



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 69 OF 2016

JACINTA WANJIRU MWENGA.....PLAINTIFF

VERSUS

SAMWEL THEURI.....1ST DEFENDANT

LOISE WANGARI RATEMO.....2ND DEFENDANT

DISTRICT LAND REGISTRAR NAIVASHA.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

(Application to disqualify counsel; counsel acting for plaintiff in a suit for recovery of title to land; title having previously been held by plaintiff; title transferred to 1st defendant who later transferred to 2nd defendant applicant; applicant having earlier in a separate suit sued 1st defendant and plaintiffs where counsel represented both defendants; argument that counsel cannot now turn against 1st defendant; 1st defendant not complaining over counsel's representation; if the 1st defendant is not aggrieved, no aggrieved, no basis upon which applicant can complain; no prejudice to applicant if counsel continues to act as the applicant and 1st defendant have no common defence, application dismissed).

1. The application before me is that dated 7 December 2017 filed by the 2nd defendant. It is an application said to be brought pursuant to Rule 9 of the Advocates (Practice) Rules, and the main prayer sought is for the disqualification of the law firm of M/s Elizabeth Wangari & Company Advocates, from representing the plaintiff in this suit. The application is opposed and before I delve into it, I will give a little background on this suit.

2. This case was commenced through a plaint which was filed on 4 March 2016. In the suit, the plaintiff has pleaded that she is the rightful owner of the land parcel Miti Mingi/Mbaruk Block 5/633 (Kianjoya). She pleaded that in the year 2012, she borrowed a friendly loan of Kshs. 70,000/= from the 1st defendant (Samuel Theuri) and as a sign of commitment to pay, she deposited her title deed with the 1st defendant. She however fell sick and could not repay her debt in the time that they had agreed, and when she recovered and went to her land, she found the 2nd defendant on the ground, and who claimed that the land has been sold to her by the 1st defendant. She did a search which revealed that the 1st defendant had transferred the land to himself and made a further transfer into the name of the 2nd defendant. It is the case of the plaintiff that all this was done fraudulently, principally because she never executed any transfer to the 1st defendant, and never applied for any consent of the Land Control Board. In this matter she wants the title of the 2nd defendant cancelled and the same to revert back to her ownership.

3. There is a second suit which was commenced in the Magistrate's Court and filed as Nakuru CMCC No. 2 of 2016. The plaintiff in that case is the 2nd defendant herein (Loise Wangari Ratemo) and she has sued Samuel Theuri (1st defendant herein) and Jacinta Wanjiru (the plaintiff herein). In that suit, she has pleaded that through a sale agreement of 11 July 2015, she purchased the suit land from Samuel Theuri and she became registered as proprietor. In that suit, she wanted the defendants therein permanently restrained from interfering with her possession of the land.

4. Given that the two suits were related, I consolidated the two and ordered the suit Nakuru CMCC No. 2 of 2016 to be transferred to this court which was done. The matter was scheduled for hearing on 9 April 2018 but I directed that this application first be dispensed with.

5. In her application, the 2nd defendant/applicant has averred that when she filed the suit Nakuru CMCC No. 2 of 2016, both Samuel Theuri and Jacinta Wanjiru, who were the 1st and 2nd defendants therein, appointed the law firm of M/s Elizabeth Wangari & Co. Advocates to defend them and the said law firm entered appearance and filed defence on their behalf. It is averred that upon being seized with the brief,

counsel procured information from the 1st defendant (Samuel Theuri) , whereby he admitted having committed fraud and undertook to have the transaction declared as fraudulent. This information was recorded in a statement of Samuel Theuri that was filed in the said case. It is averred that counsel also drew an affidavit vide which Samuel Theuri admitted to having committed a fraud. It is claimed that in this suit, counsel has used the information obtained from the 1st defendant, where he admitted having procured title by way of fraud, as a springboard to advance the plaintiff's case. It is contended that the circumstances under which the fraud was admitted under oath, is either a fact in issue, or a fact relevant to a fact in issue, and therefore Mrs. Elizabeth Wangari (Mrs. Mukira, counsel for the plaintiff) is a potential witness to the extent that the alleged fraud was admitted before her. It is further contended that it is unconscionable for counsel to collect evidence under circumstances where advocate's privilege would be pleaded and use the same evidence to advance a claim in rem. It is for these reasons that the applicant wishes to have Mrs. Mukira disqualified from representing the plaintiff.

6. Mrs. Mukira swore an affidavit to oppose the motion and it is her view that this application is malicious and vexatious. She has deposed that she has never been retained by the 2nd defendant and has never been in any fiduciary relationship with the 1st defendant. She has stated that she did receive instructions to file defence for both defendants in the suit Nakuru CMCC No. 2 of 2016 and she drew up a defence. Subsequently she received instructions to file this case for the cancellation of the title of the 1st defendant which she did. She has deposed further that the 1st defendant filed a Notice to Act in Person in respect of the suit Nakuru CMCC No. 2 of 2016, on 13 March 2017 and she no longer acts for him, and in respect of this suit, she has pointed out that the 1st defendant is represented by the law firm of M/s Maragia Ogaro & Company Advocates. She has argued that the applicant has no locus to raise an issue of representation as she has never instructed her and does not stand prejudiced in any way by her continued representation of the plaintiff. She has averred that the fact that she drew pleadings in the suit Nakuru CMCC No. 2 of 2016, does not qualify her to be a witness. She has stated that it is unheard of that counsel can be called as a witness on the basis of pleadings drafted for an opposite party. She is of opinion that this application was only filed so as to derail the hearing of the suit and quite late after directions on the hearing of the matter had already been taken. She has asked that this application be dismissed with costs.

7. In his written submissions, Mr. Githui, learned counsel for the applicant, referred me to Section 134 of the Evidence Act, Cap 80, Laws of Kenya on the privilege of Advocates. He submitted that an advocate can be a compellable witness if the advocate observes facts which lead her to the conclusion that a crime has been committed. He submitted that the legal position is that an advocate may not use his privilege where a crime is evident. He further pointed me to Rule 9 of the Advocates (Practice) Rules, and argued that since Mrs. Mukira is a compellable witness under Section 134 of the Evidence Act, it would be unconscionable for her to use the same information given to her by her former client as evidence against him in subsequent proceedings. No authorities were referred to me by Mr. Githui.

8. On her part, Mrs. Mukira submitted inter alia that she had no fiduciary relationship with the 1st defendant. She further submitted that if the issue of her representation was critical, the same would have been raised much earlier in the proceedings. She has submitted that she cannot be called as a witness as she did not participate in the drafting of the sale agreement by the 1st defendant and that Rule 9 of the Advocates (Practice) Rules is not applicable. She further submitted that the whole of her law firm cannot be disqualified. She relied on several authorities to support her arguments all of which I have taken note of.

9. What I have before me is an application to have the law firm of M/s Elizabeth Wangari & Company Advocates disqualified from acting in this matter mainly for the reason that the same firm did act for the 1st defendant (Samuel Theuri) in the related suit Nakuru CMCC No. 2 of 2016. There is really no dispute that the said firm did act for the 1st defendant, until the 1st defendant filed a Notice to Act in person on 13 March 2017. It is not also in dispute that in so far as the suit commenced by Jacinta Wanjiru is concerned, the 1st defendant is represented by the law firm of M/s Maragia Ogaro & Company Advocates, although no defence has been filed on his behalf.

10. In the applicant's complaint over the representation of the law firm of M/s Elizabeth Wangari & Company Advocates in this suit, I have been referred to Rule 9 of the Advocates (Practice) Rules, and Section 34 of the Evidence Act.

11. Rule 9 of the Advocates (Practice) Rules provides as follows :-

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 in formal or non-contentious matter of fact in any matter in which he acts or appears .

12. Section 134 of the Evidence Act, is drawn as follows :-

134. Privilege of advocates

(1) No advocate shall at any time be permitted unless with his client's express 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:

Provided that nothing in this section shall protect from disclosure—

(a) any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

(2) The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.

13. There is no question, that following Rule 9 of the Advocates (Practice) Rules, where an advocate is going to be a witness in a matter, such advocate is barred from being counsel in the same suit. With regard to Section 134 of the Evidence Act, it is important to understand its context. Section 134 falls under Chapter V Part II of the Evidence Act. Chapter V deals generally with witnesses, whereas Part II of the said Chapter, deals with "compellability and privileges of witnesses". That part deals with issues such as who can be compelled to be a witness and who cannot be so compelled owing to privilege. One of the persons who cannot be compelled to be called as a witness is an advocate and the parameters of such privilege are what are set out in Section 134. Basically, an advocate is privileged and cannot be permitted to give evidence unless with his client's express consent, over matters discussed between such advocate and his client. There are however qualifications, and among the matters excluded from privilege, are communications which may have been made in furtherance of an illegal purpose or where crime or fraud has been committed. In such instances, the advocate thus can be compelled to give evidence. Being under compulsion to give evidence, and being among the witnesses/persons that will give evidence in a case, are of course not the same thing. In other words, the fact that I do not have privilege, i.e I can be compelled to testify, does not mean that I am going to be a witness. For an advocate not to appear in a matter under Rule 9, of the Advocates (Practice) Rules, it is necessary that he is going to be a witness or is a potential witness. Rule 9 does not disqualify an advocate from acting in a matter because his privilege has been stripped under Section 134 of the Evidence Act. Thus it does not automatically follow that simply because an advocate's privilege has been stripped, or has potential to be stripped, such advocate cannot act in a suit relating to the subject matter under which his privilege has been stripped. Each case must be looked at in light of its own peculiar surrounding circumstances.

14. In our case, it is correct that Mrs. Mukira did act for the 1st defendant in the suit Nakuru CMCC No. 2 of 2016. It is also common ground that within that suit, the 1st defendant did confess, while being represented by Mrs. Mukira, through a statement and affidavit, that he wrongfully transferred the suit land to himself after forging the signature of the plaintiff herein. The 1st defendant has now been sued in this case by the plaintiff who is acting through the law firm of Mrs. Mukira. However, Mrs. Mukira is not among the persons listed to be witnesses of either the plaintiff or the defendants. In fact I doubt whether she will be called as a witness to produce any document or testify on any facts over the matter at hand. The statement and affidavit though drawn by her firm, are not her documents and not her evidence; they remain to be the documents and evidence of the 1st defendant. I therefore do not see the applicability of Rule 9 or Section 134 of the Evidence Act, in the circumstances of this case.

15. A person can of course complain about the presence of counsel outside the parameters of Rule 9 of the Evidence Act. An issue can indeed arise where there is a complaint of conflict of interest. However, in my view, it is the 1st defendant to complain, if he is aggrieved by the fact that the same counsel who represented him in a different but related suit, now acts against him. If he has no problem with that, I do not think, barring any exceptional circumstances, that another litigant would have the locus to present this complaint on his behalf. Moreover, the stance that the applicant has taken in defending this suit, is not common to the position taken by the 1st defendant, and it cannot be argued that they are presenting a common defence which can be prejudiced by the presence of Mrs. Mukira acting for the plaintiff in this litigation.

16. It is for the above reasons that I do not find merit in the application herein and the same is hereby dismissed with costs.

17. It is so ordered.

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

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Alwala holding brief for Mr. Githui for the applicant.

Mrs. Mukira for the respondent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU