



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO.1432 OF 2016

GMG.....1ST PLAINTIFF

SGM.....2ND PLAINTIFF

(a person adjudged to be of unsound mind in High Court Misc. Case No. 109 of 2014

through his friend DMG in compliance with Order 32 Rule 15

Civil Procedure Rules 2010)

VERSUS

CONCORD TRADERS LIMITED.....DEFENDANT

RULING

The Defendant filed the preliminary objection dated 22/5/2018 on 25/5/2018 in which it raises an objection to the firm of Ngure Mbugua & Co. Advocates representing the Plaintiffs in this suit. The objection is based on grounds that Mr. John Ngure Mbugua of the said firm previously testified in Kiambu Criminal Case No. 155 of 2017 whose subject matter was the suit property in this case and that he is therefore a potential witness in the case either for the Plaintiffs or the Defendant. The Plaintiff further urged that the firm is intricately involved in matters relating to the apparent dispute and has authored various letters which are intended to be used as exhibits.

The Plaintiffs opposed the Defendant's preliminary objection through the reply to the preliminary objection dated 19/9/2018. In opposition, the Plaintiffs urged that the Defendant's objection did not give a compelling reason as to why John Ngure Mbugua Advocate should cease acting for the Plaintiff, and further that the said advocate has nothing personal against the Defendant nor does he have any personal interest in the matter.

The court has considered the preliminary objection, reply to the preliminary objection together with the submissions filed by counsel for the respective parties and the law applicable. Rule 9 of the Advocates (Practice Rules) prevents an advocate appearing as advocate in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court.

The Court of Appeal held in **Delphis Bank Limited v Chatt & 6 Others [2005] 1 KLR** that a litigant's right to legal representation by an advocate of his choice is not absolute. The court set out some of the principles upon which an advocate may be disqualified from acting for a litigant. This right may be limited in two instances. Firstly where there is a possibility that the advocate may be called as a witness in the case and secondly where there exists a conflict of interest between two clients out of a previous advocate/client fiduciary relationship with the opposing client.

The question then becomes, is there a possibility that Ngure Mbugua Advocate of Ngure Mbugua & Company Advocates may be called as a witness in this matter? The dispute in this matter relates to allegations of unpaid consideration for sale of L.R. Number 12825/xxx in the form of outstanding tax arrears of Kshs. 47,446,876/= to the Kenya Revenue Authority. The Defendant is accused of failing to pay the said consideration despite entering upon the suit property. The Defendant claims to have paid the said consideration in full to Kenya Revenue Authority. The plaintiff raises allegations of fraud in relation to the sale transaction. Mr. Mbugua Advocate does not deny that he testified in Kiambu Criminal Case No. 155 of 2017, where the claim related to the suit property and in which the Defendant herein was charged. Mr. Ngure Mbugua recorded a statement with the police. A copy of his handwritten statement that was used in the said criminal case is listed in the Defendant's list of documents as one of the documents to be relied on at the hearing of this suit. A casual perusal of the Plaintiffs' documents shows that there are correspondences authored by Ngure Mbugua & Co. Advocates which are listed as documents to be relied on by the Plaintiff. Some of these include correspondence exchanged between Ngure Mbugua & Co. Advocates and the Kenya Revenue Authority, pertaining to the dispute between the parties. There is a possibility that Mr. Ngure Mbugua may be called to testify as a witness in

this case. It would be improper and unethical for counsel to act for the Plaintiffs and still testify in this matter.

The court is inclined to allow this application. Both Mr. Ngure Mbugua and the firm of Ngure Mbugua & Co. Advocates are disqualified from acting for the Plaintiffs in this case. The Plaintiffs are at liberty to engage a different firm of advocates to act for them. The pleadings filed by Ngure Mbugua & Co. Advocates will remain on record.

Dated and delivered at Nairobi this 24th day of April 2019

K.BOR

JUDGE

In the presence of: -

Ms. Rose Oluoch holding brief for Mr. Ngure for the Plaintiff

Mr. E.M. Wachira for the Defendant

Mr. V. Owuor- Court Assistant