



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CIVIL CASE NO. 238 OF 2015**

**HON. DR. EVANS KIDERO..... PLAINTIFF**

**- V E R S U S -**

**HON. DR. BONNIE KHALWALE ..... DEFENDANT**

**RULING**

1. Dr. Evans Kidero, the plaintiff/applicant herein, took out the motion dated 1<sup>st</sup> September 2015 in which he sought for **interalia** the disqualification of Ahmednassir M. Adullahi S.C. from acting as the lead counsel representing Dr. Bonni Khalwale, the defendant herein. The motion is supported by the affidavit of Dr. Evans Kidero sworn on 1<sup>st</sup> September 2015. When served with the aforesaid motion, the defendant/respondent opposed the same by raising a notice of preliminary objection dated 9<sup>th</sup> September 2015 and grounds of opposition.
2. The preliminary objection had to be disposed of first. In the notice of the preliminary objection dated 9<sup>th</sup> October 2015, the defendant put forward the following grounds:
  1. ***The issues raised in the application are not part of the plaintiff's pleadings and cause of action that will be heard and determined by the court at the full trial, in the premise the court has no jurisdiction to hear, entertain and rule on the said application that raises extraneous issues to the plaintiff's grievances.***
  2. ***The issue as whether Ahmednassir M. Abdullahi S.C will act as lead counsel in this matter is not for the applicant to raise. It is not a matter that can be determined as a preliminary issue or at an interlocutory stage.***
  3. ***Disqualification of counsel cannot be raised in a suit between litigants. It can only be the subject matter of a substantive suit.***
3. When the motion came up for interpartes hearing, learned counsels appearing in this matter recorded a consent order to have the preliminary objection and the substantive motion disposed of by written submissions. Learned counsels were further given an opportunity to make oral highlights of their written submissions.. I have considered both the rival oral and written submissions. The gist of the preliminary objection is that this court cannot grant the orders sought in the motion dated 1<sup>st</sup> September 2015 because the issues were not raised by the plaintiff in his pleadings. It is the submission of Ahmednassir, S. C, that the application seeking for his disqualification as lead counsel does not form part of the plaintiff's pleadings hence this court has no jurisdiction to hear, entertain and determine the same since the said application raises extraneous issues to the plaintiff's grievances. Mr. Ahmendnassir S.C further argued that the disqualification of a counsel cannot be raised in a suit between litigants, as the same can only be the subject matter of a substantive suit. It was pointed out that Ahmednassir S.C does not appear in

the plaintiff's list of witnesses as one of those expected to testify in this suit therefore there is no basis to have him recuse himself from representing the defendant.

4. Mr. Makhoha, learned advocate, appeared as holding brief for Prof. Ojienda, S.C argued against the preliminary objection on behalf of the plaintiff. The learned advocate was of the view that this court has jurisdiction to entertain the motion since the issues raised therein are directly related to the defamation suit. Mr. Makhoha further pointed out that the preliminary objection lacks in propriety as it does not raise pure points of law but calls for the ascertaining of facts concerning the issues raised in the pleadings therein. The plaintiff's advocate further argued that the plaintiff's motion does not raise extraneous issues hence this court has jurisdiction to entertain it. Mr. Makhoha pointed out that Ahmednassir S.C is currently the sole arbitrator in a dispute pitting Mumias Sugar Co. Ltd (MSC) and Mumias Outgrowers Company Ltd (MOCO), where the later is claiming to be paid ksh.3.7 billion from the former. The plaintiff's counsel further stated that the defence and the replying affidavit of the defendant herein are mainly pegged on the documents and evidence that have been tabled in the arbitration proceedings. It is said that the sum of kshs.3.7 billion was allegedly lost during the plaintiff's tenure as the managing Director of Mumias Sugar Co. Ltd. It is said that the defendant is justifying his defamatory statements through the arbitration proceedings. The plaintiff avers that he is apprehensive that Ahmednassir SC is likely to use the information that he gathered as the sole arbitrator in the arbitration file to the prejudice of his case.
5. After a careful consideration of the arguments submitted in support and against the notice of the preliminary objection there are certain facts which remain undisputed: First, that the plaintiff was for sometime the Managing Director of Mumias Sugar Co. Ltd. Secondly, that Ahmednassir S.C is the sole arbitrator in the arbitration dispute pitting Mumias Sugar Co. Ltd and Mumias Outgrowers Co. Ltd.  
Thirdly, that Mumias Sugar Co. Ltd and Mumias Outgrowers Co. Ltd are not parties to this suit.  
Fourthly, that Ahmednassir S.C does not represent as an advocate Mumias Sugar Co. Ltd nor Mumias Outgrowers Co. Ltd.  
Fifthly, that Ahmednassir S.C has never represented in his capacity as an advocate Dr. Evans Kidero, the plaintiff herein.  
Sixth, that there is no indication from the plaintiff that Ahmednassir S.C is amongst those witnesses whom he intends to summon to testify in his case.
6. The question which this court has been left to grapple with is whether or not the preliminary objection has any merit to upstage the plaintiff's motion for the recusal of Ahmednassir SC as the lead counsel for the defence. I have already outlined at length the grounds raised and argued for and against the preliminary objection. One of the grounds put forward by the defendant is that this court has no jurisdiction to hear and determine an application to disqualify an advocate from participating in proceedings if the issues raised do not form part of the plaintiff's pleadings. It is argued that if the court entertained such an application, it would in essence be introducing extraneous matters to the dispute. With great respect, I do not think the argument can be sustained. The factors to be considered when dealing with such an application in most cases may not relate to the issues between the parties to the dispute.
7. In the motion dated 1<sup>st</sup> September 2015, the plaintiff avers that Mr. Ahmednassir S.C is likely to use the information that he gathered as the sole arbitrator in the arbitration dispute between Mumias Sugar Co. Ltd and Mumias Outgrowers Co. Ltd to the plaintiff's prejudice. I have had a cursory look at the pleadings from both sides in this suit. It is apparent that the dispute between Mumias Sugar Co. Ltd and Mumias Outgrowers Co. Ltd is a commercial dispute while that between the plaintiff and the defendant is defamation. Neither the plaintiff nor the defendant is a party to the arbitration proceedings. Mr. Ahmednassir S.C is an arbitrator in the dispute between

8. Rule 9 of the Advocates (practice) Rules, expressly provides as follows:

***“No advocate may appear as such before any court or tribunal to 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 of affidavit, he shall not continue to appear.”***

9. I have taken into account the fears expressed by the plaintiff against Ahmednassir S.C appearing in this suit as the lead counsel for the defendant. The plaintiff has however failed to show that the information received by the learned senior counsel in his capacity as an arbitrator is confidential. For this court to bar an advocate from representing a litigant, the information withheld by the advocate must be privileged information such that the principle of advocate-client privilege becomes paramount. The arbitration proceedings the learned senior counsel is arbitrating over cannot be said to be confidential and privileged information. These are matters which are in the public domain. It is apparent from the plaintiff’s list of witnesses filed in court that Ahmednassir S.C is not one of those listed to testify for the plaintiff. He was not an advocate for the plaintiff over this dispute nor in any other case related to this dispute.

10. In **Kiambu Service Store vs Mbo-i-Kamiti farmers and 3 others Nairobi H.C.C.C. no. 546 of 1998 eK.LR** Ransley J stated **inter alia** as follows:

***“Privilege will obviously extend to confidential matters related by a client to his advocate but it is necessary to look at what has been disclosed by the advocate in order to determine whether it is knowledge acquired as a result of confidential information or facts disclosed to an advocate in the course of his duties..... A court is entitled to be told the truth and be acquainted with the facts relevant to the matters arising”***

11. In the end, I find that the motion dated 1<sup>st</sup> September 2015 does not qualify to be determined on its merits because the same is not based on the well known principles of law on recusal of advocates while appearing for the opposite party.

12. In the end, I find the notice of preliminary objection to be well founded. The preliminary objection is upheld. Consequently the motion dated 1<sup>st</sup> September 2015 is ordered struck out. In the circumstances of this case I think a fair order on costs is that the same should abide the outcome of this suit, which I so order.

**Dated, Signed and Delivered in open court this 1<sup>st</sup> day of April, 2016**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant