



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL CASE NO 25 OF 2019

(FORMERLY CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 269 OF 2018)

SHAIWAZ SADRUDIN JIWAPLAINTIFF

VERSUS

ABDLILLAHI ABDRIHAMAN ...DEFENDANT

R U L I N G

By a Notice of Motion dated 1st November 2019 and filed herein on 7th November 2019, **SHAIWAZ SADRUDIN JIWA** (the plaintiff herein) seeks the following orders: -

- 1. That an order do issue restraining Counsel for the defendant from representing the defendant due to a conflict of interest.**
- 2. Costs.**

The application is predicated on the grounds set out therein and is also supported by the plaintiff's affidavit.

The gravamen of the application is that counsel for the defendant has always represented the plaintiff in various suits as per the pleadings annexed including in **BUNGOMA ELC CASE NO 216 OF 2014**. Therefore, there will be a conflict of interest as the defendant's counsel has received a lot of confidential information and so the plaintiff will be prejudiced if his former counsel is allowed to represent the defendant herein.

The application is opposed and **MR SIMIYU MAKOKHA** counsel for the defendant has filed a replying affidavit dated 9th November 2019 in which he has deponed inter alia, that he has never acted for the plaintiff in **BUNGOMA ELC CASE NO 216 OF 2014** because when counsel took over the matter, the plaintiff's name had been removed from the record. That he has never acted for the defendant in respect of the suit property herein nor had a discussion with the plaintiff in respect to the suit property or received any confidential information. That there is no client – advocate relationship between the plaintiff and counsel's firm and that this application is brought in bad faith and solely aimed at defeating the defendant's application for the plaintiff to be present in Court for cross – examination purposes. That the defendant has a constitutional right to have an advocate of his choice without any interference from any quarter whatsoever.

The application has been canvassed by way of written submissions which have been filed both by **MR BW'ONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the plaintiff and by **MR MAKOKHA** instructed by the firm of **MAKOKHA WATTANGA & LUYALI ASSOCIATES** for the defendant.

I have considered the application, the rival affidavits and the submissions by counsel.

In support of his application, the plaintiff has annexed the pleadings in **SHAIWAZ JETHA JIWA & PETER MAOSA NYANGAU .V. NYONGESA WANGILA & COUNTY GOVERNMENT OF BUNGOMA ELC CASE NO 216 OF 2014**. However, as counsel for the defendant has averred in his replying affidavit and which is clearly borne out in the annexed plaint, the plaintiff herein was removed from the pleadings following an amendment.

Indeed, the list of the plaintiff's witnesses in the said **BUNGOMA ELC CASE NO 216 OF 2014** does not include that of the plaintiff in this case. There is however evidence in the form of bank transfer showing that sometime in 2013 (the form is not very legible) the plaintiff did transfer some Kshs. 467,800/= to the firm of **WETANGULA, ADAN MAKOKHA & CO ADVOCATES**. There is also an email dated 17th March 2018 addressed to **MR MAKOKHA** by the plaintiff and also an agreement for the sale of land between the plaintiff and

MALAKISI MUSLIM HIGH SCHOOL in which one of the witnesses is a representative of the firm of **WETANGULA, ADAN & MAKOKHA ADVOCATES**. There is therefore evidence to support the plaintiff's claim that he has communicated with **MR MAKOKHA** with respect to some properties in **MALAKISI** but in none of those documents do I see the properties subject of this case mentioned therein. **MR MAKOKHA** has deponed further that there is no Advocate – Client relationship between his firm and the plaintiff.

In support of his submissions, **MR BW'ONCHIRI** has cited the case of **KING WOOLEN MILLS LTD .V. KAPLAN & STRATON ADVOCATES C.A CIVIL APPEAL NO 55 OF 1993 (1993 eKLR)** in support of the proposition that **MR MAKOKHA** should be restrained from acting for the defendant in this case. However, the circumstances in the **KING WOOLEN MILLS CASE** (supra) can be distinguished from this case because in that case, **MR KEITH** of the firm of **KAPLAN & STRATON ADVOCATES** had acted for both the borrowers and lenders in the negotiation of a loan. That is a completely different scenario from what obtains herein as there is no suggestion that either **MR MAKOKHA** or his firm has ever acted for both parties in the same transaction. And even when **MR MAKOKHA's** firm acted for the plaintiff, it was over a matter that is not related to the subject of this dispute and so the issues of conflict of interest or breach of confidentiality are, in my view, farfetched.

The choice of a counsel is the right of a party and should not be taken away lightly unless there are sufficient grounds to do so. However, counsel also owes a duty not only to the client but also to the cause of justice in the discharge of his duty. The plaintiff has only made general allegations in his application seeking to bar **MR MAKOKHA** from acting for the defendant. In ground No. 3, he alleges as follows:

“That the plaintiff has confided a lot of information to counsel for the defendant on the suit properties situated at Malakisi Township and thus the plaintiff will greatly be prejudiced if the orders are not granted.”

In **RE – A FIRM OF SOLICITORS [1955] ALL E.R 482**, it was held as follows: -

“..... on the issue whether the solicitor is possessed of relevant information, it is in general not sufficient for the client to make general allegations that the solicitor is in possession of relevant confidential information if this is in issue some particularity as to the confidential information is required.”

There has been no particularity of any such confidential information passed to **MR MAKOKHA** or his firm relevant to this case. The test for disqualifying an advocate from acting for a party was stated by **COZENS HARDY MR** in the case of **RAKUSEN .V. ELLIS MUNDAY & CLARKE [1912] CH 831** at page 835 as follows: -

“..... but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.”

That decision was followed by the Court of Appeal in this country in **DELPHIS BANK LTD .V. CHATTHE & OTHERS 2005 1 KLR 776** where it said: -

“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 the Court of Appeal is whether real mischief or real prejudice will in all human probability result.” Emphasis added.

In **WILLIAM AUDI ODODE & ANOTHER .V. JOHN YIER & ANOTHER C.A CIVIL APPLICATION NO 360 OF 2004(NBI), OKUBASU JA** observed as follows:-

“I must state on the outset that it is not the business of the Courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a Court of Law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.” Emphasis added.

The plaintiff's bone of contention in seeking to restrain counsel for the defendant from appearing in this dispute is **“due to a conflict of interest.”** The definition of conflict of interest in **BLACK'S LAW DICTIONARY 10TH EDITION** that is applicable in this matter is: -

“A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.”

A party that alleges a conflict of interest is obliged to place before the Court cogent evidence. **Section 109 of the Evidence Act** places the burden of proof on the plaintiff to prove that it will be prejudicial to his interests if **MR MAKOKHA** continues acting for the defendant in this dispute. However, as I have already found above, there is nothing to suggest that **MR MAKOKHA's** firm has received any information from the plaintiff with respect to the properties subject of this matter that could lead to a conflict of interest. It is not sufficient for a party to simply allege a conflict of interest and leave it to conjecture.

In the circumstances of this case, other than mere allegations, the plaintiff has not presented to this Court any evidence of information of a confidential nature that **MR MAKOKHA** or his firm may have acquired by virtue of any retainer as counsel. There is therefore no risk of disclosure to warrant the disqualification of **MR MAKOKHA** from acting for the defendant bearing in mind that to do so would amount to a drastic interference with the defendant's constitutional right to be represented by a counsel of his own choice.

The up – shot of the above is that the plaintiff’s Notice of Motion dated 1st November 2019 is devoid of any merit.

It is accordingly dismissed with costs.

And as was agreed by the parties on 18th February 2020, this ruling shall also apply to **BUNGOMA ELC CASES NO 47 OF 2018** and **NO 52 OF 2018**.

It is so ordered.

Boaz N. Olao.

J U D G E

27th May 2020.

Ruling dated, delivered and signed at Bungoma this 27th day of May 2020.

Boaz N. Olao.

J U D G E

27th May 2020.

This Ruling was due on 4th June 2020. However, in view of the measures restricting Court operations due to the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23rd April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

Boaz N. Olao.

J U D G E

27th

May

2020.