



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 109 OF 2016

JOHN KANGARA KAMAU AND 84 OTHERS.....PLAINTIFF

VERSUS

EMBAKASI DEVELOPMENT PROGRAMME.....1ST DEFENDANT

CUSTOM HOMES LIMITED.....2ND DEFENDANT

RENTON COMPANY LIMITED.....3RD DEFENDANT

JAMES MUBIA GITUNDU.....4TH DEFENDANT

RULING

1. This ruling is in respect of two applications. The 3rd Defendant filed the application dated 24/2/2017 seeking to have the suit against it struck out, or in the alternative, to have Mr. Paul Muriithi Mwangi trading as Paul Mwangi & Company Advocates or his partners, associates or agents, barred from representing the Plaintiff in this suit or any other related proceedings.

2. The Plaintiff filed the second application dated 11/4/2017 seeking to have the 3rd Defendant ordered to file the particulars requested by the Plaintiff in its request for particulars dated 8/3/2017. The Plaintiffs seek to have the defence of the 3rd Defendant dated 7/11/2016 struck out if the 3rd Defendant fails to give the particulars requested for.

3. The court will deal with the 3rd Defendant's application first. The application dated 24/2/2017 is made on the grounds that the suit relates to the parcel of land known as L. R. No. 12979/4 situated within Ruai in the County of Nairobi measuring approximately 650.02 hectares ("the Suit Property") over which the Plaintiff alleges he entered into an agreement with the 3rd Defendant for the sale and subdivision of this land. The Plaintiff claims that the 3rd Defendant reneged on the agreement as a result of which the Plaintiff now claims specific performance of the sale agreement and subdivision of the Suit Property.

4. The 3rd Defendant claims that the Plaintiff's advocate acted for it while practicing in the names and style of Murage & Mwangi Advocates: M. Mwangi & Associates: Mwangi & Guandaru Advocates; and Paul Mwangi & Company Advocates.

5. The 3rd Defendant claims that the Plaintiff's advocate has acted for it in the following matters in which the subject matter of the disputes is L. R. No. 12979/4:-

- a) **Nairobi HCCC No. 323 of 2010** – Renton Company Ltd v Philip Kisia, Tom Odongo & City Council of Nairobi;
- b) **Nairobi HCCC 136 of 2007** Settlement Fund Trustees v Renton Company Ltd;
- c) **Nairobi ELC Case 351 of 2011** – James Kariuki & 2 others v city Council of Nairobi and Renton Company Ltd;
- d) **ELC Case No. 1214 of 2007** Joseph Wairegi v City Council of Nairobi; and
- e) **Petition No. 215 of 2010** – Renton Company Ltd v George Gachihi & the Attorney General.

6. The 3rd Defendant claims that the Plaintiffs advocate has also drawn up agreements, given legal opinions and been consulted heavily by the 3rd Defendant on matters touching on the Suit Property and that therefore there will be conflict of interest if Mr. Paul Muriithi Mwangi is allowed to continue representing the Plaintiff in this suit. The 3rd Defendant is apprehensive that Mr. Paul Muriithi Mwangi Advocates in

whom it has entrusted confidential information as its advocate may be in breach of trust and advocacy ethos.

7. The 3rd Defendant claims that the advocate is bound by Section 134 of the Evidence Act not to disclose any information based on the advocate- client privilege which privilege the 3rd Defendant has not waived.

8. The application is supported by the affidavit sworn by Ken Boit, the 3rd Defendant's director, who depones that the 3rd Defendant has previously sought the legal services of the Plaintiff's advocate in respect of the Suit Property herein. A copy of the plaint in **Nairobi HCCC No. 323 of 2010** drawn by M. Mwangi and Associates is annexed to the affidavit. That suit seeks a permanent injunction to restrain the Defendant from publishing statements meant to disparage the Plaintiff's title over L.R. No. 12979/4. This is the Suit Property in this case.

9. A copy of the defence in **Nairobi HCCC Commercial Division Civil Suit No. 136 of 2007** is also annexed. It is drawn by Murage and Mwangi Advocates. The suit relates to L.R. No. 12979/4. A Notice of Appointment of advocates drawn by Mwangi & Guandaru Advocates together with the statement of defence for the 2nd Defendant in **ELC No. 351 of 2011** is annexed showing that this firm of advocates was representing Renton Company Limited in that suit. A copy of the petition in **High Court Petition No. 215 of 2010** filed in Nairobi by M. Mwangi & Associates for the 3rd Defendant seeking to quash the gazette notice that revoked the land title of L.R. No. 12979/4 is also attached to the affidavit.

10. Mr. Paul M. Mwangi swore the replying affidavit in opposition to the 3rd Defendant's application. He does not refute having acted for the 3rd Defendant on various occasions. However, he maintains that no confidential information relating to the dispute in the current suit was given to him by the 3rd Defendant in the cases listed by the 3rd Defendant in its application.

11. He avers that the previous matters where he acted for the 3rd Defendant do not have any nexus with the current suit. He argues that the 3rd Defendant only makes vague reference to confidential information without providing details which would enable the court inquire into the veracity of the alleged prejudice the 3rd Defendant may suffer.

12. He contends that the Plaintiff has exercised his undisputed constitutional right to be represented by a lawyer of his choice which right cannot be taken away without proper grounds.

13. The advocate maintains that he is not prohibited by law from acting for the Plaintiffs by the mere reason that he acted for the 3rd Defendant in previous matters. He also urges that his right as an advocate to accept instructions to represent any client and earn his livelihood cannot be taken away on flimsy grounds.

14. The issue for determination in the application is whether Paul Muriithi Mwangi Advocate should be barred from acting for the Plaintiff in this case. The advocate admits having acted for the 3rd Defendant in the other cases.

15. The advocate argues that despite having acted for the 3rd Defendant previously, he does not owe the 3rd Defendant any loyalty. The 3rd Defendant's advocate argues that the advocate client privilege is sacred and an advocate cannot just sell his duty towards a client for 30 pieces of silver. The 3rd Defendant argues that lack of loyalty may only be permitted in professions like prostitution but not in the legal profession and priesthood.

16. The 3rd Defendant relies on the case of **Delphis Bank Limited v Chatt and 6 others** [2005] 1 KLR where it was held that the right to a legal representative of a client's choice is a valued constitutional right to a litigant. However, in civil cases the right may be put to serious test if there is conflict of interest which may endanger the hallowed principle of confidentiality in the advocate client fiduciary relationship or where the advocate would double up as a witness.

17. The court also stated that there is no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation but the test to be applied is whether real mischief or real prejudice will in all human possibility result.

18. In the case of **Kings Woolen Mills Limited v Kaplan & Stratton Advocates** [1993] eKLR, the Court of Appeal stated that once a retainer is established then the general rule is that an advocate should not accept instructions to act for two or more clients where there is a conflict of interest between those clients. Further, that the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate by acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent. That fiduciary relationship exists even after completion of the matter for which the retainer was created.

19. The 3rd Defendant avers that the main reason why the Plaintiff instructed Mr. Paul Mwangi Advocates to file this suit on its behalf was because he had dealt with the 3rd Defendant and had information about its transactions with regard to the Suit Property. For this travesty of justice, the 3rd Defendant argues that the suit should be dismissed since the Plaintiffs have not approached the court with clean hands.

20. It is clear from copies of the pleadings produced by the 3rd Defendant that Mr. Paul Muriithi Mwangi Advocate acted for the 3rd Defendant and that the suits revolved around L.R. No. 12979/4, which is the subject matter in the present suit.

21. In determining whether there might be real prejudice or mischief resulting from Mr. Paul Mwangi's continued representation of the Plaintiff, the court has to consider whether there is a likelihood that the information the advocate acquired while acting for the 3rd Defendant may be disclosed to the Plaintiff to the detriment of the 3rd Defendant.

22. The court finds that there is a reasonable apprehension that Mr. Paul Mwangi Advocate may disclose the information he acquired while

acting for the 3rd Defendant to the Plaintiff since the subject matter is the same suit property in which Mr. Paul Mwangi Advocate was engaged by the Plaintiff. The court therefore bars Mr. Paul Mwangi from continuing to act for the Plaintiff in this case.

23. In the 2nd application dated 11/4/2017 supported by the Plaintiff's affidavit, the Plaintiff seeks an order to direct the 3rd Defendant to supply the particulars sought in the request for particulars dated 8/3/2017. The particulars sought are to identify the confidential information communicated between the 3rd Defendant and the Plaintiff's advocate; the mode of communication of the confidential information; the date the information was communicated; the officer through whom the privileged communication was made; and the real prejudice the 3rd Defendant alleges it will suffer with respect to the following suits,

- i. **Nairobi HCCC No. 323 of 2010**- Renton Company Limited v Philip Kisia and 2 others ;
- ii. **Nairobi HCCC No. 136 of 2007**- Settlement Fund Trustees v Renton Company Limited;
- iii. **Nairobi ELC No. 351 of 2011**- James Kariuki and 2 others v City Council of Nairobi and Renton Company Limited;
- iv. **ELC Case No. 1214 of 2007** -Joseph Wairegi v City Council of Nairobi and Renton Company Limited; and
- v. **Petition No. 215 of 2010**- Renton Company Limited v George Gachihi & Another.

24. The Plaintiff avers that the 3rd Defendant has refused to provide these particulars and that the particulars are necessary for the Plaintiff's advocate to have sufficient information to prepare their case properly. He also urges that the particulars sought are necessary for the conduct of the trial of the suit in a fair and open manner.

25. The application is opposed by the replying affidavit sworn by the 3rd Defendant's director on 1/11/2017. The 3rd Defendant believes the application for particulars is not made in good faith but out of ulterior motives since it was filed after the 3rd Defendant filed its application seeking to bar the Plaintiff's advocate from acting for the Plaintiff. The 3rd Defendant also argues that the particulars sought are privileged communication which cannot be availed to the Plaintiff.

26. Section 134 of the Evidence Act bars an advocate from disclosing any communication made to him in the course and for the purpose of his employment by his client, unless it is with his client's express consent; or from stating the contents of any documents with which he has become appointed in the course of his professional employment; or disclosing any advice given to him by his client for the purpose of such employment.

27. The particulars sought are in relation to the identification of the confidential communication between the 3rd Defendant and its advocate; the mode of communication of the information and the date it was communicated. The court is inclined to agree with the 3rd Defendant that the information sought is privileged under Section 134 of the Evidence Act.

28. The net result is that the court allows the 3rd Defendant's application to bar Mr. Paul Mwangi Advocate from continuing to act for the Plaintiff in this suit or any other related proceedings in respect of L.R. No. 12979/4 situated within Ruai in the Nairobi City County.

29. The court declines to strike out the Plaintiff's suit. The 3rd Defendant is awarded the costs of the application dated 24/2/2017.

30. The court dismisses the Plaintiff's application dated 11/4/2017 with costs to the 3rd Defendant.

Dated and delivered at Nairobi this 20th day of February 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Thuita for the 3rd Defendant

No appearance for the Plaintiff and 1st & 2nd Defendants

Mr. V. Owuor- Court Assistant