



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 103 OF 2019**

**ADAN MOHAMEND IBRAHIM.....1<sup>ST</sup> APPELLANT/APPLICANT**

**SAID HUSSEIN IBRAHIM.....2<sup>ND</sup> APPELLANT/APPLICANT**

**VERSUS**

**AKILIMIO SAFARIS.....1<sup>ST</sup> RESPONDENT**

**ELIZABETH LOKARAN.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The main prayer in the application am asked to determine and dated the 7/11/2019 is that the firm of **Mutuma Gichuru & Associate Advocates** be disqualified or ordered to cease acting for the respondent and that all the pleadings and documents filed by the firm be struck out and expunged from the record on the basis that it had acted for the appellant in a criminal matter that gave rise to the civil litigation. The position of the appellant /applicant is that having instructed the counsel in the firm one Mr Ashaba, the Counsel acted for the 2<sup>nd</sup> appellant in his defence to the criminal prosecution but midway shifted camps and started acting for the respondents now as complainant in the criminal trial. The applicant fears that if allowed to continue acting for the respondent, he stands the chance to use the instruction and information given to him in confidence to the detriment of the appellants and in contravention of the law.
2. Even though duly served, the respondent did not file any response in opposition to the application nor any submissions as ordered by the court. Even on the dates set for delivery of the decision, there was never any representation.
3. I have noted that the application had been pending in court since November 2019 and had very little push towards disposing the appeal on the merits and that there was clear and obvious reluctance upon the respondent's counsel to confront the application with the consequence that the assertion of Mr Ashaba having acted for the appellant in the criminal proceedings leading to the suit had not been controverted. When not so controverted the law dictate that that counsel and the firm in which he practices ought not be allowed to act for the adversary in a matter he had previously acted for the appellant in the course of which he received confidential information. That is what the law dictates at section 134(1) of the evidence Act and Rule 9 of the Advocates (Practice Rules). I therefore find that Mr Ashaba and the firm in which he practices, Ms Mutuma Gichuru and Associates are barred from appearing for the respondent in this matter on the basis that the firm had acted for the appellant as an advocate in Isiolo Principal Magistrates Court Criminal Case No 586 of 2016, Republic Vs Said Hussein Ibrahim. That they are disqualified from acting against the appellant, it follows that any papers filed by them in this matter cannot be left to stand but are thus expunged from the record.
4. Besides the main prayer, there was the prayer for stay pending appeal which I find as an opposed. But beyond lack of opposition, I have looked at the proceedings at trial and the judgment of the court and I am satisfied that the appeal presents arguable points which needs preservation so as not rendered moot. I do grant stay but on terms that the full decretal sum be deposited into court within 30 days from today.
5. For the benefit of case management and to fast track the appeal, I do make the following additional orders: -
  - a. The appellant shall file and serve a record of appeal together with written submissions within 30 days from today.
  - b. The respondent shall, within 30 days of service by the appellant file and serve written submissions together any documents deemed necessary to make the Record of appeal complete.
  - c. Time shall be of essence in that if there shall be default to effect the deposit, the stay granted shall lapse while if it is the record that shall not have been filed as ordered the appeal itself shall stand dismissed.

d. The appeal is now deemed admitted for hearing and to be canvassed by way of written submissions

e. Mention on 24/02/2022 to confirm compliance and for further directions

f. These orders be extracted and served upon Ms Mutuma Gichuru and Associates as well as the respondent within 7 days from today.

**DATED SIGNED AND DELIVERED AT MERU THIS 10TH DAY OF NOVEMBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**IN PRESENCE OF**

**MR. MUCHIRI FOR KIOGORA FOR THE APPELLANT/APPLICANT**

**NO APPEARANCE FOR ASHABA FOR THE RESPONDENT**

**PATRICK J.O OTIENO**

**JUDGE**