



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**LAND CASE NO. 207 OF 2015(LEAD CASE)**

**(ALMAGATION OF ELC NO. 227 OF 2015, 234 OF 2015, 61 OF 2015, 16 OF 2015)**

**AMINA MOHAMED KASINGA & 22 OTHERS.....PLAINTIFFS**

**VERSUS**

**KIKAMBALA HOUSING ESTATE LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, KILIFI COUNTY.....2<sup>ND</sup> DEFENDANT**

**BANK OF AFRICA KENYA LIMITED.....INTERESTED PARTY**

**RULING**

1. By a Notice of Motion application dated 9<sup>th</sup> February 2018 the 1<sup>st</sup> Defendant Kikambala Housing Estate Limited prays for Orders as follows:-

1. ....

*2. That an order of mandatory injunction to disqualify the Interested Party's Advocate Anjarwalla & Khanna from representing the Interested Party in ELC 207 of 2015(this suit) due to the fact that there is a continuous working relationship between the 1<sup>st</sup> Defendant and the Interested Party's Advocate Anjarwalla & Khanna.*

*3. That an order be made to disregard and throw out all pleadings and representations filed by the Interested Party's Advocate Anjarwalla & Khanna in ELC 207 of 2015 (this suit)*

*4. That an Order be made to the Interested Party's Advocate Anjarwalla & Khanna do not continue to appear (sic) for the Interested Party in the ELC 207 of 2015 (this suit).*

*5. That an Order be made to the Interested Party not to be permitted to continue (sic) being represented by the firm of Anjarwalla & Khanna in the ELC 207 of 2015 (this suit).*

*6. That by an injunction an order be made that the Interested Party's Advocate Anjarwalla & Khanna whether by themselves, their parties, servants or agents from representing the Interested Party in the ELC 207 of 2015 (this suit).*

*7. That the costs of this application be provided for.*

2. The said application is grounded on the annexed affidavits of Osman Erdinc Elsek and Shahame Aziz Mwidani the gist whereof are that:-

*i) On or about 8<sup>th</sup> April 2011, the 1<sup>st</sup> Defendant purchased all that piece of land known as Plot No. Kilifi/Mtwapa 867 for purposes of developing 309 residential houses thereon;*

*ii) The Interested Party, Bank of Africa Kenya Ltd provided a loan facility for the said purpose;*

*iii) Both the Interested Party and the 1<sup>st</sup> Defendant agreed to use Anjarwalla & Khanna Advocates who were previously the Bank's Advocates in the process of issuance of title deeds to secure the credit facilities advanced by the Interested Party to the 1<sup>st</sup>*

**Defendant;**

**iv) Consequently the 1<sup>st</sup> Defendant paid a sum of Kshs 3,647,400/= to Anjarwalla & Khanna Advocates on 26<sup>th</sup> October 2012 on account of legal fees for, among other things, completing the change of user process and subsequent issuance of the title.**

**v) That there existed an attorney –client relationship between the 1<sup>st</sup> Defendant and the said Anjarwalla & Khanna Advocates and the said law firm should be therefore not be allowed to act for one party herein.**

3. In a Replying Affidavit sworn on 26<sup>th</sup> February 2016 by Mr. Ben Mwaura, the Senior Recoveries Manager of the Interested Party, the Bank denies that the firm of Anjarwalla & Khanna Advocates ever acted for the 1<sup>st</sup> Defendant. It is their case that the 1<sup>st</sup> Defendant was always represented by various firms of advocates at different points in time but not the law firm cited herein which solely at all times represented the Interested Party.

4. It is the Interested Party's case that the 1<sup>st</sup> Defendant appointed Mashariki Geo Survey Ltd to complete the Change of User process and thereafter Nabhan Swaleh & Company to act for them in the subject transactions.

5. It is further the Interested Party's case that Anjarwalla & Khanna Advocates role in the change of user process was only limited to following up with the said Mashariki Geo Surveys Ltd on the progress of the change of user on behalf of the Interested Party.

6. I have considered the Application before me and the response thereto. I have equally taken into account the rival submissions made before me in support of, and in opposition to the application.

7. It is generally accepted that the fiduciary relationship created by the retainer between a client and an advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else and/or be used to the client's detriment. That relationship exists even after conclusion of the matter for which the retainer was created. The need to protect such confidential information is so vital that Section 134 of the Evidence Act stipulates that:-

**i) No advocate shall at any time be permitted, unless with his client's consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.**

8. The only exception allowed under Section 134 of the Act aforesaid is where:-

**(a) Such communication is made in furtherance of any illegal purpose or**

**(b) The advocate in the course of such employment observes any fact, showing that any crime or fraud has been committed since the commencement of his employment, by the said client.**

9. In circumstances such as in this case where there are third parties involved the duty of confidentiality bestowed upon counsel must also be weighed against the rights of a party to instruct an advocate of his /her choice. However, as the Court of Appeal observed in **Delphis Bank Limited –vs- Chattie & 6 Others (2005) 1KLR 766**, the right of a party to be represented by an Advocate of his choice could be put to a serious test if there was conflict of interest which could endanger the principle of confidentiality in an advocate client fiduciary relationship or where an advocate could also double up as a witness.

10. As was stated by Justice E.k. Ogolla in **Shahmar Ltd & 2 Others –vs- Sadrudin Kurji & Another (2015) eKLR**, the principle upon which a Court may restrain an advocate from acting against a former client is the prevention of abuse of confidence reposed in the advocate by the former client. Before such an order can be made the Court must be convinced that there exists such confidence and the probability of its being abused. There is however no absolute rule that an advocate may not act in litigation against a former client where there is no breach of the duty of confidentiality (see **Rukusen –vs- Elius, Munday & Clerke (1912) 1Ch, 831**).

11. In **Re- A firm of Solicitors (1992)1 ALL ER 353**, the Court considered the issues regarding when an Advocate can be restrained from acting against a former client. It was held that:-

**i) There was no general rule that a firm of solicitors who had acted for a former client could never thereafter act for another client against the former client, but a firm of solicitors would not be permitted to act for an existing client against a former client if (per Parker LJ and Sir David Croon- Johnson) a reasonable man with knowledge of the facts would reasonably anticipate that there was a danger that information gained while acting for the former client would be used against him or(per Stranghton LJ) there was some degree of likelihood of mischief, i.e. confidential information imparted by the former client being used for the benefit of the new client.**

**ii) (Stranghton LJ dissenting) on the facts, a reasonable man with knowledge of all the facts....would, still consider that if the firm was allowed to continue to act for the defendant, there would be a risk that some of the confidential information provided to the firm of solicitors when it was acting for the former client might inadvertently be revealed to the firm's team who were to act for the defendant.**

12. In the matter before me, the 1<sup>st</sup> Defendant contends that Messrs Anjarwalla & Khanna Advocates acted jointly for them and the Interested Party when the 1<sup>st</sup> Defendant purchased the property the subject matter of this suit in April 2011 and/or thereafter. According to

the 1<sup>st</sup> Defendant, the Interested Party which was offering a loan facility to finance the development they intended to carry on on the suitland induced them to use the said law firm in order to expedite the process and save on costs.

13. It is the 1<sup>st</sup> Defendant's case that as a result of the said inducement, on or about 6<sup>th</sup> March 2012, they delivered all the relevant documents relating to the property to the Interested Party for purposes of enabling the Interested Party's Surveyor and the said Advocate to complete and obtain a new leasehold title with a change of user for the suit premises.

14. The 1<sup>st</sup> Defendant further submits that being aware of the urgent nature of the engagement, the Interested Party and the said law firm sub-contracted a Surveyor by the name Mashariki Geo Surveys Ltd to expedite the process. It is their case that the Interested Party and the said Law firm further induced them to consent to the appointment of the said surveyors after which the 1<sup>st</sup> Defendant paid the sum of Kshs 3,647,400/= to Anjarwalla & Khanna Advocates on 26<sup>th</sup> October 2012 on account of legal fees. It is further the 1<sup>st</sup> Defendant's case that on separate consequent dates, they paid a further Kshs 3,016,905/= which was deducted from their current account as fees and disbursements to the said Law firm and surveyors for purposes of perfecting several securities in favour of the Interested Party.

15. On their part the Interested Party vehemently deny that the law firm Anjarwalla & Khanna Advocates were engaged in the manner pleaded by the 1<sup>st</sup> Defendant or at all. According to the Interested Party, the 1<sup>st</sup> Defendant appointed one Denis Malembeka of Mashariki Geo Surveys Ltd to not only complete the Change of User process but also irrevocably and unconditionally appointed and authorized the said Malembeka to collect the new certificates of lease and the registered lease once the same were issued.

16. The Interested Party further submits that the only role played by the law firm Anjarwalla & Khanna in the change of user process was to follow up with the said Mashariki Geo Surveys Ltd on the progress of the Change of User and the entire transaction from time to time. It is the Interested Party's case that all the invoices for payments made were raised by Anjarwalla & Khanna Advocates in accordance with clause 13 of the Standard Terms and Conditions applicable to the Banking facilities which had been executed by the 1<sup>st</sup> Defendant when they signed the Letter of Offer for the loan facility on 30<sup>th</sup> August 2012.

17. I note however that at paragraph 8 (e) of the Interested Party's Replying Affidavit, they concede that the said Mashariki Geosurveys Ltd was their agent. They do not state how the 1<sup>st</sup> Defendant came to know the surveyors who according to them were the ones who initially handled this process for the 1<sup>st</sup> Defendant. As it were, the said Mashariki Geo Surveys Ltd were Surveyors and could not by all accounts be said to have been acting for the 1<sup>st</sup> Defendant in the process and thereby playing the role of Advocates in the loan transaction.

18. From the correspondence annexed herein, it is clear to me that the 1<sup>st</sup> Defendant relied on the said Anjarwalla & Khanna Advocates and the Interested Party's Agent- Mashariki Geo Surveys Limited when the charge for Kshs 296,000,000/= was created in favour of the 1<sup>st</sup> Defendant. It would also appear contrary to the Interested Party's assertions that there was an arrangement which allowed the 1<sup>st</sup> Defendant to pay legal fees to the law firm Anjarwalla & Khanna Advocates.

19. In an email dated 11<sup>th</sup> August 2014 at a time when the relationship between the 1<sup>st</sup> Defendant and the law firm appeared to have taken a nose-dive, one Akash Devani of Anjarwalla & Khanna Advocates wrote to the 1<sup>st</sup> Defendant's Aziz Shahame as follows in the relevant part(paragraph 5 thereof)

***“On our part, in accordance with our instructions, we prepared a discharge of the earlier charge, the agreement to create security, all the additional securities etc and we are waiting to receive the new leasehold title so that we can register the new charge over the relevant property. There is nothing remaining for us to complete. Despite having completed our scope of works, we have not been paid our entire legal fees and, in good faith, we have agreed to wait for further payment until progress is made with your transactions.”***

20. In a rejoinder to the said email some three days later , the said Aziz Shahame wrote back to Mr. Akash Devani thus (at paragraph 5 also):-

***“We did our part initially when we handed over the title to BOA(Bank of Africa) and our responsibility ended at that point. Services rendered by Anjarwalla & Khanna is at a fee, and it has been paid religiously. The surveyor entrusted by you to handle this matter was instructed on 23/10/2013 to embark on this process of change of user from agricultural to business-cum residential. We are in August 2014(10 months over) and this process has not been finalized!!! You are referring to our meeting and yet the responsibility has been left to the surveyor and through your office we made payment of Kshs 200,000/= for this service. Your feedback below only states that you left us with the responsibility for the change of user and we had already made payment to your firm. Your statement is misleading and very unprofessional.”***

21. In my view, it is clear from the said correspondence that an Advocate-Client relationship did exist at some point in time between the law firm of Anjarwalla & Khanna Advocates and the 1<sup>st</sup> Defendant before the 1<sup>st</sup> Defendant disagreed with the services rendered and started engaging their own Advocates independent.

22. Commenting on a similar matter in *King Woolen Mills Ltd(formerly known as Manchester Outfitters Suiting Division Ltd & Another –vs- M/s Kaplan & Straton Advocates(1993) eKLR* the court observed as follows:-

***“Quite apart from the loan and security documents and the correspondence exchanged between the parties and in particular the preparation of the debenture whose validity is now challenged by the appellant, Mr. Keith must have had much more confidential information to enable him to draw up the debenture and the other loan and security documents.”***

23. I am in agreement with the finding above that the nature of this transaction must have involved the release of such confidential information to the firm of Anjarwalla & Khanna Advocates. Again, as was stated in the same case of **King Woolen Mills Ltd**(above):-

*“The retainer created a contractual relationship between the advocate and the client irrespective of whether two or more clients are involved. That is to say that the relationship is not tripartite. Each client has a separate retainer relationship with the common advocate. For example like in the instant case, Mr. Keith for the respondents having accepted to act for the appellants, the borrowers, and the lenders, in putting together the loan transaction, he has a duty to the borrower and should not subsequently act for the lenders to enforce repayment of the loan because he had obtained relevant knowledge of the borrower’s financial position when acting for him in connection with the original loan transaction. In these circumstances he would take unfair advantage prejudicial to the borrowers if he so acts for the lenders because of apparent conflict of interest.*

24. From the pleadings herein, it is evident that the relationship between the 1<sup>st</sup> Defendant and the Interested Party involved the creation of a number of securities and the advancement of hundreds of millions of shillings. It is evident that at that stage, the 1<sup>st</sup> Defendant was never represented by an Advocate and that Anjarwalla & Khanna Advocates handled the loan transaction on behalf of both parties.

25. Accordingly and while I agree with the Interested Party that the filing of this application so late in the day is and may be meant at delaying the trial herein, I think the prejudice likely to be suffered by the 1<sup>st</sup> Defendant in the possible disclosure of confidential information far outweighs the inconvenience that may result from a slight delay in the proceedings here. Accordingly I think it is only and just that the 1<sup>st</sup> Defendant be protected from such prejudice and that Messrs Anjarwalla & Khanna Advocates be restrained from continuing to act for the Interested Party herein.

26. However, while it is clear to me from a perusal of the pleadings herein that the 1<sup>st</sup> Defendant and the Interested Party will not be pulling in the same direction in this matter, I do not think that striking out the pleadings filed by the said Anjarwalla & Khanna Advocates as requested by the 1<sup>st</sup> Defendant would serve any useful purpose other than delaying the matter and increasing the costs to the litigants. Accordingly, I will decline to strike out the pleadings as requested.

27. The upshot is that I will allow the application in terms of prayer 2, 4, 5 and 6 thereof.

28. The 1<sup>st</sup> Defendant shall also have the costs of this application.

**Dated, signed and delivered at Malindi this 21<sup>st</sup> day of March, 2018.**

**J.O. OLOLA**

**JUDGE**