



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 217 OF 2014

JACINTA MUTHONI KAMAU

CHRIST VERSATILE CHURCH

JEREMIAH OMWENGA

INTERNATIONAL GREAT WORD MINISTRIES

TEDDY ODHIAMBO.....APPLICANTS

VERSUS

KIMANYI MUTUL.....RESPONDENT

RULING

1. This is the Notice of Motion dated 16th February, 2016. It is brought under Section 3, 3A and 6 of the Civil Procedure Act (Cap 21 Laws of Kenya) Order 40 Rules 1, 2, 3 & 4 of the Civil Procedure Rules and all enabling provisions of the law.

2. It seeks orders;

1) That all pleadings, documents and affidavits filed by and in the name of Ngoiri Njoroge Advocate be struck out and dismissed with costs.

2) That the court be pleased to give further directions as to the hearing hereof.

3. The grounds are on the face of the application and are;

i) Ngoiri Njoroge Advocate was at various times to this suit acting for and on behalf of the Plaintiffs.

ii) Counsel cannot unilaterally choose to now appear for the Defendant in this cause and defend this case having acted previously for the Plaintiff against the Defendant.

iii) Counsel on record for the Defendant is a material witness in these proceedings for the interest of fairness and justice.

iv) That her continued presence as counsel for the Defendant is embarrassing, prejudicial and not in the interest of fairness and justice.

v) All her pleadings, documents and affidavits ought to be struck out and dismissed forthwith.

4. The application is supported by the affidavit of Jacinta Muthoni Kamau, the first Plaintiff herein sworn on the 16th February, 2016.

5. The application is opposed. There is a replying affidavit sworn by Leah Ngoiri Njoroge Advocate for the Respondent sworn on the 21st March, 2017.

6. On the 9th March 2017 it was agreed between the parties that the application be disposed of by way of written submissions. By 15th January, 2018, only the Applicants' Advocate had filed their submissions. A date for ruling was then given.

7. It is the Applicants' case that Ngoiri Njoroge Advocate currently on record for the Respondent had at various times prior to the filing of the matter acted for and on behalf of the Applicants. She cannot therefore now unilaterally choose to appear for the Respondent as she is a material witness in these proceedings. That her continued presence in the matter embarrasses and prejudices the interest of the Applicants.

8. The said Advocate Leah Njoroge in her replying affidavit sworn on the 21st March, 2017 denies that she has ever acted for the Applicants herein. In paragraph 5 of the said affidavit she states;

“That contrary to the deponents’ averment, the letter annexed to the originating summons and marked “JMK13” clearly shows that I was acting for the owners of the property as at the time Nonesa Cordeiro & Majorie Felicias Cordeiro in the year 2006. In paragraph 7 of the letter which is not even addressed to the deponent, the addressee was clearly notified on any instructions from Manyi Agencies (who had been appointed by the registered owners of the subject property) to institute eviction proceedings against the illegal trespassers who included Jacinta Muthoni, the 1st Applicant herein. Thereby wrote to her on 16th January, 2006 and marked it as LNN-1.”

9. I have gone through the Applicants' documents in support of the Originating summons. I do not see any document that confirms the position that the said Advocate had previously acted for the Applicants herein. The Applicants' counsel submission that she is a material witness in this matter cannot stand.

10. I am of the view that the holding in *Strathmore Research Centre & Consulting Centre –versus- Gacari Nairioi HCCC NO 484 of 2011* is not relevant to the scenario herein. In the instant case, the Applicants have not exhibited any document to show that they had instructed the Advocate Leah Ngoiri Njoroge to act for them at any one time.

There is nothing to demonstrate that there existed on Advocate/Client relationship between the Applicants and the said Advocate at any time. She has all along been acting for the registered owner of the suit property. I am not convinced that her presence in this matter will embarrass on prejudice the Applicants' case.

11. I find no merit in this application and the same is dismissed. I make no orders as to costs.

It is so ordered.

DATED and SIGNED at MOMBASA on the 22nd day of May 2018.

L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at MOMBASA on the 19th day of June 2018.

A. OMOLLO

JUDGE