



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 551 OF 2013

MANGU BUILDERS LIMITED.....PLAINTIFF

VERSUS

DANIEL KIPLANGAT KIRUI.....1ST DEFENDANT

DALICE INVESTMENT LIMITED.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

RULING

1. This is a ruling in respect of plaintiff's Notice of Motion dated 2nd December 2014. The application is brought under Order 51 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. The following orders are sought in the application:

- a) *The firm of Mirugi Kariuki & Co. Advocates be denied the opportunity or right to defend the 1st and 2nd defendants.***
- b) *All the pleadings prepared and submitted to this court with regard to this matter be expunged from the court record.***
- c) *The defendants be condemned to meet quantified costs to the applicant in the best way this court deems fit and just.***

2. The application is supported by an affidavit sworn by Mary Wangari Mwangi. She does not disclose the nature of her relationship to the parties to the suit. I note however that the verifying affidavit filed together with the plaint herein was sworn by Mary Wangari Mwangi who described herself therein as the director of the plaintiff company. She states in the supporting affidavit that the firm of Mirugi Kariuki & Co. Advocates represented the plaintiff company in the year 2012 in **Nakuru CM Misc. Application No. 57 of 2012** which matter is still pending. That privileged Communication passed between the said advocates and the plaintiff as well as its directors and the said Communication has been grossly abused to the detriment of the plaintiff and its directors. She annexed copies of pleadings in CM Misc. Application No. 57 of 2012 as well as copies of some correspondence from M/s Lawrence Mwangi & Mwangi Advocates.

3. The 1st and 2nd defendants opposed the application through Grounds of Opposition dated 11th December 2014 and filed in court on the same date. They described the application variously as being vexatious, misconceived and an abuse of the court process. They further stated that every party to a dispute has a constitutional right to be represented by an advocate of their choice and that the firm represented Madisurp Investment Ltd, a separate and distinct entity from the plaintiff herein. They further stated that the application has offered no evidence to prove that the plaintiff will be prejudiced if the defendants are represented by M/s Mirugi Kariuki & Co. Advocates.

4. The application was argued by way of written submissions. The applicant filed submissions on 3rd July 2016 while the 1st and 2nd defendants filed submissions on 24th July 2017. The 3rd defendant neither responded to the application nor filed any submissions. I have considered the application, the affidavit in support, Grounds of Opposition, submissions and authorities cited.

5. The applicant maintains that privileged communication passed between the said advocates and the plaintiff as well as its directors and the said Communication has been grossly abused to the detriment of the plaintiff and its directors. Obviously, that is a serious allegation which must be supported by evidence. Mere allegations will not suffice. Both the privileged communication and the exact nature of abuse or prejudice ought to be identified. The applicant has not done so. All I can see is an allegation that the firm of advocates represented the plaintiff company in the year 2012 in Nakuru CM Misc. Application No. 57 of 2012. A perusal of the documents annexed by the applicant reveals that the parties to the aforesaid case were Madisurp Investment Limited as applicant, The District Land Registrar Nakuru as respondent and Alexander Kipngetchi Sitienei as Interested Party. Those parties are totally different from the parties in the present case.

6. Whereas the court must always be alive to the risk of an advocate abusing his privileged position and confidential information received due to that relationship to the detriment of a litigant or a past client, on the flip side there is also the risk of a past client using the mere fact of

a previous advocate/client relationship to maliciously or baselessly stop an advocate or a firm of advocates from doing that which they and the nation have spent a large amount of resources to train them and license them to do: practice law. Obviously, such a situation would be an infringement of the rights of the advocate and even the right of his client to be represented by an advocate of his choice.

7. There being no evidence supporting the allegations made by the applicant, the applicant must fail. Notice of Motion dated 2nd December 2014 is consequently dismissed with costs to the 1st and 2nd defendants.

Dated, signed and delivered in open court at Nakuru this 28th day of February 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Moenga holding brief for Mr. Lawrence Mwangi for the plaintiff/applicant

Mr. Biko holding brief for Mr. Kibet for the 1st and 2nd defendants/respondents

No appearance for the 3rd defendant

Court Assistants: Gichaba & Lotkomoi