



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO 331 of 2019**

**ANGELA MUSIMBA & 7 OTHERS.....PLAINTIFFS**

**=VERSUS=**

**FRED RABONGO & 8 OTHERS.....DEFENDANTS**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 30<sup>th</sup> October 2019 in which the Plaintiffs/Applicants seek the following orders:-

***1. That Messrs.Ogola Okello & Co.Advocates LLP either by themselves, their Advocates, their employees, servants, and/or agents or by anyone whosoever be disqualified from acting and from continuing to act for the 1<sup>st</sup> to 6<sup>th</sup> Defendants on account of the fact ,inter alia, that their representation of the said Defendants is expressly barred by Rule 9 of the Advocates (Practice ) Rules.***

***2. That accordingly, this Honourable Court do expunge from its records all pleadings and other documents filed in this suit by Messrs.Ogola Okello & Co.LLP***

***3. That costs of this application be provided for.***

2. The Applicants are purchasers of maisonettes which are erected on **LR No. 3734/1045**. These properties were developed by the 4<sup>th</sup> Respondent. The 5<sup>th</sup> Respondent was incorporated as a management company to run the maisonettes. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are directors of the 4<sup>th</sup> Respondent. During the process of sale of the maisonettes, the 3<sup>rd</sup> Respondent who is an advocate of the High Court is the one who acted for the 4<sup>th</sup> Respondent.

3. At the time of sale of the maisonettes, the Applicants had been made to believe that an adjacent property LR No. 3734/1046 was owned by the 4<sup>th</sup> Respondent and that it was to be amalgamated with LR No. 3734/1045. It later turned out that LR No. 3734/1046 is owned by the 6<sup>th</sup> Respondent.

4. A Certificate of Occupation of the maisonettes was given on 14<sup>th</sup> May 2008 by Nairobi City Council, the predecessor to the 7<sup>th</sup> Respondent. The Certificate of Occupation was given on condition that LR Nos 3734/1045 and 1046 were to be amalgamated. In one of the letters written by M/s Ogola Okello & Co. Advcoates on 25<sup>th</sup> July 2018, the 3<sup>rd</sup> Respondent revealed that amalgamation was not possible because the two properties were not owned by the same person.

5. The Applicants argue that they had all along been made to believe that LR No.3734/1046 was to be amalgamated with LR 3734/1045 and that actually the septic tank which serves the maisonettes is on LR No.3734/1046. The Applicants attribute this to the 3<sup>rd</sup> Respondent who all along assured them that amalgamation was going to be done only to change later. The Applicants therefore argue that the firm of Ogola Okello & Co Advocates LLP should be disqualified from acting for the 1<sup>st</sup> to 6<sup>th</sup> Respondents and all documents filed by the said firm be expunged from the record.

6. The Applicants application is opposed by the 1<sup>st</sup> to 6<sup>th</sup> Defendants/Respondents based on grounds of opposition dated 1<sup>st</sup> November 2019 and filed in court on 4<sup>th</sup> November 2019 together with a replying affidavit sworn by their Advocates Job Odhiambo Ochien'g on 1<sup>st</sup> November 2019. The Respondents contend that this Court has no jurisdiction to handle this matter; that the firm of Ogola Okello & Co Advocates LLP are not parties to this suit and as such no order can be issued against the firm; that the 3<sup>rd</sup> Respondent and the firm of Ogola Okello & Co. Advocates LLP are separate and distinct ; that the 3<sup>rd</sup> Respondent has a constitutional right to be represented by an advocate of his own choice and that there is no confidential information or privileged information which has been disclosed which will enable this court to disqualify the firm of Ogola Okello & Co. Advocates LLP from acting for the Respondents.

7. The respondents further argue that the Applicants are trying to mislead the court by purporting that the firm of M/s Ogola Okello & Co. Advocates LLP was the firm acting for 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents in the transactions in contention before the Court. They argue that firm which acted for 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents was M/s Ogola Okello & Co. Advocates which was a sole proprietorship firm and is separate from M/s Ogola Okello & Co. Advocates LLP which is a limited liability partnership .

8. The Respondents further argue that there is no proof of mischief or prejudice which will be suffered by the Applicants if the firm of Ogola Okello & Co. Advocates LLP are allowed to represent the Respondents and that mere suspicion of conflict of interest is not enough to have a firm of Advocates disqualified from representing their clients .

9. I have carefully considered the Applicants application as well as the opposition to the same by the Respondents. I have also considered the oral submissions made by the counsel for the parties herein during the hearing of the application. I am not dealing with the issue of whether this court has jurisdiction to deal with this matter or not at this time. The issue of jurisdiction is for another day. The only issue for determination is whether the Applicants have demonstrated that there are grounds for disqualification of the firm of Ogola Okello & Co, Advocates LLP.

10. The Applicants have based their application on Rule 9 of the Advocates ( practice) Rules which provide 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”.***

11. In the leases which were executed between the 4<sup>th</sup> Respondent and the Applicants, the 3<sup>rd</sup> Respondent was the one who acted for the 4<sup>th</sup> Respondent. The 3<sup>rd</sup> Respondent is the one who exchanged correspondence between the Advocates for the purchasers of the Maisonettes and the 4<sup>th</sup> Respondent. It is the 3<sup>rd</sup> Respondent who in his correspondence assured the advocates for the purchasers that there was to be amalgamation of LR 3734/1045 and 1046. He is the one who forwarded the certificate of occupation to one of the lawyers for the purchasers. The certificate had been given on condition that the two properties were to be amalgamated. The question to be answered is whether this alone is ground enough for disqualification of the firm of Ogola Okello & Co. Advocates LLP from acting for the Respondents.

12. The Applicants advocates state that they intend to call the 3<sup>rd</sup> Respondent as a witness or cross examine him on why he made the Applicants believe that there was to be amalgamation only for him to change later and state that amalgamation was not possible as the two properties did not belong to the same owner. In the instant case, the 3<sup>rd</sup> Respondent is already a Defendant in this suit and if there are any questions he will be asked; that will be done. There is no doubt that the Applicants cannot call him as their witness as they have already named him as a Defendant.

13. In the case of **Virginia L Giuffre Vs Allan Darshowit 2 19 Civil 337**

**(LAP) from the United States District Court Southern District of New York** , it was held that in order to disqualify an attorney based on the advocate witness rule, a party must demonstrate that the testimony is likely to be prejudicial. This is the same reasoning which has been held in our courts in Kenya including the Court of Appeal.

14. In **Delphis Bank Vs Channan Singh Chathe & 6 Others**, the Court of Appeal had this to say:-

***“ The starting point is , of course to reiterate that most valued constitutional right to a litigant ;the right to a legal representative or advocate of his choice . In some cases, however particularly civil, the right may be put to a serious test if there is conflict of interest which may endanger the equally hallowed principle of confidentiality in advocate / client fiduciary relationship or where the advocate would double up as a witness”.***

15. There is no allegation of any breach of confidentiality on the part of the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent is already a Defendant in this suit. The issue of him being called a witness of the Applicants does not arise. As I have said hereinabove, it is a question of cross-examination, and that will be done as he is a Defendant. No other advocate from the firm of Ogola Okello & Co. Advocates LLP will be called as a witness because the only person who dealt with the transaction which is the source of the dispute is already a party.

16. The Applicants are claiming that they were defrauded. The role of M/s Ogola Okello & Co. Advocates LLP is clear for all to see. The only question to be answered is whether this role can lead to mischief or prejudice as to call for disqualification of the firm. My answer to this is that there will be no prejudice or mischief which will be suffered by the Applicants as to call for disqualification and expunging of documents filed by Ogola Okello & Co. Advocates LLP. There is equally no basis upon which any other lawyer from that law firm can be disqualified from acting for the 1<sup>st</sup> to 6<sup>th</sup> Respondents. The case of **Amina N Raso & 3 others Vs R ( 2016) eKLR** which was relied upon by the Applicants is distinguishable in that, in that case, conflict of interest was clearly brought out unlike in this case where there is no conflict which has been demonstrated . I therefore find that the Applicants’ application lacks merit. The same is hereby dismissed with costs to the Respondents.

It is so ordered

**Dated,Signed and delivered at Nairobi on this 14<sup>th</sup> day of November 2019.**

**E.O.OBAGA**

**JUDGE**

In the Presence of ;-Mr Muite and Mr Nderitu for Plaintiff

Mr Odhiambo for 1<sup>st</sup> to 6<sup>th</sup> Defendants and

Mr Mwenda for 8<sup>th</sup> Defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**