



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 2 OF 2021

ASPIRE LIMITED.....PLAINTIFF

VERSUS

ZEDKA TECHNICAL SERVICES LIMITED.....1ST DEFENDANT

LAND REGISTRAR UASIN GISHU.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

RULING

This ruling is in respect of a preliminary objection raised by counsel for the 2nd and 3rd defendants on 15th April 2021 on the ground that the firm of Kitiwa & Company Advocates should be disqualified from representing the Plaintiff as the firm participated in drawing of the Sale Agreement that is the subject matter of the suit herein and such the firm is a potential witness.

Mr Odongo submitted that a party has a right to choose an advocate of his or her choice and that it is not in dispute that the firm of Kitiwa Advocate acted for both parties in the sale agreement.

Counsel further the documents that they will rely on are the sale agreement and the correspondence from the firm of Kitiwa & Co Advocates. That the law of Evidence is clear on production of documents by the maker hence the firm will be required to produce the agreement which raises conflict of interest.

Mr Odongo therefore urged the court to uphold the preliminary objection as prayed.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel for the Plaintiff opposed the application and submitted that the plaintiff has a right to be represented by an Advocate of his choice and further that the Plaintiff does not intend to call the firm of Kitiwa & Company Advocates to testify on its behalf. Ms Achaya relied on the cases of **KENYA COMMERCIAL BANK LTD V MUKESHKUMAR KANTILAL PATEL & ANOTHER [2015] eKLR** and **DOROTHY SEYANOI MOSCHIONI V ANDREW STUART & ANOTHER [2014] eKLR** where the Courts declined the invitation to disqualify an Advocate on record for one of the parties for preparing a Sale Agreement that was in issue in the suit. Counsel therefore urged the court to dismiss the preliminary objection with costs to the respondent.

ANALYSIS AND DETERMINATION

The issue for determination is whether the firm of Kitiwa & Co. Advocates should be disqualified from acting for the plaintiff in this matter having acted for both parties in a sale agreement.

In the case of **GUARDIAN BANK LIMITED V SONAL HOLDINGS (K) LIMITED & 2 OTHERS [2014] eKLR** the Court enumerated the issues to be considered in making determination whether to disqualify an Advocate from representing a party in a matter as follows:

[11] This application is about Rule 8 of the Advocates (Practice) Rules which provides as follows;

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.

[12] I will not re-invent the wheel. All the cases which have been quoted by counsels are relevant. I will not multiply them too. What I need to state is that, in applications for disqualification of a legal counsel, a court of law is not to engage a cursory look at the argument that “these advocates participated in the drawing and attestation of the Deeds in dispute”; as that kind of approach may create false feeling and dilemmas; for it looks very powerful in appearance and quite attractive that those advocates should be disqualified from acting in the proceedings. It is even more intuitively convincing when the applicant say “ I intend to call them as witnesses”. **What the court is supposed to do is to thrust the essential core of the grounds advanced for disqualification, look at the real issues in dispute, the facts of the case and place all that on the scale of the threshold of the law applicable.** In the process, courts of law must invariably eliminate any possibility that the arguments for disqualification may have subordinated important factual and legal vitalities in the transactions in question while inflating generalized individual desires to prevent a party from benefiting from a counsel who is supposedly should be “their counsel” in the conveyancing transaction. I say these things because that kind of feeling is associated with ordinary human sense where both parties in the suit were involved in the same transaction which was handled by the advocate who now is acting for one of the parties in a lawsuit based on the very transaction; and the feeling is normally expressed in an application for disqualification of the counsel concerned in the hope it will pass for a serious restriction to legal representation. But the law has set standards and benchmarks which must be applied in denying a person of legal representation of choice; the decision must not be oblivious of the centrality of the right to legal representation in the Constitution as the over-arching hanger; equally, it should not be removed from reach to the sensitive fiduciary relation between an advocate and his clients, which in transactions such as these, would prevent the advocate from using the privileged information he received in the employ of the parties, to the detriment of one party or to the advantage of the other; it must realize that the advocate has a duty not only to himself or his client in the suit, but to the opponent and the cause of justice; but in all these, it must be convinced that real mischief and real prejudice would result unless the advocate is prevented from acting in the matter for the opponent. The real questions then become: Is the testimony of the advocate relevant, material or necessary to the issues in controversy? Or is there other evidence which will serve the same purpose as the evidence by counsel? Eventually, each case must be decided on its own merits, to see if real mischief and real prejudice will result in the circumstances of the case. And in applying the test, if the argument on disqualification becomes feeble and inconsistent with causing real mischief and prejudice, then a disqualification of counsel will not be ordered.

Counsel for the applicant does not state what prejudice the applicant will suffer if the firm of Kitiwa Advocates represents the plaintiff. What is the confidential information that counsel is likely to steal a match against the defendant? The agreement is plain and simple and from the look of the agreement there would be no reason why the advocate would be called to give evidence on the same.

Furthermore, the firm of Kitiwa has associates who can handle the matter if the defendant is apprehensive of any conflict of interest. In the case of **DOROTHY SEYANOI MOSCHIONI (SUPRA)** the Court observed thus:

The party applying must show there is real possibility of the advocate concerned using the privileged information to the detriment of the said party and or to the advantage of the other party.

The applicant has not proved that there is any possibility of the advocate using any privileged information in relation to the sale agreement against the opposite party.

The upshot is that the preliminary objection has no merit and is dismissed with costs to the plaintiff.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF AUGUST 2021

M. A. ODENY

JUDGE