



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 246 OF 2018**

**SERE TECHNOLOGIES LIMITED.....1<sup>ST</sup> PLAINTIFF**

**DR. DAVY KIPROTICH KOECH.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FORWARD CARS LIMITED.....1<sup>ST</sup> DEFENDANT**

**WALTER KIPROP CHUMO.....2<sup>ND</sup> DEFENDANT**

**HFC LIMITED.....3<sup>RD</sup> DEFENDANT**

**MIRIAM JEPKOSGEI MAINA.....4<sup>TH</sup> DEFENDANT**

**JUMA WAHAGA MAULIDI.....5<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiffs brought the application dated 25/06/2018 seeking orders that Wandabwa Advocates and all advocates serving in this firm be disqualified from acting for the 4<sup>th</sup> and 5<sup>th</sup> Defendants in the suit. Additionally, they sought orders to strike out pleadings, affidavits and averments filed by the firm of Wandabwa Advocates in the matter on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Plaintiffs also seek an order to bar the firm of Walker Kontos Advocates and all advocates serving in this firm from representing the 3<sup>rd</sup> Defendant and an order to strike out all the pleadings and documents filed by Walker Kontos Advocates.

The application was made on the ground that Paul Wandabwa of Wandabwa Advocates represented the 4<sup>th</sup> and 5<sup>th</sup> Defendants while Paul Ogunde of Walker Kontos Advocates represented the 3<sup>rd</sup> Defendants in transactions that led to transfer of the suit property to the 4<sup>th</sup> and 5<sup>th</sup> Defendants, and that it would be unprofessional for the said advocates or their law firms to represent the respective parties in this suit.

The application was supported by the 2<sup>nd</sup> Plaintiff's supporting affidavit sworn on 25/06/2018. He deponed that on or about 09/08/2002, he bought property known as L.R No. 3734/710 (Original No. 37344/3/268) situated at Lavington, Nairobi and caused the land to be registered in the name of the 1<sup>st</sup> Plaintiff to hold in trust for him and his family.

He deponed that the property was fraudulently transferred and registered in the name of the 2<sup>nd</sup> Defendant, then charged to the 3<sup>rd</sup> Defendant and subsequently transferred to the 4<sup>th</sup> and 5<sup>th</sup> Defendants without his consent. He deponed further that Wandabwa & Co. Advocates represented the 4<sup>th</sup> and 5<sup>th</sup> Defendants in the transaction that resulted in the transfer of the suit property to the 4<sup>th</sup> and 5<sup>th</sup> Defendants and drew the discharge of charge dated 09/04/2018 between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant giving rise to the fraudulent transfer of the suit property to the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

He also deponed that Paul Ogunde through Walker Kontos Advocates represented the 3<sup>rd</sup> Defendant in the discharge of charge dated 09/04/2018, which led to the transfer of the suit property to the 4<sup>th</sup> and 5<sup>th</sup> Defendants. He deponed that Paul Ogunde and Andrew Wandabwa are potential witnesses for purposes of canvassing the authenticity or validity of the transactions and should not therefore represent the parties even through their law practice. He also deponed that the two advocates have personal interest in the matter, and they have a higher duty to the cause of justice and truth since they are officers of the court.

The 3<sup>rd</sup> Defendant opposed the Plaintiffs' application through the grounds of opposition dated 09/07/2018 and urged that the applicant did not satisfy the threshold to warrant grant of the orders sought.

The Plaintiffs submitted that they intend to summon Mr. Wandabwa, Paul Ogunde and Oluoch Olunya to give evidence in this matter. They also submitted that the 3<sup>rd</sup> Defendant would not be prejudiced if it were to appoint another advocate.

The 3<sup>rd</sup> Defendant submitted that pleadings filed by parties belong to parties and not the advocates hence the pleadings filed by Walker Kontos Advocates on behalf of the 3<sup>rd</sup> Defendant should not be struck out.

By the time this application was heard, Wandabwa Advocates had exited the matter.

The court has considered the application, grounds of opposition, submissions filed by respective parties as well as the law. The issue for determination is whether the firm of Walker Kontos Advocates should be barred from acting for the 3<sup>rd</sup> Defendant in this suit. The question is whether an advocate who has prepared a document or one who was involved in the preparation of a document which may be in issue in the proceedings must disqualify himself/herself from representing a party in the suit. The law does not automatically disqualify such an advocate. The court has to look into the nature of involvement of the advocate in such a transaction and whether the issues are such that the advocate may be called to testify if the matter becomes contentious. 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 discharge of charge in contention was drawn by Wandabwa & Company advocates who as mentioned above ceased appearing for the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

Mr. Paul Ogude's stamp appears on the discharge of charge document. It is not clear whether he merely witnessed the transaction or he represented the chargee who is the 3<sup>rd</sup> Defendant. Counsel for the Plaintiffs intimated to the court that the Plaintiffs intend to call him as a witness. The Plaintiffs have also argued that they will be prejudiced if Walker Kontos Advocates continue acting for the 3<sup>rd</sup> Defendant whom they represented in a transaction for discharge of charge relating to the suit property, which transaction the Plaintiffs have challenged on allegations of fraud.

It is apparent that Mr. Paul Ogunde of Walker Kontos Advocates may be called to testify as a witness in this case. Given the allegations of fraud raised in the transaction and in the interest of justice, it is only fair that the firm of Walker Kontos Advocates exit the matter altogether.

The application dated 25/06/2018 is allowed to the extent that the firm of Walker Kontos Advocates is barred from representing the 3<sup>rd</sup> Defendant. However, the pleadings drawn by this firm for the 3<sup>rd</sup> Defendant will remain on record.

The costs of the application shall be in the cause.

Dated and delivered at Nairobi this 30<sup>th</sup> day of October 2019

**K.BOR**

**JUDGE**

**In the presence of: -**

Mr. Charles Midenga for the Plaintiffs

Mr. Samuel Makori for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ms. I. Mburu holding brief for Paul Ogunde for the 3<sup>rd</sup> Defendant

Ms. B. Mueni holding brief G. Mureithi for the 4<sup>th</sup> and 5<sup>th</sup> Defendants

Ms. Fatma Ali holding brief for A. Kamau for the 6<sup>th</sup> and 7<sup>th</sup> Defendant

Mr. V. Owuor- Court Assistant