



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC NO. 56 OF 2012

EMERG INVESTMENTS LTD.....PLAINTIFF

VERSUS

KENYA FARMERS ASSOCIATION LIMITED.....DEFENDANT

RULING

1. Parties had by consent scheduled this matter for hearing of the suit on 30th January 2020. Come that date however, counsel for the defendant informed the court that she had filed a Notice of Preliminary Objection dated 29th January 2020. She urged the court to consider it first. She equally urged the court to give her an opportunity to file a formal application raising the issues in the notice of preliminary objection.

2. The Notice of Preliminary Objection sought striking out of the suit and/or an order that the law firm of Sheth & Wathigo Advocates be barred and disqualified from acting for the plaintiff herein on the following grounds:

- 1. There is serious conflict of interest with the firm of Sheth & Wathigo Advocates acting for the plaintiff herein.*
- 2. M/s Sheth & Wathigo Advocates acted as advocates for the purchaser in the Sale Agreement giving rise to this suit, and the said advocates are potential witnesses herein, and they have in fact been named as witnesses for the defendant herein.*
- 3. M/s Sheth & Wathigo Advocates have been and still are and (sic) advocates for the defendant in various on-going and concluded litigation and conveyance transactions, and they have been variously consulted by and have given advice to the defendant, including on the conveyance giving rise to this present suit. The said Sheth & Wathigo Advocates are hence privy to confidential client information obtained by them from the defendant, and which information the said advocates have used and continue to use against the defendant herein. This suit is and was tainted with the said irregularity, nay illegality, from the onset.*

3. Subsequently, the defendant filed Notice of Motion dated 12th March 2020, through which it seeks the following orders:

- 1. THAT the firm of M/s Sheth & Wathigo Advocates by itself, its partners, associates, employees and/or agents, be barred and removed from acting for the plaintiff herein.*
- 2. THAT costs of this application be borne by the plaintiff.*

4. The application is brought under **Rule 8 of the Advocates' (Practice) Rules** and is grounded on a supporting affidavit sworn by David Ole Naeku who described himself as the defendant's acting Company Secretary and a supplementary affidavit sworn by Symon K. Cherogony who described himself as the defendant's Managing Director. They deposed that M/s Sheth & Wathigo Advocates acted for the defendant in the sale agreement giving rise to this suit and that the defendant had included it as a witness in its list of witnesses. That the said agreement, which is a crucial exhibit for both parties in the matter, was negotiated, witnessed and executed by Ndeke Gatumu, a principal partner in the said firm. Further, that the said firm has for a long time been and continues acting for the defendant in various ongoing and concluded litigation and conveyancing transactions and have therefore been privy to confidential client information obtained from the defendant which they have used and continue to use against the defendant, thus raising a serious conflict of interest.

5. The plaintiff filed a replying affidavit sworn by Nalinkumar Meghji Shah, its Managing Director. He deposed that the plaintiff was represented in the transaction by M/s Sheth & Wathigo Advocates while the defendant was represented by M/s Kale Maina & Bundotich Advocates. He added that the plaintiff has confidence on its advocates on record.

6. This ruling is in respect of both the preliminary objection and the application. The court ordered that both be canvassed together through written submissions. Whereas the plaintiff filed submissions, the defendant did not file any.

7. I will deal with the preliminary objection first. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, Law JA stated:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

8. Charles New Bold, P. added as follows:

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.

9. For a preliminary objection to be valid, it must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

10. The defendant did not offer any submissions to support its preliminary objection. That alone would be sufficient ground upon which to dismiss the objection. Nevertheless, so as to put the objection to rest once and for all, I have decided to consider it.

11. A perusal of the objection shows that it seeks to bar the law firm of M/s Sheth & Wathigo Advocates from representing the plaintiff herein on grounds that the said advocates are privy to confidential client information obtained by them from the defendant, and which information the said advocates have used and continue to use against the defendant herein. The court would have to receive evidence so as to appreciate the nature of the confidential client information and whether any injustice would thereby be occasioned to the defendant. A preliminary objection must be on 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 propped up by other evidence. The purported preliminary objection herein fails both tests. Not surprisingly, the defendant filed Notice of Motion dated 12th March 2020 so as to raise the very issues in the preliminary objection. I therefore dismiss the Notice of Preliminary Objection dated 29th January 2020 with costs to the plaintiff.

12. The plaintiff argued in its submissions that Notice of Motion dated 12th March 2020 has not met the requirements of **Rule 8** of the **Advocates' (Practice) Rules** since the defendant has not availed any material to demonstrate that the law firm is privy to any material that would be detrimental to its case. While acknowledging that the relationship between an advocate and client entails the highest degree of trust and confidence, the plaintiff argued that it has a constitutional right to be represented by an advocate of its choice which in this case is the law firm of M/s Sheth & Wathigo Advocates and that the applicant has failed to demonstrate any documentation or information in possession of the firm that would prejudice it. Reliance was placed *inter alia* on the cases of **Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eKLR**, **British-American Investments Company (K) Limited v Njomaita Investments Limited & another [2014] eKLR** and **Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR**.

13. I have considered the application, the affidavits and the submissions. **Rule 8** of the **Advocates' (Practice) Rules** pursuant to which the application is brought 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 on formal or non-contentious matter of fact in any matter in which he acts or appears.

14. The Court of Appeal had occasion to consider the said rule in **Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR** where it stated thus:

The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result.

... [E]ach case must turn on its own facts to establish whether real mischief and real prejudice will result. ...

15. A perusal of the plaint herein shows that the plaintiff's claim revolves around a sale agreement dated 21st December 2011 wherein the plaintiff was purchaser and the defendant was vendor. The plaintiff claims that the defendant breached the agreement by failing to put it in possession. There is no dispute that the law firm of M/s Sheth & Wathigo Advocates was involved in the transaction as advocates for the plaintiff. Paragraph 1.1 (c) at page 3 of the agreement also shows that the defendant's advocates in the transaction were M/s Kale Maina & Bundotich Advocates. Further, pages 16 and 17 of the agreement show that the defendant's execution was attested by S.K. Bundotich Advocate while the plaintiff's was attested by Ndeke Gatumu Advocate. Whereas M/s Sheth & Wathigo Advocates do not deny having acted

for both parties in previous transactions, it is not true as alleged by the defendant that M/s Sheth & Wathigo Advocates acted for it in the sale agreement dated 21st December 2011.

16. The defendant have also alleged that M/s Sheth & Wathigo Advocates have been privy to confidential client information obtained from the defendant which they have used and continue to use against the defendant, thus raising a serious conflict of interest. Since there is a specific allegation that the said firm has already used confidential client information against the applicant, one would have expected the applicant to be more forthright and detailed in its allegations, since after all, its position is that the hitherto confidential information is already out in the open. No details have however been availed. In such circumstances, it is not possible for the court to objectively ascertain that real mischief or real prejudice will in all human probability result to the defendant if the law firm of M/s Sheth & Wathigo Advocates is allowed to continue acting for the plaintiff.

17. Whereas it is true that the defendant herein included the law firm of M/s Sheth & Wathigo Advocates in its list of witnesses, it must be remembered that it did so after being served with the plaintiff's pleadings in which it was evident that M/s Sheth & Wathigo Advocates were acting for the plaintiff from the date of filing of the suit. The existence and terms of the sale agreement dated 21st December 2011 are formal or non contentious matters. There would be no bar to an advocate from testifying on such matters pursuant to the proviso to **Rule 8 of the Advocates' (Practice) Rules.**

18. The right of a litigant to be represented by an advocate of its choice is a constitutional edict that cannot be lightly side-stepped. Indeed, a combination of the right of access to justice under **Article 48**, the right to a fair hearing under **Article 51 (1)**, and the duty of the court under **Article 159 (2) (d)** of the **Constitution** to see to it that justice is administered without undue regard to procedural technicalities all go to vindicate the plaintiff's right to its choice of representation. The plaintiff having chosen the law firm of M/s Sheth & Wathigo Advocates to represent it, that election must be respected and upheld, more so in the present case where the applicant has not demonstrated that any real mischief or real prejudice will be occasioned to it by the said firm remaining on record.

19. In view of the foregoing, I find no merit in Notice of Motion dated 12th March 2020. Both the application and Notice of Preliminary Objection dated 29th January 2020 are dismissed with costs to the plaintiff.

Dated, signed and delivered at Nakuru this 10th day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Gatuna Magana for the defendant/applicant

Mr Kisilah for the plaintiff/respondent

Court Assistants: B. Jelimo & J. Lotkomoi