



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 258 OF 2020

JAGJIT SINGH LIDDAR.....PLAINTIFF/APPLICANT

VERSUS

JASDIP SINGH NANDHRA.....1ST DEFENDANT/RESPONDENT

PARAMJEET SINGH BAMBRAH.....2ND DEFENDANT/RESPONDENT

GURVINDER SINGH NANDHARA.....3RD DEFENDANT/RESPONDENT

RULING

1. The Motion of 14th August 2020 seeks to bar the firm of Otieno Okeyo & Co. Advocates from acting for the Defendants or any other party in this matter.
2. The Applicant cites two reasons. An apparent conflict of interest and that a member of the firm is likely to be called as a witness by either party.
3. The Applicant and the Respondents entered into a Joint Venture Agreement (JVA) dated 1st January 2011 for the design, construction, development and supervision to completion of 16 ultra-modern dwelling units which were to be erected on property known as LR No. 4857/85 in Kileleshwa. It is common ground that the firm of Otieno Okeyo & Co. preponed the JVA. The Applicant alleges a breach of the JVA and a dispute between the parties has arisen.
4. The Applicant seeks to invoke clause 20.2 of the JVA and has in the meantime moved Court for protective orders under section 7 of the Arbitration Act.
5. The Respondents are opposed to the motion. They take the position that no conflict of interest arises as the Advocates merely prepared the JVA; that none of the parties has manifested an intention to call any member of the firm as a witness in these proceedings; that the Applicant did not take the earliest opportunity to raise the issue of recusal. Lastly, that the claim at the intended arbitration is a claim of Kshs.8,000,000/= by the Applicant against the Respondents.
6. At the outset of the decision, the Court noted that the application is premised on two grounds. That there is an apparent conflict of interest in the firm continuing to act and second, that a member of the firm may be called as a witness in this matter. The law in regard to barring counsel on these two grounds is settled and the wheel need not be reinvented.
7. In respect to possible conflict of interest the Court of Appeal in Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR observed:-

“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.”

8. To be emphasized is that, because to bar an advocate from representing a party is a derogation of a party's constitutional right to counsel, the Court will only do so where conflict is rightly anticipated. The possibility of conflict must be apparent.

9. The second ground is based on the law embodied in Rule 9 of the Advocates (Practice Rules) which reads:-

“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 in formal or non-contentious matter of fact in any matter in which he acts or appears.”

The proviso to the Rule delimits the breadth of the Rule. The bar does not extend to an advocate likely to be required to give evidence on merely formal or non-contentious matters of facts.

10. The Rule places a duty on an advocate who has reason to believe that he may be required as a witness to decline appearance or at the very earliest to alert the other side that he/she may be conflicted.

11. Last, as held by the Court of Appeal in Uhuru Highway Development Ltd. & 3 Others vs Central Bank of Kenya & 4 Others [2003] eKLR others:-

“..... again, the bar to the counsel appearing as a possible witness was not subjective but governed by rule 9 of the Advocates (Practice) Rules.”

12. With this in mind, I can now navigate the circumstances of this matter.

13. For a start, the substantive proceedings before this Court are in the nature of an Application for protective orders under section 7 of the Arbitration Act. As correctly pointed out by counsel Okeyo for the Respondents, the Applicant does not state that the validity of the JVA is a point of discussion in these proceedings. Neither are questions regarding its interpretation in debate. Further, although alleged, it is not revealed how the firm of Otieno Okeyo was involved in the implementation of the JVA so as to be caught up in the issues surrounding the alleged breach. It is therefore difficult to see how the firm's role in the preparation of the JVA can give raise to a real apprehension of conflict of interest in the matter before Court.

14. Regarding possible infraction of Rule 9 of the Advocates Practice Rules, counsel Misere for the Applicant told Court that Otieno Okeyo will be required to give evidence in the Arbitration proceedings. If that was true, then it may appear improper in the eyes of an ordinary member of public for the firm to even act in the proceedings before this Court.

15. Yet, the Applicant was not able to discount the Respondents' contention that the Applicant has not shown any intention to summon Mr. Okeyo to testify. Moreover, this Court is not told on what aspects of the dispute Mr. Okeyo is likely to testify on. It has to be kept in mind that even if Mr. Okeyo was required to give evidence, still he would not be barred from acting from any of the parties if his required testimony would be on formal or non-contentious aspects of the dispute.

16. It seems to this Court that a party invoking Rule 9 of Advocates Practice Rules needs to demonstrate that the likelihood of an advocate to be called to testify on non-formal or contentious issues is a real prospect. If this is were not the case then there is a danger of the Rule being abused to stifle the right of a party to counsel.

17. The Applicant has not persuaded this Court that this is a proper occasion when a party's constitutional right to counsel should be curtailed. The Notice of Motion of 14th August 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 15TH DAY OF MARCH 2021.

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Nixon: Court assistant

Miss Misere for Plaintiff/Applicant

Sagini for Okeyo for Respondent