



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 48 OF 2016**

**DAVIDSON MWANGI KAGIRI.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**ANN MARY KINYANJUI.....DEFENDANT/APPLICANT**

**RULING**

1. Before me for determination is the Notice of Motion dated the 25<sup>th</sup> April 2019 brought pursuant to the provisions of *Rule 9 of the Advocates (Practice) Rules, Order 51 Rule 1 & 3 of the Civil Procedure Rules* and all enabling provisions of the law where the Applicant. seeks for orders to bar the firm of M/S Owang and Associates by itself, partners and associates, employees and/or agents from representing the Plaintiff in this suit.

2. The Application was heard orally where the Applicant. submitted that the application was based on the grounds set therein and on the sworn Affidavit of the Defendant sworn on the 25<sup>th</sup> April, 2019 as well as the further affidavit sworn on the 20<sup>th</sup> August, 2019. That there were two(2) principles that governed the bar of Counsel from representing a client which principles included:-

i. Counsel being in a fiduciary Advocate/client relationship with the former client, the Defendant herein and due to the relationship, he is in possession of confidential information which information may be used by virtue of disclosure to the detriment and or prejudice of that former client.

ii. Counsel could be called as a witness in the instant suit by that former client, in this case the Defendant.

3. It was the Applicant.'s submission that there was an undeniable fact that there was an Advocate/client fiduciary relationship between Counsel for the Plaintiff and the Defendant by virtue of Counsel having handled a conveyancing transaction relating to the suit property Nanyuki LR No. 6324/08 which was sub-divided resulting into LR 6324/10, the latter from which the Plaintiff now seeks to evict the Defendant on the basis of trespass.

4. That it was also an undeniable fact that for more than 10 years since the year 2003, Counsel handled not only the conveyance transaction but also the litigation emanating from the suit property to wit Meru HCC No. 411 of 1993 and its subsequent Appeal in Nyeri Court of Appeal No. 6 of 2011 which involved the suit property and the Plaintiff. That Counsel had relentlessly prosecuted both matters and extensively consulted both the Plaintiff and the Defendant by virtue of him personally handling those two matters.

5. That consultation with the Defendant had continued even after he left the firm of M/S Kirundi and Company Advocates in the year 2010. That further as evidence of the continued contact/relationship between Counsel and the Defendant, the Defendant continued to pay Counsel monies which he concedes to.

6. Counsel's submission was that the existence of the continued relationship for a period of over 10 years implied that Counsel had access to abundant confidential information from the Defendant and it would not be a contradiction to believe that the disclosure of this information would gravely be prejudicial to the Defendant in the present suit.

7. That there existed a clear conflict of interest in Counsel handling this matter particularly in the conduct of the cited cases in Meru and Nyeri which resulted in the Defendant's interest in the suit property not been recognized in the Court of Appeal despite the Defendant's plea to the Counsel to be enjoined in the suits and his insistence that she does not. It would therefore not be unmerited for the Defendant to be reasonably apprehensive that similarly in the present suit, Counsel would use that information to continue to prejudice the Defendant's right whereas the Defendant has not consented to the said disclosure.

8. The Applicant. relied in the decided cases in **Nakuru HCC Case No. 5 of 2016** being **R -vs- Silas Mutima Murimi & 2 Others** as well

as **Delphis Bank Limited -vs- Chatt and 6 Others (2005) 1KLR**, where the Court held as follows:-

*“Therefore an Advocate must ethically guard against allowing himself to be in a position that would threaten to put at risk his obligation to maintain the professional confidence imparted to him by his former client in the representation of the new client”*

9. That in the present case, Mr. Owang, Counsel for the Plaintiff sought to use information from both clients to be the basis for the cause of action to the instant suit.

10. That it was well within the knowledge of Counsel that at the time of institution of this suit, the Plaintiff had not transferred the suit property to the Defendant and despite the Defendant having had paid monies to the firm of M/s Karundi and Company Advocates and despite having been in possession of the suit property, the Plaintiff proceeded to file the instant suit.

11. The fact that Counsel continued to represent both parties for a period exceeding 10 years and was conversant to all issues pertaining the transaction to the suit properties, he had qualified to be a witness in the instant suit as well as a key witness to the counter claim filed by the Defendant. The Applicant. relied on the case of **Koch -vs- Richard Burtler 2002 EWCA CIV 1280** as cited in the case of **R -vs- Silas Mutuma (Supra)** where the Court held that;

*‘...where there is a possibility that the advocate may be called as a witness in the case and secondly where there exists a conflict of interest between two clients out of a previous advocate/client fiduciary relationship with the opposing client...’*

12. In conclusion, Counsel submitted that the Defendant had a right to the Court’s protection of her confidential information and the duty to her survived termination of the Advocate/client relationship between her and Counsel Mr. Owang Advocate. That this duty was a strict unqualified duty and could not be disclosed under any circumstances.

13. That on the other hand, the Court was duty bound even on suspicion that potential information may be disclosed to bar Counsel from representing the Plaintiff. The Applicant. sought for their application to be allowed with costs.

14. In opposing the said Application, Counsel M/S Owang relied on a replying affidavit sworn by himself and filed in Court on the 31<sup>st</sup> July, 2019 where he had addressed most of the issues raised in the application raised by the Applicant..

15. His submission was that the instant application was a belated attempt by the Defendant/Applicant to scuttle and delay the hearing of this suit which commenced on the 18<sup>th</sup> October, 2017 where the Plaintiff had given evidence and closed his case, the suit having been filed on the 24<sup>th</sup> March, 2016. That the instant application was filed more than 3 years later where ordinarily it was expected of the Defendant to move the Court expeditiously before the hearing of the main suit commenced. As it stood, the issues being raised in the instant application had since been overtaken by events.

16. That he wished to dispel the myth that he had acted for the Defendant in the conveyancing transaction. That as per the sale agreement dated 15<sup>th</sup> April, 1993, it was clear that the same was drawn by the firm of M/S Kirundi Advocate and that the sale agreement was between the Plaintiff and Defendant for the sale of three (3) plots to be excised from Nanyuki LR 6324/8.

17. That at the time, he was still in High School and did not act for the Defendant in the transaction. That he had joined the firm of M/S Kirundi and Company Advocates in the year 2003 when the Defendant was already a client in that firm. There was neither litigation at that time between the Defendant and Plaintiff relating to the terms of the said sale agreement nor any matter pending in Court for enforcement of the agreement filed by either parties. There was therefore no basis to take any instructions from the Defendant in terms of the said sale agreement.

18. That he had acted for the Plaintiff in Meru HCC 411 of 1993 which was an ongoing matter where the Plaintiff had sued the Defendant to whom he had sold portions of land to parcel No. 6324/8. That the Defendant in the matter was not party to the suit as she had not purchased any plot from the Plaintiff.

19. His further submission was that there was nowhere where the parties to the suit had indicated that he would be called as witness, as per the pre-trial directions which had been conducted. That parties had filed their witness statements and therefore Rule 9 of the Advocates Act did not apply. Counsel relied on the case of **R-vs-Silas Mutuma and 2 Others Criminal Case No. 5 of 2016 Nakuru High Court**.

20. Counsel submitted that it had been alleged that while he was handling the Plaintiff’s file, certain original documents disappeared in that file which were relevant to the suit. That he had never received any letter from his previous employer or the Plaintiff claiming that he had anything to do with the disappearance of the documents from that file. That the firm of M/S Kirundi and Company Advocates were the ones to address that issue if there were any documents that disappeared from that file. That there was no fiduciary relationship created between him and the Defendant because he had never acted for her in any matter where the Plaintiff herein was a party.

21. That even if she had interest in the Meru suit of 411 of 1993, she was not a party in that suit, where she merely wanted to know the outcome of that suit to enable her pursue any interest she may have had in regard to the sale agreement of 15<sup>th</sup> April, 1993. That the Plaintiff had never paid him any legal fees otherwise he would have issued her with the official receipts of payment.

22. That in the Defendant’s defence and counter-claim, she had sought for an order of having acquired the suit plot by way of adverse possession where she needed to prove by evidence that she had been in occupation of the suit land for more than 12 years. That in such a scenario, one did not require documents. She was not asking for enforcement of the terms of the sale agreement between himself and the Plaintiff of 15<sup>th</sup> April, 1993.

23. That the instant application was unmerited and ought to be dismissed with costs. That the overriding purpose of the law was to see that justice was not only seen to be done but was done.

24. In rejoinder, the Applicant's Counsel submitted that the failure by the Defendant to oversight her previous Counsel, to point out earlier the conflict of interest by Counsel for the Plaintiff, could not be used as a bar to the Court's jurisdiction to interfere with the infringement of her right to confidential information. Counsel had admitted to being in full knowledge of a land transaction relating to the suit property between Plaintiff and Defendant in the year 2003. He was aware that the transaction commenced in the year 1993. He also confessed that there was communication between him and Defendant in relation to the Meru case. Counsel had been privy to all confidential information and he could be called as a potential witness. They sought that their application be allowed.

**Determination.**

25. Rule 9 of the Advocate Practice Rules reads 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 in formal or non-contentious matter of fact in any matter in which he acts or appears.*

***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'.***

26. It will be noted from the above provisions of the law that an Advocate may be prevented from appearing in a matter if he may be required as a witness. But this is not absolute, for an Advocate can still appear for a party and still be a witness, so long as his evidence is confined to a formal or non-contentious matter of fact.

27. *In the case of Delphis Bank vs Channan Singh Chatthe & 6 Others (2005) eKLR.* The Court of Appeal held that:

*"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.*

*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"*

28. I have considered the submission by Counsel for the Applicant that M/S Owang Advocate, having been in a fiduciary Advocate/client relationship with the Applicant who was his former client, he is in possession of confidential information which information may be used by virtue of disclosure to the detriment and or prejudice of the Applicant. That further, M/S Owang Advocate is expected to be called as a witness in this matter.

29. I do not know the nature of confidential or privileged information, if any, that may have been imparted on M/S Owang Advocate that would be prejudicial to the Applicant. and even if he is expected to be a witnesses, the Court has not been told what evidence he would be adducing in Court.

30. M/S Owang Advocate himself does not believe he would be a useful witness, but that is not the point because the indication is that he would be summoned. The nature of the evidence that he is required to tender before Court is still unclear. If it is merely formal and non-contentious, then of course the proviso to the rule would bail him out.

31. I also note that parties had already conducted their pre-trial proceedings wherein after, the Plaintiff had submitted its evidence and closed its case on the 18<sup>th</sup> October 2018. M/S Owang Advocate did not record any statement nor did the Defence /Applicant give any indication that they intended to summon him as a witness during the trial. As such rule 9 of the Advocates Practice rules would not be applicable.

32. Indeed in her counter-claim, the Applicant had sought for an order of having acquired the suit plot by way of adverse possession where she only needed to prove by evidence that she had been in occupation of the suit land for more than 12 years and not the enforcement of the terms of the sale agreement between himself and the Plaintiff of 15<sup>th</sup> April, 1993.

33. On that consideration I find it unnecessary to issue orders barring him from participating as an Advocate in the application before me. The upshot is that the application dated the 25<sup>th</sup> April 2019 is herein dismissed with costs.

**Dated and delivered at Nyeri this 23<sup>rd</sup> day of January 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**