



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 131 OF 2014

JACKSON KIPRUTO KATAM.....PLAINTIFF

VERSUS

STEPHANUS PETRUS KRUGER.....DEFENDANT

RULING

The application before court is dated 30.1.2017. It seeks orders that all pleadings filed by the firm of Nyairo & Company Advocates be struck out of record as the said firm has no capacity to plead and appear on behalf of the defendant and that the firm of Nyairo & Company Advocates be disqualified forthwith from acting for the defendant as they are potential witness by virtue of having drawn a sale agreement dated 25.1.2011. The application is based on grounds the agreement dated 20th January, 2011, forming the subject of these proceedings has been drawn by Nyairo & Company Advocates, the same firm on record on behalf of the defendant. That the pleadings drawn by Nyairo & Company Advocates in particular the defence dated 10th July, 2014, witness statement dated 30th May, 2014 and list of documents dated 10th July, 2014 by the said firm of Advocates contravenes Rule 9 of the Practice Rules. The said firm of Advocates are potential witnesses and cannot purport to represent the defendant because of apparent conflict of interest in matters where they may be called as witnesses. The impugned agreement is contained in both defendant's and plaintiff's list of documents dated 10th July, 2014 and 17th May, 2014 and it is prima facie that both parties intend to rely upon the same whereas the maker is the defendant's advocate on record in contravention of Rule 9 of the Advocate's Practice Rules prohibiting advocates in making representations in matters where they may be called as witnesses.

The same is supported by the affidavit of Jackson Kipruto Katam who states that the subject in dispute in this matter is an agreement dated 20th January, 2011, has been drawn by Nyairo & Company Advocates, the same firm on record on behalf of the defendant. That he is informed by his advocate on record, which information he verily believes to be true and correct that the pleadings drawn by Nyairo & Company Advocates in particular the defence dated 10th July, 2014, witness statement dated 30th May, 2014 and list of documents dated 10th July, 2014 by the said firm of Advocates contravenes Rule 9 of the Practice Rules. That the firm of Advocates are potential witnesses and cannot purport to represent the defendant because of apparent conflict of interest in matters where they may be called as witnesses.

The impugned agreement is contained in both defendant's and plaintiff's list of documents dated 10th July, 2014 and 17th May, 2014 and it prima facie that both parties intend to rely upon the same whereas the maker is the defendant's advocate on record in contravention of Rule 9 of the Advocate's Practice Rules prohibiting advocates in making representations in matters where they may be called as witnesses.

The plaintiff submits that the pleadings drawn by Nyairo & Company advocates in particular the defence dated 10.7.2014 witness statement dated 30.5.2014, list of documents contravenes Rule 9 of the Practice Rules. The agreement was drawn by Nyairo & Company Advocates. The firm of Advocates are potential witness and therefore cannot purport to represent the defendant because of apparent conflict of interest in matter where they can be called as witness.

The defendant submits that the agreement dated 25.1.2011 and witnessed by Mr. A. K. Nyairo, an advocate from the firm M/s Nyairo & Company Advocates, though listed as a document to be relied upon, its validity or existence is not in dispute. The sale agreement forms a basis of the claim for specific performance. The defendant further submits that the agreement was witnessed by one A. K. Nyairo, as an advocate for both the plaintiff and the defendant and that if an issue was to arise, then A. K. Nyairo would be called as a witness and not the firm. The defendant further submits that the act of the firm of M/s Nyairo & company Advocates representing the defendant will not in any way be prejudiced to the plaintiff. There is no conflict of interest. Lastly, the applicant has not demonstrated any prejudice to be suffered by the plaintiff if the firm of M/s Nyairo & Company Advocates is allowed to represent the defendant. There is no demonstration by the plaintiff that there is a conflict of interest in the firm of Nyairo & Company Advocated representing the defendant.

The law, on the issued raised in the application was aptly stated in the case **of Serve in Home African (SILA) Trust Vs David Kipsang Kipvego & 7 Others, 2017 eKLR** where this court found that an advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren't compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients.

I did further find that Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he may be a material witness in his client's matter. A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways pick up different aspects of the three main ways in which the problem can arise. To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client. This is the basis of the conflict of interest problem. The four elements of the fiduciary duty are:

- a. The duty of loyalty to the client.
- b. The duty of confidentiality.
- c. The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests.
- d. The duty not to put your own or anyone else's interests before those of the client.

This Court added that an advocate should not act where justice must not only be done but must be seen to be done. This often makes it easier to decide whether there is or is not a conflict. The public perception of the profession and the damage that might be done to that important perception if an advocate acts having a conflict of interest should be considered. There have been attempts to categorize conflicts of interest as actual, potential or perceived. A conflict of interest is such whether or not it actually involves a breach of the fiduciary duty of confidentiality or the duty of loyalty; there is an implied suggestion that all "perceived" conflicts of interest should lead to an advocate withdrawing which is fraught with problems because many assertions of conflict of interest are misguided and many are made for tactical reasons and have no basis.

Rule 9 of the Advocates (Practice Rules) basically 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.

I have considered the application, replying affidavit and rival submissions and do find that there is no dispute as to the validity of the agreement dated 25.1.2011 between Stephanus Petrus Kruger, the vendor and Jackson Kipruto Katam, the purchaser. The dispute is on the enforcement of the agreement for sale and therefore, it has not been demonstrated that Mr. A. K. Nyairo will be called to give evidence and therefore, the application has no basis. Moreover, the firm of M/s Nyairo & Company Advocates has many advocates and therefore the court cannot debar the whole firm from representing the defendant. The applicant has not demonstrated that there is any conflict of interest between the firm of Nyairo and the parties herein and that the plaintiff is likely to suffer any prejudice if the firm of Nyairo and company is allowed to represent the defendant. The application herein lacks basis and is dismissed with costs.

Dated and delivered at Eldoret this 25th day of January, 2018.

A. OMBWAYO

JUDGE