



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.154 OF 2018

MERCY WANJIRU MBURU.....PLAINTIFF

VERSUS

ELIZABETH WANJIRA EVANS & 8 OTHERSDEFENDANTS

RULING

(Application for disqualification of counsel in a matter; principles to be applied; context of the matter being that the applicant and the respondents having been bequeathed some properties including the suit properties in a succession matter; one property however transferred to 8th defendant and another in the process of transfer to the 9th defendant; applicant claiming that she is not privy to such sale; counsel sought to be disqualified having acted for the respondents in the succession matter and also in the sale of the suit properties; counsel filing an affidavit in the course of an application for injunction to demonstrate how the sale occurred including depositions of meetings and consensus to sell the properties; there being a possibility that counsel may be called to shed light on the sale transactions; application allowed and counsel disqualified from acting)

1. The application before me is that dated 2 April 2019 filed by the plaintiff. The application is brought pursuant to the provisions of Rule 9 of the Advocates (Practice) Rules and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant wishes to have orders that the law firm of M/s Githui & Company Advocates and any partner or associate from the said firm, be disqualified from continuing to act for the 4th, 5th, 6th and 7th defendants.

2. By way of background, this suit was commenced through a plaint which was filed on 19 April 2018, vide which the plaintiff averred that the 4th, 5th, 6th and 7th defendants are her sisters and co-owners of the land parcels Nakuru Municipality/Block 7/542, 545, and 546. These properties it is averred were distributed to them through the Court of Appeal judgment in Civil Appal No. 212 and 222 of 2007. It is pleaded that the land parcel Nakuru Municipality Block 7/542 was without her authority transferred to the 8th defendant, and that the other two properties are at the verge of being disposed of to the 9th defendant. In the suit, she has sought orders to have cancelled the title of the 8th defendant to the land parcel No. 542 and an order for delivery of vacant possession of all the suit properties. Together with her suit, the applicant sought orders of injunction which I granted through a ruling delivered on 11 October 2018.

3. In this application, the applicant avers inter alia that the firm of M/s Githui & Company Advocates represented one of the respondents before the court of appeal and was thus aware that the applicant and her siblings were entitled to the suit properties. It is averred that despite this knowledge, the said law firm participated in the sale of the parcel No. 542 to the 8th defendant and is also involved in the intended transfer of the land parcel No. 546 to the 9th defendant. It is further pleaded that the said law firm is in possession of the title document to the land parcel No. 545 and have refused to have the same transferred to the applicant and her siblings. It is deposed in the supporting affidavit, that one of the issues that will require determination is how the suit properties were sold and gifted to the 8th and 9th defendants. It is contended that the said firm of advocates will have to explain themselves in court inter alia why they have refused to transfer the suit properties to the applicant and her siblings. The applicant believes that the said law firm is intent on using its position in the present proceedings to prejudice the interests of the applicant and their continued participation in this matter will lead to a miscarriage of justice.

4. The application is opposed through the replying affidavit of Mr. Githui John, who has understood that the application seeks his disqualification from acting in this matter. He has deposed inter alia that vide Rule 9 of the Advocates Practice Rules, an advocate ought not to appear in a matter where he will be called as a witness or where such counsel has real prejudice against the other party. He has acknowledged that the suit properties were bequeathed to the children of John Mburu (deceased) by the Court of Appeal, and that the applicant was among those identified as children of the late John Mburu. He has deposed that the land parcel No. 542 was offered for sale to the 8th defendant and that the applicant retained the law firm of M/s J.A. Simiyu & Co Advocates, who wrote to him a letter protesting the exclusion of the applicant in the said sale. He has mentioned that he engaged the said firm, and later, the said firm wrote a letter indicating that the transaction could proceed and that he received the sum of Kshs. 1,000,000/= as part of the consideration pending the settlement of other issues. He has averred that nowhere has he been mentioned to be a potential witness in the matter. He has belief that it is the applicant's former advocate who may be a witness to confirm the extent of his involvement.

5. In her written submissions, Ms. Ogange, learned counsel for the applicant inter alia submitted that it would be in the wider interests of justice for the law firm of Mr. Githui to be disqualified from this case and that the applicant has demonstrated that Mr. Githui is a potential witness. She referred me to several authorities to back up her submissions.

6. Mr. Geke for the 1st defendant supported the application for the disqualification of Mr. Githui, and in his submissions, he added that besides instances where counsel may be called as a witness, there are other instances where the wider interests of justice demand that an advocate be disqualified from acting. He submitted that Mr. Githui acted for the 4th to 7th defendants in the appeal matter where it was decided that the suit properties would be jointly held with them and the applicant herein. He has offered that the transfer instruments were forwarded to Mr. Githui and that whichever way one looks at it, the law firm of Mr. Githui presided over the omission of the applicant's name from the suit properties.

7. Mr. Ochweri for the 2nd and 3rd defendants also supported the application in submissions that were fairly similar to those filed by Mr. Geke.

8. In his opposing submissions, Mr. Githui submitted that the sale agreements are not in contention the only issue being that the applicant was excluded. He reiterated that nowhere has he been mentioned as a potential witness. He submitted that his firm is not under a conflict of interest as he has never acted for the applicant and he would not have knowledge of any confidential information that may be used against her. He did not think that his continued participation in the matter would prejudice the applicant in any way.

9. I have considered the matter and the rival submissions alongside the wealth of authorities that counsel relied upon.

10. What I have is an application for disqualification of counsel and it is inevitable that we start at Rule 9 of the Advocates (Practice 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 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 in formal or non-contentious matter of fact in any matter in which he acts or appears.

11. The rule above applies to instances where counsel acting in a matter may be required as a witness, and where this potential exists, counsel needs to cease acting in the matter.

12. However, the above rule is not all encompassing, and it is not only where counsel may be required as a witness, that counsel needs to cease acting in the matter. There could be situations of conflict of interest, or other circumstances, such as where an advocate possesses confidential information which may make it improper for counsel to continue acting in the matter.

13. In our case, the first line of attack in this application is that Mr. Githui may very well be called as a witness. Central to this litigation is the fact that vide a court of appeal decision, the applicant and the 4th – 7th defendants, who are represented by Mr. Githui, were bequeathed some property by virtue of being children of the late John Mburu. Those properties include the properties in the dispute herein. When I dealt with the application for injunction, there was deposition that Mr. Konosi advocate, forwarded the leases for the suit properties and transfer instruments to the office of Mr. Githui so that he may effect transfer of the same to those who were to benefit from being children of the late John Mburu. The properties were however not so transferred but as is common ground, one has already been transferred to the 8th defendant and another was sought to be transferred to the 9th defendant.

14. Within the application for injunction, Mr. Githui , on 15 October 2018, swore an elaborate affidavit to oppose the application. He inter alia deposed as follows :-

3.The widow of the late John Mburu informed me that she wished to distribute the property amongst her children. I had no objection to the proposal. She further informed me that she had decided to gift one of the properties to the 9th defendant which is a religious institution.

4. That upon her instructions and in the presence of her children, the parcel of land known as Nakuru Municipality Block 7/546 was gifted to the 9th defendant. The instrument of the gift was duly executed by all the parties and the same is annexed hereto as Exhibit GJ 1.

5. That the widow of the late John Mburu later informed me that they wished to dispose by way of sale the parcel of land known as Nakuru Municipality Block 7/542 to the 8th defendant. I did a transfer by transmission and prepared the transfer forms. However, before the transfer could be done in the names of the 8th defendant, the firm of Simiyu & Co Advocates protested the exclusion of the applicant from the transactions. The letter is part of the annexures attached by the 8th defendant.

6. That Mr. Simiyu and I had a meeting to agree on the way forward. After consultation, I informed him that the total value of the property was Kshs. 7,000,000/=. After deduction of the disbursements, the total amount available for each of the children and the widow was approximately Kshs. 1,000,000/=.

7. That further I informed him that the land known as Nakuru Municipality Block 7/545 could be held by his firm and once the

same is disposed, the proceeds could be distributed amongst the children of the late John Mburu and taking into account the value of the parcel of land which had been gifted to the 9th defendant.

8. That based on the consensus reached, we forwarded to the law firm of Simiyu & Co. Advocates a sum of Kshs. 1,000,000/= since he came on record for the applicant herein. The said sum was part of the applicant's bequest from the sale of the parcel of land known as Nakuru Municipality Block 7/542. Annexed hereto is (sic) an excerpt from statement of from statement from the client's account marked GJ 1.

9. That further I retained the original title for the parcel of land known as Nakuru Municipality Block 7/545. The retention of the title was to ensure that once the same is sold, all the children of the late John Mburu would get an equal share. Annexed hereto is a copy of the said title marked GJ 2.

10. That on the basis of the consensus, Mr. Simiyu wrote to counsel for the 8th respondent and withdrew the objection. The parcel of land known as Nakuru Municipality Block 7/542 was eventually transferred to the 8th defendants (sic).

15. The applicant filed a further affidavit to respond to what Mr. Githui deposed above. She denied attending any meeting where the gifting of the property Nakuru Municipality Block 7/546 was discussed and a decision allegedly made to gift it to the 9th defendant. She denied ever instructing the law firm of M/s Simiyu & Co. Advocates and she deposed that if the said firm of advocates held any discussions with Mr. Githui, the same was done without her knowledge or instructions. She contended that no decision has ever been made to have the land parcel Nakuru Municipality Block 7/545 sold and she asserted that the property ought to be transferred and be registered in the joint names of the 4th -7th defendants and herself. She also alluded to not receiving her share of money that was received by Mr. Githui out of proceeds of sale of other properties.

16. It is clear from the above that the approach to this litigation that the 4th – 7th defendants have is that the sale of the suit properties was arrived at after consensus between their lawyer, Mr. Githui, and Mr. Simiyu advocate, who is alleged to have acted on behalf of the applicant. The issue of whether Mr. Simiyu ever had instructions to act for the applicant is highly contested, and also contested, is whether there was ever a meeting where the applicant was present and where she supposedly agreed to have the suit properties disposed of. Mr. Githui in his depositions above has mentioned being in the meeting. Whether such meeting was held and what outcome was arrived at such meeting is an issue that may end up being central to the determination of this dispute. There is thus a chance that Mr. Githui may be called on to elaborate on the deliberations in the said meetings. It may, at the end of the day, not happen that the parties decide to call Mr. Githui to shed light on his engagement with Mr. Simiyu, or with the meetings that he allegedly held, but that possibility does exist given the nature of the litigation at hand. Indeed the potential of Mr. Githui being a witness has been revealed by the fact that he chose to swear the elaborate affidavit that I have alluded to above, in order to assist the 4th – 7th defendants resist the application for injunction. There is also the question of the Kshs. 1,000,000/= said to have been given to Mr. Simiyu, the whereabouts of which are unknown so far.

17. Moreover, by swearing the elaborate affidavit, Mr. Githui was already descending into the arena of litigation, and bringing forth contested evidence while acting as counsel, contrary to the provisions of Rule 9 above, which inter alia applies to the giving of evidence through declaration or affidavit.

18. I am aware that in his submissions Mr. Githui relied on the case of **Kenya Commercial Bank Ltd vs Mukeshkumar Kantilal Patel & Another (2015) eKLR**, where it was held that it is not necessary to seek the disqualification of counsel merely because he drew a sale agreement. I do not refute that position, it is only that in the circumstances of this case, it is not just the agreement that is in issue, but the background and context that brought forth that agreement, and for which Mr. Githui is the one who is privy to, and as I have explained above, he may very well be called to shed light on the same. I would thus distinguish the said authority in that regard.

19. The applicant has thus persuaded me that there is a possibility that Mr. Githui may be called as a witness in this matter and for that reason, I do allow this application. I do order the disqualification of Mr. Githui from this matter, and also the disqualification of his law firm, M/s Githui & Company Advocates from this case. In the event that the 4th – 7th defendants wish to be represented by counsel, they will need to appoint one, otherwise they will be deemed as acting in person henceforth.

20. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 31ST day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Ms. Oganje present for the plaintiff/applicant.

Ms. Alwala holding brief for Mr. Githui for the 4th -7th defendants/respondents and holding brief for Mr. Opondo for 8th defendant.

Mr. Geke present for the 1st defendants.

Mr. Bosire present for the 2nd and 3rd defendants.

No appearance entered for the 9th defendant.

Court Assistants: Nelima Janepher/Patrick Kemboi

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU