



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
CIVIL SUIT MISC. NO.53 OF 2005

FRANCIS GITHINJI KAROBIA.....PLAINTIFF/RESPONDENT

VERSUS

STEPHEN KAGENI GITAU.....DEFENDANT/APPLICANT

RULING

1. This Court is asked to determine the Notice of Motion dated 6th September, 2016 which seeks the following orders:-

- 1. The law firm of Maina Murage & Company Advocates be restrained from acting for the Plaintiff.**
- 2. An order be issued summoning Maina Murage Advocate to attend court during the hearing of this suit to tender evidence regarding the circumstances surrounding the execution of the Supplementary Agreement dated 30th October 1996.**
- 3. The Plaintiff and Defendant do surrender and/or deposit into the custody of this honourable Court the mother title and the provisional title respectively in respect of LR No.8110 pending the hearing and determination of this suit.**
- 4. This suit be set down for hearing on priority basis but not more than 60 days from the date of filing this application.**
- 5. In the alternative, and on account of the Defendant's ill-health as a result of old age, this honourable Court do order the Defendant to tender his oral evidence in advance prior to the hearing of the suit.**
- 6. The Respondent do pay the costs of this application in any event.**

2. The dispute herein revolves around an Agreement for sale dated 30th October 1996. One of the Prayers in the Plaint dated 28th January 2005 is for specific performance of that agreement. In answer to the Plaint the Defendant alleges that the said agreement was procured by undue influence and intense duress of the Plaintiff and his Advocates, Maina Murage & co. Advocates.

3. In paragraph 3 of the said Defence, the Defendant sets out the particulars of undue influence and intense duress as follows:-

a) In the evening of 30th October 1996 the Defendant was at the request and instance of the Plaintiff taken(sic) to this advocate's office where after being reminded of the scheduled sale of this land LR 8810, where his matrimonial home is situate, at a public auction within the next four days or thereabout, he was presented with a typed document which he was requested to sign if he wanted to save his land.

b) The Defendant was further told that the said document was an agreement whereby the Plaintiff would pay the Defendant's loan to Standard Chartered Bank to free his land for purposes of selling one acre thereof, as already agreed and an extra half acre of land and thereafter pay the balance of the purchase price to him, which proposition was a lesser evil to losing the whole of his said land but was also an undue influence to his agreeing very reluctantly to sell an extra half acre.

c) The Defendant was never given a chance to get services of his lawyers and/or inform them of what was happening.

d) The Defendant acted in the mistaken belief that the said agreement was to be witnessed by his lawyers whereas the same was witnessed by the Plaintiff's Lawyers.

e) The Defendant's Constitutional rights were circumvented by the Plaintiff and his advocates by not allowing the Defendant to seek advice of his advocates or engage the services of another advocate of his choice.

f) The Defendant never appended his official and genuine signature due to his unwillingness and doubts.

4. In seeking the disqualification of the firm of Maina Murage & Co. Advocates from acting for the Plaintiff, the Defendant states that it shall be asking that Mr. Murage testifies regarding the circumstances surrounding the execution of the Supplementary Agreement. Indeed prayer 2 of the Motion is a request that Mr. Maina Murage be summoned to testify.

5. The Application is resisted and its Bonafides is questioned as it has been brought almost 12 years after the suit was filed. The Plaintiff thinks that is a continuation of a scheme to get his lawyer out of the matter. The Defendant also argues that he is not a potential witness as he cannot be compelled to testify against his own client. Section 134 of the Evidence Act is cited for this argument.

6. The Defendant's Counsel retorts that these type of matters cannot be defeated by delay. In support of this proposition Counsel cited the case of **Uhuru Highway Development Ltd & others VS. Central Bank of Kenya & 2 others** in which the Court of Appeal held:-

"Delay, of course, is of particular importance in any case where, as a result of the delay, the interest of the defendants has been prejudiced. The advocate for the plaintiffs submits, we think with some substance, that this is not a case of that character. Where, as here, an advocate is acting in breach of privileged protection, delay in bringing an application such as the present one does not change or defeat the duty or obligation of the common advocate of the parties".

This however may not be entirely applicable here because Mr. Murage was not a **common** Advocate for the parties. However there would be lessons to be drawn from this proposition.

7. The Application before Court seeks to disqualify Counsel, not because he acted for both parties herein, but because he witnessed the execution of an agreement which is said to have been obtained under duress and undue influence and it is also alleged that he participated in the coercion. It is on this basis that the Applicant seeks to bar him under the provisions of Rule 9 of the Advocates (practice) Rules which

provides:-

“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 his 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”.

8. The principles to be applied in considering an Application which seeks to remove Counsel from representing a party on the premises that there is potential or real possibility that the Advocate sought to be removed will be a witness in the course can be restated briefly.

9. Barring Counsel from acting for a party is a drastic action which may impact on a party's Constitutional Rights to a Legal Representative of his choice. It is not one to be readily acceded to by the Court. In this regard, a party invoking Rule 9 of the Advocates (Practice) Rules to object to Counsel's appearance bears a heavy responsibility of demonstrating the necessity of Counsel's testimony. In determining the necessity of that testimony the Court will consider the relevance of the expected testimony “and must take into account such factors as the significance of the matters, weight to the testimony, and availability of other evidence” (**Hudson Valley Marine Inc vs. Town of Courtland** 30AD 3d 378 which was quoted with approval by Seron J in **Walter Ndindi Wambu Vs. Dr. JR Wambwa & 2 others**[2015]eKLR.

10. As a general Rule an Application seeking to bar Counsel should be made at the beginning of proceedings or as soon as the circumstances giving rise to the objection are known to the applying party. However, there is also an obligation on a Counsel who has reason to believe that an objection might be taken to his continuing to act to disclose this to the other side and to the Court at the earliest opportunity. This will enable any objection to be heard and resolved as early as possible. However as stated in **Geveran Trading Co. Ltd Vs. Skjevesland** [2002] EWCA Civ 1567;

“.....the obligation to make this disclosure to the other side only arises if the position can reasonably be regarded as open to objection. Moreover, if the other party has duly waived the objection there is unlikely to be any need to mention the matter to the Court”

11. The application before Court has been brought twelve years after the Defendant filed his Statement of Defence. The delay is without doubt inordinate and may be indicative of the lack of bonafides as asserted by the Plaintiff's Counsel. On other occasion delay may be construed as a waiver of an objection. What the Court must decide is whether the delay herein straightaway disentitles the Defendant of the Orders it seeks.

12. It was clear from very early in the Proceedings that the issue of as to how the Supplementary Agreement was procured and executed would be central to the dispute herein. It was raised in the Statement of Defence dated 18th April 2005 and retained in Amended Defence and Counterclaim of 4th June 2010. It was reiterated in the Witness Statements of the Defendant and that of his witness Jane Wanjiru Gitau (his wife), both made on 14th May 2012.

13. Indeed the Plaintiff's Counsel whose participation is sought to be barred identified it as the first issue for determination. In the proposed Statement of Agreed issues dated 18th July, 2012, and signed by the firm of Maina Murage & Co. the issue is framed as follows:-

“Was the Supplementary Agreement of 30th October 1996 entered into pursuant to the Defendant's plea and requests to the Plaintiff to assist him pay his loan with Standard Bank to save his land from being auctioned, or was the agreement procured through ‘*undue influence and intense duress*’ by the Plaintiff and his advocates over the Defendant?”

14. Given that the issue of duress and undue influence by the Plaintiff and his advocate was raised early in the proceedings and continued to persist to date, Mr. Maina Murage should have had reason to believe that the issue as to whether he would be required to testify would in all likelihood arise at one time or other. This may be good reason to excuse the inordinate delay. In addition this matter is yet to be heard as a result of the decision made on 4th November 2015 by both sides to have this matter, that had been partly heard, start *de novo*. In a sense therefore, the Application may not be coming too late in the proceedings.

15. Counsel Maina Murage takes a further position that he cannot be compelled to testify because of provisions of section 134 of the Evidence Act which reads:-

“(1) No Advocate shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of this employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure-

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was directed to the fact by or on behalf of his client.

(2) The protection given by subsection (1) shall continue after the employment of the advocate has ceased”.

16. But as is clear from the provision therein, the privilege does not protect disclosure of any communication made in furtherance of an illegal purpose or a fact in the knowledge of Counsel which shows that any crime or fraud has been committed since the commencement of his employment. The allegation made against the Plaintiff and Counsel is that they used duress and undue influence to force the Defendant into the agreement. If this were true then it would be an act in furtherance of an illegality.

17. The particulars of undue influence made against the Defendant and Counsel have been reproduced in paragraph 3 of this decision. There are then specific allegations made against Mr. Maina Murage in paragraphs 5,6 and 7 of the Affidavit of Mr. Gitau in which he alleges:-

“5. Mr. Maina Murage Advocate, a partner in the said law firm of Maina Murage & Co Advocates witnessed the execution of the Sale Agreement dated 29th April, 1996. *The witness stamp is exhibited at page 4 of the said Agreement.*

6. Mr. Maina Murage Advocate, a partner in the law firm of Maina Murage & Co Advocates witnessed while I was executing the said Supplementary Agreement dated 30th October 1996 which I executed through undue influence and coercion from the Respondent. *The witness stamp is exhibited at page 8 of the said Agreement.*

7. I am advised by me advocates on record, which advice I verily believe to be true and correct that Mr. Murage Advocate or any advocate from the said firm shall be called as a witnesses and the said firm should accordingly be prohibited from acting for any party in this suit”. *(my emphasis)*

18. Counsel Maina Murage elected not to make a personal response to these accusations and explained that he did not want to step into the arena of conflict. And that may be good reason for him making that election! However the allegations are also made against the Plaintiff and the Plaintiff choose to respond

through a Replying Affidavit sworn on 12th October 2012. This Court has carefully studied that Affidavit and finds that nothing in the Affidavit specifically confronts the accusation of undue influence and coercion. It is a serious allegation made against the Plaintiff and even if Counsel had chosen not to descend into the arena of conflict, it would have been expected that the Plaintiff would have something to say about it. For this reason I hold that the Defendant has made out a prima facie case that the allegation of duress and undue influence in the course of the making or execution of the impugned Agreement is a matter for determination herein and one which the Mr. Maina Murage may be required to testify on. Further the only witnesses to these circumstances could be the Plaintiff, Counsel Murage and the Defendant himself and to excuse Counsel could compromise the evidence available in respect to the contentious matter. This Court finds that Mr. Maina Murage is a compellable witness because if the allegations made by the Defendant are found to be true then, Counsel would have been witness to a communication made and action done in furtherance of an illegal purpose. This decision is taken in the interest of justice and notwithstanding that the bonafides of the Defendant is doubted by the Plaintiff and also notwithstanding that the delay in bringing this Application may inconvenience the Plaintiff in legal expenses.

19. As I conclude this aspect of the Decision, I observe that the accusations are levied against Mr. Maina Murage in person and not his firm. And it bears repeating, it is not the case of the Defendant that the said Counsel or his firm represented him. For the reason that the person who will be required to testify is Mr. Maina Murage, It is only Mr. Maina Murage who is barred from continuing to represent any party in these proceedings. If the firm has another lawyer, then it can continue representing The Plaintiff but without Mr. Maina Murage.

20. In respect to the deposit of the mother title and provisional title in respect to LR No.8110, it is common ground that there exists two titles to the same piece of land. That of course is undesirable. There is already an Application dated 7th January 2015 by the Plaintiff seeking that the provisional title be destroyed. There has been delay in prosecuting that application and the Plaintiff accepts responsibility for the delay.

21. The Defendant is now old and of poor health as evidenced by the Medical chits annexed to his Affidavit and it would be in the interest of both sides that the hearing of this old Matter be expedited. It does not profit either side for the hearing of this matter to be distracted by further interlocutory applications. In the interest of expediting the trial hereof, I would urge both sides to consider depositing both the mother Title and provisional Title in Court pending the hearing of the main suit. In that way both sides may feel a sense of protection as the hearing of this matter is processed.

22. In the meantime this Court shall be giving Directions as to the speedy hearing of this matter. But these Directions will be minded that the Plaintiff may now be required to hire another Firm of Advocates to represent him and the new Advocates should be given adequate opportunity to prepare the case for their client.

23. The outcome of the Notice of Motion dated 6th September 2016 is as follows:-

(i) Mr. Maina Murage is restrained from acting for the Plaintiff.

(ii) Prayer (2) is allowed as prayed.

(iii) Hearing of prayer 3 is stayed pending the hearing and determination of the Plaintiff's application of 7th January 2015.

(iv) The Defendant shall have half costs of the application.

Dated, Signed and Delivered in Court at Nairobi this 4th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Mutoro h/b Maina Murage for Plaintiff

Wawire for Defendant

Alex - Court Clerk