



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.472 OF 2017

WILFRED KONOSIPLAINTIFF

VERSUS

MAJID MOHAMED ADAM.....DEFENDANT

RULING

(Application to have counsel disqualified from acting for the defendant; suit being an adverse possession case; plaintiff applicant having previously engaged counsel for the defendant in other matters over the same subject matter; improper for the same counsel to now act for the defendant as the subject matter is the same; application allowed).

1. The application before me is that dated 15 January 2018 filed by the plaintiff. The principal prayers sought in the application is for orders to have disqualified from acting for the defendant, the law firm of M/s Karanja Mbugua & Company Advocates. It also seeks that the Notice of Appointment of Advocate, the Replying Affidavits filed and all pleadings filed by the said firm to be expunged from the record. The application is opposed and before I go to the gist of it, it is best that I give a little background.

2. This suit was commenced by way of a plaint which was filed on 20 December 2017. The case of the plaintiff is that he has been a lawful occupant of the land parcel Nakuru Municipality Block 11/66 which measures approximately 0.8701 acres and which property is averred to be in the name of Kenedy Nyabwari Bosire. It is pleaded that sometimes in the year 1999, some unscrupulous land speculators purported to subdivide the said land into three parcels being Nakuru Municipality Block 11/678 measuring 0.5 Ha, Nakuru Municipality Block 11/679 measuring 0.1600 Ha, Nakuru Municipality Block 11/680 measuring 0.4232 H, adding up to 1.0832 Ha, which is said to be more that the size of the land parcel Nakuru Municipality Block 11/66, with a view of disposing the same to unsuspecting individuals. It is averred that the said unscrupulous land speculators purported to effect the subdivisions without the knowledge or consent of the said Kenedy Nyabwari Bosire whose certificate of lease over the land parcel Nakuru Municipality Block 11/66 has never been surrendered. It is averred that despite the purported subdivisions, the plaintiff has remained in peaceful occupation of all the purported three parcels of land. It is pleaded that on 20 December 2017, the defendant descended on the land parcel said to be Nakuru Municipality Block 11/680 and cut down the plaintiff's live fence and deposited a container with a view of commencing construction. He was also said to be in the process of demarcating the land and putting in place boundary marks or beacons which never existed before. The plaintiff has contended that he has been in uninterrupted occupation of the whole parcel of land for over 17 years and has acquired title by way of adverse possession including the portion purported to be Nakuru Municipality Block 11/680. In the suit, the plaintiff has sought orders that he has acquired title to all that parcel of land known as Nakuru Municipality Block 11/680 by way of adverse possession and has sought orders to have the

defendant compelled to transfer the said land to him. He has also asked for a permanent injunction to restrain the defendant from the said land; general damages for trespass; and costs of the suit.

3. Alongside the plaint, the plaintiff did file an application for injunction seeking to have the defendant restrained from the land parcel Nakuru Municipality Block 11/680 pending hearing and determination of the suit. The matter was placed before the duty judge on 21 December 2017 and interim orders of injunction pending inter partes hearing of the application were granted.

4. Upon being served, the defendant appointed the law firm of M/s Karanja Mbugua & Company Advocates to appear for him in the matter and he also filed a replying affidavit to oppose the application for injunction. It is then that this application seeking to disqualify the law firm of M/s Karanja Mbugua & Company Advocates was filed.

5. The supporting affidavit is sworn by the applicant. He has deposed that the law firm of M/s Karanja Mbugua & Company Advocates acted for him in the suit *Nakuru HCCC No. 36 of 2006 Herman Ngari Kirika vs Wilfred Nyaundi Konosi* and *Nakuru CMCC No. 92 of 2011, Herman Ngari Kirika vs Wilfred Nyaundi Konosi* which suits, it is said, relate to the land parcel Nakuru Municipality Block 11/679 (one of the subdivisions of the land parcel No.66). He has averred that he has instituted the suit Nakuru ELC No. 1 of 2018 against the said Herman Ngari Kirika over the land parcel No. 679, which suit is likely to be consolidated with this suit. It is deposed that the law firm of M/s Karanja Mbugua & Company Advocates acted for the applicant in *Nakuru HCCC No. 139 of 2007, Saleh Hassan vs Wilfred Konosi* which suit relates to the land parcel Nakuru Municipality Block 11/678 (another subdivision of the land parcel Nakuru Municipality Block 11/66). It is also said that the law firm of M/s Karanja Mbugua & Company Advocates is acting for the applicant in *Nakuru HCCC No. 102 of 2007, Wilfred Nyaundi Konosi vs Geoffrey Makana Asanyo* over the land parcel Nakuru Municipality Block 11/66 or parcel No. 678. It is further averred that the plaintiff has on several occasions discussed, in confidence, with Mr. Karanja Mbugua, the circumstances under which the land parcel Nakuru Municipality Block 11/66 was allocated, and how it was purportedly subdivided by unscrupulous land speculators. He has deposed that he is genuinely apprehensive that Mr. Karanja Mbugua and any associate in his firm are in possession of confidential information which they can use to his detriment while representing the defendant. He has also annexed some letters evidencing his relationship with the law firm of M/s Karanja Mbugua & Company Advocates.

6. Mr. Karanja Mbugua swore a replying affidavit to oppose the motion. He deposed inter alia that the applicant has not demonstrated any evidence of any confidential information shared between the two of them. He has deposed that he has never represented the applicant in any case between him and the defendant herein in respect of the land parcel Nakuru Municipality Block 11/680 and that Mr. Konosi has never divulged to him anything to do with this land. He has stated that mere apprehension and suspicion cannot be good reasons why he should be disqualified from representing the defendant. On the cases referred to by the applicant, he has deposed that in the cases *Nakuru HCCC No. 139 of 2007, Hassan Saleh vs Wilfred Konosi*, and *Herman Ngari Kirika vs Wilfred Konosi*, save for filing a Memorandum of Appearance, the applicant never gave any instructions on any defence. He has argued that no material in a Memorandum of Appearance can be said to be confidential. On the case *Nakuru HCCC NO. 102 of 2007*, he has deposed that the applicant filed the suit in person and only gave him instructions much later. He has deposed that the case involved rent and distress for rent against the applicant and Mr. Asanyo over the land parcel Nakuru Municipality Block 11/66. He has deposed that the issue in the case was whose tenant Mr. Konosi was, between Mr. Asanyo and Mr. Kenedy Nyabwari Bosire, and the same was not over ownership of property. He has mentioned that all he filed was a Notice of Appointment of Advocates and nothing more and that it was Mr. Konosi who had filed the plaint. He has averred that there exists no good reason to have him thrown out of these proceedings and has lamented that at this rate, there will be no clients to represent in this small town where everyone knows each other. On the prayer to expunge the documents that he has filed on behalf of the defendant, he has argued that documents filed in court proceedings are of the litigant and not the lawyer.

7. The applicant filed a supplementary affidavit vide which he deposed that he did give Mr. Karanja all information and documents in the above mentioned suits and that he had to get copies of the same from

him in order to institute this case. He has stated that although Mr. Karanja has not represented him in any suit against the defendant herein, he cannot feign ignorance of the existence of the land parcel Nakuru Municipality Block 11/680 and the circumstances under which it came into existence. He has averred that Mr. Karanja is still representing him in the suit Nakuru HCCC No. 102 of 2007, which is still pending, and which touches on the land parcel Nakuru Municipality Block 11/680. He has stated that Mr. Karanja prosecuted an application on his behalf and also filed documents on his behalf in the case *Nakuru HCCC No. 139 of 2007, Saleh Hassan vs Wilfred Konosi*. He has refuted that all that Mr. Karanja did was to file a Memorandum of Appearance in the suit Nakuru HCCC No. 36 of 2006 and has annexed a copy of the proceedings in the said case to show that he did file a defence on 7 April 2006.

8. I invited counsel to file written submissions which they did. I have considered these submissions and the various authorities cited in arriving at my decision.

9. What is before me is an application to have counsel for the defendant disqualified from acting in this case. The reasons for this have been elaborated above and I need not repeat them. However the gist of the same is that Mr. Karanja Mbugua, counsel on record for the defendant, has previously acted for the applicant in other matters that are closely related to the issues in this suit. I have indeed seen for myself, and it is not disputed, that Mr. Karanja has acted for the applicant in various suits, all of which involve the land parcel Nakuru Municipality Block 11/66, or the three land parcels that arose out of the subdivision of the said land. The suit herein is for adverse possession over one of the subdivisions of the land parcel Nakuru Municipality Block 11/66. There is indeed another suit, Nakuru ELC No. 1 of 2018, where the applicant herein has sued to be granted orders that he has acquired by adverse possession the land parcel Nakuru Municipality Block 11/679, another of the subdivision of the parcel No. 66, and there is a strong likelihood that the two cases may be consolidated. It is also true to state that Mr. Karanja has never acted for the applicant in any case against the defendant herein. Neither is Mr. Karanja cited as among the witnesses that the applicant intends to call in support of his case. Given this scenario, would it be proper for Mr. Karanja to continue acting for the defendant or should he be disqualified ?

10. There is no question that under Rule 9 of the Advocates (Practice) Rules made under the Advocates Act, Cap 16, Laws of Kenya, an advocate ought not to appear in a matter in which he may be called as a witness. That rule is drawn 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 .

11. I do not think that there is much controversy on the above rule. Where an advocate may appear as a witness, he ought not to act as counsel in the matter. However, as I have mentioned earlier, that is not what we are dealing with here, for Mr. Karanja is not proposed to be a witness, and in fact, I doubt, given the nature of the plaintiff's case, that he would be of much use as a witness in determining the matters before the court. But does it mean that if an advocate is not going to be called as a witness then under no circumstances can he be disqualified from acting in a matter? I do not think that the provisions of Rule 9 are exhaustive and I am of the view that there may be instances where it may be improper, and the cause of justice may be prejudiced, if counsel continues appearing in a case. One of the grounds is where counsel has a conflict of interest, but the grounds cannot be listed to exhaustion, for each case has to be determined on its own peculiar facts and circumstances.

12. In our case, it is apparent that Mr. Karanja has acted for the applicant in matters involving the same subject matter that is in this suit. It follows that he must have had deep and intimate conversations over how the applicant came to be in possession of the suit properties, was and is privy to the nature of the applicant's possession and whether he was a tenant or not, and also whether the titles herein were properly procured. He must have received instructions on what to file and what not to file; what may be in favour

of the applicant and what may not be in his favour; what to advance and what to avoid under all costs. He must have come to know the strengths and weaknesses of the applicant's cases. Those cases as I have mentioned, were over the same subject matter as in this one.

13. I do not think, given that position, that it would be proper for Mr. Karanja to continue acting for the defendant given that he has had a deep interaction with the applicant over the same subject matter that he is now supposed to defend. He was acting for the applicant in the other cases and I do not see how he can now turn and act against him over subject matter which is similar in all respects. I am not for a moment holding that counsel cannot be allowed to act in a matter where he has previously acted for the other party, for clients do come and go, and barring any peculiar circumstances, one is not forever bound never to act against a person who was a former client in a different matter. What I am holding is that it is improper for counsel to act for one party, and then act for the other party, over a subject matter that is similar. The reason for this is that there is danger that counsel can use his previous knowledge of the case of his former client, or use information that may have been passed over to him in confidence, to the detriment of his former client. This, I believe, cannot lead to a fair trial, or at the very least, cannot lead to a trial that can be seen to be a fair trial.

14. It is for the above reasons that I allow the application for the disqualification of Mr. Karanja from acting for the defendant.

15. I however am not persuaded to strike out all the pleadings and documents that he has filed so far. Those can remain on record but it is another counsel or the defendant in person who will continue acting in the matter.

16. I make no orders as to costs.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of June 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Ogange holding brief for Dr. Nyagaka for the plaintiff/applicant.

Mr. Kahigah holding brief for Mr. Karanja Mbugua for the defendant/respondent.

Court Assistant : Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU