



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 299 OF 2016

NOOR MOHAMED FARAH.....PLAINTIFF

VERSUS

GLADYS NJERI.....1ST DEFENDANT

JACINTER WANJIRU NGUTI.....2ND DEFENDANT

RULING

This is the ruling in respect of the application dated 22nd February 2018 brought by way of Notice of Motion by the defendant/applicants for orders :

- a) That all the pleadings filed by MIYIENDA & CO' ADVOCATES be stuck out of the record as the said firm has no capacity to plead and appear on behalf of the plaintiff.
- b) That the firm of MIYIENDA & CO' ADVOCATES be disqualified forthwith from acting for the plaintiff as they are potential witnesses by virtue of having drawn a tenancy agreement dated 13th June 2008
- c) That the costs of this application be provided for.

This application came up for hearing on 5th April 2018 when both Counsel agreed to canvass the application by way of written submissions. The same were filed as ordered by the court.

DEFENDANT/APPLICANTS' WRITTEN SUBMISSIONS

Counsel filed written submissions on behalf of the defendant/applicants and relied on the grounds on the face of the application together with the supporting affidavit of Jacinta Wanjiru Nguti.

Counsel submitted that the replying affidavit sworn on 28th March, 2018 by EVANS OGETO MIYIENDA contravenes the provisions of Order 51 Rule 14 of the Civil Procedure Rules which provides for the manner in which a respondent may oppose an application which gives a combination of the following documents:

- a) A notice preliminary objection: and/or;
- b) Replying affidavit; and/or
- c) A statement of grounds of opposition;

Counsel submitted that it is absolutely clear from the above that only a respondent can swear a replying affidavit. Counsel stated that EVANS OGETO MIYIENDA, Advocate on record for the plaintiff/respondent is not a party in these proceedings and as such not a respondent in the meaning of Order 51 rule 14 of the Civil Procedure Rules and neither has he disclosed on whose authority he swore the impugned affidavit.

Counsel further submitted that such authority has not been produced. Mr Kibii therefore urged the court to find that the affidavit is defective in form and substance and ought to be stuck out. Counsel cited the case of **STEPHEN BERNARD ODUOR Vs AFRO FREIGHT FORWANRDERS [2002] EKLR** where the Honourable Court was faced with a similar scenario held as follows:

Before making final orders however, this court must note with dismay that the replying affidavit was drawn and sworn by one Oruko Nyawida advocate who is the Counsel for the plaintiff in conduct of this case. The mere fact that he acts for the plaintiff in no way gave him authority to swear the affidavit. Nor does he on the affidavit claim to have been specifically given authority by the plaintiff to swear the said affidavit. In my opinion therefore, the replying affidavit was sworn by a stranger in view of the fact that the deponent fails to reveal his source of authority to swear it. The failure in my view is substantial defect which renders the said affidavit incompetent and therefore amenable to striking out. I accordingly hereby strike it out.....

In conclusion, learned advocates have again and again been advised by this court to avoid placing themselves in the position of parties themselves. Unfortunately, they appear to have not ceased from this despicable practice which is contemptuous and in my opinion amounts to an abuse of court process. It should stop. To bring the point home, this court will in future go out of its way to discourage the practice.

While there are special occasions when an advocate may be called upon to swear an affidavit in a case he is conducting and will be excused or allowed to do so, the swearing of the affidavit in this case is in my judgement not excusable.

Counsel submitted that the second preliminary issue that he wished to raise arises from paragraphs 4 and 18 of the replying affidavit. He submitted that the contents of the said paragraphs are deliberately misleading and amounts to deviation from plaintiff's annexures B and C respectively in the impugned affidavit. It was Counsel's submission that vide an application dated 3rd January, 2018, the 2nd defendant/applicant sought to be enjoined in these proceedings as a defendant in her capacity as the administratrix of her deceased father and not as an interested party as demonstrated in the plaintiff's respondent annexure B and C respectively and the said application was allowed vide orders dated 26th July, 2017 and statement of defence amended in those terms. Counsel stated that the Order from the High Court dated 29th May, 2014 in P & A 36 of 2002 at paragraph 1 is expressly clear that the 2nd defendant is the legal representative of the deceased who is the registered owner of the suit property whereas Sarah Wanjiru and Paddy Karanja at paragraph 4 of the said order have been restrained by the High Court from dealing with the suit property.

Mr. Kibii further stated that these issues affirms his earlier submissions that an advocate should not swear affidavits on factual issues on behalf of clients. He submitted that the pleadings drawn by MIYIENDA CO. ADVOCATES in particular the plaint dated 24th October, 2016, witness statement and list of documents of even date by the said firm of Advocates contravenes rule 9 of the Practice Rules.

Counsel also took issue with the agreement dated 13th June, 2008, which he stated forms the subject of these proceedings as outlined under paragraph 4 of the plaint which agreement has been drawn by MIYIENDA CO. ADVOCATES, the same Firm on record on behalf of the plaintiff. He stated that the said firm of advocates are potential witnesses and cannot purport to represent the plaintiff because of apparent conflict of interest in matters where they may be called as witnesses.

It was Counsel's submission that the plaintiff is seeking for eviction of the 1st defendant and compensation whereas the defendants in their statement of defence have pleaded fraud and forgery as demonstrated under annexure JWN 2 in the supporting affidavit of the applicant. It was further Counsel's submission that the issues therein can only be fully canvassed by calling all potential witnesses including the maker of the agreement.

Counsel cited the case of **Eldoret E & L NO.279 of 2013, MURIGO WANYOIKE –VS-DYNO HOLDINGS LTD [2014] eKLR** whereby the court in determining a similar matter at paragraph 17 and 18 held that:-

The place of the law firm of M/S Mohamed Madhani is central to the determination of the issues in this case. In my opinion, I think it will not only be unwise, but also prejudicial to the plaintiff, for the said law firm to be entangled in this litigation. There is indeed potential for a member of the said firm to be called as a witness in this suit. True, the parties have not so far determined who their witnesses are going to be but it is not necessary for that to have been determined before an application of this nature can be made. The issue as stated in Rule 9 of the Advocates (Practice) Rules is whether the advocate may be called as a witness. It is enough that the likelihood of the advocate being called as a witness exists, and that likelihood, in my opinion, will continue to exist until the suit itself is finalized the mischief is to prevent a counsel whose actions are central to the litigation becoming too close to the litigation by acting as counsel in the matter so that it may be necessary for the said law firm not to act in the matter and that participation of the said firm will be prejudicial to fair hearing.

Counsel therefore urged the court to find that the application has merit and be allowed as prayed.

WRITTEN SUBMISSIONS ON BEHALF OF THE PLAINTIFF/RESPONDENT

Counsel for the respondent opposed the application and relied on his replying affidavit sworn on 28/3/2018 and all the annexures appended thereto. Counsel highlighted some of the issues starting with the lease agreement dated 13/6/08 whereby he stated that the same was drawn between the plaintiff and one Francis Karisho Nguti who was then the Administrator of the estate of the late Evanson Nguti Kamanda together with one Gitau Nguti. Counsel submitted that this shown by the Certificate of Confirmation of a Grant dated 14/7/04 appended to the Replying affidavit dated 28/3/18.

Counsel further highlighted that Francis Karisho Nguti is the one who leased the premises called Midwest Butchery to the plaintiff herein and that the second defendant Jacinter Wanjiru was not an administrator and so she cannot say anything about the said Lease which was drawn the advocate's firm. He stated that this Lease only brought the plaintiff into the premises referred to in this suit.

Mr. Miyienda also submitted that the 2nd document in the plaintiff's list of documents dated 24/10/16 filed in court on 23/2/18 being a memorandum of understanding is the subject of the proceedings in this suit and not the Lease agreement dated 13/6/08. He stated that in the said Lease the plaintiff is described as the 2nd Party while the 1st defendant is described as the 1st Party which details are in the annexure. Counsel submitted that the Memorandum of understanding clearly shows that the plaintiff sub-leased the premises to the 1st defendant under

agreed terms between the two parties.

Mr. Miyienda further submitted that the 1st defendant has brought in the 2nd defendant to cover up and that the firm of Miyienda & Co. Advocates does not feature in the two agreements mentioned. On the issue of conflict of interest, Counsel stated that the lease agreement dated 13/6/08 only created a tenancy between the plaintiff and the abovementioned administrator of the estate one Francis Karisho Nguti (deceased) and that as long as this did not involve the defendants, they have no basis to it constituting conflict of interest. It was further counsel's submission that the defendants have not demonstrated what constitute conflict of interest in the said lease agreement.

Finally on the issue of striking out Counsel submitted that the defendants have not given reasons to convince the court to strike out the pleadings and documents filed by M/S Miyienda & Company, Advocates. He therefore urged the court to dismiss the defendants' application with costs to the plaintiff.

Analysis and determination

Before I embark on the real issues in this application I must state that before the hearing of this application the court noticed that there were two firms of Advocates namely Miyienda & Co Advocates and Lusinde Khayo & Co Advocates who had filed documents purporting to act for the plaintiff herein. The court ordered the advocates to sort out the issue of representation before the matter could proceed. Counsel later agreed to expunge from the court record the grounds of opposition dated 28/3/18 filed by Lusinde Khayo & Co Advocates.

The court is being asked to disqualify the firm of Miyienda & Co Advocates from appearing on behalf of the plaintiff and to strike out all the pleadings drawn by the said firm on the grounds that they drafted a lease agreement which is a subject of this suit. The court is further urged to expunge the affidavit sworn by EVANS OGETO MIYIENDA the advocate for the plaintiff .

I will start with the issue whether it is in order for advocates to swear affidavits on facts not without specifying whether they have authority to do so. It is my considered view that advocates should not jump in the arena of conflict by being part of the duel. They should receive instructions and act on such instruction without being part of the matters under adjudication. If the deponent of the affidavit was to be put to task to explain some of the averments in the affidavit then it would put the advocate in an embarrassing situation.

In this, I agree with precedents earlier rendered in respect of this issue more particularly the case that was cited by the defendant's Counsel of **STEPHEN BERNARD ODUOR Vs AFRO FREIGHT FORWARDERS [2002] ECLR** where the court was dismayed by an advocate swearing an affidavit on behalf of the client simply because he has the conduct of the case. On the issue of an advocate swearing an affidavit on facts on behalf of the client, I find that this is unprocedural and therefore the replying affidavit is expunged from the court record.

On the second issue that Miyienda & Co Advocates should be disqualified from acting for the plaintiff as they are potential witnesses I will rely on the case of **Tom Kusienya & Others v Kenya Railways Corporation & others [2013] eCLR**, where Mumbi Ngugi J., held thus: -

19. "The legal basis of the petitioner's application in this matter is Rule 9 of the Advocates (Practice Rules) which is in the following terms:

'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: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.'

20. From the text of this Rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in *Delphis Bank Limited vs. Channan Singh Chatthe and 6 Others (supra)* observed as follows:

"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 serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.

The import of Rule 9 of the Advocates (Practice Rules) precludes an advocate appearing as advocate in a case which the advocate may be called to give evidence to help in the determination of the contested issues. It is important to note that this rule has been relied upon in various cases where courts have upheld applications for disqualification. See the case of **King Wollen Mills Vs Kaplan & Statton (1993) LLR 2170** likewise in the case of **Uhuru Highway Developers Ltd & Others Vs Central Bank of Kenya Ltd & Others (2) (2002) EA 654**.

However, we should also note that it is not in all instances that an advocate cannot appear for a client just because he or she drew some instruments in a case. In the case of **Delphis Bank Ltd Vs Channan Singh Chatthe & 6 Others** the Court of Appeal held that the test is whether real mischief or real prejudice will in all human probability result.

In the current case I notice that one of the documents listed by the defendant is the contested lease agreement that was drawn by the advocate for the plaintiff. Further the counter claim filed by the defendant enumerates particulars of fraud and misrepresentation inter alia forging a lease agreement which may require evidence from the person who drafted the lease agreement.

I have considered the submissions by both Counsel and come to the following conclusion. I had earlier expunged the replying affidavit by EVANS OGETO MIYIENDA in this application. Having considered the application in its totality, I would say that the effect of allowing the application as prayed would essentially be striking out the plaintiff's suit. In the interest of justice I will give the plaintiff a second chance to appoint another advocate to take over from Miyienda & Co Advocates as the firm of advocates might be required to give evidence in this case. I therefore order that the plaintiff engages the services of another Counsel within 30 days from the date of this ruling.

Dated and delivered this 18th day of April, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Kibii for Defendant/Applicant and Mr. Miyienda for Plaintiff/Respondent.

Mr. Koech: Court Assistant