



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 570 OF 2011

FAST TRACK

BRITISH-AMERICAN INVESTMENTS COMPANY (K) LIMITED.....PLAINTIFF

VERSUS

NJOMAITHA INVESTMENTS LIMITED.....1ST DEFENDANT

GICHUKI KING'ARA & CO ADVOCATES.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 2nd Defendant's Notice of Motion application dated and filed on 20th January 2012 was brought under the provisions of Rule 9 of the Advocates (Practise) Rules, the Advocates Act Cap 16 (laws of Kenya) and all other enabling provisions of the law. The same sought the following orders:-
 - a. **THAT the firm of Walker Kontos Advocates be restrained by an order of injunction from representing British-American Investments Company (K) Limited in this suit or any other proceedings therefrom.**
 - b. **THAT the court be pleased be (sic) grant such or further orders as it deemed fit.**
 - c. **THAT costs of the application be borne by the Plaintiff.**
2. The said application was premised on grounds which can generally be summarised as follows:-
 - a. **THAT the firm of Walker Kontos Advocates acted for the Plaintiff in the negotiation, verification and witnessing of a sale agreement dated 12th August 2011 between the Plaintiff and the 1st Defendant over the 1st Defendant's parcels of land known as L.R. No 13136/11, 13136/12, 13136/13, 13136/14 and 13136/15 situated in Thika, which agreement was witnessed by one Peter Muhiu Mwangi, an advocate in the aforesaid firm of advocates.**
 - b. **THAT the 2nd Defendant and the said firm of advocates exchanged numerous correspondence as a result of which the said firm was privy to confidential information passing between the parties.**
 - c. **THAT it was reasonable to expect that an advocate from the said firm would be called as a witness to testify on the validity of the agreement entered into between the Plaintiff and the 1st Defendant which direct conflict of interest would be greatly prejudicial to the Defendants.**

AFFIDAVIT EVIDENCE

3. The said application was supported by the Affidavit of Peter Gichuki King'ara which was sworn on 20th January 2012. He reiterated all the grounds set out in the face of the application *in extenso*.
4. On its part, the Plaintiff swore a Replying Affidavit through Nancy Kiruki, its Company Secretary. The same was sworn and filed on 9th March 2012. She deponed that it was not in dispute that the Plaintiff had rescinded the Agreement for Sale dated 12th August 2011 following a notification of the existence of an injunction order that had been issued in HCCC No 385 of 2010 in respect of the suit land, which information it passed to the 2nd Defendant.
5. She stated that the Plaintiff demanded for a refund of the deposit in the sum of Kshs 70,000,000/= on the ground that there had been material non-disclosure of a court order. She averred that the 2nd Defendant informed the Plaintiff that the said amount had been deposited with the Co-operative Bank of Kenya Limited for a period of six (6) months. She added that the 2nd Defendant proceeded to issue a twenty one (21) days completion notice indicating that the said deposit would be forfeited after which the 1st Defendant would proceed the property to other interested purchasers.
6. It was her contention that the Plaintiff had a right to legal representation of its choice, that no conflict of interest had been shown, that the 2nd Defendant drew the Agreement for Sale and was thus estopped from challenging the Plaintiff's choice of advocates and that in any event, the 2nd Defendant was representing itself.
7. In addition, she stated that no extrinsic evidence could be adduced prior to the said Agreement for Sale which represented the final contract between the parties and that the same having been rescinded, it did not call for interpretation of its terms as the said terms were clear and unambiguous. The Plaintiff therefore prayed for the dismissal of the 2nd Defendant's application with costs to it.

LEGAL SUBMISSIONS BY THE 2ND DEFENDANT

8. The 2nd Defendant reproduced the provisions of Rule 9 of the Advocates (Practise) 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 whether verbally or by declaration of 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 on formal and non-contentious matter of fact in any matter in which he acts or appears.”

9. It submitted that in the Replying Affidavit of Peter Gichuki King'ara sworn on 15th December 2011, it was evident that the said Peter Gichuki King'ara had advised parties to take alternative representation other than the advocates who were acting in the sale transaction but that neither the Plaintiff nor its advocates conceded to the said request. It was the 2nd Defendant's contention that in the eyes of the common man, Allen Gichuhi, Advocate who was acting in this matter and Peter Muhiu Mwangi, Advocate who witnessed the said Agreement for Sale must have obviously briefed each other on the pertinent issues of the suit herein. It was its averment that the said Peter Muhiu Mwangi was a potential witness to the sale agreement having explained its contents to the Plaintiff.
10. It relied on the case of **Francis Mugo & 22 Others vs James Bress Muthee [2005] eKLR** in which the court held that as an officer of the court, an advocate owes allegiance to a cause that is higher than serving the interests of his client.

LEGAL SUBMISSIONS BY THE PLAINTIFF

11. In its written submissions dated and filed on 9th March 2012, the Plaintiff referred the court to the case of **Delphis Bank Limited vs Chatthe & 6 Others Limited [2005] I KLR 766** in which the Court of Appeal found that it was a constitutional right of a party to be represented by an advocate of his choice but that such right could be put to serious test if there was a conflict of interest, which could endanger the principle of confidentiality in an advocate/client fiduciary relationship or where an advocate could also double up as witness.
12. The same court further held that there was no general rule than an advocate could not act for one party in a matter and then act for the opposite party in subsequent proceedings but that each case had to turn on its own facts. It was the Plaintiff's submission that there was no evidence before this court, as it should have been, which could have led this court to interfere with the Plaintiff's constitutional right to counsel.
13. It also placed reliance on the case of **HCCC No 452 of 2007 Sunrise Properties Limited vs National Industrial Credit Bank & 2 Others** (unreported) in which the court dismissed an application asking a firm of advocates to disqualify itself on the ground that the applicant therein did not show there was any advocate/client relationship between it and that firm of advocates or establish circumstances justifying reasonable apprehension of likelihood of bias.

LEGAL ANALYSIS

14. First and foremost, this court has deemed it necessary to address the relevance of previous affidavits that were sworn in this matter. In the Supporting Affidavit sworn by Peter Gichuki King'ara on 20th January 2012, the 2nd Defendant referred this court to the Replying Affidavit sworn on 15th December 2011 and the annexures thereto to demonstrate that M/S Walker Kontos Advocates and the 2nd Defendant had discussed the matter at length which, in its view, evidenced the conflicting stands by the party. In its Replying Affidavit sworn on 9th March 2013, the Plaintiff pointed out that it was relying on its Affidavit in support of its Notice of Motion application dated 15th December 2011 to show that it was not in dispute that the Plaintiff rescinded the Agreement for Sale date 12th August 2011.
15. This court is of the firm view that dealing with any contentions raised by the parties in the affidavits sworn in 2011 in support of other applications herein would be untidy and burdensome as it would be forced to comb through the said affidavits to establish what the Plaintiff and the 2nd Defendant really wanted to detail to support their respective stands herein.
16. It is good practise for parties to lay out facts in the affidavits that they are relying on in support of any particular application they present before the courts for determination and not refer courts to other affidavits that are not relevant to the matter that is before it. It does appear to this court that referring to facts in other affidavits is a shortcut which has the effect of burdening it to sieve through the affidavits to establish what is relevant or not with a view to arriving at a determination in this matter. The court will therefore not attach any weight to the parties' reference to these affidavits.
17. What is of concern to this court is whether or not there was a conflict of interest if the firm of M/S Walker Kontos Advocates continued to act for the Plaintiff in this matter. The crux of the dispute regarding the said firm's representation is to be found in Paragraph 5 of the 2nd Defendant's Affidavit in support of the application herein. The deponent deposed as follows:-

“THAT the instant suit raises serious issues in relation to the aforementioned Agreement for Sale and correspondence thereto, which will entail calling the makers, the executors and witnesses therein to testify on their validity or otherwise which makers and witnesses will include the Advocate who was at the material time working with the firm of Walker Kontos Advocates.”

18. The said affidavit does not say much about the conflict of interest and the notion of calling of the said Peter Muhiu Mwangi, Advocate at this particular stage it is merely speculative. As was observed in the case of **Sunrise Properties Limited vs National Industrial Credit Bank**

- (Supra), the 2nd Defendant has not **“established circumstances justifying reasonable apprehension of likelihood of bias.”**
19. Further, a clear reading of Rule 9 of the Advocates (Practise) Rules shows that an advocate who has reason to believe that he will be called as a witness to give evidence in a matter cannot continue acting in a contested court matter. It is evident from the aforesaid Paragraph 5 of the Supporting Affidavit filed in support of the application herein that the 2nd Defendant was interested in the particular advocate who witnessed the said Agreement for Sale.
20. It would therefore imposing a lot of hardship upon the firm of M/S Walker Kontos Advocates not to represent the Plaintiff herein just because one of its advocates witnessed an agreement which had been drawn by the 2nd Defendant herein. Indeed, it is not known whether or not that particular advocate was still in the firm of M/S Walker Kontos Advocates bearing in mind that the application herein had been pending hearing and determination for over two (2) years. The position of the court would, however, have been different if the firm had a single advocate who was representing the Plaintiff herein in court and who was also expected to be called to testify as a witness in a dispute that touched on the Plaintiff herein.
21. In arriving at the conclusion that a firm with more than one(1) advocate ought not to refused to act for a party if one (1) of its advocates acted for a party, the court has had due regard to the case of **National Bank of Kenya Limited vs Peter Kipkoech Korat [2005] eKLR** which it agrees with, where Gacheche J held as follows:-

“Granted he may be called as a witness, but as well put by Mr Kuloba, he is just one of the advocates in the firm and in my mind, though he can be called to give evidence in this suit, it would not require the disqualification of the whole firm of advocates. It is clear that it is Mr Kuloba who is handling this matter and I see no prejudice cause by the Defendants.”

22. This is an issue that was also dealt with by Sir Nicholas Browne Wilkinson VC where he held in **Supasave Retail Ltd vs. Coward Chance (a firm) and Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER** that:

"The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen vs. Ellis Munday and Clarke (1912) 1 Ch. 831 (1911 - 1913) ALL ER Rep 813: The Law as laid down is that there is no absolute bar on a solicitor in a case where one partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation. The law is laid down that each case must be considered as a matter of substance on the facts of each case. It also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act."

23. It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.
24. Rule 9 of the Advocates (Practise) Rules calls upon an advocate to be conscious of a possible conflict of interest at all times and not to continue acting in a matter if it becomes apparent that he will be called as a witness. He should only stop acting in a matter once the possibility of him being called as a witness becomes apparent and not at any other time. Indeed, the Court of Appeal did acknowledge this fact in the case of **Delphis Bank Limited vs Chatthe & 6 Others** (Supra) when it recognised that an advocate could act for one party and subsequently an opposing party unless it could be shown that one party was likely to suffer prejudice if he continued to act for one

- person. The court also observed that the advocate who the applicant therein had sought to disqualify from acting in that matter could appear in the application that was before it as there was no conflict of interest.
25. In the same case, the Court of Appeal was also clear that the mere fact that debenture, loan agreements, legal charges or guarantees were drawn by the advocate could not of itself be deemed to have been a confidential matter between the parties because the documents complained of would have ordinarily been exchanged between the parties.
26. Similarly, the 2nd Defendant herein did not convince this court that there were any documents that were exchanged during the sale transaction of the suit property herein that would attract the privilege of without prejudice documents and thus cause it to suffer prejudice if the firm of M/S Walker Kontos continued to act for the Plaintiff herein. In any event, the court is unable to see any conflict of interest that would arise between two (2) firms of advocates. There was no breach of contractual and fiduciary duty or negligence on the part of M/S Walker Kontos Advocates before and at the time of execution of the Agreement for Sale for 12th August 2011.
27. Having considered the pleadings herein, affidavits, written submissions and case law in support of the parties' respective cases, the court has come to the conclusion that in the absence of any plausible reason by the 2nd Defendant why the firm of M/W Walker Kontos Advocates should not represent the Plaintiff or proof that the 2nd Defendant would suffer prejudice if the said firm of advocates continued to act for the Plaintiff herein, the court is not persuaded that the said firm ought to withdraw as provided for in Rule 9 of the Advocates (Practise) Rules. Every party has a right to be represented by counsel of his choice. In other words, he is entitled to his own choice of legal representation as was with the Plaintiff herein. The court would therefore be very hesitant to come to the conclusion that M/S Walker Kontos Advocates ought to be disqualified from acting in this matter on behalf of the Plaintiff herein.
28. The court finds that the prayer sought by the 2nd Defendant to restrain the firm of M/S Walker Kontos Advocates by way of an injunction order would not obtain in a matter such as this as it would not fall within the realm of matters in which a court can grant an injunction. The test in the case of **Giella vs Cassman Brown [1973] EA 358** where an applicant must show a *prima facie* case with a probability of success at the trial, that an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable loss that cannot be compensated by way of damages and that if the court was in doubt, then it ought to grant the interlocutory injunction on a balance of convenience would not be applicable or relevant in the circumstances of the case herein.

DISPOSITION

29. For the foregoing reasons, the court does not find merit in the 2nd Defendant's Notice of Motion application dated and filed on 20th January 2012 and the same hereby dismissed with costs to the Plaintiff.
30. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of JUNE 201

J. KAMAU

JUDGE