



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 213 OF 2017

CHRISTOPHER MOKAYA MISIANI.....PLAINTIFF

VERSUS

JANE ONYANGI.....1ST DEFENDANT

PIUS MATOKE ONYANGI.....2ND DEFENDANT

R U L I N G

1. The plaintiff by an application dated 7th March 2018 expressed to be brought under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and Rule 6 of the LSK (Code of Ethics and Conduct for Advocates) 2015 seeks inter alia the following orders:-

2. That Mr. J. O. Soire and the firm of M/s J. O Soire & Co. Advocates appearing for the plaintiff in this matter be ordered to disqualify itself and cease to appear or continue to appear for the plaintiff herein;

3. That this honourable court do stay the representation by the firm of M/s J. O Soire & Company Advocates for the plaintiff in this suit;

4. That the pleadings done and/or prepared by Mr. J. O. Soire and the said firm M/s J. O Soire & Company Advocates in respect to this matter be struck out from the face of record before this honourable court.

2. The application is premised on the grounds set out on the body of the application and affidavits sworn in support thereof by Jane Onyangi, the 1st defendant herein and one Samson Nyamweya, a nephew to the first defendant. The basis of the application to have Mr. J. O. Soire and the firm of M/s Soire & Company Advocates disqualified from acting for and representing the plaintiff in this matter is that the 1st defendant avers that she had at the commencement of the suit instructed the firm of M/s Soire & Co. Advocates to act for her but she subsequently withdrew instructions from the said firm. The gist of the applicant's contention is as set out in paragraphs 2, 3, 4 and 5 of the applicant's affidavit are in the following terms:-

2. That the plaintiff herein, Christopher Mokaya Misiani brought this present suit against myself and the 2nd defendant with respect to the land parcel known as Central Kitutu/ Mwamosioma/1289 in the year 2007.

3. That with the help of my nephew; one Samson Nyamweya of ID/NO 040** I instructed the firm of M/s J. O Soire and Co. Advocates to appear for us, during the commencement stages of this suit; whereupon the firm of M/s J. O. Soire and Co. Advocates got wind of all material facts for our defense.**

4. That particularly, we disclosed all confidential information with respect to this matter to the firm including our rights and interest in the aforesaid land parcel, the history of the conveyance, and our entitlement to the subject land parcel.

5. That we however later thereafter withdrew our instructions from the said firm of M/s J. O Soire and Co. Advocates.

3. The 1st defendant further states she was assisted to procure legal services from the firm of M/s Soire & Company Advocates by her nephew, Samson Nyamweya and her averment is that she gave confidential and privileged information to Mr. J. S. Soire Advocate and his firm J. O. Soire & Co. Advocates, which unless they are barred from continuing to act for and represent the plaintiff, they could use the information to her prejudice and to the advantage of the plaintiff.

4. Mr. J. O. Soire of M/s J. O Soire & Co. Advocates filed a replying affidavit in opposition to the 1st defendant's application. He denied, he was consulted or retained by the defendants in regard to the subject matter of the present suit. He further denied ever being instructed to act for the defendants herein and stated he has never acted for either of them.

5. The court on 23rd October 2018 directed the parties to canvass the application by way of written submissions. Mr. Soire advocate filed his submissions dated 25th October 2018 on 6th November 2018. In the filed submissions, Mr. Soire advocate reiterated that the defendants had never instructed his firm in any matter relating to the land the subject matter of the suit, asserting that the defendants had not furnished any tangible evidence that could show his firm acted for them or either of them. He argued the defendants did not have any documents and/or pleadings that his law firm may have drawn to demonstrate that the firm indeed was acting for them.

6. The defendants/applicants did not file any submissions and therefore their position remains as outlined in the application and the affidavits in support of the application.

7. An advocate has the right to act for any client and a client has the right to appoint whichever advocate he desires to represent him in any matter. An advocate can only be barred from acting for a party where it is demonstrated he is placed in a position of conflict of interest and to allow him to act for the party would be prejudicial to the opposite party. The party who seeks to have an advocate disqualified from acting for another party in a matter, must of necessity provide a proper basis to the court to enable the court to make a determination that a situation of conflict of interest arises in order to make an order requiring that the advocate ceases to act for the party. Hon. Justice **Kimaru in the case of Charles Gitonga Kariuki -vs- Akuisi Farmers Company Ltd [2007] eKLR** considered the circumstances where an advocate could be disqualified in a preliminary objection taken by the defendant seeking the disqualification of the plaintiff's advocate. He observed as follows: -

“...It is trite law that an advocate cannot act for and against a client in a suit or in subsequent suits where he could utilize the information that he acquired in the cause of his work as an advocate to the detriment of that client. In Uhuru Highway Development Ltd -vs- Central Bank of Kenya [2002] 2E.A 654 at pg 661, the Court of Appeal held that an advocate would not be allowed to act against the client where he could consciously or unconsciously or even inadvertently use the confidential information acquired when he acted for such a client to his detriment. The court held, that where it was established that such a client would suffer prejudice then the court would have no alternative but to order that such an advocate ceases to act for the opposing party. An applicant, who is seeking the disqualification of an advocate from acting for the opposing party in the circumstances contemplated above, must establish the existence of such advocate client relationship that could lead such an advocate to be in possession of confidential information which he could use to the detriment of the client seeking the disqualification of an advocate.”

8. In the present matter, the 1st defendant apart from alleging she had sought the services of the firm of Soire & Co. Advocates, she has not demonstrated there was an advocate client relationship which would have entailed the dissemination of any confidential and/or privileged information that the advocate/firm could use to her detriment. Indeed the 1st defendant did not show that she in fact retained the services of the firm. For instance she did not illustrate that she paid any fees at the firm of Soire & Co. Advocates to retain their services and/or that the firm drew any documents like pleadings and/or sale agreement which would have gone to show that indeed the firm received instructions from the 1st defendant as alleged. I am not persuaded that a client advocate relationship existed between the 1st defendant and the firm of Soire & Co. Advocates from which it can be inferred and/or implied that confidential and/or privileged information must have been passed.

9. I find no basis upon which I could order the disqualification of the firm of Soire & Co. Advocates from acting for the plaintiff in the present matter. I accordingly order the defendants application dated 7th March 2018 dismissed with costs to the plaintiff.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF APRIL 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Adawo for Soire for the plaintiff

N/A for the 1st and 2nd defendants

Ruth Court Assistant

J. M. MUTUNGI

JUDGE