



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 64 OF 2013(O.S)

G MPLAINTIFF

VERSUS

D M MDEFENDANT

RULING OF THE COURT

1. The Notice of Preliminary Objection before the court is filed herein on 14th June, 2016 by the Plaintiff. The Preliminary Objection is alleged to raise a Preliminary Objection on point of law, that is

“That there is a conflict of interest as regards counsel for the Defendant on account of having acted for both parties, that is the plaintiff and the defendant on the acquisition and purchase of the matrimonial property and subject matter of these proceedings”

2. The Preliminary Objection is raised in regard to the defendant’s current advocates acting for the defendant in the Originating Summons filed herein on 27th November, 2013. In the Originating Summons the plaintiff prays for the determination and declaration of the following questions.

a. That it be declared that the movable and immovable properties acquired by the joint funds and efforts of the plaintiff and defendant are also jointly owned in their respective proportions of contribution towards their acquisition thereof.

b. That the court be pleased to order that the said properties enumerated herein below in paragraph 4 be valued and sold and the net proceeds be shared in accordance with the share of each spouse’s direct contribution to their acquisition.

*c. That the court be pleased to order the defendant to release to the plaintiff all household items, assortment of imported furniture and surplus decra roofing tiles solely purchased by the plaintiff and which items are lying at the matrimonial home in the parcel of land known as **L.R. No. Mulango/Katulani ‘A’/[particulars withheld]** pending and determination of this suit.*

d. That the defendant either by himself, his servants, agents, workers or otherwise howsoever be restrained by an order of injunction from damaging, alienating, selling, encumbering, interfering with, disposing dealing with the said properties in any manner whatsoever prejudicial to the plaintiff’s interests pending the hearing and determination of this suit that is to say:-

*i. A two (2) acre piece of land comprised in the parcel of land known as **Mulango/Katulani “A”/ [particulars withheld]**.*

ii. The four bed roomed house standing on the two(2) acres piece of land comprised in the parcel of land known as **Mulango/Katulani ‘A’/ [particulars withheld]** in Katulani in Kitui County.

iii. The assortment of imported furniture and household goods that are at the matrimonial home on **L.R.No. Mulango/Katulani ‘A’/[particulars withheld]**.

e. That the defendant either by himself, his servants, agents or otherwise howsoever be compelled by a mandatory injunction to open, permit and allow the plaintiff unlimited access possession and quiet enjoyment of the matrimonial home built on **L.R.No. Mulango/Katulani ‘A’/[particulars withheld]** pending the hearing and determination of this suit.

f. That costs of this suit be borne by the defendant.

g. That the court be pleased to grant such further or other relief(s) as may be just in the circumstances.

3. Submitting on the said Preliminary Objection, the plaintiff states that the counsel for the Defendant herein, the firm of **J.K. Mwalimu & Co. Advocates** based in Kitui County, had once acted for both parties in this suit during the acquisition of the matrimonial property. In the plaintiff’s view, this is a clear indication that counsel for the defendant is privy to vital information that the Plaintiff may have shared with him in the course of their Advocate- Client relationship, which information should remain confidential unless and until the plaintiff herself, allows the same information to be divulged. In the affidavits separately sworn by the parties herein, the plaintiff in her Supporting Affidavit to the Originating summons dated **26th November, 2013** states that the parcel of land Known as **L.R.No. Mulango/Katulani/ ‘A’/ [particulars withheld]** was bought through the joint effort of herself and the Defendant through joint and equal contributions at a total purchase price of **Kenya shillings two hundred and five thousand only (Kshs. 205,000.00/=)**. The annexure thereto, marked “**GM 3**” is a copy of the Sale Agreement that was prepared by the firm of **J.K. Mwalimu & Co. Advocates**, the firm that is on record for the defendant herein in this matter. In the Replying Affidavit sworn by the defendant herein on **4th March, 2014**, the defendant claims to have solely purchased the parcel of land known as **L.R.No. Mulango/Katulani/ ‘A’/ [particulars withheld]** and included the plaintiff’s name on the agreement just as a way of cementing their relationship. The plaintiff submits that this in itself is a triable issue, which may require the defendant’s advocate to give evidence in court.

4. In response, the defendant submitted that a Preliminary Objection should be based on pure points of law. The Defendant cited the case of **Mukisa Biscuit Manufacturing Co. ltd vs. West End Distributors Ltd (1969) EA 696** where it was held *inter alia* that “... **a Preliminary Objection consists of a point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit...**”. Similarly Sir Charles Newbold in the **Mukisa Biscuit Case (supra)** held that, “**a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop**”.

5. From the authority cited hereinabove, the defendant submitted that it is clear that for it to be a Preliminary Objection, **a point of law raised must not be blurred with factual details liable to be contested and in any event to be proved through the processes of evidence**. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principal, a true Preliminary Objection. A Preliminary Objection must not derive its foundation from factual information which stands to be **tested** by normal rules of evidence. The defendant’s case is that the Preliminary Objection herein raises questions of fact because this court has to ascertain whether or not the firm of advocates on record for the defendant has ever acted for both parties herein in the acquisition of the purported matrimonial property.

The Preliminary Objection is thus not sustainable as it does not consist of pure point of law for it to stand.

6. I have carefully considered the submissions of the parties. I raise the following issues for determination.

a. Whether the Preliminary Objection raises a pure point of law.

b. Whether there is possible conflict of interest.

7. As for the first issue, it is a fact which is not controverted that the defendant's counsel herein M/S J.K. Mwalimu & Co. Advocates had once acted for both parties in acquisition of the matrimonial property being **L.R. No. Mulango/Katulani/ "A"/ [particulars withheld]**. That is both a point of fact and a point of law, for an advocate acting for a client is a matter provided for in law. In that process an advocate acquires a lot of information, both as regards the property transacted, as well as personal information about the client, sources of funds, and if the matter involves a wife and husband, facts about possible financial contribution towards the purchase of the property. Again, where the matter involves a wife and husband, or people in such close proximity, the information acquired becomes sacrosanct in the event that the parties for which the advocates acted decide to go their separate ways. In regard to the matter before the court, that is the Originating Summons, it is clear that the questions put forth by the plaintiff for determination in the Originating Summons are all revolving around the property **L.R.No. Mulango/Kotulani "A"/ [particulars withheld]**. It is therefore clear that the defendant's advocate who acted for both parties in the acquisition of that property would have information in his knowledge which would prejudice the plaintiff in the determination of the questions raised for determination in the Originating Summons. This court observes that a possible conflict of interest in matters involving husband and wife who have since separated or are on their separate ways is more easily determinable to exist, than in other areas of relationships such as partnerships or transactions involving limited liability entities. A relationship of husband and wife, or people relating in such proximity is peculiar, and information acquired by an advocate acting for such parties while they are in good terms, must be more carefully protected especially when the parties separate. This is so because while the parties are still trusting each other, they may volunteer freely all the information without caution that there could be a problem in the future. Where that relationship collapses, and parties find themselves in a court of law, the court must take the view whenever appropriate, that secures any information which may have been given to an advocate freely by the parties while they were still in good terms. It is therefore the finding of this court that the Preliminary Objection herein raises a pure point of law, and that in answer to the issue number two, there is a possible conflict of interest on the part of the advocates representing the defendant herein. This finding is correct notwithstanding **Article 50** of the **Constitution** which guarantees any person a right to a fair hearing including the right to be represented by an advocate of choice. The defendant has before him thousands of lawyers who are registered to practice in Kenya, and any of them can represent him in fulfillment of the provisions of that Article. The same argument is true for the plaintiff, that the defendant cannot purport to take an advocate who has acted for them jointly in the purchase of their matrimonial property, and who could be having in his possession information which would be prejudicial to the plaintiff in the determination of the questions raised in the Originating Summons.

8. It is a fact that **Japheth Kiteme Mwalimu** acted for both parties in the agreement dated **7th July, 2009** when the parties purchased the matrimonial property. Although the defendant states that this is a fact to be proved whether the counsel actually acted for them, this court notes that the defendant or his counsel has not specifically denied the allegation which is part of the affidavit in support of the Originating Summons. While the defendant may contest the issue of representation, this court is satisfied that the defendant's counsel had acted for both parties in the said transaction, and that there is enough evidence to support the plaintiff's case of possible conflict of interest.

9. In the upshot, the finding of the court is that the Preliminary Objection raised by the plaintiff herein has merit and the same is upheld with costs in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF NOVEMBER, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

Mr. Makau for plaintiff

No appearance for Defendant

Court Assistant – Mr. Munyao