



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 241 OF 2020

JAMAL ABEID KHAMIS

MOHAMED ABEID KHAMIS

ABDULHAKIM ABEID KHAMIS.....PLAINTIFFS/APPLICANTS

VERSUS

AINUSHAMSI MULTIPLE AGENCIES LTD.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 12th of March 2021 and is brought under Section 1A, 1B and 3A of the Civil Procedure Act, Rule 9 of the Advocates (Practice) Rules and Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 Laws of Kenya and seeks the following orders;

1. That the firm of Marende Nacheza & Company Advocates by itself, its partners, Associates, employees and or agents be barred and removed from the record representing the defendant/respondent.
2. That the costs of this application be provided for.

It is based on the grounds that the defendant's advocates one Shimaka N. Leonard acted for the Purchaser in the agreement for sale of piece of land known as Plot No. Kilifi/Kawala'A' Kadzonzo/32. That at the time of sale of the suit property, he confirmed that the property had a clean title. That the said advocated cannot now act for the defendant alleging that the suit property belongs to the defendant herein. That it is just and fair that this Honourable Court do bar the defendant's counsel from acting in this matter

The respondent submitted that the issue of ownership of Plot No. Kilifi/Kawala'A' Kadzonzo/32 is the subject of these proceedings hence he will not comment on the same. That indeed the sale agreement was drawn by the firm of Khatib & Company Advocates who acted for the purchaser therein and also represents the applicants. That he only witnessed the same and in fact the firm of Khatib & Company Advocates should be the ones to cease acting for the applicant. That further the said firm of Marende Necheza & Company Advocates was not in conduct and/or did not act in the transaction as it was not in existence at the time. That as per the agreement the firm which acted for the vendor was Marende Birir & Company Advocates where he was only an employee. That the application herein has not demonstrated how the firm of Marende Necheza & Company Advocates being on record will prejudice the hearing and determination of the matter. That he has not made any claim whatsoever over the subject property. That the alleged representation if any was only limited to the witnessing of document but not any suit as alleged herein. That the application herein is thus, misconceived malicious and an abuse of the court process as there is no conflict of interest that may arise.

This court has carefully considered the application and the submissions therein. Rule 9 of the Advocates (Practice Rules) states 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.”

Be that as it may all litigants have the right to be represented by counsel of their own choice. The question then, is whether this is an absolute right. That question was answered by the Court of Appeal in the case of **Delphis Bank Ltd vs Chatt & 6 Others (2005) 1KLR** where it was

held that a litigant's right to legal representation by an advocate of his choice is not absolute. In that case the Court of Appeal held as follows;

“1. The right to a legal representative or advocate of his choice is a most valued constitutional right to a litigant. In some cases, however particularly civil cases, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness.

2. 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 possibility result”

In respect to possible conflict of interest the Court of Appeal in *Delphis Bank Ltd v Channan Singh Chatthe & 6 others* (2005) eKLR observed that;

“There is otherwise 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 this Court is whether real mischief or real prejudice will in all human probability result.”

In the case of *British-American Investments Company (K) Limited vs Njomaiha Investments Limited & another* (2014) eKLR, the court reiterated that existence of conflict of interest must be demonstrated and stated as follows;

“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.”

In the instant case the applicant stated that the defendant's advocates one Shimaka N. Leonard acted for the purchaser in the agreement for sale of piece of land known as Plot No. Kilifi/Kawala 'A' Kadzonzo/32. That at the time of sale of the suit property, he confirmed that the property had a clean title. That the said advocated cannot now act for the defendant alleging that the suit property belongs to the defendant herein. The respondent submitted that as per the agreement the firm which acted for the vendor was Marende Birir & Company Advocates where he was only an employee and only a witness to the agreement. That the application herein has not demonstrated how the firm of Marende Necheza & Company Advocates being on record will prejudice the hearing and determination of the matter I have perused the sale agreement in question and indeed find that the said defendant's advocate one Shimaka N. Leonard did witness the agreement on behalf of the purchaser by signing and stamping with his official stamp The issue in question in this matter is ownership of the suit land Plot No. Kilifi/Kawala 'A' Kadzonzo/32 . I find this is a clear conflict of interest if the said advocate now represents a third party who is claiming the same parcel of land.

In my view, on the surrounding circumstances of this case, I hold the opinion that the presence of the law firm of Marende Necheza & Company Advocates in this litigation will be prejudicial to a fair trial. I find the application is merited. I order the law firm of Marende Necheza & Company Advocates to cease acting for the defendant forthwith. The defendant is at liberty to appoint another advocate within the next 30 days. If no advocate is appointed, then the defendant shall be deemed to be acting in person. Costs of the application shall be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH OCTOBER 2021.

N.A. MATHEKA

JUDGE