter in issue; and
- iv. the issue had been raised once again in a fresh suit.”

38. Despite the fact that the issues of suppression of the Deed of Settlement dated 1st August, 2018, fabrication of evidence, perjury and giving contradictory statements by one Salim Sadru and Wangechi Gichuki have previously been raised by the plaintiff, the said issues have never been determined by a



Court of competent jurisdiction. Therefore, a plea of res judicata cannot be successfully raised by the 1st defendant and the 1st interested party in that regard.

Whether Salim Sadru and Wangechi Gichuki should be cross-examined in open Court in respect of their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019, respectively.

39. The plaintiff is seeking an order for cross-examination of Salim Sadru and Wangechi Gichuki in respect of the contents of their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019, respectively, so that they can explain why they gave evidence in the High Court that contradicted their sworn evidence before the Arbitral Tribunal, and why they materially failed to disclose the existence of the Deed of Settlement before the said Tribunal and the High Court, and why they acted in contempt of two orders safeguarding the property. The plaintiff submitted that this prayer has been necessitated by the recent discovery of the fact that the 1st interested party and the 1st defendant did not disclose to the Court, the Arbitral Tribunal and the plaintiff's Advocate of the existence of the Deed of Settlement dated 1st August, 2018. The plaintiff further submitted that neither the plaintiff, nor the 2nd defendant was in a position to seek production of the said Deed of Settlement since they were not aware of and/or made aware of its existence.
40. From the foregoing, it is evident that the plaintiff's bone of contention with the 1st defendant and 1st interested party is the Deed of Settlement dated 1st August, 2018. The 1st defendant averred that the plaintiff was at all material times fully aware of the fact that it and the 1st interested party got into a sale agreement for the sale of the suit property, a dispute then arose, and as a result thereof, the 1st interested party instituted a suit against the 1st defendant in HCCC No. 440 of 2011 seeking orders for specific performance. Subsequently, the Court in the said case referred the dispute therein to Arbitration before A.F. Gross, Arbitrator.
41. The record reveals that the dispute in this suit had also been referred to arbitration before Zehrabanu Jan Mohamed, Arbitrator, then the 1st defendant applied to the said Arbitrator and thereafter to the Court in HCCC No. 440 of 2011 to have the two arbitral proceedings consolidated. The plaintiff however successfully opposed the said application on grounds inter alia that the cause of action in this suit is different from the one in HCCC No. 440 of 2011, that it was not a party in HCCC No. 440 of 2011, and it had no interest whatsoever in the said suit. Notably, the arbitral proceedings before A.F. Gross, Arbitrator, were terminated by the Deed of Settlement dated 1st August, 2018.
42. That being this case, the Court finds that the plaintiff's assertion on the one hand that it had no interest in the proceedings in HCCC No. 440 of 2011 which gave rise to the arbitral proceedings before A.F. Gross, Arbitrator, and on the other hand that the 1st defendant and the 1st interested party had a duty to disclose the Deed of Settlement dated 1st August, 2018, to the Arbitral Tribunal presided by Zehrabanu Jan Mohamed, Arbitrator, to the plaintiff's Advocate, and to this Court, to be not only untidy but also misleading. Further, I am not persuaded that the plaintiff and the 2nd defendant were not aware of the Deed of Settlement dated 1st August, 2018 since they were aware of the Arbitral proceedings before A.F. Gross, Arbitrator, and they referred to the Deed of Settlement and even accused the 1st defendant and the 1st interested party of suppressing the said document in its cross-petition in ELC Petition No. 11 of 2023 and in its replying affidavit in opposition to the 1st defendant's and 1st interested party's applications dated 1st November, 2019 and 31st October, 2019, respectively.
43. Cross-examination of a deponent of an affidavit is provided for under Order 19 Rule 2(1) of the Civil Procedure Rules, 2010 which provides that in any application, evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the



deponent. In the case of *G G R v H-P S* [2012] eKLR the Court stated the general rule with respect to cross-examination of a deponent of an affidavit is as follows-

“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the truth, it is just and fair to order cross examination.” (emphasis added).

44. It is trite law that a Court’s power to order for cross-examination of a deponent of an affidavit is not only discretionary but should also be exercised judiciously and not whimsically. In this case, in as much as the plaintiff contends that Salim Sadru and Wangechi Gichuki are guilty of suppression of the Deed of Settlement dated 1st August, 2018, fabrication of evidence, perjury and giving contradictory statements, it has not tendered any evidence in support of these allegations. It is worth noting that all through the plaintiff’s pleadings and submissions before this Court, the plaintiff heavily relies on the allegation of suppression of the Deed of Settlement dated 1st August, 2018 by the 1st defendant and the 1st interested party as a ground for the said cross-examination. However, as explained hereinbefore, this Court has already found that the plaintiff was aware of the existence of the said Deed of Settlement. If it all it wished to rely on its contents, it would have sought for discovery and/or production of the said document from either the 1st defendant or the 1st interested party, but it did not.
45. Based on my findings in paragraph 42 of this ruling, it is my considered view that the proceedings before A.F. Gross, Arbitrator, were completely independent of the proceedings herein and those before Zehrabanu JanMohamed, Arbitrator.
46. Further, the issue of whether or not the 1st defendant and the 1st interested party acted in contempt of two orders safeguarding the suit property cannot be addressed in this Court. If at all the plaintiff is of the view that the 1st defendant and the 1st interested party are in contempt of Court, it is at liberty to pursue contempt of Court proceedings in the appropriate Court which issued the orders that the 1st defendant and the 1st interested party are allegedly in contempt of.
47. In the circumstances, this Court is not persuaded that adequate material has been placed before it to demonstrate that in the interest of justice and to arrive at the truth, it is just and fair to order for cross-examination of Salim Sadru and Wangechi Gichuki in respect of the contents of their supporting affidavits sworn on 31st October, 2019 and 1st November, 2019, respectively.
48. Consequently, it is my finding and I hold that there is no need for an order for investigation of Salim Sadru and Wangechi Gichuki on allegations of suppression of evidence, fabrication of evidence, perjury, conspiracy to defeat justice and giving contradictory statements.

Whether the firms of Iseme Kamau & Maema Advocates and Ahmednasir, Abdikadir & Company Advocates should be barred from representing the 1st defendant and the 1st interested party, respectively.



49. Rule 8 of the Advocates (Practice) Rules provides that -

“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”

50. The plaintiff submitted that the law firms of Iseme Kamau & Maema Advocates and Ahmednasir, Abdikadir & Company Advocates were aware of the terms of the Deed of Settlement but failed in their duties as officers of the Court to bring it to the Court’s attention and that of the plaintiff’s Advocates when applying to set aside the Arbitral Award. The plaintiff contended that this Court has jurisdiction to order them to cease from representing their clients pursuant to the provisions of Sections 55 and 56 of the *Advocates Act*, since they may be subjected to cross-examination for failing to disclose the terms of the Deed of Settlement.

51. In opposition to the said contestation, the 1st defendant submitted that the Deed of Settlement dated 1st August, 2018 was drafted by the law firms of Hamilton Harrison and Mathews and Robson Harris Advocates, and that notwithstanding, the terms of the said Deed had nothing to do with the plaintiff herein.

52. The Court of Appeal in the case of *Delphis Bank Limited v Channan Singh Chatthe & 6 others* (supra) cited with authority the case *Rakusen v Ellis, Munday & Clarke* (supra) and laid down the test for disqualification of an Advocate as follows -

“...there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice will in all human probability result...”

53. On perusal of the Deed of Settlement dated 1st August, 2018, it is evident that it was not drafted by the 1st defendant’s and 1st interested party’s current Advocates on record. To the contrary, the said Deed of Settlement was drafted by the law firms of Hamilton Harrison and Mathews and Robson Harris Advocates as correctly submitted by Counsel for the 1st defendant. Further, this Court has already held that there was no material placed before it by the plaintiff to demonstrate that the 1st defendant and the 1st interested party suppressed and/or concealed the existence of the Deed of Settlement dated 1st August, 2018 from the plaintiff’s Advocates, this Court and the Arbitral Tribunal before Zehrabanu JanMohamed, Arbitrator. As a result, the law firms of Iseme Kamau & Maema Advocates and Ahmednasir, Abdikadir & Company Advocates cannot be found guilty and/or culpable of failing to bring to the Court’s attention and that of the plaintiff’s Advocates the existence of the Deed of Settlement dated 1st August, 2018 at the time the 1st defendant and the 1st interested party made applications seeking to set aside the Arbitral Award by Zehrabanu JanMohamed, Arbitrator.

54. A party to a suit has a constitutionally underpinned right to be represented by an Advocate of his/her/ its choice in a suit, but the said right could be put to serious test if there was an allegation of conflict of interest, which could in turn endanger the principle of confidentiality in an Advocate/Client fiduciary



relationship, or where an Advocate could also double up as witness. The Court in the case of *Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd* [2021] eKLR in dismissing an application similar to the instant one set out the general principles guiding the disqualification of an Advocate from appearing for a client in a matter as hereunder -

- “(i) The basis upon which a Court disqualifies an Advocate from acting arises from the need to protect the interests of administration of justice. Whereas it is understood that choice of Counsel is an entitlement of a party, such Counsel must always bear in mind that he/she becomes an officer of the Court and as such owes an allegiance to a higher cause (justice and truth) than serving the interests of the client;
- (ii) Disqualification of an Advocate is only desirable in contentious matters and where there is or was an Advocate-Client relationship;
- (iii) It must be apparent that the Advocate sought to be disqualified will be required as a witness to give evidence in the matter;
- (iv) It is desirable that when the principle of confidentiality in an Advocate/Client fiduciary relationship will be prejudiced or where there is a possibility of real conflict of interest, then an Advocate sought to be disqualified ceases to appear in the matter;
- (v) The fact that an Advocate acted for a litigant does not, per se, lead to a situation of conflict of interest;
- (vi) Conflict of interest is an issue of fact which must be proved by way of evidence; and
- (vii) It is not a requirement that in a situation where a firm of Advocates acted for the opposite party all the Advocates in the firm be disqualified from the matter. In such an instance, only the Advocates who are in possession of confidential information relevant to the matters in issue before Court or Tribunal may be called upon to cease from appearing in the matter.”

55. In this instance, the plaintiff has not alleged that there exists conflict of interest by virtue of the impugned law firms representing the 1st defendant and the 1st interested party. In addition, the plaintiff has not fulfilled and/or demonstrated any of the principles that were laid down by the Court in the case of *Murgor & Murgor Advocates v Kenya Pipeline Co. Ltd* (supra). The plaintiff has also not alleged and/or demonstrated what prejudice it will suffer in the event that the law firms of Iseme Kamau & Maema Advocates and Ahmednasir, Abdikadir & Company Advocates continue representing the 1st defendant and the 1st interested party in this suit.

56. As such, this Court finds that the plaintiff has not made out a case to warrant issuance of an order restraining or barring the law firms of Iseme Kamau & Maema Advocates and Ahmednasir, Abdikadir & Company Advocates from representing the 1st defendant and the 1st interested party, respectively.

57. In the end, this Court finds that the Notice of Motion application dated 13th December, 2023 is bereft of merits. It is hereby dismissed with costs to the 1st defendant and the 1st interested party.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Allen Gichuhi (SC) for the plaintiff/applicant

Mr. Nyaburi for the 1st defendant

Ms Wangui h/b for Mr. Ahmednasir (SC) for the 1st interested party

Mr. Richu h/b for Mr. Anzala for the 2nd defendant

Mr. Angelo Makuwei h/b for Mr. Kere for the 2nd interested party

Ms B. Wokabi – Court Assistant.

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