



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 1 OF 2019

JEREMIAH ARNOLD OPANDE ARODI &

IDA NEREAH ADHIAMBO ARODI

(Suing through their Attorney)

NICODEMUS ATITO ARODI.....PLAINTIFFS

VERSUS

WASHINGTON JAKOYO MIDIWO.....DEFENDANT

AND

HOUSING FINANCE LIMITED.....1ST THIRD PARTY

LIGEND MANAGEMENT LIMITED.....2ND THIRD PARTY

RULING

1. Washington Jakoyo Midiwo, the Defendant, seeks through the notice of motion dated 5th February 2019 to have “Mr. David Otieno Advocate and by extension the firm of Owiti, Otieno & Ragot Advocates be disqualified from continuing to act for the Plaintiffs”, namely Jeremiah Arnold Opande Arodi and Ida Nereah Adhiambo Arodi, suing through their Attorney, Nicodemus Atitio Arodi. The application is based on the five (5) grounds on its face and supported by the affidavit of the Defendant sworn on the 5th February 2019.

2. The application is opposed by David Otieno Advocate, a partner in the law firm on record for the Plaintiffs in this suit, through the replying affidavit sworn on the 18th February 2019.

3. The application was on the 7th February 2019 fixed for hearing on the 21st February 2019 when Mr. Tiego and Otieno, learned counsel for the Defendant and Plaintiff respectively, made their oral submission for and against the motion.

4. The following are the issues for the Court’s determination;

a) Whether the Defendant has shown prima facie that Mr. David Otieno Advocate, and by extension the firm of Owiti, Otieno and Ragot Advocates’, continued representation of the Plaintiff would be detrimental or prejudicial to their case.

b) Who pays the costs of the application.

5. The Court has after considering the grounds, the affidavit evidence and oral submissions of both counsel come to the following conclusions;

a) That one of the main basis of the Defendant’s application to have Mr. Otieno David and his firm barred from representing the Plaintiff appears to be their role in the negotiations between the parties that led to document headed “**AGREEMENT OF ACKNOWLEDGMENT OF DEBT AND GRARANTEE TO PAY AND ACCEPTANCE OF ASSIGNMENT OF DEBT**” that is attached to Defendant’s replying affidavit sworn on 24th January 2019 and marked “**WJM5**”. The Defendant has also submitted that Mr. Otieno is the one who drew the power of attorney for the Plaintiffs that is in their list of documents. That the reply by Mr. Otieno Advocate is first that the Defendant’s counsel was basing their application on matters that were not pleaded in their application. The counsel asked the court to ignore such submissions. The counsel while conceding that the negotiations leading to

the Agreement of Acknowledgment of Debt document was done at their firm denied being personally involved. The counsel submitted that it was Mr. Owiti of their firm that had the conduct of the matter at the time and further pointed out that whatever was discussed with the parties was reduced into writing in the said document that the Defendant later declined to execute, and which the Plaintiffs later withdrew. That the court has perused the power of attorney dated the 5th November 2011 which was clearly witnessed by David Otieno Advocate. That however the Agreement of Acknowledgment of Debt document is clearly indicated to be drawn by Owiti, Otieno and Ragot Advocates.

b) That there is nothing in the power of attorney that was witnessed by Mr. David Otieno Advocate, that would qualify to bar him or his firm from representing the Plaintiffs in this suit. That further, the witnessing of the power of attorney is not one of the grounds or fact set out in the application, or affidavit in support thereof, dated the 5th February 2019.

c) That David Otieno Advocate and his firm were not legally engaged to represent the defendant at any stage of the negotiations leading up to the Agreement of Acknowledgment of Debt document or thereafter. That the Defendant had his own advocate, while Owiti, Otieno & Ragot Advocates acted for the Plaintiffs. That as the Agreement for Acknowledgment of Debt document was not executed by any of the parties and in the absence of disclosure of the existence of any privileged information other than that contained therein, the court finds no reasonable basis to bar Mr. David Otieno or his firm from appearing for Plaintiff.

d) That there is nothing in the Agreement of Acknowledgment of Debt document, and the related correspondence that have been availed to the court so far, that suggest that there exists any other sensitive or privileged information, apart from that already documented, that Mr. David Otieno or his firm may take advantage of, while representing the Plaintiffs to the detriment or prejudice of the Defendant. That in any case, the advocate from the firm of Owiti, Otieno & Ragot Advocates who is likely to be a witness in relation to the negotiations and Agreement of Acknowledgment of Debt document is Mr. Owiti, and not Mr. David Otieno. That Mr. Owiti is one of the advocates in that firm and that possibility and connection alone is not enough to bar the firm from representing the Plaintiffs in this case. (See **National Bank of Kenya Limited vs Peter Kipkoech Korat [2005] eKLR.**)

e) That further to the finding in (c) above, the Defendant has not particularized the nature of the evidence or information that David Otieno or his firm has possession or knowledge of that would potentially be used to their prejudice or detriment, or to the advantage of the Plaintiffs for that matter. That unless such evidence or information is availed to the court to decide whether or not it suffices to bar the counsel or his firm, the court should not interfere with the Plaintiffs' constitutional and legal right to be represented by counsel of their own choice. (See **In Oriental Commercial Bank Limited vs Central Bank of Kenya [2012] eKLR.**)

6. That flowing from the foregoing, the court finds no merit in the Defendant's notice of motion dated the 5th February 2019 and filed on the 6th February 2019. The application is therefore dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 20TH DAY OF MARCH 2019

In the presence of:

Plaintiffs Absent

Defendant Absent

Third Parties Absent

Counsel Mr. Otieno D for Plaintiffs and holding

brief for Ragot for 2nd Third Party.

M/s Ayita for Tiego for Defendant

Mr. Okoth for Letan for 1st Third Party.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE