



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL AND ADMIRALTY DIVISION

HCC NO.681 OF 2008

JOHN GATHARA KURIA.....APPLICANT

VERSUS

LEAH WANJIKU MUTHUA.....RESPONDENT

RULING

Blocking advocate from giving evidence

[1] The Applicant is asking the court to block and or disqualify JOSEPH GITEE WAWERU ADVOCATE from giving evidence on behalf of the Defendant or at all. He has applied through a Motion application dated 16th of April 2014 which is supported by the Plaintiff's affidavit. The Motion is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules, Section 3A and Section 63 of the Civil Procedure Act. The Applicant in his submissions admitted that Section 63 of the Civil Procedure Act is not the correct provision of law to base this application on, however, he implored the court to invoke article 159 (2) (d) of the Constitution and determine the substance of the application rather than rely on procedural technicality as it is being beseeched by the Defendant to do. I am glad the Applicant realized he cited the wrong provision of law in his application, however, the mistake is not a fatal one as to deny the Applicant an opportunity to have his application determined on merit. The constitutional command to courts of law is that they should as much as possible strive to serve substantive justice rather than place undue reliance on technicalities in adjudication of cases. I accordingly invoke article 159 of the Constitution and I will decide the application on merit.

The Applicant's gravamen

[2] The Applicant contended that the cause of action in this suit relates to a sale Agreement entered into on the 7th December 2005. The agreement was prepared by JOSEPH GITEE WAWERU Advocate, who at the time was acting for both the vendor (Plaintiff) and the Purchaser (Defendant). Therefore, the main bone of contention is whether it is just and /or fair for the said advocate to give evidence against or in support of either party. He has based his application on the fact that at the time of the agreement, there was a client/advocate relationship among the Plaintiff, Defendant and the said advocate. And so, the Defendant has no right whatsoever to allege that the advocate did not act for the Plaintiff at the time of the transaction. It is only the advocate and the Plaintiff who can ascertain the nature of their relationship. Furthermore, the said advocate can only be a witness for both parties. The Applicant cited the case of *King Woolen Mills & Another vs. Kaplan & Stratton (1993) KLR 273* to support their claim. In the

case, it was held therein that,

“...the fiduciary relationship created by the retainer between client and advocate demands that knowledge acquired by the advocate while acting for the client be treated as confidential, and should not be disclosed to anyone else without their client’s consent. It was held that his relationship exists even after the end of retainer and that the above principle applies equally where an Advocate acts for two or more parties in the same transaction”.

The Plaintiff further submitted that, JOSEPH GITEE WAWERU acted for both parties in the transaction and holds privileged information obtained during the retainer and, therefore, he should be barred from so testifying against the Plaintiff. If he does, the Plaintiff will be highly prejudiced. He also referred the court to the decision of Nyamweya J in the case of ***Kamindi Selfridges Supermarket Ltd vs. Kiambu Murutani Company Ltd, ELC No. 420 Of 2011***. He found further support in Section 134(1) of the Evidence Act.

[3] He, therefore, sought the court to prevent the advocate herein from disclosing any information made to him by his client unless his client authorizes him to do so. The defendant has stated that the purpose of calling the advocate as a witness is for him to testify on the discussions held in his office. According to the Applicant, those discussions were confidential and the same should only be uttered to third parties with the consent of the Plaintiff. Further, the Applicant submitted that, the protection of a client against unauthorized disclosure of any communication to the advocate continues even after the retainer of the advocate has ceased. In the circumstances, the advocate can only testify against the Plaintiff in breach of professional ethics and the law. The Applicant disagreed with the exposition by the Defendant in her replying affidavit that he should wait for the said advocate to testify then raise objection to the evidence presented by the advocate. To him, that course will make him a not vigilant litigant and may be denied assistance of equity. He also refuted the suggestion by the Defendant that the objection should have been raised at pretrial stage. The Applicant opines that this application comes at the most opportune time to object to the testimony of the said advocate and should be granted. It is not belated; it is not misconceived. There is real likelihood of mischief or real prejudice to the Applicant if the advocate testifies. The advocate’s testimony should be blocked.

Respondent says advocate should testify

[4] The Respondent filed a Replying Affidavit filed in court on 27.5.2014 in opposition to the application dated 16.4.201. She says that Mr. Joseph Githee Waweru Advocate should give evidence on her behalf, and the application dated 16.4.2014 should be dismissed. She gave her reasons. First, she submitted that there is no clause in the Sale Agreement stating that Mr. Joseph Gitee Waweru was acting for both parties in the sale. In fact Clause 5 of the Sale Agreement states: ***“The Purchaser shall pay legal and transfer fees”***. The clause confirms that the said Advocate was acting for the Purchaser (Defendant) and not the Vendor (Plaintiff). It, therefore, follows that there never existed a client/advocate relationship among the Plaintiff, the Defendant and the said Advocate. Consequently there is no reason why the said Advocate should be barred from giving evidence in this matter. Second, if Mr. Joseph Gitee Waweru was acting for the Defendant in the Sale transaction as stated by the Applicant, then, he should be allowed to testify and explain to the court what the Plaintiff and Defendant agreed when they met at his office on 27.5.2014. Indeed the issues agreed between the parties as captured in the statement of the said Advocate amounted to a variation of the terms of the sale and therefore it is important for the said Advocate to testify and confirm to the court what the two parties agreed. Third, the application is belated and is a mere afterthought meant to delay the finalization of this matter. It ought to have been filed during the pre-trial conference. The Plaintiff’s advocate did not inform the court that they are opposed to the said Advocate giving evidence in this case. If the Plaintiff’s Advocates were serious they should have raised objection immediately they were served with the statement of the said Advocate in April 2013. Fourth, if the application is allowed the Defendant will be prejudiced since the said Advocate is her only and key witness on the matter. On those reasons the court should dismiss the application with costs.

THE DETERMINATION

[5] I am being asked to bar Mr. Joseph Gitee Waweru Advocate from testifying in this case as the witness for the Defendant. The Applicant contends that the said advocate was the advocate for both parties and so he cannot be a witness of one party. He further says that the advocate obtained confidential information during the retainer and should not use it against his client by testifying in court. He cited judicial authorities as well as statutory anchorage of his arguments. Section 134(1) of the Evidence Act was quoted; it provides as follows:

“No advocate shall at any time be permitted, unless with client’s express consent, to disclose any communication made to him in the course and for the purpose of his 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 been 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...”

[6] The Respondent avers that the evidence by the said advocate is necessary and is the only evidence she has on the variation of contract herein. She is perturbed that if the evidence is excluded she will be greatly prejudiced. She insisted that the agreement did not state that the advocate in question was for both parties; he was the advocate for the Respondent.

[7] My view of this matter is that Mr. Joseph Gitee Waweru Advocate drew and witnessed the agreement herein as the advocate for both parties in the transaction even if there is no express provision stating so. There was, therefore, advocate-client relation among the parties and disclosure of privileged information can only be with the consent of the party concerned. In such scenario, the law allows the advocate to testify only on non-contentious matters arising out of the agreement. The matters on which the Respondent intends to call the advocate to give evidence are not non-contentious and indeed, they are not matters on express provisions of the agreement. They are matters of some alleged variation of the agreement herein through purported verbal agreements in a meeting held in the advocate’s office. The meeting was held by the advocate as the advocate for the parties, and notably, there is absolutely no record of the meetings which the advocate kept. Of noteworthy, the agreement herein is a written memorandum. In these circumstances, the Plaintiff will be greatly prejudiced by disclosures of privileged information which is not disclosed with his consent. Of course he has not given his consent. On this point, I am guided by the case of ***Kamindi Selfridges Supermarket Ltd vs. Kiambu Murutani Company Ltd, ELC No. 420 Of 2011*** wherein Nyamweya J stated as follows:-

“...to determine this issue, this court is reminded of the mischief that is sought to be avoided when an advocate who has acted for a party is prevented from acting or being witness for the other party. This mischief is essentially that of prejudice what will be caused to the other party in the event of disclosure of privileged information held by the advocate”

On that basis, I will not allow Mr. Joseph Gitee Waweru Advocate to testify on behalf of the Respondent. The upshot is that I dismiss the application dated 16.4.2014. I make no order as to costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 11th day of February 2015

F. GIKONYO

JUDGE