



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 329 OF 2017**

***(Formerly ELC No. 1260 of 2013- Nairobi)***

**ESTHER MBULA MWANGANGI.....PLAINTIFF**

**VERSUS**

**NELSON MUTISYA MUUNDA.....1<sup>ST</sup> DEFENDANT**

**DANIEL ONGERI ONGERA.....2<sup>ND</sup> DEFENDANT**

**RUTH MORAA ONGERA.....3<sup>RD</sup> DEFENDANT**

**AND**

**NGURISH INVESTMENT LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**ICIPE STAFF HOUSING CO-OPERATIVE.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. In the Notice of Motion dated 21<sup>st</sup> February, 2018, the Plaintiff and the 1<sup>st</sup> Interested Party are seeking for an order barring Jason Ondabu (*the advocate*) from acting as an advocate for the Defendants and for leave to call the said advocate as a witness in this matter.
2. The Application is supported by the Affidavit of the Director of the 1<sup>st</sup> Interested Party who deponed that on 7<sup>th</sup> December, 2010, the 1<sup>st</sup> Interested Party entered into a Sale Agreement with the Plaintiff for the purchase of 10 acres of land known as Mavoko Town Block 3/1970; that he was subsequently informed by the Plaintiff that the 1<sup>st</sup> Defendant had fraudulently disposed of parcels of land known as Mavoko Town Block 3/29835 and 29836 and that the Plaintiff informed him that she never appeared before Jason Ondabu to sign the transfer documents.
3. The 1<sup>st</sup> Interested Party's Director deponed that this suit challenges the transfer of the suit properties to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which was witnessed by Jason Ondabu, Advocate and that the said Jason Ondabu Advocate having presided over and witnessed a fraudulent transaction is a key and compellable witness in this suit
4. The Applicant's Director finally deponed that where the communication between an advocate and a client is for the furtherance of an illegal or fraudulent purpose, the advocate-client privilege is automatically waived.
5. In reply, the 1<sup>st</sup> Defendant deponed that on 20<sup>th</sup> September, 2007, the property known as Mavoko Town Block 3/1970 was registered in the names of five people, namely, Joseph Musyoka Muunda, the late Benjamin Muunda, the late Samuel Muli Muunda, the late Joshua Mwiulu Muunda and himself
6. The 1<sup>st</sup> Defendant deponed that the Plaintiff was one of the registered owners of the suit property after the demise of her father; that the allegations of fraud by the Plaintiff have no basis and that the DCIO Athi River investigated the matter and confirmed that the Plaintiff appended her signature on all the transfer documents.
7. According to the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Interested Party never entered into any agreement to purchase Mavoko Town Block 3/29835 and

29836 with the five registered; that Jason Ondabu merely witnessed the signing of the documents in his capacity as an advocate and that a party has a right to legal representation of his choice by dint of Article 50(2)(g) of the Constitution.

8. It was deponed that the Agreement for Sale dated 7<sup>th</sup> December, 2010 that gave rise to the instant proceedings was executed by the Plaintiff as the vendor and Michael Wainaina Ngure on behalf of the 1<sup>st</sup> Interested Party; that Michael Wainaina Ngure had no capacity to enter into a binding agreement with the Plaintiff, who was at that time not the registered owner of the property and that the Plaintiff became one of the five owners of the suit property on 18<sup>th</sup> June, 2012 when the Grant in Machakos Succession Cause No. 29 of 2009 was confirmed.

9. The Application was canvassed vide written submissions. It was submitted by counsel for the Plaintiff and the 1<sup>st</sup> Interested Party that there were two issues for determination; firstly, whether an advocate can act for a party in litigation where he is a potential witness and secondly, whether the information between Jason Ondabu as pertains to the sale agreement leading to the transfer of the suit property to the Defendants is privileged.

10. The Plaintiff's counsel submitted that there was conflict of interest in light of the fact that Jason Ondabu Advocate purportedly acted for both the purchaser and the vendor in the transfer of Mavoko Town Block 3/29835 and 29836; that the validity of the said transfer was being challenged on the grounds of fraud and that by dint of Rule 9 of the Advocates (*Practice Rules*), Jason Ondabu Advocate should be barred from appearing in this suit because he will be required to give evidence material to the determination of contested issues before the court.

11. Counsel relied on the cases of *Delphis Bank Ltd vs. Channan Singh Chatthe & 6 Others (2005) eKLR*; *Tom Kusienya & Others vs. Kenya Railways Corporation & Others (2013) eKLR* and *Dorothy Seyanoi Moschioni vs. Andrew Stuart & Another (2014) eKLR* in support of the argument that since the transfer of the documents of the suit premises were signed in the presence of Jason Ondabu, he would be a potential witness and ought to cease acting for the Defendants since they were parties in the transaction that was alleged to be fraudulent.

12. Learned counsel for the Plaintiff submitted that privileged communication cited under Section 134 of the Evidence Act and the right of the Defendants to legal representation of their choice was limited to the fact that Jason Ondabu Advocate is a key witness in this case.

13. In response, counsel for the Defendants submitted that it was premature to state that Jason Ondabu Advocate will be called as a witness in this matter because pleadings had not closed and that the Application was fatally defective because it was made by the Plaintiff and supported by the Affidavit of the 1<sup>st</sup> Interested Party's Managing Director.

14. It was submitted that the subject matter of the suit is registered in the names of the 2<sup>nd</sup> Interested Party and the Plaintiff and that even if the Plaintiff's claim succeeds, the orders of the court would be in vain. Counsel cited the case of *Kenya Commercial Bank Ltd vs. Mukeshkumar Kantilal Patel & Another, Kericho ELC Case No. 87 of 2012*. Learned counsel urged the court to dismiss the Application with costs.

15. I have considered the Application and the respective submissions of counsel. The only issue for determination is whether there is a conflict of interest if the advocate who witnessed the Sale Agreement in respect of the property which is the subject of this suit, is allowed to represent the 1<sup>st</sup> Defendant.

16. The Applicant filed the current Application under Sections 128 and 134 of the Evidence Act. The Applicant has sought to rely on Rule 9 of the Advocates (*Practice*) Rules, which provides 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.*”**

17. While construing the provision of Rule 9 of the Advocates (*Practice*) Rules, the court in *Serve in Love Africa (Sila) Trust vs. David Kipsang Kipyego & 7 others [2017] eKLR*, held as follows:

***“The aforesaid rule attempts to guard against conflict of interest. An advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren't compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients. Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter...To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client.”***

18. Black's Law Dictionary, 8<sup>th</sup> Edition, defines conflict of interest as:

***“A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. 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.”*

19. In her Plaintiff, the Plaintiff has averred that her late husband, Benjamin Mwangangi Muunda, owned parcel of land known as Mavoko Town Block 3/1970 jointly with 1<sup>st</sup> Defendant and other three individuals. The Plaintiff subsequently became a co-owner of the suit property upon the demise of her husband.

20. The Plaintiff has averred in the Plaintiff that after the sub-division of the suit land, she became the owner of land known as Mavoko Town Block 3/29835 and 29836; that while awaiting for the issuance of Title Deeds, she discovered that the 1<sup>st</sup> Defendant had transferred the two portions of land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide an Agreement dated 8<sup>th</sup> August, 2013 and that she never signed the Agreement transferring the said land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

21. The Plaintiff has also denied having signed the Transfer documents transferring the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, or attending the Land Control Board meeting which authorized the transfer of the suit property. The Plaintiff has sought for a declaration that the purported sale of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was fraudulent, null and void.

22. The Plaintiff annexed the Transfer documents in respect of Mavoko Town Block 3/29835 and 29836, which are a sub-division of the suit property. The two Transfer documents are dated 30<sup>th</sup> May, 2013. The Transfer documents show that all the five vendors, including the Plaintiff, transferred to the 2<sup>nd</sup> and 3<sup>d</sup> Defendants parcels numbers Mavoko Town Block 3/29835 and 29836 respectively.

23. The two Transfer documents further show that the Plaintiff, together with the 1<sup>st</sup> Defendant and the other vendors, appeared before Jason Ondabu Advocate, and in his presence, signed the Transfer documents, the very act that the Plaintiff has denied.

24. The 1<sup>st</sup> Defendant has retained the firm of advocates that purportedly acted for the Plaintiff and himself in the conveyance of the suit land as his advocates, which conveyance the Plaintiff is challenging. Considering that the Plaintiff has denied that she never appeared before Jason Ondabu Advocate to sign the impugned Transfer documents, it becomes apparent that Jason Ondabu Advocate will be a witness in this matter.

25. An advocate can represent a litigant and at the same time testify as a witness in the same matter, where the issue he is testifying on is non- contentious. However, like in the current suit, where the issue in which the advocates testimony is required is contentious, such an advocate should cease acting for one of the parties in the suit.

26. Jason Ondabu Advocate witnessed the signing of the Transfer documents in respect to the suit properties. The Plaintiff has alleged that she never appeared before the said advocate to sign the documents. It is the Plaintiff’s contention that the signature appearing on the Transfer documents is a forgery. Consequently, the issue of whether the Plaintiff signed the Transfer documents or not is contentious, and will require Mr. Ondabu, who is acting for the Defendants, to testify in this matter.

27. On the basis of the analysis above, it is my conclusion that Mr. Jason Ondabu Advocate cannot represent the Defendants in this case without falling into the danger of being conflicted. The said advocate can only appear in this matter as a witness, and not as an advocate for any of the parties herein. The Application to have said advocate appear in court to testify will be made during pre-trial or at trial.

28. For those reasons, I allow the Application dated 21<sup>st</sup> February, 2018 as follows:

***a) Jason Ondabu Advocate, be and is hereby barred from acting as an advocate for the Defendants in this suit.***

***b) Each party to bear his/her own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF JUNE, 2020.**

**O.A. ANGOTE**

**JUDGE**